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The Relative Priority of a Landlord's Lien and Article 9 Security Interest

by

Gregory B. Wilcox and Frank B. Harty

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THE RELATIVE PRIORITY OF A LANDLORD'S LIEN AND ARTICLE 9 SECURITY INTEREST

Gregory B. Wilcox*
Frank B. Harty**

TABLE OF CONTENTS

I. Introduction	27
II. Pertinent Statutory Provisions	30
A. The Landlord's Lien	30
B. Article 9	31
III. Resolution of the Relative Priority Issue	32
A. Background of the Exclusions and Nature of the Priority Issue	32
B. Case Law from Other Jurisdictions	35
1. Majority Approach	36
2. First-in-Time Approach	37
3. U.C.C. by Analogy Approach	38
IV. Examples Illustrating Possible Outcomes in Iowa	39
A. Purchase Money Security Interest vs. Statutory Landlord's Lien	39
B. After-acquired Property and Increases vs. Landlord's Lien	43
C. Working Capital Financing	45
V. Conclusion	46

I. INTRODUCTION

In 1965, the Sixty-First General Assembly of Iowa enacted the Uniform Commercial Code,¹ which took effect July 4, 1966.² The primary purpose for the creation and adoption of the U.C.C. was to make the law governing commercial transactions³ somewhat uniform and predictable among the states,

* B.B.A. With Honors, University of Iowa; J.D. with Honors, Drake University; Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C.

** B.B.A. with Honors, University of Iowa; J.D. with Honors, Drake University; Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C.

1. IOWA CODE §§ 554.1101 - .1109 (1985) [hereinafter referred to as U.C.C.].

2. *Preface*, 35 IOWA CODE ANN. III (West 1967).

3. 1964 REPORT OF THE UNIFORM COMMERCIAL CODE STUDY COMMITTEE, 35 IOWA CODE ANN. IX (West 1967) [hereinafter cited as *1964 Report*]; see also 1963 Iowa Acts 565 (Senate Joint Resolution 17 creating committee).

so that businessmen could anticipate the rules governing business dealings in any given jurisdiction.⁴ Commenting upon the purposes of the U.C.C., the report of the Uniform Commercial Code Study Committee provides, "the major themes of the [U.C.C.] are commercial convenience, consistency of treatment and fairness to all parties."⁵

Although the U.C.C. filled many gaps and resolved many conflicts in the interpretation of the rules governing commercial transactions,⁶ many questions remain unanswered. In some instances, the U.C.C. has actually *created* conflicts necessitating interpretative case law or the passage of additional statutory law.⁷ One of the major conceptual changes embodied in the U.C.C., the development of the concept of "secured credit,"⁸ has proven particularly illustrative of this problem. Article 9 eliminated common law security devices such as chattel mortgages and conditional sales contracts, and thereby eradicated the divergent common law rules relating to the legal formalities of such devices and the legal consequences of obtaining such an interest.⁹

Article 9 was enacted with the specific aim of treating security interests under a uniform set of rules and eliminating confusion with regard to the creation, enforcement and priority of security interests in personal property.¹⁰ Although article 9 has for the most part created predictability in the law of secured transactions, it has also created certain conflicts with other statutory provisions and has left unanswered the resolution of these conflicts. In particular, because article 9 excludes from its coverage various federal and statutory liens, including landlord's liens, confusion arises as to the proper rules to be applied in determining the priority between a landlord's lien and an article 9 security interest.¹¹

4. 1964 Report, *supra* note 3, at IX.

5. *Id.* at XIII.

6. *Id.* at XI.

7. See *infra* text accompanying note 11. In addition to the questions raised by the exclusion of landlord liens from the coverage of article 9 of the U.C.C., similar questions arise out of the other exclusions from article 9 pursuant to Iowa Code section 554.9104 (1985). See *infra* note 11.

8. IOWA CODE §§ 554.9101—9507 (1985).

9. 1964 Report, *supra* note 3, at XII. Article 9 of the U.C.C. replaced major portions of the Iowa Code including sections relating to chattel mortgages and conditional sales, assignments of accounts receivable, foreclosure of chattel mortgages and foreclosure of pledges. IOWA CODE ANN. § 554.9101 commentary at 233 (West 1967).

10. 1964 Report, *supra* note 3, at §§ 17-19. The aim of article 9 "is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less costs and greater certainty." U.C.C. § 9-101 commentary at 586-87 (1957).

11. IOWA CODE § 554.9104(b) (1985). Section 554.9104(b) of the Iowa Code provides:

This Article does not apply

- a. to a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or

Although the ostensible exclusion of landlord's liens from the operation of article 9 appears straightforward on its face, it gives rise to a considerable amount of confusion when the question of the priority of a landlord's lien vis-a-vis a U.C.C. article 9 security interest arises. The problem is best explained as follows. The priority of an article 9 security interest is governed by the priority rules set forth in article 9.¹² Because a landlord's lien is specifically excluded from the coverage of article 9, however, the article 9 priority rules appear inapplicable to a priority dispute between a landlord's lien and an article 9 security interest.¹³ Prior to the adoption of the U.C.C., the priority between a statutory or contractual landlord's lien and that of a chattel mortgage, the predecessor of the article 9 security interest, was determined by common law. On the one hand, article 9 provides that its priority rules shall govern the article 9 security interest; on the other hand, however, article 9 also provides that its rules *do not* apply to landlord's liens.¹⁴

- b. to a landlord's lien; or
- c. to a lien given by statute or other rule of law for services or materials except as provided in section 554.9310 on priority of such liens; or
- d. to a transfer of a claim for wages, salary or other compensation of an employee; or
- e. to a transfer by a government or governmental subdivision or agency; or
- f. to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do their performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a pre-existing indebtedness; or
- g. to a transfer of an interest or claim in or under any policy of insurance, except as provided with respect to proceeds (section 554.9306) and priorities in proceeds (section 554.9312); or
- h. to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or
- i. to any right of setoff; or
- j. except to the extent that provision is made for fixture in section 554.9313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or
- k. to a transfer in whole or in part of any claim arising out of tort; or
- l. to a transfer of an interest in any deposit account (section 554.9105, subsection 1), except as provided with respect to proceeds (section 554.9306) and priorities in proceeds (section 554.9312).

Id. For a brief discussion of some of the issues raised by section 9-104 of the U.C.C. see U.C.C. section 9-104 commentary. The official comments to U.C.C. section 9-104 explain the exclusion of "landlord's liens . . . and of leases and other interests in or liens on real estate" as a reiteration of the limitation on coverage, as set forth in section 9-102(3). U.C.C. § 9-104 commentary at 603.

12. IOWA CODE §§ 554.9312—9316 (1985).

13. The Iowa Supreme Court has considered the relative priority of a landlord's lien and a chattel mortgage, the predecessor to an article 9 security interest. See *infra* text accompanying notes 110-54.

14. The official comments to U.C.C. section 9-104 do not provide any guidance concerning the priority issue. The priority question frequently arises during periods of economic hardship and has arisen frequently in recent years due to the current agricultural credit crisis in Iowa.

To date, there are no reported decisions in which the Iowa Supreme Court has considered this problem. Consequently, there exist no reliable judicial or commentative guidelines to aid Iowa practitioners in the avoidance, evaluation or resolution of the relative priority question between an article 9 security interest and a landlord's lien. This Article attempts to resolve this issue. This Article will (1) analyze in general the landlord's lien and the article 9 security interest; (2) then specifically discuss case law from other jurisdictions which have addressed the priority issue; (3) discuss common factual situations giving rise to a priority conflict, accompanied by an analysis and a prediction of how an Iowa court would rule in such situations, and (4) delineate a proposal for change aimed at enhancing the predictability of outcome and thereby furthering commercial activity. Although most of the discussion in this Article applies to landlord's liens and article 9 security interests in general, regardless of the commercial setting, the Article will in particular discuss some of the issues which are peculiar to agricultural law.

II. PERTINENT STATUTORY PROVISIONS

A. *The Landlord's Lien*

A landlord's lien may be created by contract¹⁵ or by statute,¹⁶ and the mode of creation may have a great impact upon the priority of the landlord's lien vis-a-vis an article 9 security interest.¹⁷ In Iowa, a landlord has a statutory lien for unpaid rents.¹⁸ The Iowa landlord's lien statute provides: "A landlord shall have a lien for his rent upon all crops grown upon the leased premises, and upon any other personal property of the tenant which has been used or kept thereon during the term and which is not exempt from execution."¹⁹ A landlord's statutory lien continues for "a period of one year after a year's rent, or the rent of a shorter period falls due."²⁰ The lien continues for only six months after the lease term has expired.²¹

In addition to the statutory lien, a landlord may obtain an interest in the personal property of his tenant by including such a provision in a writ-

The majority of decisions dealing with the relative priority of a landlord's lien and chattel mortgage, the predecessor of the article 9 security interest, were handed down during the agricultural crises of the 1870's and the depression of 1930's. See, e.g., *Brownlee v. Masterson*, 215 Iowa 993, 247 N.W. 481 (1933); *Jarchow & Sons v. Pickens*, 51 Iowa 381, 1 N.W. 598 (1879).

15. *Brownlee v. Masterson*, 215 Iowa at 997, 247 N.W. at 483; *Brenton v. Bream*, 202 Iowa 575, 576, 210 N.W. 756, 757 (1926).

16. See IOWA CODE §§ 570.1-10 (1985).

17. See *infra* text accompanying notes 27-28.

18. IOWA CODE § 571.1 (1985).

19. *Id.*

20. *Id.* § 570.2 (1985).

21. *Id.* Iowa Code section 570.2 provides that the landlord's lien "shall continue for the period of one year after a year's rent, or the rent of a shorter period, falls due. But in no case shall such lien continue more than six months after the expiration of the term." *Id.*

ten lease.²² The statutory and contractual liens are somewhat similar in operation,²³ but they differ in several material respects.²⁴ For example, the statutory lien attaches only to property which is "not exempt from execution."²⁵ If a lease so provides, a contractual landlord's lien may cover the tenant's exempt and non-exempt property.²⁶ A second difference between a contractual and statutory landlord's lien is the effect of each upon third parties. The statutory landlord's lien does not need to be recorded and arises by operation of law without any action on the part of the landlord other than the execution of the lease.²⁷ Consequently, a statutory landlord's lien is effective as against strangers without any particular action of the landlord. A contractual landlord's lien, however, must be recorded to be effective as against strangers to the lease.²⁸ Although the statutory landlord's lien and the contractual lien are in fact two separate liens, they tend to overlap in both their coverage and effect. A plaintiff at trial does not have to make an election as to which he is relying upon²⁹ and "[i]f a lien for rent is given in a written lease or other instrument upon additional property, it may be enforced in the same manner as a landlord's lien and in the same action."³⁰

B. Article 9

The other statutory provision that must be analyzed in order to discuss the relative priority between a landlord and the holder of a security interest in personalty is article 9 of Iowa's version of the U.C.C.³¹ Article 9 is a comprehensive system of rules and definitions regulating the creation and enforcement of consensual security interests in personal property and fix-

22. *Beh v. Tilk*, 222 Iowa 729, 731, 269 N.W. 751, 752 (1936); *Brownlee v. Masterson*, 215 Iowa at 997, 247 N.W. at 483; *Brenton v. Bream*, 202 Iowa at 576, 210 N.W. at 757; *see Mau v. Rice Bros.*, 216 Iowa 864, 867, 249 N.W. 206, 208 (1933) (contractual lien not inconsistent with statutory landlord's lien).

23. Both may be enforced by the lessor against persons purchasing the property subject to the lien and both are enforced by attachment proceedings. *See Beh v. Tilk*, 222 Iowa at 730-31, 269 N.W. at 752; IOWA CODE § 570.5 (1985).

24. *See infra* text accompanying notes 25-31.

25. IOWA CODE § 570.1 (1985). As used in section 570.1, the phrase "not exempt from execution" refers to property that is not exempt from execution under Iowa's debtor's exemption statute. *See generally* IOWA CODE ch. 627 (1985); *see Weaver v. Florke*, 195 Iowa 1085, 192 N.W. 23 (1923).

26. *Brenton v. Bream*, 202 Iowa at 576, 210 N.W. at 757.

27. *See* IOWA CODE § 570.1 (1985).

28. *See infra* text accompanying notes 57-60. *See also Guthrie v. Winters*, 181 Iowa 1324, 1330, 163 N.W. 208, 210 (1917); *Sioux Valley State Bank v. Honnold*, 85 Iowa 352, 358, 52 N.W. 244, 245 (1892). It should be noted that although an unrecorded contractual landlord's lien may be ineffective against other encumbrances, the lien would be effective between the landlord and the tenant.

29. *Mau v. Rice Bros.*, 216 Iowa at 867, 249 N.W. at 208.

30. IOWA CODE § 570.6 (1985).

31. *Id.* §§ 554.9101—9507.

tures.³² Article 9 governs a "security interest"³³ created by contractual arrangement.³⁴ It applies to "any transaction . . . which is intended to create a security interest in personal property or fixtures . . ."³⁵

A benchmark in the development of commercial law in Iowa was the adoption of the U.C.C. and specifically article 9, which lent a much-needed degree of predictability to the secured financing arena. Article 9 supplies a framework by which the rights of various parties in personalty can easily be determined. The drafters of article 9, however, saw fit to exclude from its scope certain statutory liens, including landlord's liens.³⁶ Iowa Code section 554.9104(b) provides that article 9 does not apply to a landlord's lien.³⁷ Section 554.9102(2) similarly provides that, with certain limited exceptions,³⁸ article 9 does not apply to statutory liens.³⁹ The exclusion of the landlord's lien embodied in section 9-104(b) gives rise to the inevitable question of priority between a competing article 9 interest and a landlord's lien.

III. RESOLUTION OF THE RELATIVE PRIORITY ISSUE

A. *Background of the Exclusions and Nature of the Priority Issue*

The terminology of section 9-104 of the U.C.C.⁴⁰ has provided the impetus for a substantial amount of commentary⁴¹ and case law.⁴² The confusion

32. For an excellent guide to financing with different types of collateral under article 9 of the U.C.C. see Hansell, *Financing Under Article 9 of the Iowa Uniform Commercial Code*, 17 *DRAKE L. REV.* 143 (1968).

33. Iowa Code section 554.1201(37) defines a "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation." Iowa Code § 554.1201(37) (1985).

34. IOWA CODE § 554.9102 (1985). A major distinction between an article 9 security interest and the landlord's lien is the fact that the latter arises by operation of law whereas the article 9 security interest, although a creature of statutory origin, is a consensual lien.

35. *Id.* § 554.9102(1)(a).

36. *Id.* § 554.9104(b).

37. *Id.*

38. *Id.* Section 554.9102(2) states: "This Article does not apply to statutory liens except as provided in [s]ection 554.9310." IOWA CODE § 554.9102(2) (1985). Iowa Code section 554.9310 provides:

When a person in the ordinary course of the person's 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 take priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Id. § 554.9310.

39. IOWA CODE § 554.9102(2) (1985).

40. Codified at Iowa Code section 554.9104 (1985).

41. See B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶1.8[2] (1980 & Supp. 1984) [hereinafter cited as CLARK]; R. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 6:21 (1980 & Supp. 1983); J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 22-6 (1980); T. QUINN, *UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST* ¶9-104[A][5] (1978 & Supp. No. 2 1982); C. FUNK,

concerning the meaning of section 9-104 is most likely attributable to the brevity of both the provision itself and its official explanatory commentary.⁴³ On its face, section 9-104(b) seems to state very simply that article 9 of the U.C.C. does not apply to a landlord's lien.⁴⁴ The commentary explaining this provision seems equally clear. The official U.C.C. comment states that the exclusionary language of section 9-104(b) simply reiterates the limitations of section 9-102(3), which states that "the application of this Article as a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply."⁴⁵

Comment 2 to section 9-104 suggests that landlord's liens are excluded from article 9 because they are not security interests in personalty. This is questionable, however, in light of the fact that in Iowa, as in several other states, a landlord is given a lien upon the tenant's personal property located on the demised premises.⁴⁶ In Iowa, for example, a landlord is given a lien upon all crops grown upon the leased premises, and crops are considered personalty under article 9.⁴⁷ At least one court has stated that the actual basis for the exclusion of landlord's liens from the scope of article 9 is that such liens are nonconsensual in nature, and thus outside the general scope of the Article.⁴⁸ This rationale appears logical in light of U.C.C. sections 9-102(1)(a) and 9-102(2), which state that article 9 applies only to contractually created transactions intended by the parties to create a security interest.⁴⁹

Unfortunately, comment 2 to section 9-104 sheds no light upon its hidden meaning by citing to comment 4 to section 9-102(3),⁵⁰ which merely

BANKS AND THE UNIFORM COMMERCIAL CODE (2d ed. 1964); DeVita, *Conflicts Between the West Virginia Landlord's Lien and Article Nine of the Uniform Commercial Code*, 86 W. VA. L. REV. 417 (1984); Annot., 99 A.L.R. 3d 1006 (1980 & Supp. 1984).

42. See *infra* text accompanying notes 54-62.

43. See U.C.C. § 9-104(b) and comment 2 (1977). Comment 2 states:

Except for fixtures (section 9-313), the Article applies only to security interests in personal property. The exclusion of landlord's liens by paragraph (b) and of leases and other interests in or liens on real estate by paragraph (j) merely reiterates the limitations on coverage already made explicit in [s]ection 9-102(3).

U.C.C. § 9-104(b) comment 2. See also comment 4 to that section.

44. U.C.C. § 9-104(b).

45. *Id.* §§ 9-104(b) comment 2 and 9-102(3).

46. See IOWA CODE § 570.1 (1985); ILL. REV. STAT. ch. 110, ¶9-316 (1982); N.J. STAT. ANN. 2A:42-1 (West 1982); W. VA. CODE § 37-6-12 (1966 & Supp. 1984).

47. IOWA CODE § 554.9105(1)(h) (1985).

48. *Universal C.I.T. Credit Corp. v. Congressional Motors, Inc.*, 246 Md. 380, —, 228 A.2d 463, 469 (Ct. App. 1967). See also CLARK, *supra* note 41, at ¶11.8[2].

49. See IOWA CODE §§ 554.9102(1), (2) (1985).

50. See *id.* § 554.9102(3). That section states: "The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply." *Id.*

enumerates the "realty paper" aspects of article 9's coverage.⁵¹ In that regard, section 9-102(3) deals with the creation of a secured transaction within the scope of article 9 but involves an obligation secured by an interest or relationship that is beyond the scope of the Article.⁵²

The ambiguous nature of section 9-104(b) and the commentary explains why numerous courts have felt it necessary to at least comment upon, if not rule upon, the scope and intent of this provision.⁵³ Two main issues have arisen upon a regular basis: the scope of the exclusion, and the priority of a landlord's lien vis-a-vis an article 9 security interest.⁵⁴ As a broad general rule, it may be said that a majority of courts have held that article 9 does not apply to statutory or common law landlord's liens and as a result, non-code law must be looked to for guidance concerning the relative priority of competing lienholders.⁵⁵

The term "landlord's lien" as used in U.C.C. section 9-104(b), could arguably have a very broad meaning. In more than one case, it has been suggested that the exclusion of landlord's liens covers contractually created liens.⁵⁶ The issue invariably arises in a situation involving a lease granting a landlord's lien on the tenant's personalty in a jurisdiction that does not have

51. U.C.C. section 9-102(3), comment 4 states:

An illustration of subsection (3) is as follows:

The owner of Blackacre borrows \$10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This Article is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or nonrecording of an assignment of the mortgagee's interest. See [s]ection 9-104(j). But under [s]ection 3-304(5) recording of the assignment does not of itself prevent X from holding the note in due course.

U.C.C. § 9-102(3) comment 4.

52. See IOWA CODE § 554.9102(3) (1985). Thus, where a mortgage note is pledged to secure a separate obligation, article 9 applies to the pledge but has no impact upon the creation of the underlying mortgage or the rights of the parties in the real estate. See U.C.C. § 9-102(3) comment 4.

53. See, e.g., *In re Einhorn Bros.*, 272 F.2d 434 (3d Cir. 1959); *Peoples State Bank v. Thompson*, — Ind. App. —, 462 N.E.2d 1068 (1984); *Universal C.I.T. Credit Corp. v. Congressional Motors, Inc.*, 246 Md. 380, 228 A.2d 463 (1967); *Hartwell v. Hartwell Co.*, 107 N.J.Super. 91, 400 A.2d 529 (1979). See generally Annot., 99 A.L.R.3d 1006 (1980 & Supp. 1985).

54. See *infra* text accompanying notes 33-56.

55. See, e.g., *Foster v. Hamblim*, 405 F.2d 1043, 1047 (6th Cir. 1969); *In re King Furniture City, Inc.*, 240 F. Supp. 453, 456-57 (E.D. Ark. 1965); *In re Florio*, 24 U.C.C. Rptr. 415, 417 (D.R.I. 1978); *Dwyer v. Cooksville Grain Co.*, 117 Ill. App. 3d 1001, —, 454 N.E.2d 357, 359-60 (1983); *Todsén v. Runge*, 211 Neb. 226, —, 318 N.W.2d 88, 92 (1982).

56. See, e.g., *Universal C.I.T. Corp. v. Congressional Motors, Inc.*, 246 Md. at —, 228 A.2d at 470.

a statutory landlord's lien similar to Iowa's.⁵⁷ Either due to a misinterpretation of the U.C.C.'s scope, or more likely a lack of foresight, a landlord either fails to file the lease creating his lien rights or erroneously utilizes a real estate recording procedure.⁵⁸ The overwhelming majority of courts have held that section 9-104(b) excludes only statutory landlord's liens and those arising by operation of law.⁵⁹ Article 9 is, therefore, held to govern the creation and protection of contractually created liens on a tenant's property.⁶⁰

The rationale behind those decisions holding article 9 applicable to landlord liens created by lease appears sound. To hold otherwise would mean that a contractually-created security interest would be excluded from the operation of the U.C.C. merely because the parties involved were landlord and tenant.⁶¹

B. Case Law From Other Jurisdictions

A more common issue, and one of great importance to the Iowa practitioner, is the question of the relative priority of a landlord's lien and an article 9 security interest. Some courts and commentators have grouped the judicial decisions dealing with the priority question into three lines of precedent: (1) the "pre-code" approach; (2) the "first-in-time" approach; and (3) the approach which looks to the priority rules of the U.C.C. itself—the "U.C.C. by Analogy" approach.⁶² Although some annotators and commentators have stated that there appear to be three lines of decisions dealing with this issue,⁶³ in truth, an overwhelming majority of the courts that have considered the question hold that because article 9 is clearly inapplicable to a landlord's lien, "pre-code" or "non-code" law must be consulted in determining the relative priority of security interests.⁶⁴ A smaller number of courts have adopted different approaches.⁶⁵

57. See, e.g., *Todsens v. Runge*, 211 Neb. at __, 318 N.W.2d at 92.

58. See *In re Leckie Freeburn Coal Co.*, 405 F.2d 1043, 1046 (6th Cir. 1969).

59. See *Todsens v. Runge*, 211 Neb. at __, 318 N.W.2d at 90-92.

60. *Id.*

61. It could be argued that the specific exclusion of landlord liens by U.C.C. § 9-104(b) would be merely a repetition of the exclusion of statutory liens by section 9-102(2) unless the drafters intended to exclude contractual landlord's liens. This argument, however, overlooks the fact that some jurisdictions have common law landlord's liens. Thus, courts have held that the landlord's lien which is excluded from the U.C.C. is the lien which arises by operation of law or statute and not the contractually created lien. See *In re King Furniture City, Inc.*, 240 F. Supp. at 456. For a thorough discussion of the scope of the exclusion of landlord's liens from article 9, see *Universal C.I.T. Credit Corp. v. Congressional Motors, Inc.*, 246 Md. 380, 228 A.2d 463 (Ct. App. 1967).

62. See *Peoples State Bank v. Thompson*, __ Ind. App. at __, 462 N.E.2d at 1071 & n.2.

63. See Annot., 99 A.L.R.3d 1006 (1980 & Supp. 1985).

64. See, e.g., *Dwyer v. Cooksville Grain Co.*, 117 Ill. App. 3d 1001, 451 N.E.2d 357 (1983); *Hartwell v. Hartwell Co.*, 107 N.J. Super. at __, 400 A.2d at 533-34.

65. See *infra* text accompanying notes 70-105.

1. Majority Approach.

A majority of the courts which have addressed the issue have held that because article 9 excludes landlord's liens from its coverage, a rule of priority of a landlord's lien relative to an article 9 security interest must be gleaned from outside the U.C.C.⁶⁶ The majority approach has sometimes been incorrectly characterized as a "pre-code" approach.⁶⁷ This characterization probably arises from the fact that many courts, when looking for guidance outside the U.C.C., will apply the law which was developed prior to the enactment of a particular jurisdiction's version of the U.C.C.⁶⁸

The result of a priority conflict in a particular instance would predictably vary depending upon the non-code law of the various states. Under the non-code law of some states, a landlord's lien is given an automatic priority over other types of liens.⁶⁹ Other jurisdictions have non-code rules that award priority to the landlord or secured party depending upon whose interest attached first.⁷⁰ Still other states accord a secured party priority over a landlord.⁷¹

The decision of the New Jersey Superior Court in *Hartwell v. Hartwell Co., Inc.*⁷² exemplifies the majority approach.⁷³ The court stated that landlord liens were excluded from the operation of article 9 and cited *In re Einhorn Bros., Inc.*,⁷⁴ and its progeny⁷⁵ in holding that pre-code law should be applied to resolve the dispute.⁷⁶ The *Hartwell* court referred to pre-code New Jersey law, which provided that a landlord's lien was per se subordinate to the interest of a seller under a "conditional sales contract,"⁷⁷ and held that the landlord's interest was subordinate to that of an article 9 lienholder.⁷⁸

66. See, e.g., *Dwyer v. Cooksville Grain Co.*, 117 Ill. App.3d 1001, 451 N.E.2d 357 (1983); *Hartwell v. Hartwell Co.*, 107 N.J. Super. at —, 400 A.2d at 534; *Associates Fin. Serv. of Texas, Inc. v. Soloman*, 523 S.W.2d 722, 724 (Tex. Civ. App. 1975).

67. See *Peoples State Bank v. Thompson*, — Ind. App. at —, 462 N.E.2d at 1071.

68. See, e.g., *id.*

69. See, e.g., *In re Einhorn Bros.*, 272 F.2d at 440.

70. See *National Inv. Trust v. First Nat'l Bank*, 88 N.M. 514, —, 543 P.2d 482, 484 (1975).

71. See *Bates & Springer v. Friermoud*, 109 Ariz. 203, —, 507 P.2d 668, 671 (1973).

72. 167 N.J. Super. 91, 400 A.2d 529 (1979).

73. It should be noted that the *Hartwell* opinion was promulgated prior to the *Peterson* decision, discussed *infra* at text accompanying notes 89-104, and the New Jersey court followed what it obviously deemed to be the only possible course: applying pre-code law. 167 N.J. Super. at —, 400 A.2d at 534.

74. 272 F.2d 434 (3d Cir. 1959).

75. *Universal C.I.T. Credit Corp. v. Congressional Motors, Inc.*, 246 Md. 380, 228 A.2d 463 (1967); *Chessport Millworks, Inc. v. Solie*, 86 N.M. 265, 522 P.2d 812 (N.M. Ct. App. 1974); *Associates Fin. Serv. of Texas, Inc. v. Soloman*, 523 S.W.2d at 724.

76. 167 N.J. Super. at —, 400 A.2d at 534.

77. *Id.* (citing *Motor Credit Corp. v. Ray Guy's Trailer Court, Inc.*, 6 N.J. Super. 563, 567, 70 A.2d 102, — (Law Div. 1949)).

78. 167 N.J. Super. at —, 400 A.2d at 534.

The *Hartwell* court was dealing with the equivalent of a purchase-money security interest in competition with the landlord's lien. As is the case with most of the courts following the majority line of reasoning, the *Hartwell* court did not have to decide a priority contest involving a non-purchase-money security interest and a landlord's lien. The court did, however, explain in a footnote that:

It has been suggested that when the security interest is perfected after the personal property is placed upon the leased premises, the landlord's statutory lien should have priority. 69 AM. JUR. 2D, *Secured Transactions* §506 at 386 (1973). However, in New Jersey, pre-Code law is clear that a tenant could grant a chattel mortgage on property located on the landlord's premises which would be superior to the landlord's lien.⁷⁹

2. First-in-Time Approach

While it may be that some courts apply a "first-in-time" test, they probably are only using non-code law. The confusion with regard to the lines of precedent appears to arise from the fact that courts mistakenly claim to be applying "pre-code" law when they are in fact applying "non-code" law.⁸⁰ In *Chessport Millworks, Inc. v. Solie*,⁸¹ a case often referred to as a leading example of the "first-in-time, first-in-right" approach,⁸² the New Mexico Court of Appeals looked to the common law of New Mexico to resolve a priority conflict.⁸³ At common law, New Mexico adhered to the "first-in-time" doctrine and the court, therefore, utilized the same.⁸⁴ A later decision by the New Mexico Supreme Court, however, seems to misinterpret the *Chessport Millworks* holding. In *National Investment Trust v. First National Bank*,⁸⁵ the court failed to recognize that the *Chessport Millworks* decision was based upon New Mexico non-code law.⁸⁶ Looking to the *Chessport Millworks* decision for guidance, the *National Investment Trust* court indicated that the "first-in-time" approach developed at common law could be used only in the event of a non-simultaneous attachment of security interests.⁸⁷ Because the attachment of security interests was simultaneous in *National Investment Trust*, other common law precedent had to be utilized.⁸⁸ It seems, therefore, that there are actually only *two* methods used to resolve priority conflicts, the majority approach and the "U.C.C. by Anal-

79. *Id.* at n.2 (citations omitted).

80. *See, e.g.,* Peoples State Bank v. Thompson, — Ind. App. at —, 462 N.E.2d at 1071.

81. 86 N.M. 265, 522 P.2d 812 (N.M. Ct. App. 1974).

82. *See, e.g.,* Annot., 99 A.L.R.3d at 1008.

83. *Chessport Millworks, Inc. v. Solie*, 86 N.M. at —, 522 P.2d at 815.

84. *Id.* at —, 522 P.2d at 815.

85. 88 N.M. 514, 543 P.2d 482 (1975).

86. *Id.* at —, 543 P.2d at 484.

87. *Id.* at —, 543 P.2d at 484.

88. *Id.* at —, 543 P.2d at 484.

ogy" approach.

3. U.C.C. by Analogy Approach.

Adopting the minority approach, an Illinois Court of Appeals, in *Peterson v. Ziegler*,⁸⁹ held that section 9-104(b) only indicates that article 9 does not govern the creation of a landlord's lien or the priorities between competing landlord's liens.⁹⁰ Without citing precedent, the *Peterson* court stated that despite the language of section 9-104(b), the priority provisions of article 9 should be utilized in solving a conflict between a landlord's lien and an article 9 security interest.⁹¹

The *Peterson* court reasoned that "[i]n order for article 9 to be the comprehensive statute it was meant to be on the subject of all consensual security interests, article 9 must always supply a rule for determining the priorities between a consensual security interest and any other kind of lien."⁹² The apparent simplicity of the *Peterson* approach masks the difficulties attendant in looking to article 9 for guidance on a matter that it ostensibly excludes.⁹³ The *Peterson* approach treats landlord lienholders as "lien creditors" within the priority provisions of U.C.C. section 9-301.⁹⁴ This approach, however, leads to difficulties in determining the relative priority of competing interests. For instance, a court would have to determine when a landlord-lienholder attains "lien creditor" status within the meaning of U.C.C. section 9-301(b)⁹⁵ in order to resolve a priority dispute between a landlord's lien and an article 9 security interest.⁹⁶ A "lien creditor" is defined thus:

A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.⁹⁷

A court using the *Peterson* approach would, therefore, have to look to non-U.C.C. law for guidance in determining when lien creditor status is attained.⁹⁸ Presumably then, an Iowa landlord would attain lien creditor sta-

89. 39 Ill. App. 3d 379, 350 N.E.2d 356 (1976).

90. *Id.* at —, 350 N.E.2d at 362.

91. *Id.* at —, 350 N.E.2d at 362.

92. *Id.* at —, 350 N.E.2d at 362.

93. See *infra* text accompanying note 103.

94. *Peterson v. Ziegler*, 39 Ill. App. 3d at —, 350 N.E.2d at 362.

95. IOWA CODE § 554.9301(3) (1985).

96. Section 554.9301 delineates those interests that are superior to an unperfected security interest. IOWA CODE § 554.9301 (1985). A person who becomes a "lien creditor" prior to the perfection of a competing security interest takes priority over that interest. *Id.*

97. IOWA CODE § 554.9301(3) (1985).

98. See *Peterson v. Ziegler*, 39 Ill. App. 3d 379 at —, 350 N.E.2d at 362.

tus at the commencement of the leasehold.⁹⁹

The *Peterson* decision was soundly criticized by an Illinois appellate court from another district.¹⁰⁰ The court in *Dwyer v. Cooksville Grain Co.*¹⁰¹ faulted the *Peterson* court for its willingness to search for the hidden purposes of article 9 when "[t]he language of [article 9] is crystal clear—no part of article 9, including the priority rules, appl[ies] to a landlord's statutory lien."¹⁰² Despite this criticism, however, the "U.C.C. by Analogy" approach utilized in *Peterson* has been mentioned, in dicta, as a rule which might be applicable in Indiana.¹⁰³ The Indiana court nevertheless indicated that prior decisions suggest a preference for the "first in time" rule.¹⁰⁴ The "U.C.C. by Analogy" approach has also received favorable treatment by commentators.¹⁰⁵

IV. EXAMPLES ILLUSTRATING POSSIBLE OUTCOMES IN IOWA

Although it is impossible to predict with total certainty how an Iowa court would resolve a priority conflict, it seems logical to assume that it would follow one of the approaches outlined above; namely, either the "U.C.C. by Analogy," or "non-code" approach.¹⁰⁶ Based upon the precedent from other jurisdictions, it appears likely that an Iowa court would resort to Iowa common law to resolve a priority conflict.¹⁰⁷ It should, however, be noted that the Iowa Supreme Court has often analogized to the U.C.C. when forging common law and therefore might be attracted to the *Peterson* approach.¹⁰⁸ Until the Iowa Supreme Court actually rules upon this issue, the Iowa practitioner can only advise his or her client of the possible outcome in any given situation. The examples set forth below attempt to shed some light on this problem. Each example consists of a common set of facts as well as probable outcomes under the various approaches discussed above.

A. *Purchase-Money Security Interest vs. Statutory Landlord's Lien*

A common priority conflict which arises out of the landlord's lien is the conflict between the landlord's statutory lien in the personal property of the

99. See *infra* text accompanying notes 111-34.

100. See *Dwyer v. Cooksville Grain Co.*, 117 Ill. App. 3d 1001, —, 451 N.E.2d 357, 360 (1983).

101. 117 Ill. App. 3d 1001, 451 N.E.2d 357 (1983).

102. *Id.* at —, 451 N.E.2d at 360.

103. See *Peoples State Bank v. Thompson*, — Ind. App. at —, 462 N.E.2d at 1072.

104. *Id.*

105. DiVita, *Conflicts Between the West Virginia Landlord's Lien and Article Nine of the Uniform Commercial Code*, 86 W. VA. L. Rev. 417, 432-33 (1984).

106. See *supra* text accompanying notes 67-104.

107. The majority of courts dealing with the problem adopt a "non-code" approach. See *supra* text accompanying notes 67-79.

108. See *Dunn v. General Equities of Iowa, Inc.*, 319 N.W.2d 515, 516 (Iowa 1982).

tenant used or kept on the leased premises and the security interest of a secured creditor who has a purchase-money security interest¹⁰⁹ in the same property. Assume, for instance, that a farmer enters into a lease of Blackacre commencing January 1. On the same day, the farmer borrows money from the local bank to purchase a tractor to use on Blackacre. As the following discussion illustrates, it would appear that the bank would have a prior right in the tractor under either the "non-code" or "U.C.C. by Analogy" approach.¹¹⁰

Under pre-code law, a purchase-money security interest was referred to as a purchase-money chattel mortgage or a purchase-money mortgage.¹¹¹ In Iowa, it is well established under pre-code law that the purchase-money mortgagee's interest in the property of the tenant, acquired with the purchase-money from a mortgagee's funds, is prior to the landlord's interest pursuant to a landlord's lien.¹¹² For example, in *Barrett v. Martzahn*,¹¹³ a dispute arose between the landlord and holders of purchase-money mortgages over the proceeds from the sale by the purchase-money mortgage holder of property covered by both the landlord's lien and the purchase-money mortgage.¹¹⁴ In *Barrett*, the tenant brought the mortgaged property onto the leased premises after entering into the purchase-money mortgage.¹¹⁵ The court held that the purchase-money mortgage holder and his assignee were entitled to the proceeds from the sale of the collateral.¹¹⁶ In so holding, the court stated:

[The landlord's] lien attached by operation of law upon the property as soon as it was brought upon the leased premises, but it attached only to the property right of the tenant. It was co-extensive with such right, neither more nor less. The tenant held such property subject to the

109. A purchase-money security interest is, for purposes of the U.C.C., defined by Iowa Code section 554.9107. That provision reads:

- A security interest is a "purchase money security interest" to the extent that it is:
- a. taken or retained by the seller of the collateral to secure all or part of its price;
- or
- b. taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

IOWA CODE § 554.9107 (1985).

110. See *infra* text accompanying notes 114-35.

111. See, e.g., *Miller v. Swartzlender & Holman*, 192 Iowa 153, 155, 182 N.W. 651, 652 (1921); *Barrett v. Martzahn*, 186 Iowa 548, 550, 173 N.W. 72, 73 (1919).

112. See, e.g., *Farmers' Grain & Mercantile Co. v. Benson*, 195 Iowa 695, 193 N.W. 14 (1923); *Miller v. Swartzlender & Holman*, 192 Iowa at 155-56, 182 N.W. at 652; *Barrett v. Martzahn*, 186 Iowa at 550, 173 N.W. at 73.

113. 186 Iowa 548, 173 N.W. 72 (1919).

114. *Id.*

115. *Id.*

116. *Id.* at 551, 173 N.W. at 73.

purchase-money mortgage.¹¹⁷

Because the landlord's lien only attaches to the property rights of the tenant, the priority between the landlord's lien and the purchase-money mortgage is not dependent upon whether the property is brought onto the leased premises after the mortgage is granted, as in the *Barrett* case,¹¹⁸ or whether the purchase-money mortgage is granted after the property is placed on the leased premises, as in *Davis Gasoline Engine Works Co. v. McHugh*.¹¹⁹ If property which the tenant has yet to purchase is placed upon the leased premises, the landlord's lien will not attach to said property at all, assuming the tenant has no other rights therein. The moment the tenant purchases the property and grants a purchase-money mortgage, thereby acquiring rights in the property, the landlord's lien will attach, but the lien will be subject to that of the purchase-money mortgage holder.¹²⁰ The same result occurs when the purchase-money mortgage arises simultaneously with the delivery of the property onto the leased premises, when pursuant to the purchase contract, the buyer was not entitled to delivery until a chattel mortgage was executed.¹²¹ The results in the above situations would be different, however, if the chattel mortgage were not a purchase-money chattel mortgage.¹²²

To defeat the purchase-money mortgage, landlords have attempted to attack certain defects in the purchase-money chattel mortgage. For instance, in *Miller v. Swartzlender & Holman*,¹²³ the landlord argued that the chattel mortgage did not provide constructive notice of the lien because the mortgage contained a defective acknowledgement.¹²⁴ The court dismissed this argument by stating: "The doctrine of constructive notice by recording the purchase-money mortgage is not applicable, and no other lien on the part of the landlord is involved herein."¹²⁵ A similar argument was made by the landlord in *Barrett v. Martzahn*,¹²⁶ in which the court determined that:

The question of constructive notice to the landlord by recording the mortgage is not applicable. The mere bringing of the property upon the leased premises, and thereby within the operation of the lease, did not of itself make the landlord a subsequent encumbrancer for value. Such notice would only become important when the landlord in some manner changed his position, in reliance upon his new lien Nor was it

117. *Id.* See also *Miller v. Swartzlender & Holman*, 192 Iowa at 154-56, 182 N.W. at 652.

118. See *supra* text accompanying notes 113-17.

119. 115 Iowa 415, 88 N.W. 948 (1902).

120. See *id.* at 419, 88 N.W. at 949.

121. *Ancient Order of United Workmen v. Martin*, 172 Iowa 702, 703, 154 N.W. 913, 914 (1915).

122. See *infra* text accompanying notes 149-54.

123. 192 Iowa 153, 182 N.W. 651 (1921).

124. *Id.* at 155, 182 N.W. at 652.

125. *Id.*

126. 186 Iowa 548, 173 N.W. 72 (1919).

available to the [landlord] to challenge the sufficiency of the description in the mortgages. Until his position had been in some manner changed, he had no interest in such question The purpose of the description would be to impart notice and the [landlord] could not be interested in such description until he was entitled to such notice.¹²⁷

Under common law, based upon this holding, errors in the purchase-money chattel mortgage or the failure to record the chattel mortgage will not affect the priority between the chattel mortgage holder and the landlord unless "the landlord in some manner changed his position in reliance upon his new lien."¹²⁸ This is one area of the law where the result would perhaps be different if a court were to apply article 9 in establishing the priority between the landlord's lien and a non-filed or defectively filed financing statement.¹²⁹ Under article 9, in order for a creditor's security interest to be perfected, i.e., to gain priority over third parties, a financing statement may have to be filed.¹³⁰ If the article 9 financing statement contains certain defects, even though it has been filed, such as: an error in the debtor's name, an error in the secured party's name, an omission of the address of either the debtor or the secured party, an omission of the debtor's signature, or an improper description of the collateral, the secured party will not be properly perfected as against third parties.¹³¹

Looking back to the hypothetical situation outlined above, under article 9 the bank's purchase-money security interest in the tractor would be prior to all other conflicting security interests if it were perfected by filing within twenty days from the date on which farmer took possession of the tractor.¹³² If the bank failed to file within the twenty day period, the priority conflict would be governed by Iowa Code section 554.9312(5)(a), which provides:

Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.¹³³

The outcome of this conflict would turn upon when and/or if the landlord is deemed to have a perfected security interest for purposes of article 9.¹³⁴

127. *Id.* at 550-51, 173 N.W. at 73.

128. *Id.*

129. *See infra* text accompanying notes 131-32.

130. *See* IOWA CODE § 554.9302 (1985). A financing statement, however, need not be filed if the creditor is either in possession of the collateral or in other certain enumerated circumstances set forth in Iowa Code section 554.9302 (1985).

131. For a discussion of the various defects in a financing statement which prevent the secured party from being perfected see CLARK, *supra* note 41, at ¶2.9[1] - ¶2.9[5][c]. *See also* IOWA CODE § 554.9402 (1985) (formal requisites of financing statement).

132. *See* IOWA CODE § 554.9312(4) (1985).

133. *Id.* § 554.9312(5)(a).

134. It should be remembered that the landlord's lien attaches by operation of law at the

B. *After-acquired Property and Increases vs. Landlord's Lien*

A priority dispute often occurs between the holder of a landlord's lien and a chattel mortgage holder in connection with rights to increases in the collateral. Assume that a farmer borrows money from a bank, purchases some pigs, and grants a purchase-money security interest to the bank, the terms of which give the bank a security interest in the pigs and in any piglets born subsequent to the execution of the security agreement.¹³⁵ In Iowa, under the non-code or pre-code rule, any increase in the collateral, such as hogs or cattle born on the leased premises, would become subject to the landlord's lien.¹³⁶ This principle is illustrated in *Corydon State Bank v. Scott*.¹³⁷ In *Scott*, a farmer and his wife executed a chattel mortgage giving the mortgagee a mortgage in the farmer's personal property including "all increase, and the increase from the increase thereof, additions thereto and substitutions therefor."¹³⁸ The farmer then entered into a farm lease. In deciding which party had priority to the increase in the stock during the lease period, the Iowa Supreme Court held that, "as between the landlord and the chattel mortgage holder, the landlord has the superior right."¹³⁹

A similar result also occurs under pre-code law in connection with the priority dispute between a chattel mortgagee and a landlord over crops.¹⁴⁰ Such an issue was decided in *Dilenbeck v. Security Savings Bank*.¹⁴¹ Approximately one month after entering into a farm lease, the farmer in *Dilenbeck* borrowed money from a bank and gave the bank a chattel mortgage in the crops to be grown on the land. The court in *Dilenbeck* held that the landlord's rights were superior to those of the chattel mortgagee.¹⁴² The theory upon which this rule of law was based was stated by Justice Ladd as follows:

Under the law a mortgage on crops to be grown does not attach until the crop is planted, nor does it attach to the increase until it comes into existence, and it is manifest that the tenant cannot by a contract with a third person deprive the landlord of the lien expressly created by statute on crops to be grown or the increase to come into existence subsequent to the tenant taking possession of the leased premises. If there were no

time of the commencement of the lease. See, e.g., cases cited *supra* note 112.

135. There is no question, under either non-code law or article 9, that the lender would have a purchase-money security interest that would be prior to a landlord's lien as to the pigs directly purchased with the lender's money, a situation distinguishable from that involving subsequently born piglets. See *supra* text accompanying notes 109-34.

136. See *Corydon State Bank v. Scott*, 217 Iowa 1227, 1232, 252 N.W. 536, 538-39 (1934); *Mau v. Rice Bros.*, 216 Iowa at 867-68, 249 N.W. at 208.

137. 217 Iowa 1227, 252 N.W. 536 (1934).

138. *Id.* at 1228, 252 N.W. at 537.

139. *Id.* at 1232, 252 N.W. at 538-39.

140. *Dilenbeck v. Security Sav. Bank*, 186 Iowa 308, 169 N.W. 675 (1918).

141. *Id.*

142. *Id.* at 311-12, 169 N.W. at 677.

other reason for so holding, the fact [is] that the increase is nourished from the produce of the land and the crops spring from its soil, and therefore the [lessor] ought not to be deprived of the opportunity to enforce rent as compensation for the use of the land against the products incidental to such use.¹⁴³

Section 554.9204 of the Iowa Code permits a secured party to obtain a security interest in after-acquired collateral.¹⁴⁴ Consequently, a description such as "all livestock now owned or hereafter acquired by debtor" would be sufficient to describe livestock presently owned or later acquired by natural increase, in exchange for culled animals, or from other purchase.¹⁴⁵ Because article 9 allows a secured party to obtain a security interest in after-acquired property, if the priority rules of article 9 were applied and if the crop lender perfected his security interest prior to the lease, his interest in the increase in the collateral would be superior to that of the landlord.¹⁴⁶ It should be noted that if the priority rules of article 9 were applied, under circumstances such as when a lender loans a farmer money to enable the farmer to produce the crops, the lender's security interest in the crops would be superior to the landlord's lien, even though the borrower had already been leasing the property at the time the loan was made.¹⁴⁷ As the foregoing discussion illustrates, in those situations in which a lender is looking to collateral pursuant to the terms of an after-acquired property clause, the results in a priority dispute between the lender, as a secured party, and the landlord, as holder of a landlord's lien, would appear to vary depending upon whether the court

143. *Id.*

144. IOWA CODE § 554.9204 (1985). Section 554.9204(1) provides: "Except as provided in subsection 2, a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral, including after-acquired collateral which also constitutes identifiable non-cash proceeds." *Id.* The breadth of an after-acquired property case is illustrated by the Eighth Circuit Court of Appeals' holding in the case of *In re Sunberg*, 729 F.2d 561, 562 (8th Cir. 1984), in which the court, in interpreting Iowa law, held that a security interest in the debtor's "existing or hereafter acquired . . . crops, growing crops, livestock, farm products, equipment, inventory, fixtures, contract rights, accounts and general intangibles" was sufficient to obtain a security interest in the debtor's payment under the federal government's 1983 payment-in-kind (PIK) program which were categorized by the court as either a "general intangible" or as an "account." *In re Sunberg*, 729 F.2d at 562.

145. Clark, *The Agricultural Transaction: Livestock Financing*, 11 U.C.C.L.J. 106, 106 (1978).

146. IOWA CODE § 554.9312 (1985).

147. *See id.* section 554.9312(2), which provides:

A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

Id.

would apply the priority rules of non-code law or those of article 9.

C. Working Capital Financing

Assume that a bank makes a working capital loan to a farmer and takes a "barnyard blanket" security interest in all of the farmer's personal property. Under Iowa's non-code law, the bank's security interest would be subordinate to the landlord's statutory lien.¹⁴⁸ This would be true as to both the property in existence at the time the security agreement was executed, and to any increases in stock and crops grown.¹⁴⁹

If the rules of article 9 were applied, the landlord would be seen as having a perfected security interest in the farmer's property at the commencement of the lease, and he would prevail.¹⁵⁰ Under the Iowa version of the U.C.C., in a situation not involving purchase-money security interests, "[c]onflicting security interests rank according to priority in time of filing or perfection."¹⁵¹

An interesting question arises in connection with Iowa's so-called "last-chance" financing provision.¹⁵² This provision is aimed at allowing a farmer to obtain financing to plant crops even though he may be suffering severe financial difficulty. Specifically, the provision reads:

A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.¹⁵³

This enactment gives a financing party priority over "an earlier perfected security interest."¹⁵⁴ Iowa Code section 554.1201(37) defines "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation."¹⁵⁵ While this would appear to describe the statutory landlord's lien, the language of section 554.9104(b) makes it unclear whether the "last chance" provision would subordinate a landlord's

148. *Atkins v. Womeldorf*, 53 Iowa 150, 152, 4 N.W. 905, 907 (1880). See also *Stoaks v. Stoaks*, 146 Iowa 61, 63, 124 N.W. 757, 758 (1910).

149. *Dilenbeck v. Security Sav. Bank*, 186 Iowa at 311-12, 169 N.W. at 676; see also *Corydon State Bank v. Scott*, 217 Iowa at 1232, 252 N.W. at 539.

150. IOWA CODE § 554.9312(5)(a) (1985).

151. *Id.*

152. See *id.* § 554.9312(2) (1985).

153. *Id.*

154. *Id.*

155. *Id.* § 554.1201(37) (1985).

lien.¹⁵⁶

V. CONCLUSION

After a thorough discussion of the relative priority problem and how it has been treated by various courts, it appears that each of the judicial approaches contains inherent infirmities. A majority of courts will look to pre-code law in solving the problem. Although such an approach, if forewarned, would probably be somewhat predictable, the inherent fault in this course of action is the fact that it entails the application of antiquated law in a modern commercial context. The U.C.C. has worked a major change in commercial law; although the U.C.C. did not do away with "chattel mortgages," "conditional sales contracts," "factor's liens" and the like, the adoption of the U.C.C. has had the unavoidable effect of rendering case law concerning these items virtually useless.

The majority of courts addressing the problem, therefore, may be criticized for their willingness to apply admittedly outdated law without undertaking an evaluation of modern day facts and circumstances to determine whether a new rule or set of rules governing priority should be adopted. There is nothing in the U.C.C. dictating the application of outdated case law. Indeed, it was the recognition that much of the existing law was not conducive to modern-day commerce that prompted the adoption of the U.C.C.¹⁵⁷

Inherent weaknesses also exist, however, in the approaches taken by courts using an analysis other than the "pre-code" method.¹⁵⁸ It is difficult to analogize to the U.C.C. because a landlord-lien holder must be given a constructive status as a lien creditor in order to apply the priority rules of article 9.¹⁵⁹ This requires a court to make an arbitrary decision as to when a landlord has a perfected interest because article 9 specifically excludes the landlord's lien from its scope. This makes for an awkward and somewhat unpredictable process.

In *Peterson v. Ziegler*,¹⁶⁰ the premier "U.C.C. by Analogy" decision, an Illinois court assigned a landlord lienholder "lien creditor" status on the date that, pursuant to an Illinois distraint law, the landlord levied upon the personalty of his tenant.¹⁶¹ In order to make use of such an approach, an Iowa court would be forced to decide whether a landlord is a lien creditor or perfected lienholder at the time the lease commences or when he attempts

156. Landlord's liens are exempted from the operation of article 9. IOWA CODE § 554.9104(b) (1985).

157. See *supra* text accompanying notes 31-39.

158. See *Dwyer v. Cooksville Grain Co.*, 117 Ill. App. 3d at ___, 454 N.E.2d at 359-60 (1983).

159. *Id.* at ___, 454 N.E.2d at 359-60.

160. 39 Ill. App. 3d 379, 350 N.E.2d 356 (1976).

161. *Id.* at ___, 350 N.E.2d at 361.

to foreclose the lien.¹⁶²

A practical problem arises under the present system regardless of the approach utilized by a court. Assume, as was done in the example above, that a farmer seeks a working capital (i.e. non-purchase-money) loan from a bank. The loan is to be secured by an interest in all of the farmer's equipment, livestock and crops. After conducting a search for U.C.C. filings, and finding none, the bank makes the loan. As illustrated by the example above,¹⁶³ the bank has not adequately protected itself if the farmer is a tenant: the farmer's landlord would have a superior right to the personal property. Arguably, the bank could obtain a representation from the farmer that he owns the land upon which he farms and will farm only upon land he owns, but if such a representation proved to be false, the lender would merely have another cause of action against the farmer in addition to an action on the promissory note. The lender, however, still would not be protected from the interest of the landlord unless he receives a subordination agreement from the landlord. Unless the farmer was well known to the bank, the bank would have to conduct a costly search of the real estate records in order to insure adequate protection.

This scenario illustrates the infirmities inherent in the present system, suggesting that the problem may be better suited for legislative rather than judicial resolution. The problem of priority conflicts might be best addressed by the enactment of a statutory provision expressly setting forth basic rules of priority covering all liens on personal property. The Oregon legislature has adopted just such a provision.¹⁶⁴ Chapter 87 of the Oregon Revised Statutes enumerates specific procedures and rules for the perfection and priority of virtually all personal property liens arising by operation of law in Oregon.¹⁶⁵ The Oregon provisions afford landlords, as well as some other non-U.C.C. lienholders,¹⁶⁶ priority over all other liens and security interests, including those created under article 9.¹⁶⁷ Specifically, the statute gives liens upon timber, crops and livestock priority over a security interest created under article 9.¹⁶⁸

A statutory enactment such as the Oregon law seems to create as many

162. See *supra* text accompanying notes 94-101.

163. See *supra* text accompanying notes 150-52.

164. OR. REV. STAT. § 87.146 (1983).

165. *Id.*

166. Artisans and innkeepers are also given a priority over competing lienholders. OR. REV. STAT. § 87.146 (1983). The pertinent passage provides that the certain enumerated liens: "have priority over all other liens, security interests and encumbrances on the chattel subject to the lien, except that taxes and duly perfected security interests existing before chattels sought to be subjected to a [landlord's lien] are brought upon the leased premises have priority over that lien." OR. REV. STAT. § 87.146(1)(a) (1983).

167. *Id.*

168. OR. REV. STAT. §§ 87.222, .226 (1983).

problems as it remedies.¹⁶⁹ Admittedly, the statute injects a measured degree of predictability into the priority conflict area by explicitly addressing the problem. Such an enactment may, however, defeat one of the fundamental purposes of article 9, the uniformity among the states of the law governing financing transactions.¹⁷⁰ Article 9 was drafted to provide a self-contained, unified structure within which secured transactions could be accomplished.¹⁷¹ The substantive rules of a provision such as that adopted in Oregon may also undermine another paramount goal of article 9, simplicity.¹⁷² Article 9 sets forth rather basic and straightforward rules for determining priority among competing lienholders.¹⁷³ Although subject to many exceptions, one of the basic rules embodied in article 9 is that priority is accorded to the lienholder who is first to file or perfect.¹⁷⁴ An enactment of the form adopted in Oregon results in complexity and uncertainty because priority can only be determined by referring to provisions outside of article 9. In addition, there undoubtedly exists a vast difference of opinion concerning the desirability of granting a preference to a landlord.

An alternative to the Oregon statutory scheme may be the codification of the *Peterson* approach.¹⁷⁵ This would entail amending Iowa Code sections 554.9104 and 554.9301(3) to provide that a landlord is a "lien creditor" for purposes of article 9.¹⁷⁶ Clearly, this approach leaves a great deal to be desired. As discussed above,¹⁷⁷ the courts would presumably be given the duty to determine when the landlord achieves lien creditor status. This hardly promotes the article 9 goals of predictability of outcome and simplified formality. Perhaps a more viable alternative to the statutory schemes discussed above would be the enactment of a provision requiring a landlord to make a U.C.C.-type filing in order to perfect his landlord's lien as against third parties. Several jurisdictions currently have similar provisions.¹⁷⁸

Such a provision would facilitate one of the paramount goals of article 9 by providing lenders and third-party purchasers of personalty with a simple and inexpensive means of being apprised of all parties having a claim in or to a particular item of personal property. This would facilitate ease of com-

169. See Comment, *Priority Between Security Interests and Liens Arising by Operation of Law in Oregon*, 12 WILLAMETTE L.J. 173 (1975).

170. See *supra* text accompanying notes 31-39.

171. *Id.*

172. *Id.*

173. See IOWA CODE § 554.9310 (1985).

174. *Id.*

175. See *supra* text accompanying notes 90-100.

176. A "lien creditor" is a party who has "acquired a lien on the property involved by attachment, levy or the like." IOWA CODE § 554.9301(3) (1985).

177. See *supra* text accompanying notes 100-04.

178. See, e.g., IND. CODE § 32-7-1-18 (1980); WASH. REV. CODE § 60.12.040 (1974). In Washington, if a farm lease is recorded with the county auditor, that recording constitutes "notice of claim of lien for rent during the first three years of the leasehold period." WASH. REV. CODE at 60.12.040 (1974).

merce and predictability of outcome. An even simpler way to accomplish this would be to repeal the landlord's lien provision. This would relegate the landlord to the status of all other secured parties. Although such an approach may appear facially radical, it seems logical in light of the fact that Chapter 570 of the Iowa Code was enacted before the existence of a comprehensive provision such as article 9.