

# Washington Law Review

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Volume 41 | Number 4

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8-1-1966

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### Recommended Citation

anon, Comment, *UCC Section 9-301 (1) and Accounts, Contract Rights, and Chattel Paper: The Non-Existent Priorities*, 41 Wash. L. Rev. 895 (1966).

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# UCC SECTION 9-301(1) AND ACCOUNTS, CONTRACT RIGHTS, AND CHATTEL PAPER: THE NON-EXISTENT PRIORITIES?

## I. INTRODUCTION

It has been said that "fortunately . . . experience indicates that the practical importance of . . . [Uniform Commercial Code priority] problems is probably less than their intellectual challenge."<sup>1</sup> This may be fair warning to eager students, lawyers, and legal scholars. Such warnings, however, are seldom heeded, and pursuits of intellectual challenge are often productive. Constructive analysis of sections 9-301(1) (c) and (1) (d) of the Uniform Commercial Code,<sup>2</sup> insofar as they relate to "chattel paper,"<sup>3</sup> "accounts,"<sup>4</sup> and "contract rights,"<sup>5</sup> may prove to be most beneficial.

Section 9-301 is the Code's basic priority provision. In general, this section prescribes those persons who take priority over a secured party who has failed to perfect his interest according to the Code's perfection provisions.<sup>6</sup> In subsections (1)(c) and (1)(d) of section 9-301 certain persons without Code "security interests"<sup>7</sup> in chattel

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<sup>1</sup> Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 855 (1959).

<sup>2</sup> UNIFORM COMMERCIAL CODE 1962 OFFICIAL TEXT WITH COMMENTS [hereinafter cited as UCC]. For a recent treatise on pre-Code and article 9 personal property security in two volumes, see GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965). This fine work, written by one of the reporters for article 9, may become the appropriate starting place for anyone with an article 9 problem.

<sup>3</sup> "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods." UCC § 9-105(1) (b).

<sup>4</sup> "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper." UCC § 9-106.

<sup>5</sup> "Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper." UCC § 9-106.

<sup>6</sup> UCC § 9-301(1) provides as follows:

- (1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of
  - (a) persons entitled to priority under Section 9-312;
  - (b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected;
  - (c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;
  - (d) in the case of accounts, contract rights, and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

<sup>7</sup> See UCC § 1-201(37).

paper, accounts, and contract rights are said to take priority over such unperfected secured parties. Extreme difficulty is encountered, however, in attempting to identify those persons with interests in chattel paper, accounts, and contract rights who qualify for priority treatment under these subsections. Analysis of these provisions uncovers a possible real need for statutory revision of article 9 of the Code, for as presently drafted, a plausible interpretation of subsections (1)(c) and (1)(d) of section 9-301 renders them inoperative with respect to chattel paper, accounts, and contract rights.

## II. CHATTEL PAPER AND SECTION 9-301(1)(c)

Section 9-301(1)(c) of the Uniform Commercial Code provides:

Except as otherwise provided in subsection (2), *an unperfected security interest is subordinate to the rights of . . . (c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected.* (Emphasis added.)

Insofar as this provision deals with chattel paper, it may be meaningless. The following hypothetical situation poses the problem:

Lend, Inc., a company engaged in the business of making commercial loans, advances \$5,000 to Sam Johnson and receives a note and written evidence of security interest in a valuable painting in return. In order to further its operations, Lend borrows funds from Bank and executes in Bank's favor a security agreement describing the note and security interest, "chattel paper,"<sup>8</sup> as collateral. Bank fails to perfect its security by filing or taking possession as provided in the Code. Lend is subsequently sold to Credit, Inc., another lending institution, and the sale includes all chattel paper in possession of Lend. Credit is without knowledge of the security interest in favor of Bank at the time of delivery of the chattel paper. Under the Code who takes priority—Bank or Credit, Inc.?

### *A. Who is a Buyer of Chattel Paper Who is Not a Secured Party and Who Can Qualify for the Priority Treatment of Section 9-301(1)(c)?*

Bank's unperfected security interest in the chattel paper is sub-

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<sup>8</sup> See note 3 *supra*.

ordinate to the interest of Credit, Inc., if Credit is a buyer<sup>9</sup> who has taken delivery of the chattel paper and given value therefore prior to learning of security interest in favor of Bank. An interpretative difficulty immediately arises. In what sense was "buyer" used in section 9-301(1) (c)? It has been suggested<sup>10</sup> that subsections (1) (c) and (1) (d) deal with "purchasers," a term under the Code much broader than "buyer."<sup>11</sup> The thought that "buyer" defines a smaller class of persons of its own, *i.e.*, certain parties to a sale transaction, and therefore that "buyer" is not synonymous with "purchaser," is supported by other provisions of the Code.<sup>12</sup> It must be assumed that the Code drafters used "buyer" in its restrictive sense in section 9-301(1) (c), since under the Code "purchaser" is a word of art. Had the drafters wished to include non-buyers they could have easily done so.

By using "buyer" in its sales context, donees, bailees, transferees for purposes of collection, lien creditors, and other like persons are prohibited from claiming a priority under section 9-301(1) (c).<sup>13</sup> But by thus so limiting operation of the section, additional interpretative difficulties are encountered. Not only must persons entitled to priority be "buyers," they must be unsecured parties.

As defined in the Code, a secured party is a "lender, seller or other person in whose favor there is a security interest, *including a person to whom accounts, contract rights or chattel paper have been sold.*" (Emphasis added.)<sup>14</sup> In addition, a "security interest" is de-

<sup>9</sup> UCC § 9-301(1)(c) speaks of "transferee in bulk or *other buyer* not in ordinary course of business." (Emphasis added.) One logically concludes that "transferee" denotes a legal relationship denoted by "buyer," *i.e.*, party to a sale transaction.

Retention of the two terms, "transferees" and "buyer," however, may be terminologically necessary, at least with respect to "goods," because of the language of UCC § 1-201(9), which provides in part that "buying" . . . does not include a transfer in bulk . . ." For this reason, the two terms are maintained in § 9-301(1) (c) of the Appendix.

<sup>10</sup> UCC § 9-301, comment 4.

<sup>11</sup> UCC § 1-201(33) defines "purchaser" as one who takes by "purchase." UCC § 1-201(32) provides that "purchase" includes *taking by sale*, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property." (Emphasis added.)

<sup>12</sup> See, *e.g.*, UCC § 2-103, which defines buyer as "a person who buys or contracts to buy goods," and seller as "a person who sells or contracts to sell goods."

<sup>13</sup> Where the drafters intended parties other than buyers to obtain priority they have so provided. See, *e.g.*, UCC § 9-301(1)(b), which specifically provides for priority of a lien creditor.

<sup>14</sup> UCC § 9-105(1) (i). It is not the purpose of this Note to discuss the drafters' wisdom in treating sales of accounts, contract rights, and chattel paper generally as security transactions. For such discussion, see, *e.g.*, 2 COOGAN, HOGAN & VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 15.02 (1), at 1586 (1964); 1 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10.5

fined to include "any interest of a buyer of . . . chattel paper . . . which is subject to Article 9."<sup>15</sup> Article 9 applies to any sale of chattel paper<sup>16</sup> except as limited in section 9-104(f), which provides that article 9 does not apply to any "sale of . . . chattel paper as part of a sale of the business out of which they arose . . ." Thus, the only buyers of chattel paper in whose favor section 9-301(1) (c) *might* operate are buyers of chattel paper as part of a sale of the business out of which they arose (hereinafter called "9-104(f) buyers"). All other buyers of chattel paper are secured parties;<sup>17</sup> their priority rights are determined according to other provisions of the Code.<sup>18</sup>

It is probable, however, that operation of section 9-301(1) (c) in favor of "9-104(f) buyers" is precluded by the Code. The Code provides not only that section 9-104(f) transactions do not create security interests, but that no provision of article 9 applies to transactions described in section 9-104(f).<sup>19</sup> The difficulty with the contrary position, that section 9-104 should be read narrowly, only to exclude certain transactions from creating security interests, is that where the drafters intended transactions to come within other provisions of article 9, notwithstanding their inclusion in section 9-104, the drafters expressly so provided.<sup>20</sup> Thus, it is submitted that as the Code is presently drafted it is literally possible to conclude that the only buyers of chattel paper who might claim priority rights under section 9-301(1) (c) are precluded from doing so by section 9-104(f).

### *B. Who is a Buyer Not in Ordinary Course?*

Assuming that there are in existence under the Code buyers of

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(1965). Suffice it to say that the principal effect of this Code treatment is to merely subject buyers of such property to the Code's perfection and priority scheme. Otherwise, buyer status is maintained. See, *e.g.*, UCC § 9-504(2).

<sup>15</sup> UCC § 1-201(37).

<sup>16</sup> UCC § 9-102(1) (b).

<sup>17</sup> It might be argued, however, that since § 9-105(i) speaks of security interests in favor of persons to whom chattel paper has been *sold*, an agreement between the seller and any class of buyer of chattel paper that title would not pass until some future time—as for example with the pre-Code conditional sale—will preclude creation of a security interest, on the ground that no completed sale has taken place. Thus, if prior to the passing of title to a buyer of chattel paper, litigation arises under § 9-301(1) (c), it might be argued that that section should operate in favor of the non-title holding buyer if he otherwise qualifies. This argument is faulty. The Code provides that "each provision of . . . [article 9] with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor." UCC § 9-202.

<sup>18</sup> See UCC § 9-301(1) (a).

<sup>19</sup> UCC § 9-104 provides that "Article [9] does not apply to . . . [the following transactions]."

<sup>20</sup> See, *e.g.*, UCC § 9-104(c), which expressly provides that article 9 does not apply "to a lien given by statute or other rule of law for services or materials *except as provided in Section 9-310* on priority of such liens . . ." (Emphasis added.)

chattel paper who are not secured parties and who are not prohibited from seeking priority over an unperfected secured party, such buyers must be either "transferees in bulk" or some other "buyers *not* in ordinary course of business." Again interpretative difficulties arise. The Code defines a "buyer in ordinary course of business" as one:

[W]ho in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker.<sup>21</sup>

The Code nowhere defines "buyer not in ordinary course of business," but the Code comments<sup>22</sup> refer to the "buyer in ordinary course of business" provisions.

It is generally thought that a "buyer in ordinary course of business" is a buyer who buys from inventory.<sup>23</sup> The Code itself provides that the term does not include a transferee in bulk or a buyer from a pawnbroker.<sup>24</sup> Thus, is a "buyer *not* in ordinary course of business" one who buys from a pawnbroker, or one who buys in bulk, or one who does not buy from inventory? Or are the other definitional elements<sup>25</sup> of "buyer in ordinary course of business" important as well? For example, must a buyer to be a "buyer not in ordinary course of business" in addition to buying from a pawnbroker also buy in bad faith and with knowledge? Or are any one or all of the definitional elements of independent significance? The answers to these questions are not at all clear. Only some of this uncertainty is clarified for purposes of section 9-301(1) (c) which provides that it will not operate in favor of a buyer who has knowledge<sup>26</sup> of contestant's security interest when he takes delivery of the chattel paper.

These questions pose interesting problems of judicial interpretation, but a more pertinent and crucial question, as far as chattel paper is concerned, is whether a buyer of chattel paper can ever be a "buyer not in ordinary course of business." The term "buyer in ordinary course of business" concerns only buyers of "goods."<sup>27</sup> In article 9 "goods" are defined to include "all things which are movable

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<sup>21</sup> See UCC § 1-201 (9).

<sup>22</sup> UCC § 9-301, comment 4; UCC § 1-201, comment 9.

<sup>23</sup> See, *e.g.*, *Al Maroone Ford, Inc. ex rel. Bank of Buffalo v. Manheim Auto Auction, Inc.*, 205 Pa. Super 154, 208 A.2d 290 (1965).

<sup>24</sup> UCC § 1-201 (9).

<sup>25</sup> See text accompanying note 21 *supra*.

<sup>26</sup> Under the Code "knowledge" is distinguished from "notice." See UCC § 1-201 (25).

<sup>27</sup> UCC § 1-201 (9).

at the time the security interest attaches or which are fixtures . . . *but does not include . . . chattel paper . . .*" (Emphasis added.)<sup>28</sup> Thus, that portion of section 9-301(1) (c) dealing with "buyers not in ordinary course of business" does not identify any buyer of chattel paper, unless it was the drafters' intention that since chattel paper is not a class of "goods," all buyers of chattel paper should be classified as "buyers not in ordinary course of business."

### *C. Who is a Transferee in Bulk of Chattel Paper?*

Since it may be that no buyer of chattel paper is a "buyer not in ordinary course of business," section 9-301(1) (c) can then operate only in favor of "transferees in bulk" of chattel paper. The transferee should be considered a buyer,<sup>29</sup> but in no provision of article 9 or the comments thereto do the drafters define the term "transferee in bulk."

In article 6 the Code provides that a bulk transfer "is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory . . ."<sup>30</sup> The comments to that section are instructive; they provide that:

The transfers included are of "materials, supplies, merchandise or other inventory" that is, of goods. *Transfers of . . . [chattel paper] are not covered* by the Article . . . Such transfers are dealt with in other Articles, and are not believed to carry any major bulk sales risk. (Emphasis added.)<sup>31</sup>

Since article 9 defines "goods" to exclude chattel paper,<sup>32</sup> and nowhere provides that "transferee in bulk" expressly includes a buyer of chattel paper, it is possible to conclude that no buyers of chattel paper can qualify as "transferees in bulk."

### *D. Who is the Intended Beneficiary of Section 9-301(1)(c)?*

As suggested under subheadings *B* and *C*, above, a literal reading of the Code leads to the conclusion that section 9-301(1) (c) is inoperative as to buyers of chattel paper, on the ground that there are not buyers of chattel paper who qualify as "transferees in bulk

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<sup>28</sup> UCC § 9-105 (1) (f).

<sup>29</sup> See note 9 *supra*.

<sup>30</sup> UCC § 6-102 (1).

<sup>31</sup> UCC § 6-102, comment 3.

<sup>32</sup> UCC § 9-105(1) (f).

or other buyers not in ordinary course of business." On the other hand, it would seem more reasonable, on the theory that the drafters purposefully included buyers of chattel paper within the coverage of section 9-301(1) (c), to construe "transferee in bulk" and "buyer not in ordinary course of business" so as to include buyers of chattel paper.

Such a construction, however, would operate only in favor of buyers who are not secured parties, and as concluded in subheading *A*, above, the only persons who fit this qualification are literally prohibited from claiming their priorities because of section 9-104(f). One must assume that the drafters did not intend section 9-301(1) (c) to be meaningless with regard to chattel paper. It should, therefore, be arguable that the drafters did not intend that section 9-104(f) would deny priorities otherwise obtainable under section 9-301(1) (c). It would follow that "9-104 (f) buyers" of chattel paper would probably qualify as "transferees in bulk." Thus, Credit, Inc. in the above hypothetical would take priority over Bank. From a policy standpoint, allowing such a buyer a priority is entirely reasonable, and compensates him somewhat for his inability to qualify under article 9 as a secured party who otherwise might take advantage of the Code's notice filing procedures.<sup>33</sup>

Although this result might be reached judicially by using the principle of statutory construction which prefers the construction that renders the statute operative rather than inoperative, Code clarification would be desirable. A prefatory amendment to section 9-104(f) might appear as follows:

(f) except to the extent that provision is made for priority over unperfected security interests in Section 9-301 . . . .

In addition, in absence of full statutory revision of section 9-301(1) (c), which would seem preferable,<sup>34</sup> revision of some of the comments is required. As presently drafted the comments are misleading. The comments should clarify use of "purchaser" as opposed to statutory use of "transferee" and "buyer." The comments ought also to clarify the extent to which "transferee in bulk" and "buyer not in

<sup>33</sup> See UCC §§ 9-302, 9-304, and 9-402. Of course, complying with the Code's notice filing provisions does not guarantee a perfect priority position. See UCC § 9-312 and other provisions referred to therein.

<sup>34</sup> As will be discussed in the text *infra*, UCC § 9-301(1) (d) also deserves redrafting. Assuming that with respect to accounts, contract rights, and chattel paper, UCC § 9-301(1) was intended to benefit UCC § 9-104(f) buyers, a suggested statutory solution is offered in an Appendix to this Note.

ordinary course of business" aid in identifying persons with interests in chattel paper. Part of such comment revision might include remarks similar to the following:

Since any sale of chattel paper creates a security interest in the buyer, except as provided in section 9-104(f), the very language of subsection (1) (c) of this section prohibits its operation in favor of buyers of chattel paper except buyers whose interests arise in sales described in section 9-104(f). Generally, priority rights of buyers of chattel paper, since they are secured parties, are determined by subsection (1) (a) of this section.

### III. ACCOUNTS AND CONTRACT RIGHTS AND SECTION 9-301 (1) (d)

Section 9-301(1) (d) of the Uniform Commercial Code provides:

Except as otherwise provided in subsection (2), *an unperfected security interest is subordinate to the rights of . . . (d) in the case of accounts, contract rights, and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.* (Emphasis added.)

The Code comments<sup>35</sup> indicate that the omission of the element of delivery from the substantive requirements of this section is based on the fact that the property to which this section relates is not represented by any piece of paper whose physical delivery is a method of transfer. The absence of the element of delivery does not aid, however, in the interpretation of the section; insofar as it relates to accounts and contract rights, it is as difficult to comprehend as is section 9-301(1) (c) with respect to chattel paper. The following hypotheticals pose the problems:

The operation of Ace Department Store gives rise to numerous accounts and contract rights as those terms are defined in article 9 of the Uniform Commercial Code,<sup>36</sup> and in order to continue operations, Ace uses this property as collateral for advances from Lend, Inc. Lend fails to perfect its Code security in these accounts and contract rights according to the provisions of article 9.

(a) Subsequently, and without knowledge of Lend's security interest, Discount House, Inc. buys the Ace Department Store business, including all of its accounts and contract rights. Who takes priority—Lend, Inc. or Discount House, Inc.?

(b) Subsequently, and without knowledge of Lend's security interest, John Jones takes an assignment of the accounts and contract rights from

<sup>35</sup> UCC § 9-301, comment 4.

<sup>36</sup> See notes 4 and 5 *supra*.

Ace Department Store in liquidation and satisfaction of a pre-existing debt owed to Jones. Who takes priority—Lend, Inc. or John Jones?

*A. Who is a Buyer of Accounts or Contract Rights Who is Not a Secured Party?*

Subsection (1) (d) is very similar to subsection (1) (c) of section 9-301 in its interpretative problems. Subsection (1) (d) operates in favor of transferees for value who are not secured parties. Reading together sections 9-105(1)(i),<sup>37</sup> 1-201(37),<sup>38</sup> and 9-102(1)(b)<sup>39</sup> one concludes that the Code generally provides that buyers of accounts and contract rights are secured parties and, therefore, that their rights are not determined by reference to section 9-301(1) (d).<sup>40</sup> The Code nevertheless provides, in an exception to the general rule, that a sale of accounts or contract rights, "as part of a sale of the business out of which they arose,"<sup>41</sup> does not create a security interest. But as previously discussed,<sup>42</sup> no provision of article 9, including priority provisions, applies to such a transaction. Thus, if "buyer" is synonymous with "transferee" for purposes of section 9-301(1) (d), then, insofar as that section relates to accounts and contract rights it is literally inoperative. And in the above hypothetical (subpart (a)) then, Lend, Inc. would take priority over Discount.

*B. Who is a Section 9-301(1)(d) Transferee of Accounts and Contract Rights?*

Article 9 nowhere defines "transferee" and it is indeed arguable that its definition goes beyond that of describing a mere "buyer." In *Spurlin v. Sloan*,<sup>43</sup> the Kentucky court held in a different context that an assignment of accounts in liquidation and satisfaction of a prior existing indebtedness did not give rise to a security interest in favor of the transferee. The court apparently reasoned that the trans-

<sup>37</sup> UCC § 9-105(1) (i) provides that the term "secured party" includes "a person to whom accounts ... [and] contract rights ... have been sold."

<sup>38</sup> UCC § 1-201(37) provides that a security interest "includes any interest of a buyer of accounts ... [and] contract rights which is subject to Article 9."

<sup>39</sup> UCC 9-102(1) (b) provides that article 9 applies "to any sale of accounts ... and contract rights ..."

<sup>40</sup> See UCC § 9-301(1) (a). The analysis here is similar to that in regard to chattel paper and UCC § 9-301(1) (c) and, therefore, reference is here made to that analysis. See notes and text accompanying notes 14 through 18 *supra*.

<sup>41</sup> To the extent that a "transfer of a contract right to an assignee who is also to do the performance under the contract," might constitute a sale, this discussion is also applicable. UCC § 9-104(f).

<sup>42</sup> See last paragraph of subheading A of part II of the text of this Note.

<sup>43</sup> 368 S.W.2d 314 (Ky. 1963). See 1 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 11.1, at 334 n.3 (1965).

action neither secured an obligation nor constituted a sale.<sup>44</sup> Thus, if John Jones in the above hypothetical (subpart (b)) is a "transferee," he takes priority over Lend, Inc. to the extent that he gives value<sup>45</sup> without knowledge of Lend's security interest.

But, as mentioned, "transferee" is nowhere defined in the Code. The Code comments<sup>46</sup> suggest that both subsections (1) (c) and (1) (d) of section 9-301 relate to "purchasers." It is unclear whether "purchasers" was used in its broadest sense.<sup>47</sup> Professor Gilmore in his treatise on personal property security says only that:

Under § 9-301 lien creditors, buyers and other transferees, in order to take priority, must be "without knowledge" of the unperfected interest at the time their liens attach or their purchases are made. However, subsections (1) (c) and (1) (d), which deal with buyers and transferees, use the formula: "a person who is not a secured party and who is a transferee [buyer] . . ." (Author's brackets.)<sup>48</sup>

This passage by one of the reporters of article 9 is of little aid. He uses "buyers," "transferees," and "purchasers" in a short space without discussing in what sense each of the terms was used. His bracketing "buyer" may suggest, however, equality of "buyer" and "transferee."

It is probable that "transferee" means "buyer," since "transferee" as used in section 9-301 (1) (d) was no doubt intended to be used to describe a class of persons similar to that described by "buyer" in section 9-301(1) (c).<sup>49</sup> Such would be in general accord with pre-Code law providing for priorities in favor of bona fide "buyers" over secured but unperfected parties.<sup>50</sup> No sound policy suggests why this priority should be extended in favor of an existing non-lien holding creditor who is able to find a desperate debtor.<sup>51</sup> The contest is one

<sup>44</sup> See UCC § 1-201 (37).

<sup>45</sup> Jones would have given value under the Code. See UCC § 1-201(44) (b).

<sup>46</sup> UCC § 9-301, comment 4.

<sup>47</sup> See note 11 *supra*.

<sup>48</sup> 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 34.2, at 898 (1965).

<sup>49</sup> Neither the Code nor sound policy suggests any reason why a broader class of persons with interests in accounts and contract rights should obtain priority under UCC § 9-301(1)(d) than should persons with interests in chattel paper under UCC § 9-301(1)(c). See also note 9 *supra*, suggesting that "transferee" is used in UCC § 9-301(1)(c) to describe "buyer" relationship.

<sup>50</sup> It is true that pre-Code law did not limit priority over unperfected parties solely to "buyers." Neither does the Code, but parties other than "buyers" must seek their rights elsewhere than in UCC §§ 9-301(1)(c) and (1)(d). The Code is put in general accord with pre-Code law in UCC §§ 9-301(1)(a) and (1)(b).

<sup>51</sup> UCC § 9-301, comment 3 expressly rejects such a priority. For an example of the rare pre-Code law which has so provided, at least as to subsequent creditors, see WASH. REV. CODE § 63.12.010 (1963).

between a non-diligent secured party and a general creditor. The former should prevail. The former probably would not prevail, however, if "transferee" describes a class of persons larger than "buyer" describes.

*C. Who is the Intended Beneficiary of Section 9-301(1)(d)?*

As has been above suggested, it is possible by literal interpretation to render section 9-301(1)(d) inoperative with respect to accounts and contract rights on the ground that the only persons who qualify as unsecured transferees are buyers who are precluded from claiming priorities by section 9-104(f). The more reasonable analysis, however, is that section 9-104(f) was not intended to deny priorities that might otherwise be obtainable under article 9.<sup>52</sup> Such an interpretation would be guaranteed by recourse to the amendment proffered under subheading *D* of Part II, above. And in absence of statutory revision, which would seem preferable,<sup>53</sup> the comment revisions mentioned under subheading *D* of Part II, but taking into consideration accounts and contract rights, would also be in order.

#### IV. CONCLUSION

Sections 9-301(1)(c) and (1)(d) of the Uniform Commercial Code are awkwardly, if not incomprehensively, drafted; they and companion section 9-104(f) appear to be in need of clarification, if not extensive revision.

A not unreasonable reading of these sections with other appropriate provisions of the Code, especially those sections which treat sales of accounts, contract rights, and chattel paper as security transactions, leads to the conclusion that sections 9-301(1)(c) and (1)(d) are wholly inoperative with respect to these types of property. One assumes that such a result was not intended. Pre-Code and Code policies seem least violated by saying that the reference in sections 9-301(1)(c) and (1)(d) to accounts, contract rights, and chattel paper is for the purpose of providing some priority protection to "9-104(f) buyers" in consideration of their inability to become secured parties. Even this interpretation may call for some statutory revision.

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<sup>52</sup> See subheading *D* of part II of the text of this Note.

<sup>53</sup> Assuming that UCC § 9-301(1)(d) was intended to give priority to UCC § 9-104(f) buyers of accounts and contract rights, a suggested statutory clarification is offered in the Appendix to this Note.

If, however, it was the drafters' intent that, insofar as sections 9-301(1) (c) and (1) (d) deal with accounts, contract rights, and chattel paper, they would not be operative in favor of "9-104(f) buyers," a great number of questions arise. If these sections are not intended to operate in favor of "9-104(f) buyers," who are the intended beneficiaries? Are "9-104(f) buyers" of accounts, contract rights, and chattel paper members of this group? Are sections 9-301(1) (c) and (1) (d), although dealing with different types of property, intended to deal with the same class of persons, whether they be buyers, *or* transferees, *or* purchasers? These are questions presently left unanswered by the Code. Hopefully, the Code's Permanent Editorial Board will clear up this confusing situation.

#### APPENDIX

Assuming that the drafters had intended sections 9-301(1) (c) and (1) (d) to give priority to section 9-104(f) buyers of accounts, contract rights, and chattel paper, a clarificatory revision of section 9-301(1) might appear with deletions bracketed and new language italicized, as follows:

- (1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of
  - (a) persons entitled to priority under Section 9-312;
  - (b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected;
  - (c) in the case of goods, instruments, *and* documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral before it is perfected;
  - (d) *in the case of chattel paper, a person who is not a secured party by virtue of Section 9-104(f) and who is a buyer to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;*
  - (e) in the case of [accounts, contract rights, and] general intangibles a person who is not a secured party and who is a [transferee] *buyer* to the extent that he gives value without knowledge of the security interest and before it is perfected;
  - (f) *in the case of accounts and contract rights, a person who is not a secured party by virtue of Section 9-104(f) and who is a buyer to the extent that he gives value without knowledge of the security interest and before it is perfected.*