The Future Advance Interest Under the Uniform Commercial Code: Validity and Priority

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THE FUTURE ADVANCE INTEREST UNDER THE UNIFORM COMMERCIAL CODE: VALIDITY AND PRIORITY

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TABLE OF CONTENTS

I. INTRODUCTION .................................................. 1
II. VALIDITY OF THE FUTURE ADVANCE INTEREST ......................... 3
   A. Pre-Code Law ................................................. 3
   B. Code Law .................................................... 4
   C. Extra-Code Law .............................................. 7
III. FUTURE ADVANCE PRIORITIES .................................. 11
   A. Pre-Code Rules .............................................. 11
   B. Code Rules .................................................. 13
      1. The First-to-File Rule .................................... 13
      2. The First-to-Perfect Rule ................................. 15
      3. Limitations on Future Advance Priority ................. 22
   C. Tax Liens .................................................... 29
IV. CONCLUSION ...................................................... 36

I. INTRODUCTION

Under the Uniform Commercial Code, the security interest concept is not grounded on a static relationship between debtor and secured party. The relationship may be affected by an expansion or contraction of the security interest in two ways: (1) the amount of collateral which is subject to the security interest may increase or decrease, and (2) the indebtedness with which the collateral is charged may vary. Therefore, any security agreement may include an after-acquired property interest, a future advance interest, or both. The purpose of this article is to examine the treatment which future advance interests should receive under the Uniform Commercial Code. This involves two questions: (1) what must be done by the secured

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1 Hereinafter referred to as the Code. Unless otherwise specified, all citations are to the 1962 Official Text.
party to create and fully validate his interest in future advances; and (2) assuming that the interest is valid, how does it rank compared to other interests in the same collateral that arise between periodic advances?

If the law validates a future advance interest and fully protects it against interference from other interests, the effect is to permit the rights of the secured party to date from the time the security interest first arises, instead of from the time advances are actually made. Economically, this form of loan transaction has certain advantages. From the debtor's point of view, a future advance arrangement may enable him to spread the loan repayment over a longer period than he normally could. Of course, the debtor is under no obligation to repay a loan until it is made, but by spreading out the time for making loans the time for repayment is likewise extended into the future. At the same time the creditor saves the use of the funds until they are actually advanced. In addition, depending upon the bargaining position of the parties, the debtor may convince the creditor to commit to make future advances at the current rate of interest. The effect of this, of course, will depend upon the ups and downs of the money market, but the debtor may find an advantage in a source of future funds at today's interest rates. Finally, a promise of funds to come in the future, even if it is an optional or unenforceable promise, may demonstrate confidence in the debtor that he can translate into good will in the operation of his business.

For either party, the future advance transaction saves the cost and time of refinancing each transaction as funds are periodically advanced; frequent filings, legal fees, and searches of the record may be avoided. In practice, however, the future advance device is probably most favorable to the creditor. He may make an optional advance agreement whereby he is not bound to make advances in any stated amount or at any stated times. Even if the creditor commits himself to obligatory advances, he will probably be cautious enough

\[\text{2} \text{ Of course a creditor could, if he wished, make a single large loan and provide for installment repayment of principal, but it is not certain that creditors will often be willing to do this, because they can achieve the same result with greater protection by use of the future advance interest.}\]

\[\text{3} \text{ Occasionally, the lender will pay all amounts to be loaned to an escrow agent, to be disbursed according to the terms of the escrow agreement. Technically, this is not a future advance interest at all. It has been distinguished most clearly in Maryland. Watkins, Maryland Mortgages for Future Advances, 4 Md. L. Rev. 111, 127 (1940). But see Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898 (1928) where a similar arrangement was treated as a mortgage for obligatory future advances. The escrow arrangement may be unique to real estate financing, but in the case of personality a similar analysis is presented when the lender credits the full amount of the loan to the debtor's account, even if the debtor agrees to draw on the funds at intervals.}\]
to include an escape clause triggered by an adverse change in the
debtor's credit position or by a decline in the interest rate. Thus, the
creditor creates for himself a favorable future market for his product.
Furthermore, there is a likelihood that the creditor with a future
advance interest will be the first party to whom the debtor looks when
he feels the need for additional funds and thus will be constantly
informed of the level of the debt being carried by the debtor. Finally,
in the case of construction and crop loans, or loans which are coupled
with an after-acquired property clause, the value of the collateral
may be increasing along with the amount of the indebtedness, thereby
making future advances as secure, economically, as the first advances,
or even more so.

II. VALIDITY OF THE FUTURE ADVANCE INTEREST

A. Pre-Code Law

The legal justification for allowing future advances developed in
England, at a time when the title theory of mortgages was popular.
Under this view, the title to the collateral, not merely a lien or charge
on it, passed to the creditor. Since the mortgagee held the full legal
title as security, it was very easy for courts to hold that the creditor
could retain the title as security not only for loans presently made,
but also for future loans if the arrangement so stipulated. Although
many American jurisdictions preferred the lien theory of mortgages,
the future advances device was readily accepted from English prac-
tice. Soon, however, the mortgage for future advances was shown to
have serious disadvantages.

Debtors were unfamiliar with the future advance interest and
did not understand the extent of the security interest they granted.
More importantly, if the loan agreement covered and fully protected
all future advances, debtors soon realized that they were forced to
obtain all their funds from the creditor who first advanced them
money since no other creditors were willing to lend funds when there
was a risk of being subordinated to an unsuspected future advance.
The greatest adversity to the mortgage for future advances arose
when creditors turned them into outright fraudulent and preferential
arrangements. Secured parties engaged in the practice of buying up
claims against their debtor at substantial discounts and adding these
to their established priority at full face value, thus making a profit
on the transaction at the expense of unsecured creditors.

These practices led to statutes requiring the mortgage to state a
maximum amount of loan, so that at least a subsequent creditor might

4 3 G. Glenn, Mortgages § 399, at 1603 (1943).
be put on his guard. The purpose of such remedial legislation was to prevent liens on property for amounts and claims never contemplated by the parties in the initial transaction. Thus, Comment 8 to Section 9-204 of the Uniform Commercial Code states:

At common law and under chattel mortgage statutes there seems to have been a vaguely articulated prejudice against future advance agreements comparable to the prejudice against after-acquired property interests. Although only a very few jurisdictions went to the length of invalidating interests claimed by virtue of future advances, judicial limitations severely restricted the usefulness of such arrangements. A common limitation was that an interest claimed in collateral existing at the time the security transaction was entered into for advances thereafter was good only to the extent that the original security agreement specified the amount of such later advances and even the times at which they should be made.⁶

B. Code Law

The judicial and legislative hostility to unlimited future advances seems not to be shared by the Uniform Commercial Code.⁷ Section 9-204(5) provides that “[o]bligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.” However, even this simple sentence is subject to conflicting interpretations. The language seems to validate future advances to a very wide extent, and it clearly allows for optional advances. Since an optional advance may not be contemplated as a very realistic possibility when the parties sign the security agreement and yet is still within the coverage of 9-204(5), the Code policy on future advances may be subject to the same criticism that appeared in the “Dragnet” cases under pre-Code law. As an example, suppose that a debtor gives a security interest for an advance of one dollar which is perfected by a filed notice covering “inventory.” Later, another creditor lends a large sum of money on the same inventory, and perfects his security interest. Still later, the original lender takes a new security interest, again in the same inventory, that was not contemplated by the parties at the time they made the first security agreement. Does the original notice determine the rights of the parties so as to drag the third loan ahead of the second by virtue of the first agreement? Professor Coogan, one

⁵ U.C.C. § 9-204, Comment 8.
⁶ Comment 8 to § 9-204 continues: “[T]his subsection validates the future advance interest, provided only that the obligation be covered by the security agreement.” Id.
⁷ U.C.C. § 9-204(5).
of the draftsmen of Article 9 of the Code, has indicated that this is the exact meaning of 9-204(5). 8

Section 9-204(5) does not necessarily go this far. Comment 8 to that section says that the Code validates the future advance interest "provided only that the obligation be covered by the security agreement." 9 This language implies that being covered in the security agreement is a condition of validity when future advances are concerned. Thus, it is arguable that the security agreement must mention specifically that future advances are contemplated in order for them to be "covered." 10 Viewed in this way, 9-204(5) would be in line with the pre-Code "Dragnet" cases that close the original security interest to claims against the debtor which are unrelated to the course of financing and not contemplated by the parties. In any case, the burden on the secured party will be small, for he will probably use standard form loan contracts which provide for optional advances.

So far, the Code case law in the area supports the more restrictive reading of 9-204(5). Coin-O-Matic Service Co. v. Rhode Island Hosp. Trust Co. 11 held that if any claim to priority as of the original advance will be made for future advances, the security agreement must provide for such future advances. "That is to say, a single financing statement in connection with a security agreement when no provision is made for future advances is not an umbrella for future advances based upon new security agreements, notwithstanding the fact that involved is the same collateral." 12

A more difficult point is presented in the Coin-O-Matic case, however, by the court's dictum that "in all of these cases a lender can protect himself against the situation involved herein by providing in the original security agreement for future advances." 13 The court here was concerned with an intervening creditor, but it is difficult to understand how a future advance clause in the security agreement helps the intervener. The security agreement is not required to be filed, and the financing statement, which is filed, need only contain the address of the secured party, from whom information may be obtained, the address of the debtor, and a statement of the types or a de-

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9 U.C.C. § 9-204, Comment 8.
scription of the items of collateral. Therefore, a statement about future advances in the security agreement is of no aid whatsoever to a potential creditor to whom the record discloses only the barest outline of a prior transaction.

Should the potential creditor ask the prior lender his intention in regard to the making of future advances, the Code does not require the prior lender to answer. In view of this result, what rationale is there for requiring the security agreement to provide specifically for future advances? There is none, given the Code as it now exists because the potential creditor cannot compel the prior lender to disclose the contents of his security agreement. Even by using the debtor information procedures of 9-208 the potential creditor will probably not be able to ascertain the prior lender's intentions in regard to future advances.

Under the provisions of 9-208, the creditor must furnish certain information to the debtor concerning the state of the obligation. The debtor states what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and presents this information to the creditor for correction or approval. If the secured party fails to comply with this request for approval, he may claim a security interest only as shown in the statement against persons misled by his failure to comply. The theory of 9-208, as explained in the comments thereto, is to avoid requiring the secured party to disclose the details of his business to any casual inquirer or competitor. Any subsequent creditor, before making a loan to the common debtor, may force the debtor to use the 9-208 procedure to obtain information for the purpose of establishing his credit and proving which of his assets are free of claims.

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14 U.C.C. § 9-402 (1).
15 U.C.C. § 9-208, Comment 2.
16 None insofar as the other creditors are concerned, at least. Of course, the agreement between the debtor and the future advancer must provide for future advances in the sense that both agree to the future advance interest, because the parties are bound only by the bargain which they have actually made. Cf. U.C.C. § 9-201.
At least two faults are found with this system. First, the theory of 9-208's use by the subsequent creditor assumes that he has sufficient bargaining power to compel the debtor to act. If this happens not to be the case, the subsequent creditor is virtually at the mercy of the prior advancer. Second, even if the subsequent creditor is successful in obtaining information from the prior creditor, it is not clear exactly what measure of protection 9-208 will afford him against a future advance. Suppose, for example, that the priority issues to be discussed later are resolved so that the first advancer is entitled to full priority for his future advances against any intervening advancer. When asked for a statement of indebtedness unpaid as of a specified date, he replies "$X.xx and all other sums which may be advanced in the future." It is not certain that this is allowable under 9-208, but if it is, it has a discouraging effect on any potential creditor. Furthermore, 9-208 may be construed to exist completely outside the priority rules. Therefore, an intervening creditor may take subject to future advances even if the prior advancer does not correct the 9-208 statement to mention that future advances are covered by his security agreement. The same types of problems exist with after-acquired property interests and the attempt to ascertain which items of the debtor are subject to claims. In that context, it has been suggested that to make 9-208 viable "[s]ome form of estoppel certificate or other agreement by the first secured party is needed in order to permit the inquirer to assume that any new credit extended by him will not be subject to greater prior claims than those he is told are outstanding." The same suggestion may be made with respect to future advances.

In sum, 9-208 in its present form indicates that a future advance clause in a security agreement is of minimal help to a potential intervening creditor. Also, it should be remembered that so far only intervening creditors who take a security interest have been considered. There are other possible interveners, such as judgment lien creditors, statutory lienors, and even buyers who will have no recourse to 9-208's meagre protection by way of notice but who may nevertheless be subject to future advances made under 9-204(5). With respect to these interests, it is fruitless to insist that the security agreement contain a specific provision for future advances, as did the Coin-O-Matic court.

C. Extra-Code Law

Although a future advance clause in a security agreement provides scant notice to subsequent parties, such a clause should be
included for non-Code reasons. The Federal Tax Lien Act of 1966 provides that a security interest may, in certain situations, be prior to a filed notice of tax lien. As discussed later, there are three sections of the new Tax Lien Act which accomplish this result with a greater or lesser degree of completeness. Since it is uncertain which of the three provisions is most likely to be of most service to the secured creditor, he will do well to comply with all three. One of them, section 6323(c)(2)(A), requires an "agreement . . . to make loans to the taxpayer." The phrasing of this section indicates that the agreement in which the security interest is embodied must contain a provision for future advances if such advances are to be claimed as prior to the tax lien. This interpretation is in harmony with case law under the pre-1966 tax lien provisions which generally required that the future advances must be under, and pursuant to, a security interest which by its terms purports to secure subsequent loans. Some courts have displayed a notable dislike for claims that future advances should come prior to the federal tax lien. In United States v. Automatic Heating & Equip. Co., a loan was made under a real estate trust deed which provided that the collateral secured \["\text{in addition to the above described indebtedness . . . any and all other indebtedness due . . .}\] The court held that there was no valid future advance interest because "indebtedness due" meant only indebtedness presently due and could not be stretched to cover indebtedness which may become due in the future. Thus, the wise lender should include in his security agreement a clear statement of his interest in future advances. In addition to complying with the possible Tax Lien Act requirements, he will fall within the Coin-O-Matic rationale and any ambiguities in 9-204(5) should be resolved in his favor.

In some jurisdictions, requirements relating to the maximum amount or timing of future advances may exist because of incomplete repealers when the Uniform Commercial Code was adopted.

\[\text{Coin-O-Matic} \]
land provides an example. Prior to adoption of the Code in 1963, Maryland provided, with certain exceptions not relevant, that “no mortgage to secure future loans or advances shall be valid unless the amount or amounts of the same and the times when they are to be made shall be specifically stated in said mortgage . . . “27 This statute has never been specifically repealed. The Code provides for a general repealer in section 10-103, but this provision has not been uniformly adopted. And even with the general repealer, it is not perfectly clear that any pre-Code state restriction on the validity of future advances is “inconsistent” with 9-204.28

Even if the future advance interest is valid between the parties, it may be defeated by creditors. As early as 1812, it was argued that a mortgage covering future advances was fraudulent. Two Connecticut cases indicated that it might be, but the United States Supreme Court indicated otherwise.29 One of the early treatise writers noted that as a general rule a mortgage securing future advances was not a fraudulent conveyance.30 This seems to have laid the issue to rest, but one wonders whether things should be reconsidered in light of the Uniform Fraudulent Conveyance Act.31 Under Sections 4, 5, and 6 of that Act, a security interest may be set aside if the debtor: (1) is or will be rendered insolvent, (2) retains an unreasonably small capital, or (3) believes he will incur debts beyond his ability to pay and if the security interest is taken without giving “fair consideration” in exchange.32 Although, as will be seen later, there is a dispute as to the meaning of “value” in the Code,33 the meaning of “fair consideration” advances, and as to all optional advances made by the secured party without knowledge of an intervening right; and

(c) In all cases, as to advances and expenditures made by the secured party for the protection, maintenance, preservation or repair of the collateral.

Accrued interest has the same priority as the advance or expenditure to which it relates. Repayment in full of amounts owing under a security agreement covering future advances does not extinguish the security interest of the secured party.

This subdivision (7) does not apply to conflicting security interests in the same collateral, priorities among which are governed by subdivisions (3), (4), and (5) of this section.


29 Compare Pettibone v. Griswold, 4 Conn. 158 (1822) and Stoughton v. Pasco, 5 Conn. 442 (1825) with Shirras v. Craig, 11 U.S. (7 Cranch) 34, 50 (1812) (dictum).
30 G. Glenn, Fraudulent Conveyances and Preferences 641 (1940).
32 U.F.C.A. §§ 4-6.
33 U.C.C. § 1-201(44).
in the Uniform Fraudulent Conveyance Act is more clear, and more troubling.\textsuperscript{34} "Fair consideration is given for [the security interest when it] is received in good faith to secure a present advance . . . in amount not disproportionately small as compared with the value of the [security interest]."\textsuperscript{35} (Emphasis added.) Thus, in the previously considered hypothetical case the debtor gives a security interest in all of his inventory for one dollar and the prospect of optional future advances, a fraudulent conveyance may be made out if a creditor can prove the necessary elements under the Uniform Fraudulent Conveyance Act.

The trustee in bankruptcy could make the same attack on a future advance interest under Sections 70(c) or (e) of the Bankruptcy Act,\textsuperscript{36} which gives the trustee the powers of actual and certain hypothetical creditors. The future advance interest may also run afoul of the trustee's power under Section 70(b) of the Bankruptcy Act\textsuperscript{37} to reject contracts which are executory in whole or in part. This section is ambiguous. "As long as there remains any part of a contract unperformed, the contract is executory . . . ."\textsuperscript{38} but does 70(b) reach every loan agreement where the debtor has not fully performed because payments are due and unpaid or not yet accrued? The language of section 70(b) is too broad. In the normal loan situation, the creditor has fully performed his half of the contract by the advancement of funds, and when the contract is fully performed by the nonbankrupt party, 70(b) has been held not applicable.\textsuperscript{39} In the future advance situation, however, if the contract is only partly performed on both sides, the trustee's challenge under 70(b) may succeed. The law does not clearly answer this question, and although trustees have not pressed 70(b) to its literal extreme, they may decide to do so.\textsuperscript{40}

\textsuperscript{34} P. Coogan, A Suggested Analytical Approach to Article 9 in Secured Transactions Under Uniform Commercial Code 284 n.32 (1967).
\textsuperscript{35} U.F.C.A. § 3(b).
\textsuperscript{37} 11 U.S.C. § 110(b) (1964).
\textsuperscript{38} 4A Collier, Bankruptcy 522 (14th ed. 1967).
\textsuperscript{40} In addition to sections 70(b), 70(c), and 70(d), the trustee has a potential weapon in section 60(a)(8), which provides that transfers to secure a future loan shall have the effect of a transfer for new and contemporaneous consideration if the future loan is actually made. But if anticipated future advances, either optional or obligatory, are not made to the extent anticipated, does the negative inference of section 60(a)(8) mean that any security interest for loans that actually were made is preferential? Two commentators would say no, one because of section 60(c) of the Bankruptcy Act, Seligson, Slade, Kallman, Levinson, Ruben & Spellman, Floating Liens and the Bankruptcy Act, 13 Prac. Law. No. 8 at 59, 61 (Dec. 1967), and the other on the reasoning that section 60(a)(8)
FUTURE ADVANCE INTERESTS

III. FUTURE ADVANCE PRIORITIES

A. Pre-Code Rules

Before exploring the priority problems of the Code, it is helpful to review the pre-Code American and English law in the area. In America, a distinction was drawn between future advances which the secured party was obligated by the terms of the loan contract to make, and those advances which were characterized as "optional." As to obligatory advances, it was the unanimous rule that, given proper notoriety, subsequent lienors and encumbrancers took subject to advances required to be made in the future. The theory protecting obligatory advances was that the future advance was part of the original debt, and that the lien for this advance related back to the time the debt was created. As a practical matter, most courts felt compelled to protect the creditor who was required to make the advance and who had no power to prevent the debtor from placing liens on the collateral which would otherwise be preferred. This doctrine was sometimes restricted in its application by local statutes, such as the Maryland statute that was examined earlier, but in general terms the lien for obligatory future advances stood on very firm footing in America.

On the other hand, the lien for optional advances did not encounter such smooth sailing, despite its very firm launching in the English case of Gordon v. Graham. In that case the debtor executed a mortgage for an antecedent debt owed the creditor and provided that the mortgage should secure such other sums as might be lent or advanced to him. The debtor then made a second mortgage upon the same collateral. The Lord Chancellor of 1716 decided that "[t]he second Mortgagee shall not redeem the first Mortgage, without paying as well the Money lent after, as that lent before the second Mortgage was made; for it was the Folly of the second Mortgagee, with Notice, to take such security." Thus, the optional future advancer was protected without regard to his knowledge of an intervening interest. Some American courts adopted the same rule, relying on the theory enunciated in 1716 and on the notion that the debtor's retained interest after the first mortgage was only an equity of redemption subject to his contractual promise that future advances would reduce...
this equity.\textsuperscript{45} Therefore, this was all the interest which the debtor could transfer, voluntarily or otherwise.

In 1861, the House of Lords overruled \textit{Gordon v. Graham}. Lord Campbell noted that the previous case had been seriously questioned by judges and treatise writers alike. More importantly, he minutely examined the prior opinion and concluded that the report deviated from the facts in such a way as to leave the question open. Thus, \textit{Hopkinson v. Rolt}\textsuperscript{46} held that optional advances were entitled to priority only as to those advances actually made before the first creditor receives actual notice of a subsequent interest. Lord Campbell pointed out that the actual notice rule is really no hardship to the first creditor because he is fully protected for advances made prior to actual notice, and is under no obligation to make any advances after actual notice. Instead, he may request from the debtor new, unencumbered security. Lord Chelmsford, concurring in \textit{Hopkinson}, felt that to continue \textit{Gordon v. Graham} would, in effect, preclude a mortgagor from borrowing money from other than the first lender.

The reasoning of their Lordships Campbell and Chelmsford must have captured the imagination of English jurists, for in 1899 the doctrine of \textit{Hopkinson v. Rolt} was applied to future advances made in pursuance of a covenant in the first mortgage,\textsuperscript{47} thus undercutting the basic rationale of the actual notice rule. It was not until 1925 that the distinction between obligatory and optional advances was revitalized, this time by statute. Section 94 of the Law of Property Act provides that obligatory future advances take priority in all cases over intervening interests. Optional advances are subject to the actual notice rule.\textsuperscript{48}

In America, it has been noted, obligatory advances were protected against intervening interests. As for optional advances, the majority of jurisdictions adopted the actual notice rule, relying on the rationale of \textit{Hopkinson v. Rolt}.\textsuperscript{49} There was a minority rule for optional advances,\textsuperscript{50} sometimes called the Michigan Rule after the case of \textit{Ladue v. Detroit & M. R. R.}\textsuperscript{51} Under this rule, the recorded mortgage to

\textsuperscript{45} E.g., Witzinski v. Everman, 51 Miss. 841, 846 (1876). Blackburn, Mortgages to Secure Future Advances, 21 Mo. L. Rev. 209 at 228 n.67 (1956), lists Alabama, Florida, Mississippi, and Texas as advocating the “Old English” view. But see Russell and Prather, The Flexible Mortgage Contract, 19 Legal Bull. 73, 86-109 (1953), to the effect that the pre-Code rule in all of these states was the actual notice, or majority rule discussed infra. Annot. 138 A.L.R. 566 (1942).


\textsuperscript{47} West v. Williams, [1899] 1 Ch. 132.


\textsuperscript{50} This rule is in addition to the minority view in those jurisdictions, if any, adopting the “Old English” priority rule. See note 42 supra.

\textsuperscript{51} 13 Mich. 380 (1865). See note 49 supra.
secure future advances is of notice to subsequent encumbrancers, but constitutes a lien only to the extent of liabilities actually incurred prior to the recording of the subsequent interest. Thus, for priority purposes, the lien of the mortgagee attached as of the time of each advance with no relation back; the prudent lender had to search the record on his debtor each time an advance was to be made. This rule is inconsistent with the normal view that all subsequent parties are chargeable with notice of prior recorded interests, for in the case of a mortgage for future advances, any protection for prior interests is disregarded. Despite the Michigan and “Old English” Rules, however, pre-Code law demonstrates a high degree of uniformity in the treatment of the future advance interest: obligatory advances protected completely, and optional advances protected up to the point of actual notice of an intervener.\(^{52}\)

**B. Code Rules**

1. **The First-to-File Rule**

The clearest Code priority rule with regard to future advances is 9-312(5)(a). It applies when both the future advance interest and the intervening interest are perfected by filing.\(^{53}\) One of the most notable features of the Code is that it allows a secured party to file his interest before there is any security agreement with the debtor.\(^{54}\)

“The justification for the rule lies in the necessity of protecting the filing system—that is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condition of protection, to check for filings later than his.”\(^{55}\) Whenever the perfection of the security interest takes place, the priority of the interest “relates back” to the time of filing. It should be noted at

\(^{52}\) In addition to the majority and minority rules, there were several one-of-a-kind priority rules. Thus, in Illinois, a notion of limited priority developed, whereby all advances made within 18 months after the mortgage were given priority regardless of any notice. After 18 months the Michigan rule applied. Ill. Ann. Stat. ch. 30, § 37a (1935). A California court ruled that a second mortgage, duly recorded, did not prevail over fresh advances from a prior mortgagee, but that, nevertheless, if the second mortgage is foreclosed, the purchaser at the foreclosure sale will be prior to further advances if he records his deed. Atkinson v. Foote, 44 Cal. App. 149, 136 P. 831 (1919). A similarly strange transformation of priority occurred in Maryland, the jurisdiction most hostile to future advances. In Robinson v. The Consolidated Real Estate & Fire Ins. Co., 55 Md. 105 (1880), the creditor contracted to advance construction funds from time to time. The debtor then confessed judgment in a suit for collection of the first amount due under the contract. With the judgment, an agreement was filed, stating that the judgment was to be security for the repayment of all money to be loaned or advanced in the future. A traditional mortgage with a future advance clause was filed in addition to the judgment and the contract. The court held that the lien dated from the time of the judgment, and that the strict state statute regulating future advances did not apply.

\(^{53}\) U.C.C. § 9-312(5)(a).

\(^{54}\) U.C.C. § 9-402(1).

\(^{55}\) U.C.C. § 9-312, Comment 4.
the outset, then, that the Code concept of notice filing is inconsistent with the Michigan Rule of future advances discussed above.

Example 4 in the comments to section 9-312 indicates that the first-to-file rule operates to protect fully all future advances against intervening Code interests perfected by filing, and the Coin-O-Matic case bears out this conclusion. In July, 1963, the account debtor purchased a motor vehicle from a car dealer on the time payment plan. A security interest was executed and assigned by the dealer to the creditor, along with the account debtor's note. The creditor perfected his interest by filing. In October, 1964, the account debtor was indebted to a different creditor and executed his note for the amount of the debt as well as a security agreement covering the same property as the prior interest. Later in the same year, the first creditor advanced an additional sum to the debtor, who subsequently went bankrupt, leaving collateral insufficient to cover the security interests of both creditors. Because of the rather unusual setting of the case, primarily the fact that the first security interest did not specifically provide for future advances, the Rhode Island Superior Court held that the intervening creditor was prior to the future advance made by the first creditor. However, the court was also of the opinion that if the original security agreement had provided for future advances, the first creditor would have been protected against the intervener.

The first-to-file rule of 9-312(5)(a) may not be a wise one, but it is probably still too early to tell. It is at least a clear rule, and despite "theoretical deficiencies," it may enable a creditor to undertake all of a debtor's reasonable money needs without fear of certain kinds of interveners. It is interesting to note that in 1954 the New York Law Revision Commission recommended that the protection afforded the first filer be cut down. The Article 9 subcommittee and the Code Editorial Board agreed to amend 9-312 as follows:

When a later secured party gives new value and perfects his security interest in equipment, consumer goods or farm products covered by an earlier perfected security interest, he has priority over the earlier security interest as to any advance subsequently made by the holder of the earlier security interest unless the subsequent advance or a commitment to make it was made before the holder of the earlier security interest knew of the new value given by the second secured party, or was made for the necessary protection.

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57 Id. at 1117, 4 C.C.H. Instal. Credit Guide ¶ 98,142, at 88,814.
FUTURE ADVANCE INTERESTS

maintenance or preservation of the collateral or any part thereof.\textsuperscript{59}

The amendment would have re-established the majority rule under pre-Code law. Although this solution has a great deal to recommend it, the proposed amendment was dropped for reasons unknown. It has been suggested that the episode suggests “the wisdom of making changes in the priority rules only after experience indicates which fears are justified and which are exaggerated.”\textsuperscript{60}

2. The First-to-Perfect Rule

The priority rule of 9-312(5)(a) does not apply unless both security interests, the original lender’s and the intervener’s, are perfected by filing. If either interest is perfected other than by filing, the priority is determined by the order of perfection under section 9-312(5)(b). Perfection is accomplished as specified in 9-303, which, among other things, requires an attachment of the security interest, and, under 9-204(1), there can be no attachment until value is given. Because of the ambiguous definition of value in 1-201(44), however, two theories have developed among Code commentators in regard to the question of priority for the future advance interest under 9-312(5)(b). Under the Code definition of “value” in 1-201(44)(a) “a binding commitment to extend credit” will have the effect of attaching and perfecting the obligatory future advance interest. In the case of optional advances, however, the result is not clear. “Any consideration to support a simple contract” may constitute value under 1-201(44)(d).

Is a promise to make an optional advance sometime in the future “value” so as to date the time of perfection? Or is “value” measured as of each time that an advance is actually made? Two of the leading commentators on the Code have disagreed on this point. Professor Gilmore takes the “single security interest” view, that an optional advance security interest attaches when the promise to make optional advances is made, provided that some small present advance is made.\textsuperscript{61} This view is expounded by Gilmore at length, and need not

\textsuperscript{59} P. Coogan, Priorities Among Secured Creditors and the “Floating Lien,” in Secured Transactions Under the Uniform Commercial Code 723 (1967). A complete draft history of the future advance interest is found in Comment, supra note 19, at 140 n.46.

\textsuperscript{60} P. Coogan, Priorities Among Secured Creditors and the “Floating Lien,” in Secured Transactions Under the Uniform Commercial Code 723, 724 (1967).

\textsuperscript{61} G. Gilmore, Security Interests in Personal Property 933-46 (1965). The present advance is required to avoid a conceptual problem. If there is no present advance, there is no obligation, and no security interest, hence nothing to which future advances can relate back. Economically, the present advance may be valueless. It nevertheless serves as “consideration,” i.e., to solemnify the agreement between the parties and invest it with legal consequences. Cf. Bloom v. Hilty, 427 Pa. 463, 234 A.2d 860, 4 U.C.C. Rep. Serv. 821 (1967) ($1 constitutes value under 1-201(44)(d)).
be repeated here. The major thrust of Gilmore's argument is that under 9-201 the security interest is effective according to its terms against all other interests unless the Code otherwise provides. Reading the definition of value in 1-201(44) (especially 1-201(44)(d)) literally, Gilmore concludes that an optional advance agreement plus binder is value, just as is a binding commitment to extend funds in the future. At the heart of Gilmore's theory is the conceptual equation of optional and obligatory advance arrangements. He points out that either type of future advance agreement is analytically difficult. There can be no specific performance to enforce the loan contract, and damages would be limited to the increased interest rate the borrower has to pay to get funds from another source. If there has been any impairment of the borrower's credit position, the lender may be discharged from his obligation, and even if he is not discharged, any resultant damage to the borrower will be more from his own deteriorated credit position than from the natural and probable consequences of the lender's breach. Thus, all agreements to lend money can be breached at will without liability, and there is no reason to distinguish an "optional" future advance from an "obligatory" one.62

In all fairness, Gilmore may overstate the similarity. The language of 1-201(44) itself implies that there is some difference between optional and obligatory advances, at least enough to require two separate clauses to deal with them. Also, the words "binding commitment" suggest that a commitment is enforceable unless "binding" is merely redundant. Finally, one doubts that the person making the promise is indifferent to the form that the promise takes.63 Nevertheless, even if optional and obligatory advances are not identical in legal concept, an optional advance clause plus a small present advance as binder seems to constitute "any consideration," and therefore "value" under 1-201(44)(d), just as much as a binding commitment to extend credit constitutes "value" under 1-201(44)(a).

The counterweight to Gilmore's view is the "multiple" or "building-block" security interest theory of Professor Coogan.64 According to this view, security interests are severable both as to property covered and as to debt protected. Thus, "value," in 1-201(44) terms, must

63 Cf. U.C.C. § 5-115. Lenders may regard the commitment to lend an outstanding liability. Furthermore, borrowing is usually a tailor-made process; any re-negotiation or re-investigation of credit takes time, which may turn out to be a cost because of changes in the terms of the loan.
be measured from time to time. Of course, if a creditor has committed himself to make an advance, he has given value to the extent of the commitment. But if the agreement is merely an optional one, no value is given until, and to the extent that, loans are actually made. Each advance stands on its own feet for priority purposes. Coogan reaches his conclusion by pointing to 1-201(37) to the effect that a security interest requires an obligation, and by inferring that the scope of the security interest parallels the scope of the obligation. Coogan also points out that the future advance provisions of Article 9 derived from the Uniform Trust Receipts Act which provided that the entruster's interest did not extend to obligations to be subsequently created. Thus, Coogan sees a basic difference in priority between optional advances and obligatory advances under 9-312(5)(b). This difference is justified by the predominantly psychological factors that lead banks and other lenders very rarely to disregard their commitments, and be extremely reluctant to obligate themselves to lend money in the future.

The multiple security interest theory is virtually identical to the pre-Code Michigan Rule of priority which provided that the first recorded interest took priority only for advances made prior to a subsequently recorded interest. This was the minority view, however, and it seems strange to impute to the Code the acceptance of a minority position unless that result is fairly compelled from the language of Article 9. The only conclusion that is indicated by the language of the Code, however, is that the draftsmen were aware of the possibility of defining value so as to limit the priority of optional future advances, but that they did not choose to do so. Article 3, for example, contains a special definition of value applicable only to holders in due course. Under 3-303 a promise to give value is not value itself, unless there is an irrevocable commitment to third persons. Thus, the Michigan Rule was adopted by the draftsmen in this context; their failure to adopt it clearly in other contexts signifies that it is not the Code rule in those other contexts.

The same thing may be said even of the pre-Code majority rule. Sections 9-313(4) and 9-314(3) provide that when a security interest in fixtures or accessions intervenes between the advances of a previously perfected lender, such lender is entitled to priority only if he makes or contracts to make the future advance before he has knowledge of the intervening security interest. Since knowledge is defined by 1-201(25) to be the equivalent of "actual notice" in pre-Code terms, the cited sections adopt the pre-Code majority rule in regard to the priority of future advances. Because this rule is adopted for security interests in fixtures and accessions but not in any other part

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65 If this is so, of course, one wonders why the same language was not conveniently written into Article 9 if a similar result was desired.
of the Code, the inference is allowable that the actual notice result was not intended outside the confines of 9-313 and 9-314. When one thus eliminates the pre-Code majority rule and the pre-Code minority rule from the list of possible results under 9-312(5)(b), one is forced into an all-or-nothing choice of priority rule. But 9-204(5) refutes the notion that no optional future advances can be entitled to priority, because if such were the case, these future advances could not be said to be covered in the obligation of the original security interest. This author therefore concludes that the single security interest theory is the proper one to apply.

Although there is scant authority on future advance problems, indications are that the single security interest theory will be judicially adopted. The principal indication came from Friedlander v. Adelphi Mfg. Co.66 which adopted the single security interest view in favor of a code security interest and against a lien creditor.67 The court, acknowledging the difference of opinion between Coogan and Gilmore, felt that "although in the instant case there was no binding commitment to extend credit, [the secured party with an optional advance interest] clearly gave 'value' for his security interest when he made the first advance."68 (Emphasis added.) Friedlander presents unusual problems which are discussed in full in the section that deals with judgment creditors. Nevertheless, the case should have a strong effect outside the judgment creditor area, because the decision is based primarily on the definition of value contained in 1-201(44)(d).69 As mentioned earlier, this definition is the key to priority contests between two secured creditors, as well as contests between secured creditors and all other interests.

The Attorney General of Wyoming70 also seems to be in favor of the single security interest theory. An opinion was requested on the effect of a future advance clause endorsed upon the certificate of title of an automobile being used for collateral. Under the Wyoming version of 9-302, a security interest in a motor vehicle is perfected by (1) filing a financing statement or security agreement with the county clerk of the county in which the vehicle is located, and (2) noting the security interest on the certificate of title.71 As presented, the question was whether an endorsed notice of the security interest which included a future advance clause would have "force and effect" upon persons lending money against the automobile in the interim between the first loan and any subsequent loans made by the first advancer. On the

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67 The decision is still of value in discussing the priority questions under 9-312(5)(b).
69 Id.
basis of 9-204(5), the opinion of the Attorney General was that the question should be answered in the affirmative, even though the effect of such opinion "would be to prevent any other person from obtaining a valid security interest in the automobile until the original lien was terminated."

The above authority is hardly conclusive, however, for one may doubt that the future advance priority issue was fairly focused for decision. The opinion is very brief and relies on 9-204(5), a section that does not really shed any light on the priority question. Also, the opinion stresses the fact that the amount of the loan to be secured would be stated on the certificate of title. It is unclear why this should be important for there is no requirement of this sort in order to validate the interest in future advances. If one assumes that future advances are valid only up to the amount stated, it may appear to make the priority rule easier to live with. However, a maximum amount requirement is really illusory protection to an intervening lienor if the first advancer chooses to make it such by stating a very large maximum. Finally, it is hard to believe that the Attorney General's opinion means what it says. The excerpt quoted above indicated that an intervening interest would be invalid, whereas the traditional single security interest theory would only subordinate the intervening interest to the interest of the future advancer.

There is another argument in favor of the single security interest theory. The first-to-file rule of 9-312(5)(a), which was examined earlier, provides priority for all future advances, whether optional or

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72 4 U.C.C. Rep. Serv. at 616.
73 California adopted a maximum amount requirement when it passed the Code in 1963. "Because of [a] long history involving the distinction between optional and obligatory future advances, and because of the almost casual attention devoted to future advances under the Code, the California version . . . incorporated a section similar in nature to section 2975 of the Civil Code." Project, California Chattel Security and Article Nine of the Uniform Commercial Code, 8 U.C.L.A.L. Rev. 806, 863 (1961). The only problem was that section 2975 (and its companion, section 2974) had a rather mysterious past. With only one uninstructive exception, there are no reported decisions interpreting these sections, and "[d]o legislative history has been found which might throw light on their meaning or function." California Law Revision Commission, Recommendation and Study Relating to Mortgages to Secure Future Advances C-15 (1958).

Perhaps this ambiguity led the California Law Revision Commission to conclude that since "Article 9 embodies an integrated approach to security transactions different from that of the present California law it seemed unwise to consider §§ 9-204 and 9-312 as possible models for revising §§ 2974 and 2975 of the Civil Code. Piecemeal adoption of bits and pieces of Article 9 would tend toward confusion, rather than clarity." Id. at C-24 n.49.

What finally happened in California was just the opposite: adoption of Article 9 outright, with the counterpart of §§ 2974 and 2975 added on "piecemeal" as 9-312(7). Note 26 supra. Unfortunately, as little is known of 9-312(7) as was understood about its pre-Code ancestor. In 1965 it was repealed, virtually without comment. Cf. Review of 1965 Code Legislation 102 (CEB 1965). Professor Gilmore suggests, however, that the cautious and wise lender will voluntarily state the maximum amount that he intends to lend. 2 G. Gilmore, supra note 61, at 932-33.
obligatory, against intervening Code interests which are perfected by filing. In the present situation, where the intervening interest is a Code interest perfected other than by filing, what is the rationale for changing the rule of 9-312(5)(a)? It may be conceded that 9-312(5)(a) is not the best way to accommodate all of the interests involved, but it is nevertheless a clear and certain rule as exemplified by the Code comments. It is the clarity of the result under 9-312(5)(a) which justifies the single security interest view under 9-312(5)(b); for to apply the single security interest theory in a 9-312(5)(a) case and then apply the multiple security interest theory in a 9-312(5)(b) case is "too legalistic and seems to defeat the purpose of Article 9 in executing its concept of notice filing. . . ." There seems to be no reason for reaching a different result when [the subsequent advancer] took possession of the collateral instead of filing a financing statement. The result should be the same in each situation."\textsuperscript{74} Of course a pledgee is not as likely to refer to the filing records as one who is required to file in order to perfect, but a reasonably cautious pledgee will probably do so. Thus the pledgee will be in exactly the same position as the perfection-by-filing interest, with respect to notice of the prior security interest; there is no compelling reason for favoring the pledgee.

Finally, an English analogy provides a justification for construing the priority of a future advance interest rather broadly. The multiple security interest theory, as did pre-Code law, would recognize a difference between obligatory and optional advances. One writer has suggested that the difference is not at all clear, and that the distinction, if it is one, serves only the purpose of allowing the courts to decide priority questions on an "ad hoc or ad hominem"\textsuperscript{75} basis. Although this view may be overly skeptical, the point is well taken that sometimes optional advances take on the characteristics of obligatory advances; perhaps the law should treat both equally.

One may distinguish three cases: (1) where the secured party is bound to make advances, (2) where he has the right to make the advances independently of the debtor's will, and (3) where he may make advances only if both he and the debtor agree that he shall

\textsuperscript{74} Goodwin, Priorities in Secured Transactions—Article 9, Uniform Commercial Code, 20 Bus. Law. 877, 895-6 (July 1965). See also Lee, Perfection and Priorities Under the Uniform Commercial Code, 17 Wyo. L.J. 1, 43 (1962). The argument assumes that the future advance interest itself is perfected by filing. This assumption is not necessarily so, of course, although the future advance interest is traditionally used with inventory collateral, a security interest which is perfected by filing. U.C.C. § 9-312, Comment 3.

If the future advance interest is perfected other than by filing, the single security interest theory may produce bizarre and undesirable results. For a hypothetical example, see Coogan, Intangibles as Collateral Under the Uniform Commercial Code, 77 Harv. L. Rev. 997, 1029 n.82 (1964).

\textsuperscript{75} 2 G. Gilmore, supra note 61, at 930.
do so. The second arrangement vests an important right in the secured party: the right to make an economically required advance. An example is a construction mortgage where the secured party has the right to complete the structure and have a lien for completion advances which is superior to the interests of interveners.\footnote{76} In the personal property area, advances for the protection, maintenance, preservation or repair of the collateral are within the same doctrine. It seems essential to protect these economically dictated advances. Furthermore, when the secured party has a right to make the advance independently of the will of the debtor, a contractual interest is created which deserves protection. This rationale seems to have found its way into English law,\footnote{77} although American courts were far from clear about whether to apply it or not.\footnote{78} California recognized the importance of advances to preserve collateral, and provided in its version of 9-312 that they were entitled to priority over intervening interests.\footnote{79} The California priority changes were repealed after a couple of years in operation, but the advances-to-protect-collateral rule has received favorable comment.\footnote{80} Whether courts will grant priority to advances to protect collateral is just as unclear, of course, as the general problem of priority under 9-312. The realization that advances may start out being optional, and wind up being required, however, heightens the argument that all advances should be treated equally under the single security interest theory.

On the other hand, the uncertainty of the priority rules may allow a court to re-introduce the pre-Code actual notice rule. Suppose, for example, that an intervening Code lender decides to send the prior lender actual notice of his intervention. This is easily accomplished, because the first creditor's financing statement gives his name and address to the public. The problem is that knowledge or notice is generally not relevant to the rules of 9-312. Section 1-203, however, imposes an obligation of good faith on the performance or enforcement of every contract embraced by the Code. Is it bad faith to advance money contrary to the interests of a known intervener? The Code provides no answer to this question, but it is worth noting that in England the answer is yes.\footnote{81} If the English rule is considered
desirable, it may be adopted, since 9-312 is not clearly contra, but the chances are not great that any court will reach this conclusion.\(^82\)

This possibility aside, however, the argument so far has shown that the Code affords priority to the future advancer, whether the advances are optional or obligatory, against intervening Code security interests. Having said this, one must ask whether it says too much, whether such protection for future advances is unwarranted. The main problem is that the priority rules as they have been outlined may operate to lock a debtor into the service of his first creditor. Although this possibility did not disturb the Attorney General of Wyoming, it was responsible for the overruling of *Gordon v. Graham*.\(^83\) The General Counsel of the United States Savings and Loan League has stated that as a matter of sound business policy and fairness future advances should be limited to a stated maximum amount,\(^84\) but a limiting legal doctrine is more comfortable. Some legal doctrines, however, do limit the impact of future advance priority.

3. **Limitations on Future Advance Priority**

In order to explore the principles and rules limiting the future advance priority, one might again look to English law. One of the Lords dissenting in *Hopkinson v. Rolt*\(^85\) suggested that any intervening creditor could protect himself against a future advance by entering into a promise with the debtor that he will not make loans with the first creditor. A similar device was popular in America following the depression and is called a negative pledge agreement.\(^86\) The main problem with the negative pledge is that it is not easily enforced. Even if liquidated damages are provided, the promisee will have difficulty in ascertaining that there has been a breach of the promise. He may not discover the breach until the future advancer moves to foreclose his interest, or until insolvency proceedings are initiated against the debtor. In either case, it is not likely that the debtor will be in a position to make good the liquidated damage provision of his negative pledge agreement. Moreover, the negative pledge did not create a legal or equitable lien under pre-Code law, nor is it likely to create a Code security interest.\(^87\) One recent case

\(^84\) Russell & Prather, The Flexible Mortgage Contract, 19 Legal Bull. 73, 81 (1953); cf. 2 G. Gilmore, supra note 61, at 933.
\(^86\) See generally 2 G. Gilmore, supra note 61, at 999-1019.
\(^87\) Coogan, Kripke and Weiss, The Outer Fringes of Article 9: Subordination Agree-
FUTURE ADVANCE INTERESTS

has suggested the possibility that the promisee can enforce the promise in an action against the transferee of the property subject to the negative pledge, but this result seems unlikely.\textsuperscript{88} Thus, a negative pledge clause will be fairly useless unless the promisee can discover the breach while the debtor is still solvent.\textsuperscript{89}

The Code itself provides for certain interests to intervene between the future advancer's loans. A security interest in accessions, for example, may cut across the priority of a future advancer. As was shown before, the future advance interest in this special situation is subject to the actual notice rule.\textsuperscript{90} Similarly, the purchasers of collateral in the form of chattel paper, instruments and documents may take priority over prior-perfected security interests.\textsuperscript{91}

Even more important is the super-priority that is accorded the purchase money interest. Despite some early confusion as to whether a purchase money security interest would break the future advance priority,\textsuperscript{92} it is now accepted that the purchase money interest takes priority over prior security interests and over future advances made pursuant to a prior security interest.\textsuperscript{93} Section 9-107 defines purchase money security interest, but it will be convenient to return to that definition at a later time; generally, the interest results from the addition of new value to the debtor in the form of new collateral or funds with which to acquire new collateral.

The ability of a purchase money security interest to cut across a future advance interest depends upon the collateral which is the subject of the purchase money interest. In the case of an interest in inventory, section 9-312(3) provides that the intervening party must notify the prior secured party. The prior party, upon receiving notice, will presumably not make any advances.\textsuperscript{94} One of the leading com-

\textsuperscript{88} Cf. Coast Bank v. Minderhout, 61 Cal. 2d 311, 392 P.2d 265 (1964). The implications of 9-311, moreover, indicate that the transferee is protected.

\textsuperscript{89} Coogan, Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien," 72 Harv. L. Rev. 838, 876 (1959), mentions other contractual devices that an intervening creditor may use to stop the future advance priority.

\textsuperscript{90} U.C.C. § 9-314(3).

\textsuperscript{91} U.C.C. §§ 9-308, 9-309.

\textsuperscript{92} Project, California Chattel Security and Article Nine of the Uniform Commercial Code, 8 U.C.L.A.L. Rev. 806, 924 (1961).

\textsuperscript{93} See generally Gilmore, The Purchase Money Priority, 76 Harv. L. Rev. 1333 (1963). It is strange that this result should ever have been doubted in view of Comment 8 to 9-204.

\textsuperscript{94} Although the Code does not specify the period of time for which notice of the purchase money interest will be operative, it is most likely that a five-year life will be applied by analogy to 9-403(2). Kripke, Suggestions for Clarifying Article 9: Intangibles, Proceeds, and Priorities, 41 N.Y.U.L. Rev. 687, 720 (1966). But see Gilmore, The Purchase Money Priority, 76 Harv. L. Rev. 1333, 1380 (1963).
mentators on the Code expressed the hope that the provisions of 9-312(3) would be a dead letter, but a more recent opinion suggests that the purchase money device is being used extensively in some fields.\textsuperscript{95} It must be noted that the notice provisions of 9-312(3) apply only to purchase money interests in inventory; when the collateral is anything other than inventory, 9-312(4) controls, and notice to the prior secured party is not required. Indeed, this purchase money interest is even allowed a ten-day grace period for filing without sacrificing its priority.\textsuperscript{96} The operation of 9-312(4) has caused Professor Gilmore to comment as follows:

It is not suggested that this result is wrong, but it is clear that [a future advancer] cannot make his [first] advance with any assurance that 9-312(5) gives him priority over security interests which represent intervening advances. Nor can he tell by checking the files whether any such security interests are entitled to the purchase money priority: a financing statement on file would not in all probability disclose the fact that a purchase money interest was involved. . . . The upshot of the discussion is that a lender, before agreeing to make future advances, should ponder the possible effect of 9-312(4).\textsuperscript{97}

It is just this possible effect on a future advancer that may lead one to conclude that there should be no future advance priority for optional advances in the first place.\textsuperscript{98} Since the future advancer runs the risk of an intervening 9-312(4) interest, so the argument goes, he will be checking the filing records to guard against the purchase money interest, and thus the policy of notice filing is undermined. This argument is partially offset by Gilmore's analysis set out above; since the record does not disclose which subsequent interests are purchase money, and which are not, the future advancer may never check. Moreover, the extent to which the 9-312(4) priority will be bothersome to a future advancer is unknown. The Comments to 9-312 reveal that the authors of the Code did not expect the problem to occur in areas other than inventory financing, where notice is required. Currently, traditional lending patterns are prevailing and a sharp clash between the future advance interest and the non-inventory purchase money security interest has not occurred.\textsuperscript{99}

\textsuperscript{95} L. Hellerstein and S. Hellerstein, Secured Transactions Under Article 9, Uniform Commercial Code of Colorado § 87 (1967). But see 2 G. Gilmore, supra note 61, at 786.
\textsuperscript{96} U.C.C. § 9-312(4).
\textsuperscript{98} Cf. Note, Mortgages Securing Future Advances—A Need for Legislation, 47 Iowa L. Rev. 342, 448 (1962). However, the possibility of a subsequent purchase money interest is a threat to any interest given priority by 9-312(5).
Another interest that may intervene between advances is demonstrated by 9-310, which provides that statutory liens on goods in the possession of those who furnish services or material with respect to such goods take priority over a perfected security interest unless the statute which creates the lien provides otherwise. This interest may be thought of as a new value interest, in the same class as a purchase money interest. Since it operates only pursuant to state legislative policy, it presents no unusual challenge to the priority for future advances.

A buyer of collateral may also be protected under the Code against the future advance priority. The policy of 9-307 seems to be based on the desirability of keeping the channels of commerce free, by allowing a dealer to sell his inventory free of his financer's security interest. However, 9-307 may not go far enough in its protection against the future advance interest. One notable group that is not protected by 9-307 is bulk sale transferees. To subject them to the uncertainty of a subsequent advance may unduly hinder the debtor from selling his business in bulk. The transferee, however, is required to give notice to the transferor's creditors and thus must know of the prior future advance interest. Perhaps it is not asking too much if the bulk transferee is expected to pay off and terminate the future advance interest as a practical requirement of the bulk sale. This conclusion is supported by 6-107 which requires the transferee to state whether or not he intends to assume the liabilities of the bulk seller.

Other buyers not included in the protection of 9-307 are buyers at execution sales held to enforce the interest of a judgment lien creditor. Some Code commentators feel that any type of buyer is free of the future advance priority. Professor Kripke has said of the problem that "it seems to me that this could not happen and that after the [collateral] has been sold, [the creditor] could not increase its security interest on the [collateral] by a later advance." On the other hand, some commentators insist that the future advance priority extends to buyers as well as to other intervening interests. While

100 U.C.C. § 9-307.
101 U.C.C. § 1-201(9).
102 U.C.C. § 6-105.
103 U.C.C. § 1-201(9).
104 E.g., Coogan, Intangibles as Collateral Under the Uniform Commercial Code, 77 Harv. L. Rev. 997, 1029 n.82 (1964); cf. the silence of Gilmore, supra note 61, at 942-46.
it may be impossible to reconcile these two views, one must at least plan for the possibility that the problem will arise. The broad impact of 9-201, and the implications of 9-307 indicate that the buyer of collateral will be as subject to the future advance priority as other intervening interests.

Recently, it has been argued that the Code protection of buyers under 9-307 should extend to buyers at an execution sale, although it is acknowledged that both the Code as written and the decided cases exclude these buyers from 9-307's ambit. Rephrased, the problem is the extent to which a judgment lien creditor can intervene. Section 9-311 is the operative Code provision, providing that the debtor has an interest in the collateral subject to a security interest, and that this interest may be levied upon by judicial process. It may be asserted that 9-311 preserves for the levying creditor only what the debtor himself had. Since the debtor is bound by his future advance agreement in accordance with 9-201, he retains only a very speculative and contingent interest in the future advance situation and this is all that passes to the levying creditor. However, the above interpretation would cut seriously into whatever substance 9-311 contains, transforming it into a virtually meaningless section when faced by a future advance interest. Since no provision of the Code should be allowed to become meaningless, the very presence of 9-311 argues that a creditor should be able to interrupt the future advance sequence. In a general way, the existence of 9-311 thus supports the multiple security interest view.

In practice, however, the levying creditor may not be harmed by the application of a future advance priority. If he succeeds in getting the execution sale held before the subsequent advance is made, he has realized on the debtor's equity and cannot complain; the risk is now on the buyer at the execution sale, as discussed above. This may cause the proceeds of the sale to be extremely low, although perhaps not appreciably lower than at any judicial auction, where property is sold subject to various unknown claims which may be prior to the buyer's interest. If the execution sale is not held until after a future advance is made, the property will be subject to a larger prior interest, but the debtor's estate has been increased by the advanced cash. However, it may be that cash is so easily dis-

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110 V. Countryman, Debtor and Creditor 111 (1964).
sipated that the levying creditor will not be able to "turn around" in time to collect his judgment from this new fund.

One can only say that the Code is unclear on the point. In the case of the levying creditor, the solution to the problem is difficult. It might be easiest to apply the general rule of priority for future advances, as has been discussed and generally advocated throughout this article. On the other hand, it is only by implication from 9-301(1)(b)\footnote{Section 9-301(1)(b) provides that an unperfected security interest is subordinate to the rights of a lien creditor without knowledge of the security interest. The inference is that a perfected security interest is prior to a lien creditor. This view has been judicially adopted, e.g., Friedlander v. Adelphi Mfg. Co., 5 U.C.C. Rep. Serv. 7 (Sup. Ct. N.Y. 1968), even though the Code does not purport to regulate directly the rights of non-consensual security interests, such as lien creditors. Cf. U.C.C. § 9-102, Purposes Comment.} that the Code has anything at all to say about the conflict between a security interest and a judgment lien creditor. It is worth noting in this regard that the pre-1956 version of 9-312 provided that:

A secured party who has a perfected security interest and who makes later advances to the debtor on the same collateral and under the same security agreement takes priority as to the later advances from the time when his security interest was originally perfected.\footnote{U.C.C. § 9-312(2)(1952 version).}

Thus, at one time the Code purported to apply the substance of what is now 9-312(5)(b) to judgment creditors. It is difficult to infer the intent of the draftsmen from their revision of that section. Did they mean to exclude the judgment lien creditor problem from the Code and leave it to non-Code state law? Or did they mean to have the idea of the pre-1956 version carry over to the revised version in 9-312(5)?\footnote{Gilmore states: "[T]he draftsmen were satisfied that future advances priorities could be satisfactorily resolved as a special instance under the general priority rules." 2 G. Gilmore, Security Interests in Personal Property 934 (1965). California, for one, did not think it was all that clear, and adopted 9-312(7), supra note 26, "because of the almost casual attention devoted to future advances under the Code . . . ." Project, California Chattel Security and Article Nine of the Uniform Commercial Code, 8 U.C.L.A.L. Rev. 806, 863 (1961). California's solution was to make the future advancee subject to the actual notice rule with respect to judgment liens, unless he stated a maximum amount to be loaned or committed to obligatory advances. But again there is an ambiguity: was California explicit because the problem of priority was so obvious that it was easy, or because it wanted to change the Code rules otherwise obtaining? Also, what is the effect of the repeal of 9-312(7)? See note 73 supra.}

At least one recent case has adopted the single security interest theory against a creditor who attempted, by execution and levy, to break a future advancee's hold on a debtor. In *Friedlander v. Adelphi Mfg. Co.*\footnote{5 U.C.C. Rep. Serv. 7 (1968).} a security interest covering a stated indebtedness of
$24,000 plus "any other indebtedness . . . now existing or hereafter arising, including all future advances or loans which may be made at the option of the Secured Party . . . ." was perfected by filing. Later, a creditor obtained a judgment against the debtor, docketed the judgment, and levied on the property of the debtor, including property which was used as collateral under the prior security interest. Still later, the secured party made additional advances pursuant to his previous security agreement. The court held that the future advance was entitled to priority over the judgment creditor for the full amount of his advances, regardless of the time they were made.

The court relied on the general rule of Code § 9-201 that "a security agreement is effective according to its terms . . . against creditors." Also, the court felt that a present advance plus an optional advance clause "clearly" constituted value so as to allow the security interest to attach when the security agreement was made. This much of the opinion is straightforward, and consistent with the single security interest theory advanced by Gilmore and generally advocated herein.

Two additional points in the Friedlander decision are disturbing, however. The first is the court's assertion that pre-Code law supports the single security interest theory. This statement is true in the sense that under pre-Code law a future advancer was protected against subsequently recorded interests. However, this protection was withheld when the future advancer received actual notice of the subsequent interest. The possibility that the actual notice rule might still exist after passage of the Code was previously discussed. If Friedlander now implies that the actual notice rationale carries over to the Code, the decision is a radical one. In spite of the fact that the actual notice rule may best accommodate the conflicting interests of secured and unsecured creditors, notice has been thought to be irrelevant to the problems of Code priorities. Furthermore, the language of 9-204(1), 9-303(1) and 9-312(5) indicates that a security interest derives its priority when "value" is given and at no other time.

The Code does require good faith, and the role played by the good faith requirement is the second disturbing aspect of Friedlander. The court held that the future advance interest was entitled to priority only if all advances were made in good faith and the issue

115 Id. at 8. Note that the initial advance of $24,000 was substantial and therefore not merely a "binder" for the possibility of future optional advances. Also, the secured party had the option to make future advances. As discussed previously, this type of future advance interest presents a strong claim for protection.
116 U.C.C. § 9-201.
118 Id. at 9.
119 Supra note 82.
120 U.C.C. § 1-203.
was referred to a special referee. It is uncertain what the court had in mind when it referred to good faith; it implied that there would be lack of good faith if the future advances were "simply a method . . . of depriving [the intervener] of its right to collection of its judgment." Under this test, any advances after knowledge of an intervening interest may be considered bad faith. It is hoped, therefore, that the court meant by "good faith" only the traditional estoppel concepts. Thus, the net result under Friedlander will coincide with the single security interest theory's protection of future advances regardless of notice or knowledge of an intervener.

C. Tax Liens

The problem of the judgment lien creditor serves as an introduction to the difficulties presented when a governmental body becomes a lien creditor. Tax liens present an additional problem because they contain their own statutory priority provisions, which must be meshed with Code priority rules. In California, for example, the lien for state income taxes is subsequent to any recorded lien which "attached" prior to the tax lien. Clearly, in order to apply this rule, it must be known when the security interest "attached," and all of the problems discussed earlier, in regard to the single-multiple security interest dichotomy, are raised again. Even more unclear, however, is the status of a future advance interest when the intervening tax claim is on behalf of the United States Government. In addition to lack of clarity in the Code, there is a new and complex Federal Tax Lien Act.

Before examining the provisions of the 1966 Tax Lien Act, it is helpful to have the pre-1966 law clearly in mind. The issue of the priority between a future advance interest and an intervening federal lien was presented to the Supreme Court as early as 1805. United

121 There has been no final disposition of the case as of this writing.
124 There are statutes in two states which may require the future advance to take account of intervening creditors of whom he has knowledge. In California, under Cal. Civ. Proc. Code § 689(b) (West 1955), and in Massachusetts, under Mass. Gen. Laws ch. 223, § 75 (1958), an attaching creditor may serve notice of his attachment on the secured party, who then states his "claimed debt." If the attaching creditor does not pay the claimed amount within the statutory period, his attachment is dissolved. So far, however, there has been no indication that this statutory system will interrupt the future advance interest, although both states have amended their "buy out" statutes since passage of the Code, thus indicating that somehow the Code and the "buy out" statute were intended to work together. They seem hopelessly at odds in the future advance situation. See Barnard v. Moore, 90 Mass. 273 (1864).
125 Cal. Rev. and Taxation Code § 18933 (West 1956).
States v. Hooe was a security deed made in January and providing for future advances, and a federal lien perfected in August, prior to several of the later advances. Mr. Justice Marshall spoke for the Court:

That the property stood bound for future advances is, in itself, unexceptionable. . . . It is frequent for a person who expects to become more considerably indebted, to mortgage property to his creditors, as a security for debts to be contracted, as well as for that which is already due. . . . It will barely be observed, that the validity of this conveyance is to be tested by the statutes of Virginia which embrace this subject.

The lien of the later advance was held superior to the federal claim, probably on the basis of the majority rule of pre-Code law, the actual notice rule. Thus, in the few states that followed the Old English rule of priority, future advances would always win over the federal lien; in the minority of states where the Michigan rule applied, the future advance interest would always lose to the federal lien; and in the vast majority of states, optional future advances were subject to actual notice of the intervening federal lien.

Whenever any person indebted to the United States is insolvent, however, R. S. 3466 provides that the debts due the United States shall be first satisfied. The Supreme Court has never held that the absolute priority accorded by R. S. 3466 would overcome a fully perfected and specific lien upon the property, since there was always some reason for finding that the lien involved was not sufficiently specific and perfected. The long-established rule requires that the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor. . .; (2) the amount of the lien. . .; and (3) the property to which it attaches. . . .

In several early decisions, the Supreme Court by dictum read into R. S. 3466 an exception in the case of previously executed mortgages. The doctrine was based on the title theory, but was applied by the lower courts even in lien theory states.

Gradually, the specificity tests under R. S. 3466 were taken over

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127 7 U.S. (3 Cranch) 73 (1805).
128 Id. at 89.
130 United States v. Saidman, 231 F.2d 503, 505 (D.C. Cir. 1956).
by federal tax lien acts and applied even in proceedings where the
debtor was solvent and R. S. 3466 was inapplicable. Thus, the fed-
eral lien for taxes would prevail over interests that were not suffi-
ciently “choate.” The choateness test began to go farther than its
ancestor, however, for judicial dicta indicated that it applied to con-
tractual liens. The Internal Revenue Service picked up this lead,
and issued Revenue Ruling 56-41 to the effect that mortgages to
secure future advances were not choate as to advances made after filing
of the tax lien. The ruling drew no distinctions between optional and
obligatory advances, and therefore applied to both types. The ruling
also took a stricter position in regard to the effect of state law on the
interests of the parties. Instead of Marshall’s deference to state deter-
minations, the ruling provided that “although a state court’s classifica-
tion of a lien as specific and perfected is entitled to weight, it is subject
to reexamination by the [federal] courts.”

The high water mark of this trend came when the Supreme Court
held that a surety’s obligation was secured by an inchoate instru-
ment. A subcontractor assigned to the surety all sums to become due
under its work contracts, as security for all liability of the surety
under its bond with the general contractor. In a mysterious per curiam
opinion, the Court held by a vote of five to four that the surety’s
security interest was inchoate and subject to the tax lien against the
subcontractor. Thus, a leading commentator on tax liens was able to
say that a “security interest, regardless of protection under state law,
and regardless of whether providing for optional or obligatory ad-
vances, was inchoate in the federal sense until advances were actually
made, and then only valid to the extent of disbursements made before
the lien was filed.” This summary may not have been entirely cor-
rect, however, for in a 1961 case the Supreme Court seemed to attach
some importance to the fact that the future advancer was not obligated
to make the advance that was denied priority over the federal lien.
Furthermore, the lower courts were not unanimous in their hostility to the future advancer.\footnote{E.g., United States v. Lebanon Woolen Mills Corp., 241 F. Supp. 393, 396 n.3, 397 n.4 (D.N.H. 1964).}

Against this background, the Tax Lien Act was passed in 1966. The purposes of the new Act were, among others, (1) to conform the lien provisions of the internal revenue laws to the concepts developed in the Code, and (2) to improve substantially the status of secured creditors.\footnote{H.R. Rep. No. 1884, 89th Cong., 2d Sess. (1966); S. Rep. No. 1708, 3 U.S. Code Cong. & Ad. News 3722, 3723 (1966).} Unfortunately, the new Act does nothing to clear up the mysterious relationship between its own priority provisions and the rules under R. S. 3466. It has been argued that the new act is comprehensive on the subject of tax lien priorities and that the R. S. 3466 tests should no longer be applied, but this contention has been rejected by the Fourth Circuit.\footnote{H. R. Agsten & Sons, Inc. v. Huntington Trust & Sav. Bank, 388 F.2d 156, 160 (4th Cir. 1967).} Thus, under present law, the Commissioner may have a choice of priority rules when the debtor is insolvent.

Section 6323(b) of the Tax Lien Act provides that certain interests will be valid against the tax lien even though the notice of tax lien has been properly filed. In other words, 6323(b) interests are entitled to "super-priority," and are protected regardless of the action taken by the taxing authority. Recently, the Internal Revenue Service has announced in Rev. Rul. 68-57 that "a purchase money security interest or mortgage valid under local law is protected even though it may arise after a notice of Federal tax lien has been filed."\footnote{Rev. Rul. 68-57, 1968 Int. Rev. Bull. No. 6 at 24, T.I.R. 957 (Jan. 11, 1968).} Thus, the Service has admitted a new interest to the super-priority category. Since the interest is judged by local law,\footnote{But see generally Commissioner v. Estate of Bosch, 387 U.S. 456 (1967); Cohen, The Binding Effect of State Court Determinations in Federal Tax Proceedings, 4 Harv. Legal Comm. 245 (1967).} it seems that if the future advancer can fit himself into the mold of section 9-107 of the Uniform Commercial Code, all future advances will be good as against an intervening tax lien (at least when the debtor is solvent).

Section 9-107 provides, in pertinent part, that "[a] security interest is a 'purchase money security interest' to the extent that it is ... 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."\footnote{§ 9-107(b).} It is clear that there can be no purchase money security interest created in satisfaction of a pre-existing claim or antecedent debt, for no present consideration is added. But it seems that future advances, if restricted to the permitted uses, can be the basis of the super-priority interest. In order to meet
the requirements of 9-107, the advancer will require that his advances be used to purchase new collateral, for example inventory, and will have an after-acquired property clause included in his security agreement. Unfortunately, one referee in bankruptcy has decided that there can be no purchase money security interest which includes future advances.\textsuperscript{149} The opinion is based on very weak reasoning,\textsuperscript{150} and shows a hostility for future advances that should have been put to rest by 9-204(5). It does not appear that the creditor had an after-acquired property clause. This is crucial, for admittedly the future advances cannot be used to acquire collateral as contemplated by 9-107(b) if new property is not subject to the security interest. However, the referee's opinion does not rest on this technical ground, but invalidates the purchase money interest because a future advance clause was included in the security agreement.\textsuperscript{151} For the reasons mentioned, \textit{In re Simpson} is wrong; hopefully future advancers will be able to avail themselves of Revenue Ruling 68-57 to achieve super-priority.

Short of this, the future advancer still has other havens in the new Tax Lien Act. Section 6323(a) provides that the tax lien is not valid as against holders of security interests where the rights under the security interest are acquired prior to the filing of the tax lien. The definition of security interest in section 6323(h)(1) presents problems for the future advancer, however, because the interest exists only if (1) "the interest has become protected under local law against a subsequent judgment lien" on a simple contract, and (2) "to the extent that ... the holder has parted with money or money's worth."\textsuperscript{152} This latter phrase is troubling.

One of the purposes of the new Act is to correlate the taxing statute with the Code, and if this purpose indicates that "money's worth" is the equivalent of "value," the analysis is simplified. Obligatory future advances will be fully protected and optional advances


\textsuperscript{150} Section 9-107 specifically provides that a purchase money security interest may be held by one who makes advances. Comment 2 to 9-107 is to the same effect. The Referee felt that this language indicated that a future advance clause disqualified the purchase money aspect of a security interest. The best that can be said of the Referee's reasoning is that it is contrary to specific provisions in the Code. The Referee also raises his opinion over the words of the Code with the simple observation that the draftsmen probably forgot about future advances when they wrote 9-107. To support this conclusion, he produces another contrary citation: Comment 8 to 9-204, which attempts to dispel judicial hostility to future advances. Finally the Referee cites a pre-Code conditional sales decision, which is probably overruled by the passage of the Code. See United States v. Lebanon Woolen Mills Corp., 241 F. Supp. 393, 395, (D.N.H. 1964).

\textsuperscript{151} The presence of the future advance clause, not the operation of it, was solely responsible for the decision because no future advances were ever made.

\textsuperscript{152} Int. Rev. Code of 1954, § 6323(h)(1).
may be protected, depending upon how that question is resolved under the Code. Most of the commentators, however, reject this reading of “money’s worth.”\textsuperscript{153} Moreover, 1-201(44) seems to look only to a minimal threshold of value in order to validate a contractual interest, whereas section 6323(h)(1) looks to the extent of the “money’s worth” that is supplied. Thus, section 6323(h)(1) imports quantitative evaluation, a notion that is carried over from uses of the term “money’s worth” elsewhere in the tax code.\textsuperscript{154}

Even under this view, however, at least obligatory advances should constitute “money’s worth”. The promise to lend can probably be valued, although there may be some element of discount involved,\textsuperscript{155} and the taxing authority is benefited by the fact that funds are committed to the debtor’s estate. Furthermore, an obligatory advance clause gives the creditor a definite contractual interest in the debtor-creditor relationship which is analogous to the contractual rights of the holder of an option. Since an option is protected against the tax lien,\textsuperscript{156} its security interest counterpart should also be protected. Finally, the future advance either adds funds or allows the debtor to purchase property, to which the government’s lien may attach. If, in addition, the lien of the advance is subordinated to the tax lien, “the lender is made an unwitting contributor to the government’s coffers, and can be pictured as a victim of its greed.”\textsuperscript{157} These arguments may save the obligatory or “quasi-obligatory” advancer the burden of searching elsewhere in the Tax Lien Act for protection.\textsuperscript{158} But since they will probably not avail the optional advancer, sections 6323(c) and (d) must be examined.\textsuperscript{159} The following analysis will be equally relevant to the obligatory advancer if his prior arguments have been rejected.\textsuperscript{160}

Section 6323(d) protects the future advancer who makes disbursements within forty-five days after the tax lien filing, provided the advancer has no actual notice of the tax lien and has a security interest which is “protected under local law against a judgment lien

\textsuperscript{153} W. Plumb and L. Wright, supra note 135 at 79; Young, Priority of the Federal Tax Lien, 34 U. Chi. L. Rev. 723, 738-39 (1967).
\textsuperscript{155} Cf. Treas. Reg. § 20.2056(b)-4(a) (1968).
\textsuperscript{156} Int. Rev. Code of 1954 §§ 6323(a), 6323(h)(6)(C).
\textsuperscript{157} Young, supra note 153, at 733.
\textsuperscript{158} Compare Tax Liens, supra note 136 at 1391 with Plumb, Federal Liens and Priorities—Agenda for the Next Decade, 77 Yale L.J. 605, 670 (1968).
\textsuperscript{159} Concerning future advances only, and except as qualified herein, section 6323(c) and (d) are virtually identical in relevant language, and will be discussed together as if section 6323(d) existed by itself. Under section 6323(c), the interest may include after-acquired property, but is limited to advances made in the ordinary course of the debtor's business and only against certain specified kinds of collateral. For a complete discussion, see Tax Liens, supra note 136.
\textsuperscript{160} Cf. W. Plumb & L. Wright, supra note 141, at 81 n.48.
arising, as of the time of tax lien filing, out of an unsecured obliga-
tion.\textsuperscript{161} The latter requirement of 6323(d)(2) may be interpreted in
several ways. One is the interpretation that is implied by one of the
few cases on the new Tax Lien Act, United States v. Strollo.\textsuperscript{162} The
Strollo court construed the "protected under" language, in effect, as
requiring full perfection in the Code sense. This seems clearly incor-
crect, for if the interest must be fully perfected to obtain the benefit of
6323(d), it is hard to see how the interest can, at the same time, come
into existence after the tax lien filing as is required under 6323(d).
The more intelligent analysis is that the draftsmen of the tax lien
sought to deal with the problem of notice filing under the Code, in
advance of the actual attachment of the security interest. Thus, the
advance filing protects the security interest in gestation against a filed
tax lien, provided that the security interest comes into existence within
forty-five days of the tax lien filing, and before actual notice of the
tax lien.

A second interpretation of 6323(d)(2), as tentatively suggested
by Professor Young,\textsuperscript{163} is that, given the above analysis, an advance
filing per se protects the security interest from the tax lien for the
stipulated period. This view overlooks the language of the cited sec-
tions to the effect that the degree of protection must be judged under
local law. Since the Code is the local law in all states but Louisiana, a
filed security interest is protected against a tax lien for the stipulated
period only if the interest is, under state law, protected against a hypo-
thetical judgment lien. Even this formulation allows two interpreta-
tions, because, as was noted previously, the relationship between the
Code and judgment liens is not clear.

Under the first of the two possible interpretations, the priority of
the hypothetical judgment lien may be judged by non-Code law. Thus,
under the majority rule, obligatory advances are fully protected and
optional advances are protected to the point of actual notice. The
problem is that the Tax Lien Act, while giving the tax lien the status
of a hypothetical judgment lien, does not say whether or not the hypo-
thetical lienor gives hypothetical actual notice to the optional future
advancer. If the Internal Revenue Service or the courts decide that
such notice is not implied, optional advances would be protected for
forty-five days, provided that the advancer complies with the other
terms of section 6323(d).\textsuperscript{164}

Under the second possible interpretation, the priority of the hypo-

\textsuperscript{161} Int. Rev. Code of 1954 §§ 6323(c)(1)(B), 6323(d)(2). Subsequent references
to § 6323(d) include a duplicate reference to the corresponding language in § 6323(c).

\textsuperscript{162} 67-1 U.S. Tax Cas. § 9,142, 201 So. 2d 466 (Fla. App. 1966).

\textsuperscript{163} Young, supra note 153, at 738.

\textsuperscript{164} Plumb, Federal Liens and Priorities—Agenda for the Next Decade, 77 Yale
Theoretical judgment lien may be judged by Code law. In the prior discussion of judgment liens the argument was presented that 9-311, 9-201, and 9-301(1)(b) taken together indicate that judgment liens take subject to a perfected security interest covering future advances. Under this view, obligatory advances are protected, and optional advances are saved if the single security interest theory is adopted, but not if the multiple security interest view prevails. The corollary to this proposition is that if the multiple security interest theory is adopted, section 6323(d) does not apply to optional advances, because under the multiple security interest view, optional advances are not protected under local law against a judgment lien as required by section 6323(d)(2). However, if, because of the multiple security interest view, section 6323(d) does not cover optional advances, then it must apply to obligatory advances if it is to have any meaning at all. The argument was previously advanced that obligatory advances were “money’s worth” under section 6323(h), and were therefore protected under 6323(a). Now, however, it is seen that this argument can only be made if the single security interest theory is adopted under the Code. For under the multiple security interest theory, obligatory advances are covered by section 6323(d) and therefore are probably not covered by section 6323(a) also, unless one admits that both sections 6323(a) and 6323(d) cover obligatory advances. Thus, the multiple security interest theory is inconsistent with the view that obligatory advances are “money’s worth” under section 6323(h).

IV. Conclusion

Most of the problems raised by the future advance interest have not yet formed the basis for litigation. Perhaps this fact suggests that the Code is workable, even though it seems opaque. On the other hand, the next few years may see future advance problems very much before the courts. In either event, it is probably not wise to be overly dogmatic about how future advances should be treated; any rule has its strengths and weaknesses of application. Professors Coogan and Gilmore may disagree on interpretations, but both have stated that changes in the future advance rules should come cautiously, after experience shows where push is necessary, and where pull is desirable. At least three general areas of consideration should be focused.

165 Section 6323(a) comes into play because the interests defined in § 6323(h) are protected by § 6323(a). But the dualism contemplated in the text would be nonsensical because § 6323(a) provides full protection for the obligatory advance interest, whereas §§ 6323(d) protects only 45 days’ worth.


167 Cf. Coogan, Intangibles as Collateral Under the Uniform Commercial Code, 77
First, a choice must be made between the single security interest and the multiple security interest theories. The split of opinion on this threshold issue makes the choice impossible to avoid. Since it is a threshold issue, however, one must not overlook the possibility that different priority rules may apply in different situations. For example, judgment creditors may be treated differently than consensual creditors. Also, one must be aware of sub-priority rules, especially those concerning purchase money interests, that operate to put slack in any general rule or theory.

Second, those who buy collateral that is subject to a future advance interest present a vital problem. On the whole, it seems that 9-307 does not go far enough to protect these buyers. The unsecured creditor should be permitted to reach the debtor's equity with some measure of finality, and the debtor should be allowed to sell effectively his interest in the collateral. This issue is all the more vital when one realizes that the priority of the federal tax lien may depend upon the rights of a judgment creditor.

Finally, and perhaps independently of the priority rules, 9-208 must be vitalized. The concept of notice filing is central to the Code, but notice is only effective if information can be obtained outside the record. Section 9-208 tries to facilitate this process, but its function is unclear, and its operation ambiguous. Perhaps broadening the scope of 9-208 will allow an easier resolution of the other problems of the future advance interest.