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CONFLICTS BETWEEN THE WEST VIRGINIA LANDLORD'S LIEN AND ARTICLE NINE OF THE UNIFORM COMMERCIAL CODE

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I. INTRODUCTION

This article examines the interplay and conflict between liens given landlords in West Virginia for the collection of rent and the legal rights given secured parties under Article 9 of the Uniform Commercial Code (UCC).1

It is clear that Article 9 does not apply to a landlord's lien.2 It is less than clear whether Article 9 affects the priority to be given a landlord's lien when it conflicts with an Article 9 security interest in the same goods.3 This article discusses in general the relationship and in particular the priority between a landlord's lien in West Virginia and a competing Article 9 security interest in the same goods.4 This article considers landlord's liens in other jurisdictions to the extent necessary to illustrate how those jurisdictions have treated conflicts between landlords and Article 9 claimants. Presently, there are no decisions in West Virginia construing the relationship between a landlord's lien and an Article 9 security interest.

II. LANDLORD'S LIENS IN WEST VIRGINIA

A. Common Law

At common law, the landlord had no lien against the tenant's property.5 When rent became delinquent the landlord had a common law remedy of distress, whereby he was authorized to distrain property of the tenant, and hold it as a sort of pledge to secure payment of rent.6

There was no official intervention in the landlord's common law distress remedy.7 The landlord was not permitted to sell distrained property to satisfy the rent claim.8

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3 See infra note 76 and accompanying text.

4 Of course there is no priority issue where the lien claimants do not desire the same property.

5 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1304 at 474 (1959) [hereinafter cited as THOMPSON].


7 Note, Constitutional Law—West Virginia's Distress for Rent Law—A Landlord's Remedy vs. a Tenant's Protections, 74 W. VA. L. REV. 170, 175 n.23 (1971).

8 Id.
At common law, the landlord acquired no interest in the property of the tenant unless and until it was distrained; it was the landlord's actual or constructive possession of the tenant's property, if anything, that allowed him to claim the property as against the tenant's other creditors.9

B. Statutory Liens

1. Statutory Distress

In West Virginia, the common law remedy of distress has not been in terms abolished, but has been modified.10 The statutes provide that a landlord may, by presenting an appropriate affidavit to a justice of the peace (magistrate), obtain a distress warrant which authorizes a sheriff to distrain or levy upon the tenant's personal property, and later sell it, to satisfy the rent claim.11

The requirement of official issuance of the distress warrant and the landlord's power to sell distrained property are the two substantive differences between common law and statutory distress in West Virginia.12

Certain procedural aspects of the distress statutes were declared facially unconstitutional in 1972;13 however, given compliance with constitutional pre-seizure notice and hearing requirements, or the existence of exigent circumstances, it would seem that the remedy is still available.14

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9 THOMPSON, supra note 5, at 482; Note, supra note 1, at 41.
10 Note, supra note 1, at 42.
11 W. VA. CODE § 37-6-12 (1966 & Supp. 1983) provides as follows:
§ 37-6-12. Distress for rent; time and place; warrant.
Rent may be distrained for within one year after the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by any sheriff or constable of the county wherein the premises yielding the rent or some part thereof may be or the goods liable to distress may be found, under a warrant from a justice founded upon the affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed.
13 The holding in State ex rel. Payne v. Walden, 156 W. Va. 60, 190 S.E.2d 770 (1972), was expressly limited to procedural aspects of the distraint statute. Then Justice Halden observed:
Undoubtedly, there are special characteristics incident to the landlord-tenant relationship which may justify statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of property of the landlord. Unless the law leaves an aggrieved landlord to his own devices, the legislature must provide a judicial mechanism of relative swiftness to prevent the withholding tenant from denying the landlord the right of income incident to ownership by the tenant's refusal to pay rent and by his prevention of rental or sale to a third party. Many expenses of the landlord continue to accrue, whether the tenant pays his rent or not. Prompt judicial conclusion of disputes is
West Virginia is one of the few jurisdictions having a statute establishing priority between the distraining landlord and other lien creditors of the tenant. "Absent such a provision, it has generally been held that the landlord does not acquire an interest in the property of the tenant until the distress warrant is issued."16 In West Virginia, however, the provision has enabled the supreme court of appeals to hold that the distrain lien under section 37-6-13 attaches at the instant the property is brought on to the leased premises.16 If the tenant's personal property is carried on to the leased premises subject to a creditor's lien which is valid against other creditors of the lessee, the landlord will, upon issuance of the distress warrant and levy, have rights only in the tenant's equity in such property.17 If, on the other hand, the tenant's personality is first subjected to a lien after it has already come upon the leased premises, then the landlord's lien by distrain takes complete priority over the lien of a competing creditor of the tenant in such property.18

The operation of this provision is particularly apparent with respect to

desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment or dispossession of his actions and rental agreement provide otherwise.

*Id.* at 64, 190 S.E.2d at 778.

Shaffer v. Holbrook, 346 F. Supp. 762, 766 (S.D. W. Va. 1972), also indicates the validity of distress statutes given constitutional compliance. Distraint is not a dead letter. Va. Code § 55-232-1 (1981). The court further noted in Payne that the infirmity of the statute may not apply in cases of extraordinary State or creditor interest. 156 W. Va. at 76, 190 S.E.2d at 779. Finally, the court stated that "[o]ur holding goes no further" than to invalidate procedural aspects of the distress statute. *Id.* Therefore, given notice and opportunity to be heard, there does not appear to be any constitutional defect in a court order permitting distraint to be made. Once distraint occurs, the landlord's lien rights and the rights of the tenant's other creditors could be decided by a court in the course of a civil action. See infra note 79.

15 SCHOISHINSKI, supra note 6, at § 6:21 at 434.


§ 37-6-13. Property subject to distress.

The distress may be levied on any goods of the lessee, or his assignee or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. If the goods of such lessee, assignee or undertenant, when carried on the premises, are subject to a lien which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, they shall be liable to distress, but for not more than one year's rent, whether it shall have accrued before or after the creation of the lien. No goods shall be liable to distress other than such as are declared to be so liable in this section.

The statute defines priority of competing liens in terms of "property subject to distress."


18 Anderson v. Henry, 45 W. Va. 319, 31 S.E. 998 (1898), overruled on other grounds, 156 W. Va. 52, 190 S.E.2d 779 (1972); see also Huffard v. Akers, 52 W. Va. 21, 43 S.E. 124 (1902).
property distrained after it is first carried on the leased premises not subject to any lien. In that event, the lien by distraint is said to "relate back" from the date of distraint to the time the disputed personal property first comes upon the leased premises to defeat intervening liens.\(^{19}\) The important question is whether the property is subject to a lien, valid against the lessee's creditors, when it is first brought upon the property. Determining priority with the lien created by statutory distress is a relatively straightforward matter.

2. Liens by Operation of Law

Many jurisdictions have statutes that give the landlord a lien on the tenant's property by operation of law to secure payment of rent.\(^{20}\) Such liens exist independently of any contract or act of the landlord to distrain or levy upon property of the tenant.\(^{21}\) As a rule, notice of the statutory lien need not be recorded.\(^{22}\)

The West Virginia statute does not in terms give the landlord a lien. Rather, with regard to property to which it applies, it forbids removal by a competing lien creditor unless such creditor satisfies the landlord's rent claim, not to exceed one year's rent. This preferential right of payment operates as and has been held to constitute a lien.\(^{23}\)

The question of when the landlord's statutory lien arises under statutes

\(^{19}\) Pepsi Cola Bottling Co. v. Indian Rock Bottling Co., 98 W. Va. 269, 126 S.E. 715 (1925); Bartlett v. Loundes, 34 W. Va. 493, 12 S.E. 762 (1890).

\(^{20}\) SCHOSHINSKI, supra note 6, at \$ 6:22 at 435.


\(^{22}\) Id. at 491.

\(^{23}\) Anderson v. Henry, 45 W. Va. 319, 31 S.E. 998 (1898), overruled on other grounds, 156 W. Va. 52, 190 S.E. 2d 779 (1972). W. Va. Code \$ 37-6-18 provides:

\section*{37-6-18. Removal of goods by third party having lien.}

If, after the commencement of any tenancy, a lien be obtained or created by trust deed, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, the party having such lien may remove such goods from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent, so much as is in arrear, and securing to him so much as is to become due; what is so paid or secured not being more altogether than a year's rent in any case. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and, as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchaser bond, with good security, payable to the person so entitled, and delivering such bond to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal.

Neither this nor any other section of this article shall affect any lien for taxes or levies.

The constitutionality of this statute was acknowledged in In re McIntire, 142 F. 593 (N.D. W. Va. 1906). Section 37-6-18 is a lineal descendant of the Act for the Better Security of Rents, 8 Anne, ch. 14, \$ 1 (1709). See American Exchange Bank v. Goodlee Realty Corp., 135 Va. 204, 116 S.E. 505 (1923).
similar to section 37-6-18 is a source of some confusion. The cases are few and very unclear, and say indiscriminately that the lien may arise when the tenancy begins, when the tenant's property is brought upon the leased premises or when the property is brought upon the premises, then relating back to the commencement of the tenancy. Depending upon which time the statutory landlord's lien actually arises, the relative rights of the landlord as against a competing lien creditor will of course vary.

C. Contractual Landlord's Liens

If the lease provides that the landlord is to have a lien against certain of the tenant's personal property to secure payment of rent, there is no doubt that the rights and duties of the landlord with respect to the lien are governed by Article 9 of the UCC, which governs all consensual liens against personal property.

III. Article 9 of the Uniform Commercial Code

The other body of law one must examine to understand the priority as between a landlord and a secured party competing for the same property is Article 9 of the UCC.

Article 9 is a comprehensive system of rules and definitions governing every kind of consensual arrangement intended to create a security interest in personal property or fixtures. While Article 9 abolished none of the pre-code security devices such as the chattel mortgage, the conditional sale, the factor's lien and the trust receipt, it makes distinctions along functional instead of formal lines, and applies to "every transaction (regardless of form) which is intended to create a security interest...."
Once it is determined that a particular transaction comes within the operation of Article 9, two analytical concepts becomes important. The first of these is "attachment" and the second is "perfection."

"Attachment" refers to the process by which a security interest becomes legally enforceable against the debtor. Section 9-203 states the conditions for the attachment of a security interest. Section 9-203 functions much as a statute of frauds.39

"Perfection" alludes to the status of the secured party's right to collateral relative to the rights of other creditors claiming the same collateral. It is axiomatic that the debtor can never raise the secured party's unperfected status as a defense to the secured party's exercise of Article 9 rights and powers.31 In most cases, perfection of a security interest requires the filing of a financing statement.32

A security interest cannot be perfected before it attaches. "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."33

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39 U.C.C. § 9-203 provides in pertinent part:
A security is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
   a. . . . the debtor has signed a security agreement containing a description of the collateral . . .
   b. value has been given; and
   c. the debtor has rights in the collateral.
U.C.C. § 9-203 (1)(a)-(c). A security interest attaches when it becomes enforceable against the debtor and third parties with respect to the collateral. Attachment occurs as soon as all the events specified in U.C.C. § 9-203(1)(a)-(c) have occurred unless explicit agreement postpones the time of attaching. U.C.C. § 9-203(2). The statute of frauds effect of section 9-203 is supported by comment 5 to that section. See WHITE & SUMMERS, HANDBOOK ON THE LAW OF THE UNIFORM COMMERCIAL CODE § 23-3 at 903 (1980) [hereinafter cited as WHITE & SUMMERS].

31 An unperfected security interest is as good against the interest of a person who is not a "lien creditor," see U.C.C. § 9-301(3), as a perfected security interest is against an unperfected security interest. "[I]n a dispute between the secured creditor and the debtor, the unperfected condition of the security interest is quite irrelevant; so too, if creditors of the debtor have not advanced to the status of "lien creditors," they are also subject to the security interest." T. QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 9-30[A][1] (Supp. No. 2 1982). In In re Estate of Yealick, 69 Ill. App.3d 353, 387 N.E.2d 399 (1979), a party who did not achieve "lien creditor" status was subordinate to the rights of an unperfected secured party. Also see U.C.C. § 9-201, which contains the "golden rule" of priority for Article 9 cases. WHITE & SUMMERS, supra note 30, § 25-2 at 1031 (1980).

32 A security interest can be perfected in one of three ways: (1) by possession of the collateral pursuant to agreement; U.C.C. § 9-305; (2) by the filing of a financing statement; U.C.C. § 9-302; (3) or by automatic perfection, permitted under several provisions of the U.C.C. See WHITE & SUMMERS, supra note 30, § 23-6 at 919.

33 U.C.C. § 9-303(1). This is no more than saying that a security interest must be valid against the debtor before it can be valid against anyone else. See In re Rivet, 299 F. Supp. 374 (E.D. Mich. 1969).
Also, unless dictated otherwise by the UCC, a security agreement is effective against other creditors. Unless a creditor can fit himself into a status treated by the UCC as having priority over a secured party, perfected or not, the secured party should prevail.34

Priorities between an Article 9 unperfected secured creditor and most non-UCC creditors are determined by section 9-301. Priorities as between two Article 9 secured parties are governed by section 9-312, the heart of which, section 9-312(5), embodies the ancient rule of "first in time, first in right."35

As this article is concerned with the priority between an Article 9 secured creditor and a landlord, further discussion of section 9-312 itself is not really necessary. However, as will be developed later, despite Article 9's ostensible inapplicability to landlord's liens, section 9-301 may have something to say about who wins a priority battle between a landlord and a secured party when the tenant/debtor defaults on his obligation to each.

IV. THE CONFLICTS BETWEEN THE LANDLORD'S LIEN AND THE ARTICLE 9 CLAIMANT

A. The Approach of the Courts

Thus far, this article has directed attention to the law that gives the landlord and the secured creditor rights against the tenant's personalty. Now the article discusses the legal analysis the courts have used to determine the competing claims of a landlord and a secured party when each is asserting rights to the tenant's property.

1. Majority

Most jurisdictions that have considered the question take the UCC at its word and hold that, because Article 9 states that it "does not apply to a landlord's lien," the priority between an Article 9 security interest and a landlord's lien is governed by the pre- or non-UCC priority rules of the jurisdiction whose law governs the case.36 As one might expect, since forty-nine of the states have adopted the UCC, the results in these cases have varied with the particular jurisdiction's pre- or non-UCC law.

The pre- or non-UCC law of some jurisdictions prescribes that landlord's liens are superior to other types of liens, including Article 9 security interests, and gives automatic victory to the landlord.\textsuperscript{37} In other states, the pre- or non-UCC rule is that a creditor's rights under a chattel mortgage or conditional sales contract, pre-code security devices, are superior to a landlord's lien, and the courts have therefore given victory to the secured party.\textsuperscript{38} Still other states have non-UCC rules that award priority to the landlord or the secured party depending upon whose interest first "attached" to the tenant's property.\textsuperscript{39} Although outcomes may vary, all of these approaches may be reconciled by their use of pre-or non-UCC law as the rule of decision.

2. Minority

A minority has interpreted the exclusion of section 9-104(b) in light of the spirit and purpose of the UCC as a whole. This approach stresses the idea that Article 9 was intended by its drafters to be a comprehensive and preemptive statement in the area of secured transactions in personal property.\textsuperscript{40} This view interprets section 9-104(b) to mean that Article 9 does not apply to the creation of landlord's lien or the priority of landlord's liens \textit{inter se}. However, if an Article 9 security interest is engaged in a priority dispute with another lien against the same property, the goals and policies of Article 9 can be accomplished only if Article 9 supplies the rule of priority. Accordingly, this approach has treated landlord lienors as "lien creditors" within the priority provisions of UCC section 9-301(b), and has used non-UCC rules to determine when the landlord achieved "lien creditor" status for purposes of priority resolution.\textsuperscript{41}

Predictably, West Virginia has no decision interpreting section 9-104(b) of the UCC. However, were the court to adopt the majority approach, it would likely fall into line with those jurisdictions that award priority to the lien that first attaches.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{37} \textit{In re} Einhorn Bros., 272 F.2d 434 (3d Cir. 1959); Universal C.I.T. Credit Corp. v. Congressional Motors, Inc., 246 Md. 380, 228 A.2d 963 (1967).
\item National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975).
\item See note 76 infra and accompanying text. "Article 9 is the most novel division in the Code. It is designed to provide a simple and unified structure within which the immense variety of present day secured financing transactions can be effected with less cost and greater certainty." SPEIDEL, SUMMERS \& WHITE, COMMERCIAL \& CONSUMER LAW 21 (1981).
\item This assertion can be made because no provision of Chapter 37, Article 6 of the West Virginia Code provides for automatic superiority of either the landlord's lien or the competing lien. A "security interest" includes a lien. U.C.C. § 1-201(37). If the landlord's lien is a "security interest," Note, supra note 1, at 43, it is not the kind of security interest whose creation is governed by Article 9.
\end{itemize}
B. The Relationship of the West Virginia Landlord’s Lien to the Article 9 Security Interest

1. When Landlord’s Liens Arise in West Virginia

a. Landlord’s Lien by Distraint. It was noted earlier that the landlord’s lien under the distraint statute has priority over the lien of a competing creditor to the extent that the tenant’s property is first brought upon the leased premises unencumbered by a lien which is valid against the tenant’s creditors. If encumbered by a lien which is valid against the tenant’s creditors when first brought upon the leased premises, then the landlord has rights only to the tenant’s equity in such property.

These requirements should be considered closely. Under section 37-6-13, the legislature has mandated that if a creditor’s lien arises with respect to property of the tenant after it is on the premises, then such creditor is entitled to only what the distraint landlord leaves, if anything, after taking up to one year’s rent from the proceeds of a sale of the property. This makes some sense if one assumes in the first instance that the landlord ought to have some noncontractual lien against the tenant’s property.

The second requirement, however, that the lien be valid against the lessee’s creditors, adds a peculiar twist to the secured party’s position. Section 37-6-13 necessitates that the secured party have a perfected security interest in the property at the time it is taken upon the property, or else his interest is subordinate to that of a distraining landlord. The effect of the West Virginia distress statute as it relates to Article 9 of the UCC is to benefit the landlord by placing him in a class of persons who can defeat a perfected security interest on the happen stance of the physical location of the collateral when a security interest therein is perfected, even though the landlord never has to comply with any notice or filing requirements to disclose to potential Article 9 creditors that the tenant’s property may be subject to a landlord’s lien. It should be recalled, for example, that even if a lease begins on January 1, and unencumbered property is brought on to the leased premises on January 8, a creditor who gets and perfects a security interest in such property on June 1 will lose priority to a landlord who causes distraint to be made on such property on, say, December 1. The key to priority under section 37-6-13 is whether the property is encumbered by a lien, valid against the lessee’s creditors, when brought on to the property.

b. Landlord’s Lien by Operation of Law. Section 37-6-18 of the Code also

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4 See supra note 18 and accompanying text.
5 See supra note 17 and accompanying text.
6 Hawley v. Levy, 99 W. Va. 335, 128 S.E. 735 (1925); Huffard v. Akers, 52 W. Va. 21, 43 S.E. 124 (1903).
gives the landlord a lien, but does so quite independently of any distraint or other act by the landlord.\

However, section 37-6-18 is ambiguous as to the time the lien it contemplates arises in favor of the lessor. The ambiguity obtains because it is not made clear in the relevant decisional law whether the lien arises at the instant the lease begins, when the property comes on the leased premises, or in a combination of the first two alternatives, at the time the property comes on to the leased premises, then relating back to the beginning of the tenancy. Some support exists for each of these three views.\[8\]

The two reported decisions in West Virginia interpreting the statute shed no light on the issue. Anderson v. Henry\[9\] merely recites the rule that the statute actually creates a lien in favor of the landlord with no action required by him. Huffard v. Akers\[10\] erroneously discusses the statute in circumstances requiring application of the distraint statute only, and is thus of no use in resolving the problem.

The Virginia court has on several occasions interpreted its analogue of section 37-6-18. That court's decisions create the distinct possibility that a landlord's statutory lien dates not just from the time the tenant's property comes on to the premises, but from the time the lease begins.

In United States v. Waddill, Holland & Flinn, Inc.,\[11\] the Supreme Court of Appeals of Virginia held that a landlord's lien under that state's statute (identical to section 37-6-18) "relates back to the beginning of the tenancy." The lien was held to qualify as "duly perfected" from such date within the meaning of Virginia unemployment compensation lien statute awarding priority to competing liens that achieved such a status before the accrual of the state's claim for unemployment compensation taxes.\[12\]

The rule in the Waddill case was reinforced in United States v. Lawler.\[13\] In that case the court ruled that for all state law purposes, a landlord's statutory lien is specific, not inchoate, and relates back to the day the lease begins.\[14\]

West Virginia law is silent on the issue of when the landlord's statutory lien arises. But if the Virginia cases are to be taken seriously, as inter-

\[9\] See supra notes 24-26 and accompanying text.
\[10\] 45 W. Va. 319, 31 S.E. 998 (1898), overruled on other grounds, 156 W. Va. 52, 190 S.E.2d 779 (1972).
\[11\] 52 W. Va. 21, 43 S.E. 124 (1902).
\[12\] 182 Va. 351, 28 S.E.2d 741 (1944), rev'd on other grounds, 323 U.S. 353 (1945).
\[13\] Id. at 357, 28 S.E.2d at 746.
\[15\] Id. at 691, 112 S.E.2d at 926.
pretative of an identical statute, then there is a definite possibility that the lien section 37-6-18 contemplates is effective from the date the lease first begins, regardless of when the tenant’s property comes on to the leased premises or whether it is encumbered by a security interest before it comes on to the premises. This would create a situation in which the only way a secured creditor could ensure his priority over a landlord wielding a statutory lien that dates from the beginning of the tenancy is to attach and, arguably, perfect his security interest before his debtor’s lease begins.54

2. When an Article 9 Interest Arises

Article 9 applies to consensual liens in personal property or fixtures.55 In the normal non-possessory secured transaction a debtor signs a security agreement reflecting his intention to grant the secured party a security interest in certain property or property rights of the debtor to secure the debtor’s performance of an obligation to the secured party.

The security interest does not become legally enforceable until all of the requirements of section 9-203(1)(a)-(c) have been satisfied. One of these factors is that the debtor have “rights in the collateral.”56 Until the debtor has rights in the collateral, the security interest cannot attach, and the security interest does not legally exist.57

Ordinarily, the debtor does own or have rights in the collateral, and there is no problem. However, it is not too difficult to imagine circumstances in which a debtor-buyer enters into a sales contract with a distant seller of goods, “F.O.B. Buyer’s plant,” the goods to be transported in seller’s vehicles, cash on delivery.58 In such cases, the risk of loss with respect to the goods, a common indicia of ownership or rights to the goods, will not pass to the buyer

54 In National Inv. Trust v. First Nat’l. Bank, 88 N.M. 514, 543 P.2d 482 (1975), a landlord’s lien and a security in the same goods attached at the same time. The landlord’s lien attached when the property arrived on the premises and the security interest attached at the same time, because that was when the debtor acquired rights in the collateral. The landlord in this case lost because his original tenant had assigned the leasehold estate to another who later defaulted on his obligations to both the landlord and the secured party. The court noted that the date of the assignment created a new landlord-tenant relationship. The secured party had a perfected security before the assignment of lease occurred, but not before the original lease was executed. Thus, in the court’s opinion, the “new” lessor took subject to the security interest which was perfected at the time the assignment of lease occurred and the “new” landlord-tenant relationship created. The court implies that if the secured party’s security interest had been perfected after the assignment of lease, the landlord would have prevailed. See Chessport Millworks, Inc. v. Solis, 86 N.M. 265, 522 P.2d 812 (1974).
55 U.C.C. § 9-102 and official comments.
56 U.C.C. § 9-203(1)(c). For the importance of the debtor’s rights in collateral, see Manger v. Davis, 619 P.2d 687 (Utah 1980).
57 U.C.C. § 9-203(2).
until he takes delivery at the named destination point. Here, the buyer-debtor may not acquire rights in the collateral until the goods reach his place of business. Not infrequently, the place of business may be under lease from a commercial landlord.

Consequently, the secured party who may have done everything ostensibly necessary to create and perfect a security interest in the buyer's goods may find that his security interest arises only when the goods are delivered to the buyer at the buyer's place of business. Should the debtor-buyer-lessee later default on his obligations to the lessor and the secured party, the secured party and lessor may find themselves locked into a full-scale priority battle over the lessee's goods. In this kind of priority contest, the secured party must usually venture out of the familiar Article 9 array of priority rules and travel back into time to wrestle with the pre-Code priority rules of the jurisdiction whose law happens to govern.

In a related problem, if the secured party has a security interest in the debtor's inventory "now owned or hereafter acquired," a substantial question may arise as to whether the secured party's security interest can attach, and therefore become perfected, as to after-acquired inventory until the debtor acquires rights in such after-acquired inventory. There is authority that the security interest dates, even as to after-acquired property, from the time of the original agreement although the debtor did not acquire rights in specific property covered by the security interest until well after the date of the agreement. This position is by no means unanimous and, indeed, is totally rejected by the Bankruptcy Code for purposes of voidable preference analysis.

C. Respects in which Article 9 and West Virginia Landlord's Lien Conflict under the Majority Approach

1. Distraint Lien

As was noted above, the distraint statute awards priority on the sole basis of whether the subject property was encumbered by a lien, valid against the lessee's creditors, when such property was first carried on to the

61 Id. See supra note 36 and accompanying text.
64 11 U.S.C. § 547(e)(3) adopts the "improvement in position" test for voidable preference analysis and eschews the authority of cases such as those cited supra note 63.
premises. A landlord has no statutory or other obligation to record public notice of his lien under Chapter 38, Article 6 of the West Virginia Code.

The priority rules in the West Virginia distraint provisions disrupt the symmetry of Article 9 and undermine its reliability as the exclusive body of law to which a secured party can look for determining and predicting his rights relative to others claiming an interest in the same goods.

For example, Article 9 contemplates that a lender who is considering whether to extend credit to a debtor and secure that debt by taking a security interest in some of the debtor's assets need only search applicable financing statement indices to ascertain whether those assets are subject to the prior security interest of another creditor. However, the distraint lien operates in such a way that, even if a secured party diligently searches the applicable financing statement indices and finds no indication of a prior security interest in the asset against which he may lend, he will lose priority in the asset to a distraining landlord if, by inadvertence, he waits until the asset is placed on the leased premises before the security interest is created.

Similarly, if the secured party waits until the property is on the leased premises before he files a financing statement, or otherwise perfects his security interest, then even though the security interest attached before the property was taken on to the leased premises, the landlord who later distrains against the property will win the priority battle with the secured party. The secured party's interest in the property must be one that is valid against the lessee's creditors before it prevails over the lien of a distraining landlord.

If the secured party's security interest attaches simultaneously with the delivery or carriage of the property on to the leased premises, the secured party runs a greater risk of losing priority to the landlord. Because perfection cannot occur prior to attachment, if the debtor acquires rights in the collateral only when the property reaches the leased premises, then the secured party's lien will attach and, of course, be perfected only at such time and not before. Cases of simultaneous attachment of liens are, to say the least, undesirable from the secured party's standpoint, especially where he has

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[55] See National Inv. Trust v. First Nat'l. Bank, 88 N.M. 514, 543 P.2d 482 (1975), in which simultaneous attachment of a landlord's lien and a security interest resulted in defeat of the landlord's lien where the security interest was perfected before the landlord-tenant relationship was created by assignment of the lease by the original tenant.
[57] In National Inv. Trust v. First Nat'l. Bank, 88 N.M. 514, 543 P.2d 482 (1975), the court observed: "The dilemma we face then is the priority between a landlord's lien and security interest which attached at the same time, namely when the Flexsteele inventory was delivered to Lyons." 88 N.M. at 516, 543 P.2d at 484.
done everything the Code required of him to make sure he advanced credit against unencumbered assets.

Doubtless, the incidence of landlord distrait is less common since procedural aspects of the distrait scheme were declared constitutionally infirm.79 However, the remedy of distrait has by no means been abolished.71 Thus, if the majority view of UCC section 9-104(b) were adopted, and section 37-6-13 governed conflicts between secured parties and distraining landlords, important goals of Article 9 might be thwarted. The distrait priority section interferes with the reliability of Article 9 as the exclusive source of the secured party's rights to collateral, and interpretive case law requires use of pre-Article 9 concepts and rules.

2. The Statutory Landlord's Lien

The chief problem with a landlord's lien of the variety contained in section 37-6-18 is the distinct possibility that under interpretative decisional law, it may come into existence as of the day the lease begins.72

A secured party searching the financing statement indices will have no occasion to believe that liens other than ones reflected in the financing statements index, the execution lien index or the tax lien index will have any effect on the property in which he is considering taking a security interest. The pernicious aspect of the statutory landlord's lien is that the landlord is obligated to do nothing to inform subsequent creditors of his claim against the property. This idea is absolutely repugnant to the philosophy of Article 9.73

If the lien of section 37-6-18 arises when the lease begins, a secured party will be able to ensure his priority status only by creating and, arguably, perfecting his security interest before the lease begins.74 Under the terms of

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79 There would seem to be nothing to prevent a court from authorizing a distress warrant after a rent claim has been pursued to judgment, or even authorizing the warrant provisionally so that levy could be made after notice and opportunity for hearing were accomplished. In that event, due process would be satisfied and, since the priority of a distress lien depends on whether the property was encumbered when carried on to the premises, the lien created by the distress statute would take priority over a competing security interest not perfected before the distrained property was carried on to the premises.


77 See supra note 24 and accompanying text.

72 Article 9 adopts the notice filing system. U.C.C. § 9-402, official comment 2.

74 Compare Chessport Millworks, Inc. v. Solis, 80 N.M. 265, 522 P.2d 812 (1974) with National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975). The controlling difference between these two cases is the time at which the security interest was perfected. Under New Mexico law, which, as West Virginia seems to do, dates a landlord's lien from the first day of the lease,
an after-acquired property clause in some jurisdictions, even doing this will not save him, as it is possible that the debtor may acquire rights in after-acquired inventory only after the lease has begun, and the security interest will not attach and be perfected until such time.75

Moreover, even if the landlord's lien under section 37-6-18 were to arise only when the tenant's property was brought on to the leased premises, a much more reasonable alternative, the secured party may still have to make sure that his security interest in such property was perfected before it arrived at the leased premises. This, in turn, presupposes an additional burden on the part of the secured party to ascertain in the first instance that the collateral would ultimately be placed on premises under lease. This burden could be significant given what must be the great volume of interstate secured transactions.

The statutory landlord's lien gives the lessor rights in specific property of the tenant while requiring the lessor to do nothing to obtain such rights. The secured party's lien, on the other hand, is a creature of contract. By exposing the secured party to the pitfalls and uncertainty of the statutory landlord's lien, the reliability of Article 9 as a necessary adjunct to credit extension decisions is jeopardized. Additional burdens are unnecessarily cast upon the secured party. The exclusive and preemptive nature of Article 9 is undermined.

V. Suggested Solutions

In Peterson v. Ziegler,76 an Illinois appellate court interpreted section 9-104(b) of the UCC to mean that Article 9 "does not govern the creation of a landlord's lien or the priorities between competing landlord's liens."77 However, the court observed:

In order for article nine to be the comprehensive statute that it was meant to be on the subject of consensual security interests, article nine must always supply a rule for determining the priorities between a consensual security interest and any other kind of lien. Thus, despite the language of section 9-104(b), it is proper to look to article nine for a rule of priority [between a security interest and a landlord's lien].78

The court in Peterson used UCC sections 9-301(1)(b) and 9-301(3) to resolve the priority as between a landlord's lien and an Article 9 security in-

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77 Id. at 385, 350 N.E.2d at 382.
78 Id.
terest.79 Thus, under state non-UCC law, the landlord in the case did not become a "lien creditor" until he obtained a judgment for rent, no matter that he obtained a distress warrant before that date.60 The landlord's "lien creditor" status arose several years after the secured party had the holder of a perfected security interest in the coveted asset of the debtor. Section 9-301(1)(b), by implication, awards priority to one who perfects his security interest before his competitor achieves "lien creditor" status.81

Peterson stands alone as the only reported decision that used Article 9 to resolve a priority battle between an Article 9 secured party and a competing landlord's lien. This approach has been urged before other courts, but never successfully before or after Peterson.82

It is submitted that the approach of the Peterson court has much to recommend itself. The prevailing view subjects security interests to the priority rules of the pre-UCC law of any one of forty-nine jurisdictions.83 Thus, by definition, the priority of the security interest will be judged under a scheme of rules developed when there were conditional sales contracts, chattel mortgages, trust receipts, pledges, equipment trusts, factor's liens, and a special body of law governing each of these arrangements.84 The very

79 Id.
80 Id. at 385, 350 N.E.2d at 361.
81 WHITE & SUMMERS, supra note 30, at § 25-2 at 1031 (1980): "Section 9-301 provides ... by negative implication that a perfected secured creditor beats a lien creditor."

Even the landlord may benefit under the Peterson v. Ziegler approach because, if he is treated as a lien creditor, he can avoid the seemingly automatic defeat saddled upon anyone challenging a security interest who cannot arm himself with a specific Article 9 provision awarding him priority. Those jurisdictions which do not apply Article 9 to priority contests between security interests and landlords liens ignore the clear mandate of UCC § 9-201: The secured creditor wins unless someone can beat him by holding one of the code-created class of interests that take priority over a security interest. This would have been an equally good rationale for the Peterson court had it desired to apply the UCC to the priority dispute but not desired to classify the landlord as a "lien creditor." It should be noted that if UCC § 9-201 is used to resolve a dispute between a secured party and a landlord lienor, even an unperfected secured party would prevail over a landlord lienor. On the other than, if UCC §§ 9-301(1)(b) and 9-301(3) are used to resolve such a dispute (which is the Peterson approach), only a previously perfected secured party would prevail over a landlord lienor. Compare UCC § 9-201 with UCC §§ 9-301(1)(b) and 9-301(c).

A close and confirmatory analogy to the approach of using UCC § 9-201 to resolve priority disputes between secured parties and landlord lienors is Continental Am. Life Ins. Co. v. Griffin, 306 S.E.2d 285 (Ga. 1983). In Griffin, the court used UCC § 9-201 to resolve a priority dispute between a secured party and the holder of a contractual right of setoff, despite that UCC § 9-104(g) seemingly provides that Article 9 does not apply to rights of setoff. The analogy to conflicts between landlord's liens and security interests is clear.

82 But see Beneficial Fin. Co. v. Van Shaw, 476 S.W.2d 772 (Tex. Civ. App. 1972), in which the court followed the majority view of U.C.C. § 9-104(b) but cited U.C.C. § 9-401(2) and awarded priority to the secured party on the basis of the landlord's actual knowledge of the contents of an improperly filed financing statement.
84 The laws governing the various kinds of security devices in a particular jurisdiction could and did differ in significant respects. Some pre-Code devices were available with
purpose of Article 9 was to unify and de-formalize secured transactions. The fate of the Article 9 secured party should not be determined by the rules of a bygone legal era, when the location of "title" decided cases: it is unbecoming of a court having any degree of understanding of the purpose of Article 9 to measure the Article 9 security interest by the legal rules of another time.

Moreover, because each state has its own view of how landlords ought to fare against others claiming an interest in the personal property of a tenant, the uniformity that is one of the Code's chief goals is undermined, if not defeated.

The drafters of Article 9, it may be assumed, consciously allocated risks, burdens and benefits among the persons whose legal relationships were to be governed by that body of law. To subject the secured party to the relative unknown of a state's pre-Code priority rules disrupts that allocation of risks, burdens and benefits. To do so may cause substantial, if not total, defeat of the legitimate expectations of the secured creditor. Further, it may dilute the reliability of Article 9 as a guide to the legal and financial soundness of a particular credit extension decision. This is especially true in the case of interstate credit transactions, where it may be difficult to determine applicable law.

The above criticisms are general in nature. However, they apply to the situation in West Virginia as well. To prevent the legal incongruence between Article 9 of the UCC and the West Virginia landlord's lien, one of the following things could be done.

The landlord's lien statutes could be amended in two ways. The first would require the landlord to file some sort of public notice that, by virtue of

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respects to some types of collateral but not for others. The steps required to create a security interest varied from device to device. So, too, the requirements for perfection. Remedies on default varied. Some laws included priority provisions and others did not. Not all differences between devices could be rationalized. Others were wholly without justification.

SPEIDEL, SUMMERS & WHITE, COMMERCIAL & CONSUMER LAW 82 (1981). See Bane, Chattel Security Comes of Age: Article 9 of the Uniform Commercial Code, 1 DEPAUL L. REV. 91 (1951); See In re Yale Express System, 370 F.2d 433 (2d Cir. 1966) for a court in tune with the Code's rejection of purely formal concepts such as "title" being determinative of substantive rights.

1 U.C.C. §§ 1-102(2)(c) and 9-102(1)(a).

2 Article 9 eschews "title." U.C.C. § 9-202. Justice Learned Hand had this to say about "title": "It seems to be a barren distinction, though indubitably true, that title does not pass upon a conditional sale; "title" is a formal word for a purely conceptual notion; I do not know what it means and I question whether anybody does, except perhaps legal historians." In re Lake's Laund,ry, 79 F.2d 326, 328-29 (2d Cir. 1935) (Hand, J., dissenting).

3 U.C.C. § 1-102(2)(c).

See the labyrinthine choice of law provisions of U.C.C. § 9-103. Of course, if the UCC does not apply in the situations covered by this article, then non-UCC choice of law rules may govern, further thwarting the intent of the Code.

his lease, he is claiming a landlord's lien under state law. The statute could be further amended to provide that any security interest perfected before the landlord's filing of such notice would be superior to the landlord's lien, regardless of the location of the property when the security interest was perfected. The statute could also be amended to provide that no landlord's lien could attach prior to the property's placement on the leased premises.90

This would eliminate two present problems. The first problem that would be avoided is the secured party's present inability to independently evaluate whether the prospective debtor's assets are subject to a landlord's lien until it is too late. The second consists in decisions such as United States v. Lawler91 and United States v. Waddill, Holland & Flinn, Inc.92 which create the legal fiction that the landlord's lien "relates back"93 to the day the lease began, regardless of when the property comes on to the premises. Thus, the secured party would have a more informed and rational foundation on which to make secured credit extension decisions, and would be on more of an equal footing with the landlord in the event of a priority dispute.

A second alternative would be to judicially or, preferably, legislatively include a landlord claiming a nonconsensual lien as a "lien creditor" within the meaning of UCC section 9-301(3)94 and amend the landlord's lien statutes to provide that notwithstanding any other law or court-made rule, a landlord's lien may not arise until the property against which the lien is asserted comes on to the leased premises.

This would in essence codify the approach of Peterson v. Ziegler95 and allow the court to treat the landlord as any other "lien creditor" for purposes of UCC priority resolution as of the day the tenant's property first came on to the leased premises.

A third approach, which is the most radical and theoretically appealing,

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90 This is directly contrary to those decisions which hold that the landlord's lien dates from the beginning of the lease and not just from the time the property is brought on to the premises. The conclusion that the landlord's lien does date from the inception of the lease is also supported by Note, supra note 1, at 43.
91 201 Va. 886, 112 S.E.2d 921 (1960).
92 182 Va. 351, 28 S.E.2d 771 (1944).
93 Id.
94 Peterson v. Ziegler, 39 Ill. App. 3d 379, 350 N.E.2d 356 (1976). It would seem that even under the majority view, if a court chose not to treat a landlord as a U.C.C. § 9-301(3) "lien creditor," neither would it use U.C.C. § 9-201 to award priority to the secured party. U.C.C. § 9-201, it will be recalled, provides a sort of "safety net" to the Article 9 security interest: unless a competing creditor can bring himself within the terms of a Code-created class of interests which take priority over a security interest, the security interest takes priority. See supra note 34 and accompanying text. A "lien creditor" currently includes persons who have "acquired a lien on the property involved by attachment, levy or the like..." U.C.C. § 9-301(3). It does not appear too difficult to understand this language to include a landlord lienor.
95 See supra note 76 and accompanying text.
is to completely repeal the landlord's lien statutes. This would place the landlord on a footing equal to that of any other creditor in the commercial world and make any lien in favor of the landlord a function of contract rather than a function of status. The history of landlord-tenant law shows that rules governing that legal relationship have developed into matters of contract from matters of somewhat reified property law. There is no inherent reason today why the law should confer less financial and legal risk on the landlord than on anyone else in the commercial world. If the landlord is to have a lien to secure rent obligations, perhaps he should have to bargain for it.

96 In Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1979) the West Virginia court joined the modern trend to treat leases of real property as essentially matters of contract. This represents a rejection of the authority of the hypostatized concepts of "property" or "estates in property" as raison d'être of the nonconsensual landlord's lien. Our landlord's lien statutes developed in feudal times, see St. 8 Anne, ch. 14, § 1, and carried forward to the common law of England and early America, when legal conceptualism and formalism reigned. See Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935). The historical reasons for the nonconsensual landlord's liens no longer exist. Indeed, the development of the law does and should evince a movement from status to contract; the landlord should not, merely by reason of his status as such, take priority over others who have extended credit to the tenant and acquired a consensual interest in the tenant's property as security.

If then we employ Status, agreeably with the usage of the best writers, to signify those personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

H. Maine, Ancient Law 174 (1906). Perhaps Maine's status-to-contract theory is applicable to the landlord tenant situation.