Natural Resources Journal

8 Nat Resources J. 2 *(Spring 1968)*

Spring 1968

The Warehouse vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest

Mark B. Thompson III

THE WAREHOUSEMAN VS. THE SECURED PARTY: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?

MARK B. THOMPSON, III*

Good Life and wife decide to make a temporary move to Panama City, and, anticipating that they will find a furnished apartment, they have their household goods stored by Bill Bailee & Sons, Moving & Storage Co. Included in these goods are various items, stereo, color TV, stove, freezer, etc., all purchased on "conditional sales," evidenced by notes and security agreements. Good and spouse default on their payments and Easy Finance Co., holder of the security interests in these various items, seeks possession from Bill Bailee & Sons.

Phil Fastbuck, owner of an appliance store, anticipates a great upsurge in sales of color TVs due to the advent of CATV. He puts in orders for 500 color sets and since he does not have room to stock them he makes an arrangement with Bill Bailee & Sons to store the sets when they arrive from the manufacturer. Some of the financing for these purchases was done through a local bank, the rest by the manufacturers. Instead of approving CATV, the City Commission builds a culture center and the bottom drops from the TV market. Phil defaults on his payments and the financing parties seek possession of the TV sets.

Query? Can Bailee retain the goods until the holders of the security interests pay the charges for storage? To put it another way, does the warehouseman's lien for the storage charges prevail over the security interest?[1]

The pre-Uniform Commercial Code statutes did not usually provide a method of determining the priority between the warehouseman's lien and the security interest, but the courts resolved the problem in favor of the secured party under most circumstances.[2] With

* Member of the New Mexico bar. (The author wishes to thank Miss Rosemary Trujillo, Santa Fe, for her help in preparing this article for publication.)

1. The legal concepts involved in these problems have application to various types of storage warehousing. But it should be made clear at the outset that the hypothetical problems indicate that the author is particularly concerned with the problems of the average practitioner who has to advise the "average" warehouseman or financing party.

2. See generally, 2 L. Jones, Chattel Mortgages & Conditional Sales 245, n. 44 (6th ed. 1933); Eager, Chattel Mortgages & Conditional Sales 611-12 (1941).

the enactment of the Uniform Commercial Code in New Mexico,[3] the legislature has established a starting point for lawyers attempting to resolve the hypothetical problems given above.

Section 9-310 of the Code provides:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

This section in effect provides a rule of statutory construction replacing the priority rules established by the courts prior to the Code.[4] Only security interests perfected after the effective date of the Code are affected.[5]

This Code section is intended to define the priorities between the security interest and all of the common law and statutory liens on personal property. Only one general New Mexico lien statute provides for priority for the security interest.[6] Some rules of priority are changed by the adoption of section 9-310.[7] Some of the problems could definitely use a very close analysis.[8]

---

3. The Uniform Commercial Code was enacted by the New Mexico Legislature in 1961 and became effective January 1, 1962. The New Mexico version, as originally enacted, is based on the 1958 Official Code text, but the legislature in 1967 enacted many amendments which bring New Mexico more into line with the 1962 Official Text. N.M. Laws 1967, ch. 186. The Code is codified as N.M. Stat. Ann. §§ 50A-1-101 to -9-507 (Repl. 1962), but for simplicity the citations will only refer to the Code section.

4. § 9-310, Comment 2; 2 Jones, Chattel Mortgages & Conditional Sales, *supra* note 2.

5. Diamond Trailer Sales Co. v. Munoz, 72 N.M. 190, 382 P.2d 185 (1963). See also, First Nat. Bank v. Bahan, 26 Ohio Op. 2d 429, 198 N.E.2d 272 (1964), which suggests that to apply § 9-310 to a security interest perfected before the Code would be an impairment of contracts in violation of U.S. Const. art. I, § 10.

6. Liens of innkeepers, livery stable keepers, lessors, agistors and feedlot operators. N.M. Stat. Ann. § 61-3-5 (Supp. 1965) as amended by N.M. Laws 1967, ch. 219. See also United States v. Traylor Bros, Inc., 245 F.2d 678 (7th Cir. 1957). The lien statute refers to "chattel mortgages" taking priority, not "secured interests." Should that make a difference? Not logically perhaps, but one court has thought so. See, Corbin Deposit Bank v. King, 384 S.W.2d 302 (Ky. 1964).

7. Diamond Trailer Sales Co. v. Munoz, 72 N.M. 190, 382 P.2d 185 (1963)—trailer court operator's lien, N.M. Stat. Ann. § 61-3-14 (Repl. 1960). Owen v. Waukesha Engine & Equip. Co., 74 N.M. 59, 390 P.2d 439 (1964); Southwest Engine Co. v. United States, 275 F.2d 106 (10th Cir. 1960); *see also,* Maulhardt v. J.D. Coggins., 60 N.M. 175, 288 P.2d 1073 (1955); Universal Credit Co. v. Printy, 45 N.M. 549, 119 P.2d 108 (1941)—mechanics lien, N.M. Stat. Ann. § 61-3-1 (Repl. 1960).

8. For example: the mechanic's and materialman's lien and the security interest in fixtures. *See* N.M. Stat. Ann. § 61-2-5 (Repl. 1960); N.M. Stat. Ann. §50A-9-313 (Repl.

A. THE STATUTORY WAREHOUSEMAN'S LIEN

1. The General Rule

The Uniform Commercial Code itself, in the article on documents of title, provides that "[a] warehouseman has a lien against the bailor on the goods covered by a warehouse receipt . . . ."[9] But this lien is only effective against a third party "who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid . . . ."[10]

The strange reference to pledges is certainly not a model of modern UCC draftsmanship. The comment to the section tells us that the special priority granted to statutory liens by section 9-310 does not apply to the warehouseman's lien of section 7-209(1) because section 7-209(3) expressly provides otherwise within the meaning of section 9-310.[11] Except in two states,[12] the general rule remains as it was before the adoption of the Code: the warehouseman's lien under 7-209(1) is subordinated to existing, perfected security interests in the goods, unless the secured party authorized or acquiesced in the bailment.[13]

2. When the warehouseman has actual knowledge of an unperfected security interest

Section 9-310 talks only about "perfected" security interests.

1962); Note, 4 Natural Resources J. 109 (1964). The landlord's lien, *see* N.M. Stat. Ann. § 61-3-4 (Repl. 1960); N.M. Stat. Ann. § 50A-9-104(b) (Repl. 1962). *See also,* Note 65 W.Va. L. Rev. 40 (1962). The agricultural landlord's lien; N.M. Stat. Ann. § 61-6-1 (Repl. 1960), United States v. Evans, 245 F.2d 681, 683 (10th Cir. 1957).

9. § 7-209(1).

10. § 7-209(3). The section concludes with the phrase "but [the lien] is not effective against a person as to whom the document confers no right in the goods covered by it under Section 7-503." An examination of § 7-503, which protects the "true owner" against the claim of a holder of the document of title, does not make it clear that this concluding phrase really adds anything to § 7-209(3). See, 2 G. Gilmore, Security Interests in Personal Property 889 (1965).

11. § 7-209, Comment 3.

12. Texas and California have both made changes in 7-209(3). Texas enacted a provision which amounts to a sweeping reversal of the general rule. The Texas legislature did not rewrite 7-209(3), but simply added to it, which should cause some interesting statutory interpretation problems. At the end of the Official Text, the Texas law adds the following sentence: "However, the warehouseman's specific lien for charges and expenses under subsection (1)(a) is effective against any security interest." The remainder of the new matter describes what the warehouseman must do to maintain his lien if he learns of the security interest. Tex. Laws 1965, ch. 721, § 7-209(3). California merely added an amendment in 1965 which apparently favors the lien on household goods. Cal. Comm. Code § 7209(3)(b) (West Supp. 1966). See also the recommendations by the Permanent Editorial Board of the UCC, note 45, infra, and accompanying text.

13. 2 G. Gilmore, *supra* note 10, at 890.

Does it automatically follow that the lien will prevail over an unperfected interest under all circumstances? (Expressio unius est exclusio alterius?) As appealing as that approach might be to counsel for a warehouseman with actual knowledge of an unperfected interest, it is hard to predict whether the courts will accept the argument.

It should be acknowledged that the question is not completely free of doubt. If in examining section 7-209(3) and Comment 3 to that section, the reader emphasizes the words "pledge" and "pledgee" he could come up with an interesting analysis. He might have some vague recollection that a pledge is a security device[14] and then ascertain that, as under the law of pledges, a secured party under the Code can perfect an interest in goods by taking possession.[15] Therefore, he would conclude, priorities would be determined by the Code section establishing priorities between security interests, section 9-312. If the case did not involve one of the special priority rules of that section, the residual rules of section 9-312(5) allow him to prevail even with actual knowledge of the prior, unperfected interest.[16]

As already pointed out above, the pre-Code law favored the secured party. Apparently the warehouseman had no better position than one who takes the goods in good faith, for value, and without notice (actual or constructive) of an existing interest.[17] In view of the fact that a pledgee is considered a purchaser under the Code,[18] it is likely that the Code retains the pre-Code view that the warehouseman has the same status as a purchaser.

It follows, therefore, that we must look to the Code section which establishes rules for "persons who take priority over unperfected security interests." Section 9-301 (1) (c) provides, in part, that an unperfected security interest in goods is subordinate to the rights of a person who is not a secured party and who is "a transferee in bulk or other buyer not in ordinary course of business to the extent that

14. *See generally,* 1 G. Gilmore, Security Interests in Personal Property 5-23 (1965).

15. § 9-305.

16. § 9-312, Comment 4; 2 G. Gilmore, *supra* note 10, at 895-902. Note! Use of 9-312 would be proper when the warehouseman takes a security interest under § 7-209(2), but we are limiting this discussion to the lien of § 7-209(1).

17. *See e.g.,* Albert Lifson & Sons v. Williams, 10 N.J. Misc., 982, 162 A. 129 (Dist. Ct. 1931); Wooten v. Carrollton Acceptance Co., 103 Fla. 237, 137 So. 390 (1931).

18. § 1-201(32) & (33).

he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected. . . ."[19]

To apply section 9-301(1)(c) to the warehouseman, each element of that section must be analyzed. To begin with, a transferee in bulk is merely one kind of buyer not in the ordinary course of business.[20] The warehouseman is by definition a buyer not in the ordinary course of business because he does not buy "in ordinary course from a person in the business of selling goods of that kind."[21] Since he performs a service by storing the goods he probably gives value for the exchange.[22] Therefore, according to the Code, a warehouseman's lien takes priority over an unperfected security interest only if the warehouseman has no knowledge or reason to know[23] of its existence. This analysis at least changes the rule of those pre-Code cases which held that the lien was subordinated even when the warehouseman had no actual knowledge of an unperfected interest.[24]

3. When the secured party gives actual or implied consent to the bailment of the goods

Under the general rule stated above, the warehouseman can prevail over a perfected security interest if the secured party consented to the bailment.[25] We arrive at this conclusion because 9-310 does not say otherwise,[26] and this was the law before the Code.[27] The principles of law and equity supplement the Code unless displaced by a particular provision.[28]

Authorization or consent by the secured party can be a written statement that the goods are stored with the consent of the secured party[29] or by express consent given to the debtor-bailor.[30] Implied consent can be the acceptance of an assignment of the warehouse

19. § 9-301(1)(c).

20. *See* § 6-102.

21. § 1-201(9).

22. § 1-201(44)(d): "[A] person gives 'value' for rights if he acquires them . . . in return for any consideration sufficient to support a simple contract."

23. § 1-201(25).

24. *See e.g.*, Knoxville Outfitting Co. v. Knoxville Fireproof Storage Co., 160 Tenn. 203, 22 S.W.2d 354 (1929); Jersey Security Co. v. Lottimer, 20 N.J. Misc. 432, 28 A.2d 623 (1943).

25. 2 G. Gilmore, *supra* Note 10, at 890 and accompanying text.

26. *Id.*, at 887.

27. *See generally*, 2 L. Jones, Chattel Mortgages & Conditional Sales, *supra* note 2.

28. § 1-103; Clovis Nat. Bank v. Thomas, 77 N.M. 554, 563, 425 P.2d 726, 732 (1967).

29. Schmidt v. Bekins Van & Storage, 27 Cal. App. 667, 155 P. 647 (1915).

30. Zahner Mfg. Co. v. Harnish, 224 Mo. App. 870, 24 S.W.2d 641 (1930).

receipt from the debtor-bailor,[31] a request to the debtor-bailor that the goods be stored,[32] or a request to the warehouseman that the latter hold the goods subject to the security interest.[33] Or, a court might find implied consent if the secured party admits that "it allowed all its debtors to place goods covered by a security agreement in storage, and doesn't really care, so long as it gets its money."[34] The Code may disallow proof of a usage of trade or course of dealing between the secured party and the debtor-bailor prior to the security agreement as establishing implied consent.[35]

4. Consumer goods vs. inventory

The hypothetical problems posed at the beginning of the article represent two very common types of situations involving the average moving and storage company. The Code differences between "consumer goods" and "inventory" present not only different legal problems, but also practical problems for the warehouseman who wants to protect himself as much as possible.

The goods involved in the second hypothetical problem would be classified as "inventory" under the Code.[36] A security interest in inventory is perfected by filing[37] in the office of the county clerk in the county of the debtor's residence, at least under the facts given by the hypothetical.[38] For a shipment as large as Phil Fastbuck's, the warehouseman might find it advisable to search the record. He could then approach the secured party for written consent for the bailment, at least in the cases where the latter is the local bank or loan company.

Of course, New Mexico is primarily a consuming state and Phil Fastbuck had to buy his goods in other states. As noted, some of the sellers provided their own financing in our hypothetical. Under the usual circumstances it would probably be understood that the property would be kept in this state and would have to be perfected in this state.[39] If the out-of-state financing party did not file, he is

31. Rhoads v. Walsh, 48 Pa. Super. 465, 468 (1912).

32. Pacific Storage Warehouse & Distrib. Co. v. Bjorklund, 188 Wash. 269, 62 P.2d 39 (1936).

33. Buckley-Newhall Co. v. Bangs, 130 Misc. 293, 224 N.Y. Supp. 71 (1927).

34. *Cf.* Clovis Nat. Bank v. Thomas, 77 N.M. 555, 560, 425 P.2d 726, 729.

35. § 1-205(6). Clovis Nat. Bank v. Thomas, 77 N.M. 555, 569, 425 P.2d 726, 736 (Carmody, J., dissenting).

36. § 9-109(4).

37. § 9-302(1).

38. § 9-401(1)(a). The 1967 amendments to § 9-401 have no bearing on this problem. See N.M. Laws 1967, ch. 186, § 26.

39. § 9-103(3).

out of luck as long as the warehouseman has no actual knowledge of the interest. If under any circumstances a security interest in goods was already perfected in another state before it was brought into this state, then it would remain perfected for four months.[40]

The goods in the first hypothetical would be classified as consumer goods.[41] A purchase money security interest[42] in consumer goods could be perfected without filing, but a non-purchase money interest must be filed to be perfected.[43] The warehouseman is not going to be able to spend much time or money avoiding conflicts with either purchase money or non-purchase money security interests in consumer goods. California solved the problem by changing its version of 7-209(3), making the lien on household goods effective against all persons if the depositor was the *legal possessor* of the goods.[44] The Permanent Editorial Board for the Uniform Commercial Code has now followed California and recommended that all the states amend section 7-209(3) to provide the exception for household goods.[45]

5. The storage in transit problem

We cannot leave the question of household goods without taking note of an additional problem which might seem outside the scope of an article on the warehouseman's lien. To change the facts of the first hypothetical, suppose Good Life and family were only moving from Raton to Tyrone and did not yet have a home in Tyrone. In such a case, the goods could be picked up under a bill of lading providing for storage in Raton and shipment as soon as the shipper had a home. (Known in the trade as storage in transit, origin. [SIT].)

If there was a default and attempted "repossession" before the goods left Raton, Bill Bailee would not claim a lien as a warehouse-

40. *Id.* Add an element of fraud to the problem and you can always come up with a problem that does not seem to have a ready answer. Suppose Crook buys widgets in Illinois, loads them in his rented truck, telling the seller-secured party that he is taking them to his business in California. The secured party dutifully files his financing statement in California. In fact, Crook intends to smuggle the widgets into Mexico where the black market is very good. Crook stops in Alamogordo, N.M., and places the widgets in storage, telling the warehouseman that he is opening a business there. The warehouseman dutifully searches the Otero County records and naturally finds no security interest covering the goods. Crook loses his nerve and never returns for the goods. When the seller finds them, does he have to pay the storage charges?

41. § 9-109(1). Note, however, what a warehouseman calls "household goods," might not always be "consumer goods."

42. § 9-107.

43. § 9-302(1)(d).

44. Cal. Comm. Code § 7209(3) (b) (West Supp. 1966).

45. UCC Permanent Editorial Bd., Report No. 3 pp. 6-7 (1967).

man, but would claim a lien as a common carrier.[46] Unlike the warehouseman, the common carrier prevails over a perfected security interest in the goods so long as he had no actual knowledge of the bailee-debtor's lack of authority to ship the goods.[47]

B. THE WAREHOUSEMAN'S COMMON LAW LIEN

Section 7-209(1) indicates that the statute creates a lien *only when the goods are covered by a warehouse receipt.* What happens if the bailment is oral or there is merely an inventory list, etc.?[48] The Uniform Warehouse Receipts Act (UWRA) section 27, which was in force in New Mexico prior to the Code,[49] was much broader. It gave a lien "on goods deposited" with the warehouseman.[50]

California is apparently the only state to enact a different version of section 7-209(1). The legislature there decided to retain the use of the "goods deposited" language of the UWRA.[51] The California Code Comments indicate a belief that the warehouseman would not have a lien under the official Code version if he does not issue a receipt.[52] It may be just as reasonable to conclude that the warehouseman would have a common law lien on goods for which no receipt was issued.

To begin with, there is authority for the proposition that a common law lien arises if the bailment is oral and the lien statute only covers a bailment under a written memo.[53] Furthermore, courts have often had to turn to the common law when the lien statutes and the personal property security statutes did not resolve conflicts between themselves.[54]

In New Mexico, we can clinch the argument for the supplementary common law lien by applying the rules of statutory construction. One such rule holds that if a statute does not cover the whole ground

46. § 7-307(1).

47. § 7-307(2) and Official Comment. *See also,* 2 G. Gilmore, *supra* Note 10, at 890-92.

48. The definition of warehouse receipt is probably broad enough to cover many writings which are not titled "warehouse receipt." Some cases could hang on this definition. *See,* § 1-201(45).

49. N.M. Laws 1909, ch. 38, § 27, compiled as N.M. Stat. Ann. § 50-8-27 (1953), repealed by N.M. Laws 1961, ch. 96, § 10-102.

50. Uniform Warehouse Receipts Act § 27 (act withdrawn 1962).

51. Cal. Comm. Code § 7209 (1) (West Supp. 1966).

52. Cal. Comm. Code § 7209, California Code Comment 5 (West Supp. 1966).

53. Mack Motor Truck Corp. v. Wolfe, 303 S.W.2d 697, 700 (Mo. App. 1957).

54. Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, 560, 18 P.2d 351, 353 (1933); Reeves & Co. v. Russell, 28 N.D. 265, 148 N.W. 654 (1914); City Nat'l. Bank v. Laughlin, 210 S.W. 617, 618 (Tex. Civ. App. 1919).

occupied by the common law, the statute pre-empts only the part specifically covered.[55] Then, there is the old standby, statutes in derogation of the common law are strictly construed.[56] Finally, under the Uniform Commercial Code, rules of law and equity supplement the Code unless displaced by a particular provision.[57]

These rules of construction only help us if there was a warehouseman's lien at common law. One English treatise writer apparently includes the warehouseman's lien in his general definition:

> It is laid down as a general rule, that whenever anyone is obliged to receive goods, to perform any duty on them, he has a lien on them at common law. For as that imposes the burthen, it also gives him the power of retaining for his indemnity.[58]

Two other early works on bailments do not emphasize the warehouseman's lien in their general discussion,[59] but a later general work on liens does contain a section of the common law specific warehouseman's lien.[60]

Though the warehouseman's lien may have been a relative newcomer, the Supreme Court of Pennsylvania in 1844 said that on principle, there was no reason why a warehouseman should not have the same lien as that of a carrier.[61] A recent case expressed the opinion that before the Uniform Warehouse Receipts Act was drafted, the warehouseman had at least a specific lien for storage charges enforceable against the goods to which the charges applied.[62] In any event, ample authority establishes the warehouseman's common law specific lien.[63]

---

55. Ex parte De Vore, 18 N.M. 246, 259, 136 P. 47, 51 (1913).

56. State ex rel. Miera v. Chavez, 70 N.M. 289, 373 P.2d 533 (1962); Hinds v. Velasquez, 63 N.M. 282, 317 P.2d 899 (1957); El Paso Cattle Loan Co. v. Hunt, 30 N.M. 157, 228 P. 888 (1924).

57. *See* note 28, *supra.*

58. Jeremy, Carriers, Inn-Keepers, Warehouseman and other Depositories of Goods For Hire 69 (1816).

59. See Jones, Bailments (app.) 49-54 (1836) and Story, Bailments 587 (4th ed. 1846).

60. Jones, Liens 981 (3rd ed. 1914).

61. Steinman v. Wilkins, 7 W. & S. (Pa.) 466, 468 (1844).

62. Harbor View Marine Corp. v. Braudy, 189 F.2d 481, 484 (1st Cir. 1951).

63. Stewart v. Naud, 125 Cal. 596, 58 P. 186 (1899); Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, 559, 18 P.2d 351, 352; Cole v. Tyng, 24 Ill. 100, 104 (1860); Alden & Co. v. Carver, 13 Iowa 253 (1862); Stallman v. Kimberly, 6 N.Y. 706, 707 (Supp. Ct. 1889); Sage v. Gittner, 11 Barb. (N.Y.) 120, 124 (Sup. Ct. 1951); Schmidt v. Blood, 9 Wend. (N.Y.) 268, 271 (Sup. Ct. 1832); Rhoades v. Walsh, 48 Pa. Super. 465, 468 (1912); George v. Bekins Moving & Storage Co., 53 Wash. 430,

The reader has probably lost sight of why this legal history was important. Counsel for the warehouseman must convince the court that the warehouseman has a lien given by rule of law when the storage is made without the issuance of a warehouse receipt. In such a case, the warehouseman's lien takes priority over a perfected security interest covering the same goods under the terms of section 9-310. This again assumes that the warehouseman took the goods in good faith, *i.e.*, without actual knowledge of the security interest.[64]

431, 102 P. 23, 24 (1909). One case is digested as holding a contrary position. *See,* Mack Motor Truck Corp. v. Wolfe, 303 S.W.2d 697, 702 (Mo. App. 1957). The case did not involve a warehouseman, but an artisan who wanted a lien for both his repairs and storage.

64. §§ 1-201(19) & 1-203. See also, Farnsworth, Good Faith Performance and Commercial Reasonableness Under The Uniform Commercial Code, 30 U. Chi. L. Rev. 666 (1963); Note, 23 U. Pitt. L. Rev. 754 (1962).