

# Toward a Satisfactory Fixture Definition for the Uniform Commercial Code

Robert L. Magielnicki

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## TOWARD A SATISFACTORY FIXTURE DEFINITION FOR THE UNIFORM COMMERCIAL CODE

Section 9-313, the primary fixture-security provision of the Uniform Commercial Code,<sup>1</sup> sets forth the priorities between a party with a security interest in a fixture and a person having an interest in the real estate to which the fixture is attached. The section is inadequate<sup>2</sup> because it fails to define the term "fixture;" instead, it provides that "[t]he law of this state other than this Act determines whether and when . . . goods become fixtures."<sup>3</sup>

The UCC creates three classes of goods used in association with real estate. (1) Goods that are used upon the realty but in which no purchaser or encumbrancer of the real estate obtains any interest. Such goods are personalty or chattels, and security interests in them are governed by sections of Article 9 other than section 9-313.<sup>4</sup> (2) Goods that are used in such close connection with the real estate as to become "incorporated into" it. Such goods are considered to be real estate, and security interests in them are unavailable under the UCC. (3) Goods that are "affixed" to the real estate so as to become "fixtures," and thus a part of the realty, but which can be severed from the realty and returned to the status of chattels if the proper "priority" has been obtained;<sup>5</sup> security interests in them can be maintained under section 9-313. The Code does not clearly separate these categories. It draws only a rough line between fixtures and real estate, providing that goods that have become realty are "incorporated into a structure in the manner of lumber, bricks, . . . metalwork and the like . . ."<sup>6</sup> The more

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<sup>1</sup> For the text of § 9-313 see Appendix A *infra*. All citations to the Uniform Commercial Code [hereinafter cited as UCC or Code] are to the 1966 Official Version.

<sup>2</sup> The list of those who have criticized § 9-313 includes some of its draftsmen. Coogan, *Fixtures—Uniformity in Words or in Fact?*, 113 U. PA. L. REV. 1186 (1965) [hereinafter cited as Coogan]; Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962) [hereinafter cited as 75 HARVARD]; Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44 (1964). See also Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788 (1964).

The Article 9 Review Committee has proposed a revision of the section. REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, *Fixtures* (Preliminary Draft No. 1, November 20, 1968). For its text see Appendix B *infra*.

<sup>3</sup> UCC § 9-313(1).

<sup>4</sup> E.g., UCC §§ 9-301, 9-312.

<sup>5</sup> See Coogan at 1190.

<sup>6</sup> UCC § 9-313(1).

critical line, that between fixtures and chattels, is to be drawn by "[t]he law of this state other than this Act."<sup>7</sup>

Accurate definition of these categories is crucial to the creditor holding a security interest in goods that may or may not be fixtures. The perfection requirements are different for each class of property,<sup>8</sup> and only proper perfection protects a security interest against the debtor's other creditors. Failure to perfect may result in loss of the security interest<sup>9</sup> and a reduction in status to that of general creditor, an unacceptable risk to one willing to furnish goods or credit only on a secured basis.<sup>10</sup>

## I

### THE LAW OF THIS STATE . . .

In relying on the law of each state for the definition of "fixture," the Code abandons the uniformity it establishes in other aspects of chattel financing.<sup>11</sup> This would create relatively minor inconveniences if each state had a workable fixture definition, but there is no uniformity among the states, and the cases within a given state are often in irreconcilable conflict. In many states, whether a good has become a fixture is decided under the "intention test" of *Teaff v. Hewitt*.<sup>12</sup> Although it purports to ascertain the intent of the one affixing goods to

<sup>7</sup> *Id.*

<sup>8</sup> No UCC security interest in real estate is possible, and the creditor must look to his state's real property law to obtain a mortgage or materialman's or mechanic's lien. The Code provides different filing requirements for fixtures (§ 9-401(1)(b)) and chattels (§ 9-401(1)(c)).

<sup>9</sup> For a demonstration of the worthlessness of improper filing against a trustee in bankruptcy, see *In re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961); *In re Luckenbill*, 156 F. Supp. 129 (E.D. Pa. 1957).

<sup>10</sup> The recent growth of interstate credit through large metropolitan banks and nationwide credit systems is an additional reason for a clear and uniform definition of "fixture." Forcing such lenders to rely on the non-uniform fixture law of the several states, especially when fixture law is often unsettled within a state, may hamper interstate credit transactions.

<sup>11</sup> The Code's primary objectives are "to simplify, clarify and modernize the law governing commercial transactions" (UCC § 1-102(2)(a)) and "to make uniform the law among the various jurisdictions" (UCC § 1-102(2)(c)).

<sup>12</sup> 1 Ohio St. 511, 59 Am. Dec. 634 (1853). The court stated the "intention test" in this manner:

[T]he united application of the following requisites will be found the safest criterion of a fixture.

- 1st. Actual annexation to the realty, or something appurtenant thereto.
- 2d. Appropriation to the use or purpose of that part of the realty with which it is connected.
- 3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the *party* making the an-

real estate, the *Teaff* test is really objective. The outcome depends primarily on a jury's unguided weighing of a number of facts in an effort to determine an ordinary person's expectations in the circumstances, and the results are inconsistent and unpredictable.<sup>13</sup>

A more basic problem is that a number of states do not use the term "fixture" in the Code sense. In these states only two types of property, realty and personalty, are recognized; the tripartite division of property contemplated by section 9-313 is completely unfamiliar.<sup>14</sup> "Fixture" is used, not to describe a special class of property attached to the real estate but severable under proper circumstances, but to express the legal conclusion that the goods have become a non-removable part of the realty.<sup>15</sup>

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nexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

*Id.* at 529-30, 59 Am. Dec. at 644-45 (emphasis in original).

*Teaff* has been referred to as "the leading American case on the law of fixtures." 75 HARVARD at 1344.

<sup>13</sup> See 5 AMERICAN LAW OF PROPERTY § 19.3, at 17 (A. Casner ed. 1952).

<sup>14</sup> In Massachusetts a legislative attempt to create a tripartite system was foiled by the courts. Under *Clary v. Owen*, 81 Mass. (15 Gray) 522 (1860), all property added to real estate after a mortgagee acquired his interest inured to the mortgagee. The harshness of the *Clary* rule led some courts to find for the conditional seller by holding that the goods had never become fixtures, and "in time Massachusetts law became notable for the extraordinary subtlety of the distinction between fixtures and personalty." Gilmore, *supra* note 2, at 1357. The legislature attempted to inject some order into the area by allowing conditional sales of certain goods even if they were to be "wrought into or attached" to real estate. Ch. 271, [1912] Mass. Acts & Resolves 183. This statute was crippled by judicial narrowing of the class of goods to which it applied and by holdings that it did not protect against prior real estate interests. *Coogan* at 1209. Conditional vendors therefore continued to rely on findings of fact that goods remained personalty. *Id.* at 1210.

<sup>15</sup> "A removable fixture as a term of general application, is a solecism—a contradiction in words." *Teaff v. Hewitt*, 1 Ohio St. 511, 524, 59 Am. Dec. 634, 640 (1853).

California, with only two categories of property, refused to enact § 9-313:

[C]ourts attach the label "fixture" to an object when they have decided that the owner of an interest in the land should prevail, and they attach the label "personalty" . . . when they have decided that the owner of an interest in the object apart from the land should prevail; and they may attach both labels to exactly the same object in different circumstances . . . .

. . . [W]hat the Code asks the judge to do is to decide in the abstract over "existing law" whether an object is a "fixture," and the Code will then tell him . . . [who] will prevail . . . . But under the only existing law that there is, an answer to the first question answers the second also . . . .

It would probably be a great advance in the law if the law of fixtures could be codified and separated into two distinct problems: A factual classification of an object as a "fixture," . . . and . . . a statement of the legal results . . . which follow from such a classification. *It is impossible, however, to do only half of this job without making a greater mess than there was before.* . . . [T]his Section would only "add to the confusion" of the California law of fixtures (which is not unique in that regard).

CALIFORNIA SENATE FACT FINDING COMMITTEE ON THE JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, Part I, The Uniform Commercial Code 578 (1959-61) (emphasis added).

It is not clear how the non-Code law of these states can help courts determine into which of the three classes of property established by the Code an item falls. The policy reasons for labelling certain collateral as either realty or personalty in a situation where there was no provision for notice to real estate interests may no longer be valid under the Code with its filing provisions.<sup>16</sup>

Even in states that had the tripartite division of property contemplated by the Code, reference to the law of the state for a fixture definition is confusing and inadequate. This category of states is best typified by those jurisdictions that adopted the Uniform Conditional Sales Act (UCSA).<sup>17</sup> Section 7 of the UCSA, the model for section 9-313,<sup>18</sup> permitted removal of goods affixed to realty if there had been a proper filing and if the goods could be severed "without material injury to the freehold." Interpretations of this phrase varied, however, despite the drafters' assertion that it included only physical injury, such as would be caused by the removal of structural materials.<sup>19</sup> In Pennsylvania the "material injury" test was really one of economic, rather than physical, injury. Pennsylvania courts resurrected the "industrial plant mortgage doctrine" of *Voorhis v. Freeman*: "[w]hether fast or loose . . . all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold."<sup>20</sup> The doctrine was not limited to "manufactories," but was eventually applied to a private house, an office building, an apartment house, a restaurant, and a stone quarry.<sup>21</sup> Similarly, New Jersey's "institutional test" adopted an economic definition of "material injury." Under it, there was material injury, and hence irremovability, whenever removal of the goods would impair the economic "integrity" of the enterprise, even though the severance would cause no physical damage.<sup>22</sup>

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<sup>16</sup> The concern that courts have shown in regard to the notice issue is evident in a case such as *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 19 N.E.2d 273 (1939). In that case the court allowed a subsequent purchaser of the realty, who happened also to be a prior mortgagee, to prevail over the conditional vendor of a furnace. However, the decision might have been different had there been a means by which the furnace company could have filed its conditional sales contract in the real estate records. *See id.* at 55-56, 19 N.E.2d at 276.

<sup>17</sup> 2 U.L.A. 1-42 (1922). The UCSA was adopted in only 11 states. 2 U.L.A. 9 (Supp. 1967).

<sup>18</sup> 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 801 (1965) [hereinafter cited as GILMORE]; Kripke, *supra* note 2, at 46.

<sup>19</sup> *See* 2A U.L.A. 98-99 (1924).

<sup>20</sup> 2 W. & S. 116, 119, 37 Am. Dec. 490, 493 (Pa. 1841).

<sup>21</sup> Leary, *Financing New Machinery for Mortgaged Pennsylvania Industrial Plants*, 4 VILL. L. REV. 498, 523 (1959).

<sup>22</sup> Gilmore, *supra* note 2, at 1360. *See also* Coogan at 1218-19.

It seems that section 9-313 has abolished these doctrines as they apply to removability.<sup>23</sup> The section eliminates the "without material injury" phrasing; a fixture-secured party with the proper priority can remove his collateral regardless of the injury to the real estate, provided that he is willing to reimburse the holder of any real estate interest who is not the debtor for the cost of repairing any physical damage caused by the removal.<sup>24</sup> Also, section 9-313 narrows the class of irremovable goods to only those "incorporated into" a structure; under the plant mortgage doctrine physical affixation of the goods was irrelevant.<sup>25</sup> Although New Jersey's test always required a minimum of some physical affixation, the Code has abolished its economic test.

Fixture cases that have arisen under the Code demonstrate the inadequacy of state fixture law. In *United States v. Baptist Golden Age Home*<sup>26</sup> the court decided that carpeting was equipment but admitted that it was "capable of being construed as a fixture."<sup>27</sup> The court in *In re Park Corrugated Box Corp.*<sup>28</sup> employed the pre-Code economic injury<sup>29</sup> and intention tests,<sup>30</sup> despite the Code's emphasis on physical attachment. One court employed other Code provisions to avoid having to attempt to ascertain, through the use of confusing state law, the applicable definition of "fixture." *In re Collier*<sup>31</sup> held that an oil-fired boiler and burner used in a dry-cleaning establishment was "equipment" under section 9-109(2).<sup>32</sup> Equating the term "equipment" with "chattel," the referee in bankruptcy held that it should have been pro-

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<sup>23</sup> Pennsylvania: Gilmore, *supra* note 2, at 1397. New Jersey: *id.* at 1397.

<sup>24</sup> UCC § 9-313(5).

<sup>25</sup> Compare *Vail v. Weaver*, 132 Pa. 363, 19 A. 138 (1890) (an engine and electric dynamo firmly affixed to prepared foundations in a factory building were personality because their purpose was to light an opera house across the street), with *First Nat'l Bank v. Reichneider*, 371 Pa. 463, 476, 91 A.2d 277, 282 (1952) (dissenting opinion) (beer kegs that constantly went in and out of the brewery were fixtures).

Arguably, § 9-313 uses physical affixation as the major determinant of when goods becomes fixtures. See *Coogan* at 1190.

<sup>26</sup> 226 F. Supp. 892 (W.D. Ark. 1964).

<sup>27</sup> *Id.* at 903. Since the conditional seller had failed to perfect his interest for either equipment or a fixture, the decision is correct. But it is of little assistance in defining the term "fixture."

<sup>28</sup> 249 F. Supp. 56 (D.N.J. 1966). The court held that a corrugated box manufacturing machine weighing 45,000 pounds and bolted to the floor was not a fixture.

<sup>29</sup> The court's "institutional doctrine" determined "whether the chattel is permanently essential to the completeness of the structure or its use." *Id.* at 58.

<sup>30</sup> The court's "traditional test" is simply a restatement of the intention test of *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634 (1853). See note 12 *supra* and 249 F. Supp. at 58.

Another Code case that used the "intention test" to determine what is a fixture is *In re Particle Reduction Corp.*, 5 UCC REP. SERV. 242 (E.D. Pa. 1968) (referee's opinion).

<sup>31</sup> 3 UCC REP. SERV. 1076 (E.D. Tenn. 1966) (referee's opinion).

<sup>32</sup> "Goods are 'equipment' if they are used or bought for use primarily in business." TENN. CODE ANN. § 47-9-109(2) (1964) [UCC § 9-109(2)].

perly filed as such in order to prevail against a trustee in bankruptcy,<sup>33</sup> and that therefore the fixture filing was ineffective.<sup>34</sup>

## II

### ALTERNATIVES TO A DEFINITION

Some commentators believe that if the filing requirements are changed, no definition of "fixture" will be needed. For example, Professor Shanker suggests that a security interest in fixtures should be considered perfected only when filings are made in both the chattel records and the real estate records.<sup>35</sup> This is unsatisfactory for a number of reasons. First, in some states triple rather than double filings in different places would be required;<sup>36</sup> such multiple filings can be time-consuming and expensive. Second, even where a party has made multiple filings, a definition may still be necessary because section 9-313 requires reimbursement for any damage done to the realty in removing a fixture, while there is no corresponding duty of reimbursement for incidental damage done in removing a chattel covered by a security agreement. "It is easy to imagine cases where the secured party, to avoid the reimbursement requirement, can argue plausibly that the goods are not fixtures, while the real estate encumbrancer can, with equal plausibility, argue that they are."<sup>37</sup> Finally, Professor Shanker's proposal is based on the specious assumption that everyone filing security interests in goods that are not unmistakably chattels will file twice. The first time a creditor with a security interest in questionable collateral files only once, confident that the article is a chattel, and then comes into conflict with a real estate encumbrancer or trustee in bank-

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<sup>33</sup> TENN. CODE ANN. § 47-9-401(1)(c) (1964), an adaption of the second alternative subsection (1) to UCC § 9-401, required a filing in the office of the Secretary of State.

<sup>34</sup> The decision may rest on a theory of estoppel, since the sales contract referred to the boiler as "equipment" and "personal property." 3 UCC REP. SERV. at 1077. For an example of the use of estoppel under similar circumstances, see *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 25 Conn. Supp. 327, 338, 203 A.2d 441, 446 (1964).

<sup>35</sup> See Shanker, *supra* note 2, at 796-97.

<sup>36</sup> In states that have adopted the third alternative subsection (1) to UCC § 9-401, the financing statement would have to be filed for a fixture in the office where a mortgage on the real estate would be filed or recorded (UCC § 9-401(1)(b)) and filed for a chattel in the office of the Secretary of State and in addition in the office of the county clerk if the debtor has a place of business in only one county of the state, or if he has no place of business in the state but resides in the state (UCC § 9-401(1)(c)).

There is, in addition to filing requirements, the requirement of § 9-402(1), which provides that a financing statement covering fixtures must "contain a description of the real estate concerned."

<sup>37</sup> 2 GILMORE at 824.

ruptcy who claims that the collateral is a fixture, this solution is useless—the court will have to determine whether the article is a fixture.

Professor Kripke,<sup>38</sup> with the concurrence of Professor Gilmore,<sup>39</sup> suggests that a single filing in the chattel records should be sufficient to protect all security interests in both chattels and fixtures against purchasers of the collateral and personal creditors of the debtor. If the fixture-secured party desires protection against persons interested in the real estate, an additional filing or indexing into the real estate records, called “real estate notification,”<sup>40</sup> should be required. This proposal is open to the same criticism as Professor Shanker’s; if a secured party files only once, confident that his collateral is a chattel, and then comes into conflict with a real estate interest claiming that it is a fixture, the court must still define “fixture.” In addition, as Professor Kripke notes,<sup>41</sup> his proposal raises the question of whether a filing that is good against the debtor’s personal creditors but not against real estate interests in the land to which the fixture is attached would be good against the debtor’s trustee in bankruptcy. He concedes that an amendment to the Bankruptcy Act may be necessary—a proposal that raises a host of entirely new considerations.

### III

#### PROPOSED DEFINITIONS

An adequate solution to the fixture problem requires a clear and workable definition of the term “fixture.” The Article 9 Review Committee has proposed a revision of the fixture provisions of the UCC that employs the definitional approach in its solution of the problem.<sup>42</sup> The text of this proposal [hereinafter referred to as *Revision*] is set forth in Appendix B.

In seeming to distinguish between the concept of a fixture under the Code and under the other law of the state, section 1(a) of the *Revision* makes a good start. The UCC is concerned with what is a fixture only for the purpose of protecting security interests in goods that are in some way attached to the realty; for the sake of clarity and uniformity, it should ignore confusing and inconsistent state law that was formulated for other purposes and with other policy objectives in mind.<sup>43</sup> But in section 1(b)(i), the *Revision* embraces what it seemingly

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<sup>38</sup> Kripke, *supra* note 2, at 57.

<sup>39</sup> 2 GILMORE at 820-21.

<sup>40</sup> Kripke, *supra* note 2, at 60.

<sup>41</sup> *Id.* at 58.

<sup>42</sup> See note 2 *supra*.

<sup>43</sup> See 75 HARVARD at 1348.

rejects in section 1(a). Instead of breaking with the confusion and uncertainty that plagues present fixture law, the provision continues to look to the law of each state.<sup>44</sup>

The sentence in section 1(b)(i) relating to "readily removable" machines and replacements of domestic appliances is unclear and is a possible source of confusion. Nowhere in the section or in the comments is the phrase defined. At best, courts will disagree as to when a machine or appliance is "readily removable;" at worst, the phrase will be treated as "without material injury" in section 7 of the UCSA was treated by the Pennsylvania and New Jersey courts.<sup>45</sup> In addition, there seems to be no reason for limiting the provision relating to domestic appliances to "replacements." Surely, whether a particular item is a fixture or not should not depend upon whether it is an original or a replacement.

Section 1(b)(i) of the *Revision* expands the list of items that are considered "ordinary building materials," and thus not fixtures, when incorporated into a structure on the land. This expansion clarifies the class of goods that, when so incorporated, becomes realty, but it remains unclear whether incorporated building materials are the *only* types of goods in which a UCC security interest cannot be maintained.

A definition better than the *Revision's* has been proposed by Mr. Coogan<sup>46</sup> (the text is set forth in Appendix C). His proposal is a good one because it defines each of the three classes of property contemplated by section 9-313, but it can be improved by engrafting upon it certain parts of the *Revision*. Such a combination results in the most effective definition, and a suggested text is set forth in Appendix D.

Subsection 1(a) of the suggested definition (hereinafter referred to as *Suggestion*) is basically section 1(a) of the *Revision*. This is one of the strong points of the *Revision* which is lacking in the Coogan definition. It makes a clean and badly needed break with non-Code fixture law by asserting that a "Code fixture" is a unique concept which neither is affected by the real property law of a state nor affects that law any more than is absolutely necessary.

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<sup>44</sup> The first sentence of § 1(b)(i) is a verbose restatement of the same provision in the 1952 version of § 9-313(1), which read in pertinent part:

(1) When under other rules of law goods are so affixed or related to the realty as to be a part thereof, a security interest in such goods which attaches before they become part of the realty takes priority as to such goods over the claims of all persons who have an interest in the realty . . . .

UCC § 9-313(1) (1952). The change from the 1952 phrasing to the word "fixture" in the present § 9-313(1) was "primarily for clarification" (2 GILMORE at 808) and did not make any substantive change in the section. Now the provision has come full circle—returning to what is essentially the 1952 wording for clarification.

<sup>45</sup> See text accompanying notes 20 & 22 *supra*.

<sup>46</sup> Coogan at 1226-27.

*Suggestion* subsection 1(b) sets forth the definition of "incorporated" goods, which become realty and in which a security interest cannot be maintained. It strives for a concise statement of the applicable rule and precise definitions of the key terms so as to leave no room for misunderstanding. It avoids the verbosity of subsection 1(a) of the Coogan proposal, which is really more a list of relevant factors than a definition. *Suggestion* subsection (1)(b) is a more comprehensive delineation of this category than is the *Revision* provision, even though *Suggestion* subsection 1(b)(i) is borrowed from *Revision* subsection 1(b)(ii).

*Suggestion* subsections 1(c) and (d) are almost verbatim carryovers of subsections 1(b) and (c) of the Coogan definition. These provisions are the strongest parts of Mr. Coogan's proposal, and it is in this area that the *Revision* fails badly. They provide clear and workable definitions of both the fixture and chattel categories, while the *Revision* refers, as does present section 9-313, to "the law of this state other than this Act." Only minor editorial changes, in the interests of clarity, have been made in these subsections.

The suggested definition operates on two premises: (1) the best way to formulate a workable definition of "fixture" is to define the two non-fixture categories also; and (2) a definition of "fixture" should be based on what a purchaser of the real estate would reasonably expect to pass with his purchase unless he was notified otherwise. Because of the tremendous variety of goods that can be attached to realty in a myriad of ways, the definition necessarily includes negative as well as positive terms and refers to the purpose of affixation as well as the manner. The touchstone of the definition, however, is always the reasonable expectations of the purchaser of the realty.<sup>47</sup>

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<sup>47</sup> Some examples may serve to demonstrate the approach of the definition. A central air conditioning unit installed in a factory building would clearly be a fixture. It is clearly neither "building materials" nor "incorporated" into the factory building as defined in subsection (b). The unit is also excluded from subsection (c) because it is attached to the building by pipes and ducts and not solely by a power source or for the purpose of reducing noise or vibration. Subsection (d) includes the unit because it is related to the functioning of the building itself, as a factory, and not merely to the conduct of a particular activity therein. In addition, it falls within the designation of "plumbing, heating, air conditioning, sprinkling systems and similar types of goods," also in subsection (d).

In contrast, a large power saw installed in the same building would not be a fixture. It is related to the carrying on of a particular activity within the building (e.g., carpentry work) rather than to the functioning of the building as a factory. In addition, as is clearly covered by subsection (c), the saw is attached to the building either solely by a power source (e.g., an electrical cord), or by additional fastenings intended only to reduce noise or vibration or to hold the equipment in place.

## APPENDIX A

## § 9-313. Priority of Security Interests in Fixtures.

(1) The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

(4) The security interests described in subsections (2) and (3) do not take priority over

- (a) a subsequent purchaser for value of any interest in the real estate;  
or
- (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or
- (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

## APPENDIX B

The Article 9 Review Committee's proposed revision creates this delineation:

§ 9-313. Priority of Security Interests in Fixtures.

- 1(a) This governs the priority between a security interest in goods, including fixtures, and a real estate interest in the goods. The declaration in this section that certain goods are not fixtures is only for the purpose of the priority rules stated in this section, and does not determine whether an interest in the goods passes under a conveyance or mortgage of the real estate or whether the goods are part of real estate under the law of this state other than this Act.
- (b) For the purpose of this section and the provisions in Part 4 of this Article referring to fixture filing, the following definitions apply:
- (i) Goods are "fixtures" when they are so related to particular real estate that under the law of this state other than this Act an interest in the goods would pass as part of the real estate under a conveyance or mortgage thereof without specific mention of the goods, except as stated in this paragraph. Where ordinary building materials are incorporated in an improvement upon land, which improvement is itself not a fixture, the materials are real estate and not a fixture. An improvement upon land is not a fixture unless it is readily removable from the land. Readily removable factory and office machines and readily removable replacements of domestic appliances are not fixtures. Where the debtor is a tenant, goods which he has a right to remove are not fixtures but are personal property. Standing timber and growing crops and oil, gas and minerals before severance are not fixtures.
  - (ii) The term "ordinary building materials" includes lumber, millwork, brick, tile, siding, roofing, cement, glass, wiring, piping and structural members, other than readily removable items of special value such as ornamental metal work, ornamental mantels and carved panelling.

#### APPENDIX C

Mr. Coogan's proposal takes the following form:

##### § 9-313. Security Interests in Fixtures.

(1) The following rules govern the application of this Article to goods associated with particular real estate.

- (a) Neither the fixture rules nor any other rules of this Article shall apply to goods after they have become building materials, and no security interest in them can thereafter exist under this Article. Fixture rules include those of this section 9-313 and the fixture rules of Part 4 of this Article.

The term building materials includes goods that have become so incorporated or built into a building that their removal therefrom would necessarily involve the removal or destruction of some part of the building and thereby cause substantial damage to the building apart from the value of the goods removed, but the term

does not include goods that are severable from the land merely by unscrewing, unbolting, unclamping or uncoupling, or some other method of disconnection, and does not include equipment or consumer goods installed in a building for use in the carrying on of an industry or activity where the only substantial damage, apart from the value of the equipment or consumer goods removed, that would necessarily be caused to the building in removing the equipment or consumer goods therefrom is that arising from the removal or destruction of the bed or casting on or in which the item is set and the making or enlargement of an opening in the walls of the building sufficient for the removal from the building. Building includes a structure, erection, or mine, erected or constructed on or in land.

This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate, *but the priorities established by this section shall control where applicable.*

- (b) The fixture rules do not apply to any collateral other than equipment or consumer goods, nor to equipment or consumer goods not physically affixed to the realty, nor to such goods physically attached *only* by electrical cords or temporary water connections, nor do they apply to equipment physically attached *only* for a purpose such as reducing noise or vibration, or holding the equipment in place. Security interests in such collateral are covered by sections of Article 9 other than the fixture rules.
- (c) The fixture provisions of this Article apply to equipment and consumer goods which relate to the functioning of the building, for whatever purpose it may be used (as distinguished from the functioning of particular activities conducted therein), including goods used for plumbing, heating, air conditioning, refrigeration, sprinkling systems and other equipment and consumer goods which are customarily physically affixed to the real estate, not including building materials referred to in subdivision (a) nor goods attached only for the purpose set forth in subdivision (b). Notwithstanding the provision of paragraphs (a) and (b), such fixture rules apply to portable buildings other than those required to be registered or licensed in connection with motor vehicle laws.

#### APPENDIX D

The synthesis suggested by this note as the most effective definition is:  
 § 9-313. Security Interests in Fixtures,

- (I)(a) This section governs the priority between a security interest in goods attached to real estate, and a real estate interest in such goods. The declaration in this section that certain goods are not fixtures is only for the purposes of this Act and of the priority rules stated in this section, and does not determine whether

an interest in the goods passes under a conveyance or mortgage of the real estate or whether the goods are part of real estate under the law of this state other than this Act. Nor does this Act prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate, but the priorities established by this section shall control where applicable.

- (b) Neither the rules of this section nor any other rules of this Article shall apply to building materials which have been incorporated into a building, and no security interest in them can thereafter exist under this Article. Such goods are the only class of goods in which a security interest under this Article cannot exist.

(i) The term "building materials" refers to goods on the order of lumber, millwork, brick, tile, siding, roofing, cement, glass, wiring, piping, and structural members.

(ii) The term "incorporated" means built into a building in such a way that the removal of the building materials would *necessarily* involve the destruction or removal of some part of the building itself. It does not include goods which are severable merely by unscrewing, unbolting, unclamping, uncoupling, or a similar method of disconnection.

(iii) The term "building" includes a structure, erection, or mine, erected or constructed on or in land.

- (c) The rules of this section do not apply to any collateral other than equipment or consumer goods, nor to such equipment or consumer goods not physically attached to the realty, nor to such goods which are physically attached *solely* by electrical cords or any other power source, or temporary water connections. Nor do the rules of this section apply to equipment which is physically attached for a purpose such as reducing noise or vibration or holding the equipment in place; nor to goods which relate not to the functioning of the building itself, but to the conduct of particular activities therein. Such collateral are not fixtures, and security interests in them are covered by other sections of this Article.
- (d) The rules of this section apply to equipment and consumer goods which relate to the functioning of the building itself, for whatever purpose it may be used (as distinguished from the conduct of particular activities therein), including goods used for plumbing, heating, air conditioning, sprinkling systems and similar types of goods which are customarily physically attached to the real estate, not including the building materials referred to in subdivision (b) nor goods attached solely for the purpose referred to in subdivision (c). Notwithstanding subdivisions (b) and (c), the rules apply to portable buildings other than those governed by motor vehicle laws.

