Creditors' Remedies: Treatment of Trade Fixtures under the California Commercial Code

Carol Kinsock Francone

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plaintiff. Even without the clear legislative policy, however, the court should have decided on the facts of Madden and on an analysis of the actual impact of an arbitration clause that the Board acted beyond the scope of its authority. As an alternative, the court should have used the adhesion doctrine to invalidate the arbitration provision as unfair. In failing to do so, however, the court may have undermined the adhesion doctrine in California.

Jessica S. Pers

VI
CREDITORS' REMEDIES
TREATMENT OF TRADE FIXTURES
UNDER THE CALIFORNIA COMMERCIAL CODE

Goldie v. Bauchet Properties.¹ The California Supreme Court eliminated the distinction between fixtures and trade fixtures² in the

1. 15 Cal. 3d 307, 540 P.2d 1, 124 Cal. Rptr. 161 (1975) (Sullivan, J.) (unanimous decision; Wright, C.J., did not participate).
2. In general, a fixture is a chattel that has lost its identity as personal property by becoming permanently affixed to real property. The California Civil Code defines a fixture as follows:

   A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. . . .

   CAL. CIV. CODE § 660 (West 1954). This definition, though accurate, is somewhat simplified. The problem is that while the meaning of “affixed” is apparent in theory, it is often unclear in practice. In response to this difficulty, courts have frequently purported to apply a more complex tripartite definition of fixture, first enunciated in Teaff v. Heawitt, 1 Ohio St. 511 (1853). Under that definition an item is a fixture if

   (1) it is permanently attached to the land;
   (2) it is particularly adapted for use with the real estate;
   (3) the party bringing the chattel onto the land intends that it become a fixture.

   Courts and commentators frequently assert that the intent of the party who installs the chattel determines whether it is a fixture. See, e.g., Jahnke v. Jahnke, 81 Cal. App. 387, 391 (3d Dist. 1927); 2 H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 313, at 411-12 (1968). Such applications, however, have yielded divergent and even contradictory results. In California, for example, the same item may be determined to be a fixture in one case, but not in another. Compare Fisher v. Pennington, 116 Cal. App. 248, 2 P.2d 518 (1st Dist. 1931), and Southern Cal. Hardwood & Mfg. Co. v. Borton, 46 Cal. App. 524, 189 P. 1022 (3d Dist. 1920) (wall beds are not fix-
context of California Commercial Code section 9102.³ That section governs the applicability of the Code to security interests in fixtures. For purposes of section 9102, according to the court, trade fixtures must be included in the category of fixtures. Thus the rights of various parties claiming what at first appear to be security interests cannot be determined in all cases solely by reference to article 9 of the California Commercial Code.

Part I of this note will discuss the case itself. Part II will analyze the Goldie court’s resolution of the case in light of prior law governing competing interests in fixtures and trade fixtures in California. Part III will examine both the theoretical and practical implications of Goldie. Finally, part IV briefly examines the outcome of Goldie had

³ The Goldie court may have added to the confusion over the definition of “fixture,” since the court stated that fixtures are defined as “goods affixed to real property,” ignoring the other elements of the tripartite test. 15 Cal. 3d at 317, 540 P.2d at 8, 124 Cal. Rptr. at 168.

By making the attachment the owner of the chattel in essence agrees to surrender his interest to the owner of the land. California law provides that when a chattel is affixed to land the resulting fixture belongs to the owner of the real property:

When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in this chapter, belongs to the owner of the land, unless he chooses to require the former to remove it or the former elects to exercise the right of removal provided for in Section 1013.5 of this chapter. 15 Cal. 3d at 317, 540 P.2d at 8, 124 Cal. Rptr. at 168.

Physically, a trade fixture is indistinguishable from any other fixture; legally, the two are quite different. A trade fixture is created when a tenant affixes a chattel to rented premises in accordance with the Civil Code, which defines a trade fixture as follows:

A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be affected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises. Id. § 1019.

Following such an attachment the chattel remains the personal property of the tenant, at least insofar as any dispute between landlord and tenant is concerned.


3. The section provides in pertinent part:

(1) Except as otherwise provided . . . this division applies
(a) To any transaction (regardless of its form) which is intended to create a security interest in personal property including goods . . . and also . . .

(c) To any transaction (regardless of its form) which is intended to create a security interest in goods which are or later become “fixtures” under the law of this state, but as against third parties having or acquiring an interest in or a lien on the real property, the rights and duties of the parties to the secured transactions are governed by the law of this state relating to real property and fixtures.
it been decided under Uniform Commercial Code section 9-313, which has not been adopted in California.

I. The Court's Treatment of the Case

a. Facts and Issues

Goldie arose out of two competing claims to a packaging machine used in a frozen food business on leased premises. These premises were originally owned by one Henry Kermin, who also operated the frozen food business through two wholly owned corporations. Kermin sold the property to two individuals, who simultaneously and without recording leased the property back to the Kermin corporations. The buyer-lessees subsequently formed a limited partnership, Bauchet Properties, to which they conveyed both the property and the lease.

At the time of the sale and lease, one of the two lessee corporations owned the packaging machine. The lease granted the lessor a security interest in all trade fixtures and equipment on the premises, and in a separate clause provided that the lessees could remove any such item upon termination of the lease provided they were not in default.4

4. The pertinent lease provisions provided:
Article V, subdivision (b):
As additional security for the faithful performance by Lessee of all of the terms, covenants, and conditions of this Lease by said Lessee to be kept and performed during the term hereof, Lessee hereby grants to Lessor a security interest in all its fixtures, machinery, equipment, furniture, furnishings, and the proceeds therefrom presently owned by Lessee and located at said demised premises and all after acquired property of the same class and description. However, while Lessee is not in default in the payment of rent or any of its obligations under this Lease, it may trade in or replace any of said items free of this security interest and the security interest shall then apply to the newly acquired items. This security interest shall also be subordinate to the lien of any security interest hereafter given to any lending institution as security for a bona fide business loan to Lessee. Upon the default in the performance of any of the obligations of Lessee as provided in Article XVIII, Lessor shall immediately have the remedies of a secured party under the Uniform Commercial Code.

Article XII, subdivision (b):
All trade fixtures and equipment and other like property which the Lessee has installed in or attached to the building or improvements located upon the demised premises . . . shall remain the property of the Lessee, subject to Lessor's security interest, and the Lessor agrees that the Lessee shall have the option at any time . . . provided the Lessee is not then in default in the performance of any of the obligations of the lease on its part to be performed to trade in or replace any and all of its trade fixtures, equipment, and other like property which it may have installed in the building or improvements, and upon the termination of the lease, to remove same . . . provided that if Lessee be in default, it shall not then have any right of trading in, replacing or removing of such trade fixtures, equipment and other like property which it may have installed.

15 Cal. 3d at 311 nn.2 & 3, 540 P.2d at 4 nn.2 & 3, 124 Cal. Rptr. at 164 nn.2 & 3.
Following the lease transaction, one of the corporate lessees borrowed money from Goldie, giving back a demand promissory note secured by a chattel mortgage on the packaging machine. The financing statement evidencing this agreement was subsequently filed with the Secretary of State.

The lessees defaulted in the payment of rent, and the corporate obligor defaulted in the payment of interest due under the terms of the secured note. Upon the corporations' surrender of the premises and the machine to Bauchet Properties, plaintiff Goldie brought suit for possession of the machine. He prevailed in the trial court on the theory that, as a trade fixture, the machine was personal property for purposes of California Commercial Code section 9102; under article 9 of the Code, therefore, his perfected security interest took priority over the defendants' unrecorded lease.

On appeal, the defendants asserted that the trial court had erred in basing its ruling on the provisions of the California Commercial Code. They claimed that general landlord-tenant law in existence prior to the enactment of the Code in California controlled the case.6

b. The Court's Resolution

The supreme court reversed and remanded for a new trial, although it approved the trial court's finding that the machine was a trade fixture.6 In support of the reversal, the court pointed out that under pre-Code law the plaintiff could assert no greater right to the machine than could the lessees; since the lessees had granted the plaintiff an interest in the machine after entering into the lease,7 plaintiff's rights in the absence of the Uniform Commercial Code would have been subordinate to those of the defendants.

The court next considered what relevance, if any, the Uniform Commercial Code, as adopted in California,8 might have to the plaintiff's claim of a security interest in the trade fixture. The court first noted that under California Commercial Code section 91029 the competing claims of the holder of a security interest in a fixture and the holder of an interest in the real property on which the fixture is installed are governed not by the Code but by state real property law.10

5. Id. at 312, 540 P.2d at 5, 124 Cal. Rptr. at 165.
6. Id. at 313, 540 P.2d at 5-6, 124 Cal. Rptr. at 165-66.
7. Id. at 314, 540 P.2d at 6, 124 Cal. Rptr. at 166.
8. California has not adopted Uniform Commercial Code section 9-313, which governs priorities among competing interests in fixtures. See notes 37-46 infra and accompanying text.
9. The section is set out in note 3 supra.
10. The court noted three effects of the section:
The Commercial Code governs disputes only when both claimants assert security interests unrelated to an interest arising out of ownership or encumbrance of real property.

The justices then addressed the omission from the California Commercial Code of any reference to trade fixtures. Their unanimous conclusion was that the intent of the California legislature would best be served by including trade fixtures within the generic term “fixtures” for purposes of section 9102, although they are generally considered personal property as between landlord and tenant. Had trade fixtures been held to be personal property, any security interest therein would have been governed by the Code.

The court recognized that by equating trade fixtures with fixtures the limited applicability of the Code to security interests in fixtures would extend to trade fixtures as well. Because of this restriction on the applicability of the Code, the court held that if the defendant lessor actually possessed a real property interest in the machine, state real property law, not the Commercial Code, would resolve the dispute. The defendant, whose interest was first in time, would prevail. If the defendant possessed merely an unperfected security interest, however, the Code would determine priority between the parties. The court held that in such a case the plaintiff, whose interest was perfected under the Code, would prevail.

In essence the court held that a lease, normally considered a grant of an interest in real property, may constitute in part a security agreement between landlord and tenant. Unless perfected by a filing pursuant to the Commercial Code, the interest created by that agreement could be subordinate to a later-perfected interest. Since under the court’s interpretation the nature of the lessor’s interest controlled the outcome of the case, the court remanded for a new trial to determine the nature of that interest.

(1) The Code governs security interests in fixtures;
(2) competing claims between the holder of a security interest in “fixtures” and the holder of an interest in real property on which the “fixtures” are installed are governed by state real property law, not by the Code;
(3) whether goods are or become “fixtures” is governed by California law independent of the Code.

15 Cal. 3d at 315, 540 P.2d at 7, 124 Cal. Rptr. at 167.
11. Id. at 316-17, 540 P.2d at 8, 124 Cal. Rptr. at 168. See, e.g., City of Los Angeles v. Hughes, 202 Cal. 731, 737, 262 P. 737, 740 (1927).
13. 15 Cal. 3d at 317-18, 540 P.2d at 8-9, 124 Cal. Rptr. at 168-69.
14. Id. at 318, 540 P.2d at 9, 124 Cal. Rptr. at 169.
16. 15 Cal. 3d at 320-21, 540 P.2d at 10-11, 124 Cal. Rptr. at 170-71. The court found the lease to be ambiguous on this point, noting that although the lessor might merely have reserved a security interest in the machines, it might also claim that upon
II. Analysis of the Court's Resolution of Goldie

The major impact of the Goldie decision on existing law is that in the future competing claimants to trade fixtures will be governed by California real property law, unless both parties claim a Code-governed security interest in the trade fixture. Thus Goldie must be examined in light of its probable relationship to present California real property law regarding trade fixtures.

a. Law Adopted

In two significant respects the court in Goldie adopted and extended existing California law in the trade fixture area. First, in holding that the term “trade fixture” is included within the term “fixture” for purposes of the California Commercial Code, the court properly found that although a trade fixture is personal property as between landlord and tenant, it has not been so defined for all purposes. This finding is borne out by cases holding that chattels affixed to realty are to be taxed as part of the real property, although they may be trade fixtures, hence personal property, as between landlord and tenant. 17

Second, in holding that a lessor’s real property interest in a trade fixture would prevail over a third party’s perfected personal property security interest, 18 the court relied upon a recurrent principle in California law that such subsequent interests are derivative. A general statement of this principle is that a lessee may grant only the interest held by the lessee at the time the grant is made; that is, any prior encumbrance limits the granted interest.

The principle has been applied when under a lease the lessee has lost his right to remove a trade fixture encumbered to a third party after it was affixed to realty. Under the derivative theory, in such a case, the chattel mortgagee must also incur this disability because the security interest he originally obtained was limited by the existence of a prior

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17. Simms v. County of Los Angeles, 35 Cal. 2d 303, 217 P. 936 (1950) (classification of property as fixtures must be determined by outward appearances, without regard to status of annexor of chattels as landlord or tenant); accord, Trabue Pittman Corp. v. County of Los Angeles, 29 Cal. 2d 385, 175 P.2d 512 (1946); County of Ventura v. State Bank, 251 Cal. App. 2d 240, 59 Cal. Rptr. 404 (2d Dist. 1967).
18. 15 Cal. 3d at 313, 540 P.2d at 6, 124 Cal. Rptr. at 166.
real property interest in the lessor. The converse of this derivative limitation, as the Goldie court indicated, is also true: when fixtures installed by a tenant are subject to a security interest granted to a third party before being attached to the realty, the lessor can assert no greater rights against the secured party than could his tenant.

b. Changes in Existing Law

The derivative theory alone does not explain the reasoning in Goldie. The court assumed that the lessees' right to remove the machine had been impaired by their default; the court also recognized that the lease existed before the plaintiff's security interest. Yet the court held that the plaintiff would prevail if the trial court found, on remand, that the lessor's interest was an unperfected security interest, rather than an interest arising out of his position as owner of the real property. Thus, while purportedly applying prior law that would have limited the chattel lender's rights to those held by the lessee-debtor, the court held that the advent of the Commercial Code may allow a chattel lender to remove a trade fixture even when the lessee himself, because of his default, could not.

Prior to Goldie the chattel lender in the event of a lessee-debtor's default was at least theoretically subject to a lessor's prior interest arising out of the lease, whether it was a "security interest" or an incident of a landlord's right to possession of the premises. Under Goldie a chattel lender can prevail over the lessor when the tenant defaults if the landlord's interest is determined to be a Code-governed security interest that has not been perfected.

It should be noted that Goldie does not clearly indicate whether the derivative limitations on the lessor's rights against a third party still exists. Under the cases applying the derivative analysis, if a conditional seller acquires a purchase money security interest in a chattel subsequently installed on leased property the lessor cannot claim a right to the equipment upon his tenant's default by virtue of a reservation

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20. 15 Cal. 3d at 313 n.5, 540 P.2d at 6 n.5, 124 Cal. Rptr. at 166 n.5.
22. 15 Cal. 3d at 318, 540 P.2d at 9, 124 Cal. Rptr. at 169.
of such right under the lease. The lessor, under California case law, can claim no greater right than his tenant.\textsuperscript{23}

\textit{Goldie} clearly alters this result with respect to fixtures installed on leased property where both claimants assert a security interest. In such a case the Code applies, and a landlord's perfected subsequent interest will prevail over a prior unrecorded one.\textsuperscript{24} If the lessor's interest derives from his ownership of the real property, however, \textit{Goldie} presumably leaves the prior "derivative" case law untouched. A lessor claiming a real property interest in a fixture still can assert no greater interest therein than his tenant possessed at the time the chattel was affixed.

c. \textit{Law Not Considered}

By relying exclusively on California cases that have determined the priority of competing claims to trade fixtures on the basis of derivative limitations upon interests, the court neglected an equally important consideration. California courts have frequently suggested that one who acquires an interest in a fixture must record or otherwise give notice to those acquiring subsequent interests if he is to prevail against them.\textsuperscript{25} The logical extension of this rule has likewise been applied: a private agreement between lessor and lessee regulating their rights in certain property has no effect on third parties without notice of the agreement.\textsuperscript{26}

\textsuperscript{23} See cases cited in note 21 supra.

\textsuperscript{24} 15 Cal. 3d at 318, 540 P.2d at 9, 124 Cal. Rptr. at 169.

\textsuperscript{25} See, e.g., Commercial Bank v. Pritchard, 126 Cal. 600, 59 P. 130 (1899) (recorded mortgage given by lessee bars subsequent conveyance of goods affixed to land, which were part of mortgaged property although trade fixtures as between lessor and lessee); San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 P. 92 (1894); Bridges v. Cal-Pacific Leasing Co., 16 Cal. App. 3d 118, 93 Cal. Rptr. 796 (2d Dist. 1971) (conditional vendor of trade equipment with actual notice of landlord's right to fixtures cannot assert rights therein); cf. Oroville-Wyandotte Irrigation Dist. v. Ford, 47 Cal. App. 2d 531, 118 P.2d 340 (3d Dist. 1941) (recorded agreement that mining equipment would be regarded as personal property bars purchasers' claim of equipment at tax lien sale).

\textsuperscript{26} Certain cases indicate that a trade fixture will be treated as realty, as against third parties claiming the lessee's interest, if the lessor's real property interest and the grant to the lessee of a right to remove goods are not recorded. See, e.g., McNally v. Connolly, 70 Cal. 3, 11 P. 320 (1886) (unrecorded agreement between lessee and lessor that former could remove machinery from premises not effective against purchaser at judgment lien sale); Camp v. Matich, 87 Cal. App. 2d 660, 197 P. 345 (1st Dist. 1948) (lessee's possession and occupancy of leased premises insufficient to give notice of right to remove fixtures to bona fide purchasers of real property). Other cases indicate that an unrecorded real property interest will not prevail against the claim of a subsequent chattel mortgagee. Stewart v. Leasure, 12 Cal. App. 2d 652, 55 P.2d 917 (3d Dist. 1936) (landlord's unrecorded reservation in lease of a security interest in trade fixtures on leased property does not defeat interest of subsequent chattel mortgagee); cf. West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 P. 993 (1890) (unrecorded landlord-ten-
Another line of California cases, however, suggests that inquiry notice\textsuperscript{27} of a landlord-tenant relationship is sufficient to deny priority to a subsequent purchaser or encumbrancer.\textsuperscript{28} Under the rule of these cases, notice of the relationship itself apparently imparts inquiry notice of the terms of any landlord-tenant agreement.

Much of the case law emphasizing the importance of notice relied on pre-Commercial Code law.\textsuperscript{29} For that reason, the court may have failed to recognize the continuing relevance of that law in determining the rights of competing claimants in cases where, because the lessor claims a real property interest, the Code will not apply. When both claims are mere security interests, the court was content to allow the Code filing scheme to determine the priority of these claims.\textsuperscript{30} But in remitting the claimants to the rules of pre-Code law where one bases his claim on a real property interest, the court apparently failed to recognize that pre-Code law is not unambiguous. In particular, the effect of inquiry notice upon a subsequent security interest remains unresolved and will likely require a future judicial determination.

It is possible, of course, that the court reasoned that a lender who expects to be secured by an existing fixture should be presumed to have notice, by the mere existence of a lessor-lessee relationship, that the lessor may have a prior interest in the fixture. Such reasoning would be an implicit adoption of the inquiry notice theory. If this is the rationale agreement that fixtures could be removed cannot defeat mechanics liens claimants); Hammond Lumber Co. v. Gordon, 84 Cal. App. 701, 258 P. 612 (2d Dist. 1927) (same).

27. CAL. CIV. CODE § 19 (West 1954).
28. The California cases are in conflict about the effect of inquiry notice. On the one hand it is asserted that possession by a tenant, inconsistent with the landlord's ownership interest, is sufficient to impart notice of the existence and extent of a landlord's interest in fixtures. \textit{See}, e.g., Security Loan & Trst Co. v. Willamette Steam Mills L. & M. Co., 99 Cal. 636, 34 P. 321 (1893) (purchaser of real property from lessor has inquiry notice from tenant's possession of landlord-tenant relationship and that tenant may have right to remove fixtures); Bridges v. Cal-Pacific Leasing Co., 16 Cal. App. 3d 118, 93 Cal. Rptr. 796 (2d Dist. 1971) (chattel lender with actual knowledge of landlord-tenant relationship bound to inquire about extent of landlord's interest in fixtures); cf. Manig v. Bachman, 127 Cal. App. 2d 216, 273 P.2d 596 (1st Dist. 1954) (when stranger to record title of vendor in possession, purchaser bound to make inquiry in order to retain status of bona fide purchaser); Basch v. Tidewater Associated Oil Co., 49 Cal. App. 2d Supp. 743, 117 P.2d 956 (App. Dep't Super. Ct. 1942) (purchaser from lessor with knowledge of landlord-tenant relationship bound by lessor's unrecorded collateral agreement regarding rental rates with tenant). On the other hand it is frequently asserted that subsequent third parties are not bound by an unrecorded landlord-tenant agreement. \textit{See} cases cited in note 26 \textit{supra}.

30. The Uniform Commercial Code provides that certain security interests may be perfected by filing, and that filing establishes priority. \textit{E.g.}, U.C.C. §§ 9-302 to 304, 9-312 (1972 version).
rationale of the opinion, however, the outcome of the case should not
depend, as it does in Goldie, on the type of interest that the lessor
claims. Under Goldie inquiry notice will be effective only if the les-
sor's prior interest is based on a real estate interest. A secured lender
will not lose the priority conferred by a Uniform Commercial Code fil-
ing, however, if the lessor's claim is based on a prior, but unrecorded,
security interest.

III. Implications of Goldie

The most significant implication of the Goldie case, and its most
serious defect, is that in the future lenders, practitioners, and courts
will be unable to predict with any certainty when the California Com-
mercial Code will apply to trade fixture transactions. Prior to Goldie it
could reasonably have been argued that the Commercial Code gov-
erned trade fixtures not as "fixtures," but as "personal property." In
fact, the plaintiff in Goldie contended that the Commercial Code gov-
erned all security interests in trade fixtures because they are personal
property, and division 9 of the Code applies "to any transaction (re-
gardless of its form) which is intended to create a security interest in
personal property . . . ."31

Had the court accepted the plaintiff's argument, trade fixture
lenders could have relied on compliance with the Code to secure com-
pletely their financing transactions. Lessors or other real property
owners or encumbrancers could also have been assured that a Com-
mmercial Code filing would protect their interests. Under the interpre-
tation of the Code that Goldie adopts, however, trade fixtures are to
be classified as fixtures for purposes of determining the applicability
of the Code. The result is that trade fixture lenders must now ascer-
tain the nature of a possible opposing prior interest in order to deter-
mine whether perfection of a security interest will be of any avail.
That such a determination must now be made offers such lenders the
argument that a lease may contain a security agreement that can be per-
fected only by compliance with Commercial Code filing provisions.

A second significant defect of the Goldie opinion is its failure to
offer any specific guidelines for the court on remand in ascertaining
whether the defendant lessor's interest was a security interest or a real
property interest. The court merely acknowledged that the lease in
Goldie was ambiguous and authorized the court below to hear addi-
tional evidence submitted by the parties or by the court on its own mo-
tion.32 This failure to offer any factors to guide both individuals and

32. 15 Cal. 3d at 318-19, 540 P.2d at 9, 124 Cal. Rptr. at 169.
courts will affect not only trade fixture transactions, but also fixture financing. Under the *Goldie* case the Commercial Code will govern all such transactions whenever one or more parties reserves a Code security interest. But *Goldie* does not tell us what factors will determine whether such an interest has in fact been created.

To a certain extent, however, *Goldie* does afford some significant guidance to lessors, lenders, and other parties in situations similar to that of the parties in *Goldie*. For example, post-*Goldie* lenders no longer incur the risk that collateral which appears to be realty may be found to be a trade fixture and therefore personal property. Prior to *Goldie* a lender might have recorded his security as a real estate interest only to find himself superseded by a perfected Commercial Code security interest in an item that was, despite appearances, personal property.

It should also be noted that *Goldie*, by defining "trade fixtures" as "fixtures" for purposes of the Code, has further clarified the law by negating the possibility that a trade fixture might be classified as "equipment," hence subject to the Code's filing requirements independent of section 9102. Cases interpreting the Uniform Commercial Code in other Code states have classified trade fixtures as equipment, to the detriment of lenders who had recorded their interests in trade fixtures in the real property indices. Of course, *Goldie* does not completely solve the definitional problems inherent in the terms "fixture" or "trade fixture." Because the case offers no precise definition of either term, it fails to clarify the exact limits of division 9 of the California Commercial Code.

Of far more general concern is that almost all post-*Goldie* chattel-secured lenders should protect their interests by filing both in the real estate grantor indices and in the Commercial Code filing system with the Secretary of State. The Commercial Code filing would assure the lender of priority over existing unrecorded security interests as well as subsequent perfected interests. The real estate filing would not pro-


duce such readily predictable results. At the very least, however, it would impart notice to subsequent encumbrancers and purchasers of the real property of the chattel-secured lender’s interest.

Yet Goldie suggests that a real estate recordation for a lender in the plaintiff’s position may be ineffective. The court expressly held that the lender’s rights were derivative and that once the tenants lost their right to remove the chattels by virtue of a prior real property interest, so did the chattel-secured lender. The court suggested that the plaintiff’s right to the machine on the lessee’s default would be barred, simply because the lease and the affixing of the chattel in question were prior to plaintiff’s loan, whether or not the lease was recorded. In circumstances parallel to those of Goldie, therefore, even a double filing might not protect a chattel-secured lender. Thus, the ultimate result of the case may be to eliminate virtually all nonpurchase money financing. Lenders simply are not likely to risk loans if they cannot be sure of their ability to protect their rights against an existing lessor who has a hidden but prior interest in already affixed trade fixtures arising out of his interest in the real estate.

Goldie also indicates that a prudent lessor should file pursuant to the Commercial Code with the Secretary of State. He can no longer be assured priority merely because his interest is prior in time. If a lease is ambiguous, a court may find that the lease has retained for the lessor only a security interest subject to Code filing requirements. Only if a lessor is certain that the lease unequivocally reserves an interest arising out of his interest in the real estate may he ignore the necessity of filing a Code financing statement.

IV. Uniform Commercial Code Section 9-313: A Preferable Solution

Uniform Commercial Code section 9-313 has not been enacted

36. 15 Cal. 3d at 314, 540 P.2d at 6, 124 Cal. Rptr. at 166.
37. § 9-313. Priority of Security Interests in Fixtures

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the fixtures are readily removable factory or office machines or read-
Adoption of the section has been suggested, and it has been argued that to adopt it would require no fundamental change in California fixture law. Consideration of section 9-313 in light of Goldie reveals the substantial advantages that might be conferred by that provision.

Section 9-313 has as its basic purpose the creation of a means for protecting security interests in fixtures from all competing real property interests, both prior and subsequent. Protection against prior recorded real property interests is limited to purchase money interests and security interests in readily removable factory or office machines. Under this section a fixture filing—that is, recordation of the security interest in the real estate indices—perfects the security interest and establishes its priority over all subsequent real property interests in the fixture. Finally, section 9-313 provides that in situations where, as in

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ily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

U.C.C. § 9-313.

38. Section 9-313 was omitted in California apparently because of the “fear that any positive treatment of fixtures in the Commercial Code would only further confuse California law on the subject.” Bohn & Williams, California Code Comment, CAL. COM. CODE § 9313 (West 1964) (explaining omission of section 9313 in California).

One of the principal objections to the original section 9-313 was its failure to give priority to construction mortgagees over subsequent fixture interests. The California rule, first enunciated in Dauch v. Ginsburg, 214 Cal. 540, 6 P.2d 952 (1931), protected the construction lender. This objection, at least, has been stilled by the amended version of section 9-313. U.C.C. § 9-313(6).

39. Note, Uniform Commercial Code Section 9-313: Time for Adoption in California, 27 HASTINGS L.J. 235, 246-47 (1975). For example, the author notes that both California law and section 9-313 generally subordinate a security interest in fixtures to the interest of a subsequent bona fide purchaser without notice, and that both require the owner to pay for physical damages to premises caused by removal of a fixture. Under section 9-313(4)(a) of the Code, however, a purchase money security interest in fixtures will defeat the interest of a prior mortgagee of the real estate if it is filed within 10 days; this is not altogether true in California, where courts have traditionally applied the “impairment of security” rule. Id. at 250-51; Ayer, supra note 35, at 951.


Goldie, a lessee has lost through default his right to remove goods from leased real property, the security interest of a third party in those goods, whether perfected or not, continues against the lessor for a "reasonable" period.

The use of section 9-313 would make Goldie an easy case. If the lessor's interest in Goldie were a real property interest, the plaintiff would prevail if he removed the machine within a reasonable time after the lessees' default, without regard to whether either of the competing interests had been recorded.

Moreover, section 9-313 would provide a needed clarification of California law because it eliminates entirely any need to examine the derived rights of the competing claimants. Under section 9-313 the perfected security interest of a chattel lender will prevail upon a tenant's default, even if it is derivatively limited by a preexisting interest in a lessor, provided that the chattel is promptly removed and that the tenant had a right to remove it.

The section also eliminates the need for reference to the lines of California cases emphasizing that actual or inquiry notice may preclude the claim of a subsequently acquired interest. A lender in the plaintiff's position in Goldie, provided that his debtor has a right to remove the goods, will always prevail over an encumbrancer or owner of the real property even if he has notice of a real property interest.

Finally, section 9-313 would have the virtue of certainty. It would resolve almost all conflicts between claimants whose interests in fixtures arise out of an interest in real estate and claimants whose security interests arise out of chattel financing agreements. Chattel lenders in the position of the plaintiff in Goldie could predict precisely under what circumstances their interests would take priority over a competing real property interest. The cumbersome result of Goldie, the necessity for a case-by-case judicial determination of the nature of a lessor's interest, would be circumvented.

The one remaining ambiguity, even under section 9-313, is that the definition of fixture in California law is still unclear. Thus a chat-

42. Section 9-313(5)(b) provides that a security interest in fixtures always has priority over a competing real property interest if the debtor has a right to remove the goods. See text of the subsection, quoted in note 37 supra.
43. See notes 19-21 supra and accompanying text.
tel lender would be well advised to perfect a security interest by the usual filing with the Secretary of State in addition to a fixture filing in the real property indices.\footnote{According to one authority, such a double filing is advisable in any state whose definition of "fixture" is unclear. Coogan, The New UCC Article 9, 86 Harv. L. Rev. 477, 497 (1973); Shanker, supra note 40, at 795-97.} If the goods in question were found to be personal property, not fixtures, a Code filing would of course be necessary to protect the interest against subsequent security interests and against prior unperfected interests.

No practical obstacle exists to adoption of fixture filings in California. These Code filing requirements could easily be integrated into the California Commercial Code scheme, which already requires filing in real property indices of security interests in crops, timber to be cut, and other goods normally attached to real property.\footnote{CAL. COM. CODE § 9401(1)(b) (West Supp. 1976) (financing statement must be filed in office where a mortgage on real estate would be recorded); CAL. COM. CODE § 9403(7) (West Supp. 1976) (financing statement is indexed in grantor index under name of debtor if debtor is not record owner of real property).}

**Conclusion**

The California Supreme Court in *Goldie v. Bauchet Properties* eliminated a gap in the California Commercial Code by interpreting sections 9102(1)(a) and (c) in conformity with what the court considered to have been the legislature’s intention: it held that the term “fixtures” in the statute includes “trade fixtures.” Thus competing security interests in trade fixtures are governed by the Commercial Code, and California law independent of the Code continues to determine the priorities of conflicting interests in fixtures when one claimant’s interest arises out of his interest in real property.

*Goldie* purports to follow prior California law establishing the derivative nature of a lender’s or a lessor’s rights. Its holding, however, departs from and in some circumstances modifies the former rule by giving priority to the interest of a chattel-secured lender that he would not previously have enjoyed. The opinion does not discuss the proper role of notice—actual, inquiry, or constructive—when two competing parties claim an interest in a fixture. Under *Goldie* the ultimate resolution of the conflict turns on the nature of the lessor’s interest.

Practically, *Goldie* implies that double filing is necessary for the trade fixture-secured lender. In the last analysis the case does limit the reach of the Code by rejecting the contention that the Code automatically governs trade fixtures. But the opinion does little to dispel the confusion generated by section 9102(1)(a) and (c) because it still