U.C.C. Section 2-326(3): Creditor Protection in the Deemed Sale or Return Transaction

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Notes

U.C.C. SECTION 2-326(3): CREDITOR PROTECTION IN THE DEEMED SALE OR RETURN TRANSACTION

Consignment transactions present unique obstacles to a creditor seeking to satisfy claims against the consignor-debtor. The Uniform Commercial Code's approach to the problem was to protect creditors who rely on the consignee's ostensible ownership of goods in the latter's possession. U.C.C. § 2-326 has produced a variety of confusing judicial interpretations, the most recent being Walter E. Heller & Co. S.E. v. Riviana Foods, Inc. This Note explores the basic problem of satisfying a claim against consigned property. After an analysis of the U.C.C. approach, with special emphasis on its construction in Riviana, the Note concludes that modification of § 2-326 is needed to restore stability in the consignment area.

INTRODUCTION

THE LAW OF consignment has long been problematical, largely because there is no precise and functional legal definition of the term. As commonly used, a consignment embodies the transfer of “merchandise into the hands of another party for ultimate movement to a consumer-purchaser.” Since this description is vague enough to apply to myriad transactions, the prevailing confusion in the area is not surprising.

The Uniform Commercial Code (U.C.C. or Code) attempted to clarify the murky consignment area in section 2-326. The purpose of this section is to protect the creditors of those who receive goods in the absence of an actual sale on the principle that,

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1. As one commentator has noted, “[f]ew widely used commercial devices have had so checkered and volatile a legal history as the consignment. And few such devices have been able to survive so long and tortuous a legal history and yet retain so many elements of confusion and disarray.” Harrington, The Law of Consignments: Antitrust and Commercial Pitfalls, 34 Bus. Law. 431, 431 (1979).

2. See infra notes 19–24 and accompanying text.


4. But see infra note 10.

5. U.C.C. § 2-326 (1978) provides as follows:

Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a “sale on approval” if the goods are delivered primarily for use, and

(b) a “sale or return” if the goods are delivered primarily for resale.
lacking objective evidence to the contrary, one may reasonably assume that all goods in the debtor's possession are unencumbered.⁶ Specifically, in addition to providing for the sale on approval⁷ and sale or return⁸ transactions, the Code treats a consignment as a "deemed sale or return" transaction in section 2-326(3).⁹

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
(c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2-201) and as contradicting the sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section 2-202).

6. See id. § 2-326(1)(a) for the definition of "sale on approval." Goods thus transferred are not subject to the claims of buyer's creditors. Id. § 2-326(2).

7. A "sale or return" transaction is separately defined at id. § 2-326(1)(b). Goods delivered to another under this arrangement are subject to buyer's creditors' claims while in the buyer's possession. Id. § 2-326(2).

8. A number of features distinguish the "deemed sale or return" or consignment transaction from the "sale or return" and "sale" transactions. For a brief look at these distinctions, see generally Note, Commercial Transactions: Consignors, Creditors and the U.C.C., 19 O.KLA. L. REV. 407, 407–10 (1966). U.C.C. § 2-106(1) (1978) defines a "sale" as "the passing of title from the seller to the buyer for a price . . . ." Of particular importance in these three situations is the determination of the party that is to bear the risk of loss should the goods be damaged, attached by a creditor, or otherwise impaired prior to "sale" but while in the possession of someone other than the creditor. See BENDER, supra note 3, § 11.04, at 11–55, 11–56; Note, Sale or Return v. Consignment—The Intention of the Parties is No Longer Determinative of the Issue, 24 BAYLOR L. REV. 288, 288–89 (1972). Thus, inasmuch as three wholly separate legal operations are involved, only those U.C.C. sections that were intended to cover a given transaction should be applied to the circumstances of a particular case. E.g., American Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970) ("consignment" exceptions of U.C.C. § 2-326(3) held not applicable to a sale or return under U.C.C. § 2-326(1)).

9. As one court observed, "[t]he purpose of [U.C.C. § 2-326(3)] is to protect the creditors of the consignee who would have a right to assume the goods were the property of the consignee." American Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 377, 504 P.2d 1113, 1115–16 (1972). In addition, the drafters of this Code section specifically stated their purpose of protecting the consignee's creditors:

Pursuant to the general policies of this Act which require good faith not only between the parties to the sales contract, but as against interested third parties,
Predictably, section 2-326(3) has yielded a variety of judicial interpretations as to the necessary elements for a "deemed sale or return." For purposes of this Note, the new consignment problems culminated in *Walter E. Heller & Co. Southeast v. Riviana Foods, Inc.*, in which the United States Court of Appeals for the Fifth Circuit held that a secret arrangement between an owner of goods and the debtor-receiver of those goods sufficed to defeat a creditor's claim against the debtor-receiver's inventory. *Riviana* effectively undermines the Code's goal of protecting creditors who rely on the ostensible ownership of goods in their debtor's possession. The decision not only creates new standards for protecting creditors in a situation which should have been treated as a deemed sale or return transaction, but serves as a substantial setback in the continuing effort to clarify and systematize this disarrayed body of law.

This Note will address the difficulties inherent in consignment transactions. A discussion of the judicial tests which developed in the consignment/deemed sale or return area will follow, focusing on those tests which were or could have been utilized in *Riviana*. Finally, the *Riviana* decision will be analyzed in light of the U.C.C. and prior judicial interpretations.

subsection (3) resolves all reasonable doubts as to the nature of the transaction in favor of the general creditors of the buyer. . . . The purpose of the exception [set out in subsections (3)(a)-(c)] is merely to limit the effect of the present subsection itself. . . . to cases in which creditors of the buyer may reasonably be deemed to have been misled by the secret reservation.


11. The phrase "new consignment problems" refers to those difficulties which have arisen as a result of interpretation of the Uniform Commercial Code's "deemed sale or return." This is opposed to the "old" common law problems of consignments. See infra notes 25–28 and accompanying text. Inasmuch as the Code does not define "consignment," however, and in light of U.C.C. § 1-103 (which retains all common law principles not otherwise displaced by the Code), the Code-created problems may not all be recent developments, but merely recurring common law problems.

12. 648 F.2d 1059 (5th Cir. 1981). For a discussion of this case, see infra notes 92–146 and accompanying text.

13. 648 F.2d at 1062.

14. See infra note 37 and accompanying text.

15. See infra notes 120–57 and accompanying text.

16. See infra notes 19–56 and accompanying text.

17. See infra notes 57–91 and accompanying text.

18. See infra notes 92–146 and accompanying text.
Although the viability of the Fifth Circuit's holding is the central issue, it should be noted that the predominant question is one of statutory interpretation; uncertainty will persist as long as explicit provisions for the applicability of section 2-326(3) are lacking.

I. HISTORICAL BACKGROUND

Because of its diverse definitions, the term "consignment" has been applied in a variety of situations. A "consignment" is generally defined as the process of delivering goods to one who will transmit them to a designated agent, or of depositing goods with another, for disposition or care. The typical common law application of the word suggests an agency relationship wherein goods are transferred by a consignor-principal and received by a consignee-agent for the consignor's benefit, for purposes of either sale or care.

Some authorities imply that to effectuate a consignment, the consignee must actually sell the goods received for the benefit of the consignor. Most definitions, however, are not so limited. At

19. This view is not unanimous in light of such statements as "[t]he [word] . . . 'consignment' . . . [has] a definite legal meaning universally understood in the business world . . . ." Charles M. Stieff, Inc. v. City of San Antonio, 130 Tex. 594, 601, 111 S.W.2d 1086, 1090 (1938). But see Winship, The "True" Consignment Under the Uniform Commercial Code, and Related Peccadilloes, 29 Sw. L.J. 825, 825 n.1 (1975) (discussing the difficulties encountered by the Uniform Commercial Code drafters in negotiating among themselves the true meaning of a "true" consignment).

20. See BLACK'S LAW DICTIONARY 278 (5th ed: 1979). The common English definition is "to commit, to entrust . . . to deliver into the care and control of another." Ryttenberg v. Schefer, 131 F. 313, 321 (S.D.N.Y. 1904). It has also been suggested that, depending on the circumstances, "consignment" can be synonymous with "shipment." Commonwealth v. Harris, 168 Pa. 619, 627, 32 A. 92, 94 (1895).

21. As one court has observed, "a consignment of goods . . . does not pass the title at any time, nor does it contemplate that it should be passed. The very term implies an agency, and that the title is in the consignor, the consignee being his agent." Rio Grande Oil Co. v. Miller Rubber Co., 31 Ariz. 84, 87, 250 P. 564, 565 (1926); see Bender, supra note 3, § 11.03[2].

22. E.g., Sturm v. Boker, 150 U.S. 312 (1893). Although the Court specifically stated that a consignment existed where property was delivered "for care or sale," id. at 329 (emphasis added), the consignee was in fact to sell the goods for the consignor. Id. at 326. See also 2 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS § 317 at 252 (rev. ed. 1948) (indicating that the "ordinary" common law consignment involved a power to sell by the agent-consignee). But see In re Novak, 7 U.C.C. REP. SERV. (CALLAGHAN) 196 (Md. Cir. Ct. 1969) (no consignment since no authority to sell and no sales actually made).

23. See supra notes 20 & 21 and accompanying text. This seemingly subtle distinction between a delivery for sale and one that is not is discussed later in determining whether a transaction constitutes a deemed sale or return under U.C.C. § 2-326(3). See infra notes 57-67 and accompanying text.
common law, consignment is established when: (1) the consignor retains title to the goods, (2) the goods are delivered by the consignor into the possession of a consignee, and (3) the consignee retains possession of the goods until title is transferred through a sale with a buyer.\(^{24}\) Thus, it is a change in possession which effects a consignment, not a change in ownership.

Prior to the promulgation of the Uniform Commercial Code in 1951,\(^{25}\) the prevalent problem with the consignment transaction resulted from the fact that the consignment failed to pass any interest whatsoever in the consigned property to the consignee.\(^{26}\) This was of particular significance to the consignee's creditors claiming an interest in all property belonging to the consignee upon the latter's default. If a creditor had extended credit to a consignee relying upon the consignee's ostensible ownership of goods in its possession, that creditor would be likely to find that the supplier-consignor had insulated the goods from creditors' claims.\(^{27}\) The common law result was that the retention of bare legal title allowed the consignor to repossess his goods against the claims of the consignee's creditors.\(^{28}\)

The common law concepts of title were significantly modified in the Uniform Commercial Code, which does not utilize the title


\(^{26}\) This arrangement, therefore, was said to have created in the consignor's retained title both "the sword of reclamation and the shield against execution." W. Hawland, \textit{supra} note 24, at 396.


\(^{28}\) In response to this unjust treatment afforded third parties who relied on the ostensible ownership by consignees-agents in possession of their consignors'-principals' goods, factors' acts were passed by state legislatures. For a concise explanation of the development of factors' acts in England and the United States, see S. Williston, \textit{supra} note 22, §§ 318–320; Conant, \textit{The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership}, 47 Neb. L. Rev. 678, 693–703 (1968). Nonetheless, consignors with undisclosed interests continued to prevail. \textit{See}, e.g., Ludvigh v. American Woolen Co., 231 U.S. 522 (1913) (consignment agreement was entered into in good faith between consignor and consignee; consignor prevailed against trustee in bankruptcy). This common law development was later criticized as creating "a secret lien against creditors of a shaky consignee, as harmful as an unfiled chattel mortgage or conditional sale." Liebowitz v. Voiello, 107 F.2d 914, 916 (2d Cir. 1939); \textit{see} J. White & R. Summers, \textit{supra} note 10, at 883.
concept in resolving sales problems. This change affected not only sales transactions, but consignments as well.

Rather than concentrating solely on the location of title to formulaically determine whose claim would be successful, the Code has taken another approach in dealing with the problem engendered by the consignment transaction. The U.C.C. generally requires that where a person seeks a "security interest" in property, that person take various steps to assure the creation and maintenance of that interest. Respecting consignments, where the consignor intends to retain such an interest in property, the transaction is deemed a "security consignment," and is governed by Article 9 of the Code. This is distinguished from the "price-fixing" consignment, otherwise known as a "true" consignment, which involves no security interest and is subject to Article 2 of the Code governing sales transactions. Both of these transac-


30. The U.C.C. states that "[e]ach provision of Article 2 with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title." U.C.C. § 2-401 (1978) (emphasis added).

31. Perhaps the provision which displays the greatest departure from the traditional title concepts in the consignment area is the "modern factors' act" codified at U.C.C. § 2-403(2) (1978). This section protects third parties who buy consigned goods from an agent-consignee by empowering the consignee-dealer in those goods to transfer all of the consignor's rights in the property to a buyer in the ordinary course of business. For purposes of the issue presented at infra note 23 and accompanying text, and at infra note 42 and accompanying text, it should be noted that no authority to sell is required under this provision. Rather, since the principal-consignor creates an apparent authority situation by utilizing as a consignee one who deals in the same types of goods, the consignor's goods will be subject to third party claims. See Conant, supra note 28, at 701-03.


33. The retention of title by an owner is equated with the retention of a "security interest"—"an interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-201(37) (1978).

34. U.C.C. §§ 9-101 to -507 (1978). The U.C.C. test for a "security consignment" is subjective, focusing on the parties' intent to determine the type of consignment involved. "Unless a . . . consignment is intended as security, reservation of title thereunder is not a 'security interest' . . . ." U.C.C. § 1-201(37) (1978) (emphasis added).

35. Even though the distinction holds no immediate importance for this discussion, a number of noteworthy commentators have analyzed the differences between the two types of consignments and the varying treatment of each under the Code. See Bender, supra note 3, ch. 11 passim; Duesenberg, Consignment Distribution Under the Uniform Commercial Code: Code, Bankruptcy, and Antitrust Considerations, 2 Val. U.L. Rev. 227 (1968); W. Hawkland, supra note 24. Although it superficially appears to be an instinctive deci-
tions are always subject to interpretation under section 2-326.36

Section 2-326(3) is based on the principle of ostensible ownership and seeks to protect innocent creditors of the consignee.37 This protection is generated through the interaction of two section 2-326 provisions. First, section 2-326(2) provides that in a sale or return transaction, the goods will be subject to the claims of the buyer's creditors where the buyer is in possession of those goods.38 Second, section 2-326(3) specifies that a consignment transaction will be deemed a sale or return transaction.39 In effect, then, a consignment transaction is treated as a sale transaction, even though the primary requirement of a sale—the passage of title—has not occurred.40 Section 2-326(3) thus allows the creditor to assume that the consignee owns the consigned goods, because in its dealings with the creditor, the consignee is treated as owner.

Since the Code considers only the objective nature of the transaction, the parties' subjective intentions are irrelevant in distinguishing a sale transaction from a consignment.41 If the objec-

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36. The effect of the Code's subjective test set out at U.C.C. § 1-201(37) is that all consignments are subject to interpretation under § 2-326(3), but only those consignments intended as security are subject to the stringent requirements of Article 9. Thus, an extensive amount of litigation revolves around the nature of the consignment in question in order to determine which Code provisions are applicable. See BENDER, supra note 3, § 11.02[1].

37. See supra note 9. This section's fundamental purpose has been described by a leading U.C.C. scholar as follows:

Regardless of the legal theory of the consignment, in practical operation it looks like a sales transaction in which the unpaid seller retains a secret lien in his goods. From a creditor's point of view, the consigned goods appear to be part of the regular inventory of the consignee which, therefore, ought to be subject to their claims. What is more, unlike a pre-code chattel mortgage, there is no public filing or other notoriety respecting the consignment to warn the creditors that the consignor may have rights in the goods which are superior to theirs.

The Code drafters were apparently much impressed that the consignment situation could be terribly misleading to creditors of the consignee. So, while the Code permits the consignment transaction to continue, it declares that the consignment will be valid as against creditors only if there is some way by which creditors can learn of the consignment.

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38. U.C.C. § 2-326(2) (1978). This section is set forth in full at supra note 5.

39. U.C.C. § 2-326(3) (1978). This section is set forth in full at supra note 5.

40. See supra note 8.

tive criteria are met, therefore, the appearance of ownership is created and a deemed sale or return will be found. These requisite criteria are: the delivery of goods by the owner-consignor to a person "for sale," to a location where the latter deals in goods of the same kind, and the receiver-consignee's use of its own name, rather than that of the owner-consignor, in dealing with the goods.

A deemed sale or return will not be found, and a belief in the ostensible ownership of goods will be deemed unreasonable, if the owner-consignor has taken the precautionary steps required by statute to warn others of its retention of title in the goods. These steps are: (1) the consignor must comply with the law in those few states which have determined that the posting of a sign suffices to indicate retained ownership; (2) the consignor must show that the consignee's creditors generally know that a substantial portion of the consignee's business involves the sale of similar goods which are owned by others, and (3) the consignor must fulfill the Article 9 public filing requirement. Through these exceptions, the U.C.C. specifies when a creditor is not "deemed to be
deceived" by a consignor into believing that the consignee owns the goods in its possession and has the power to dispose of them, by sale or otherwise, as the latter so desires.

Some commentators have suggested that section 2-326(3) was designed to compromise the owner-consignor's interest in its goods while affording protection to the creditor who relied on its debtor's (i.e., the consignee's) ostensible ownership. Although the section balances the conflicting interests of the consignor and the creditor, there is no evidence of compromise in section 2-326(3). If the transaction creates the appearance of ownership by satisfying the objective criteria described above, and the consignor has not protected its interest in the goods by complying with the notoriety exceptions, the consignor's claim of ownership will be subordinated to a creditor's claim.

Ambiguous statutes are likely to result in a variety of interpretations, particularly where, as here, a uniform statute has been promulgated for nationwide adoption. With respect to the interpretation of section 2-326(3), the recent Fifth Circuit decision in *Walter E. Heller & Co. Southeast v. Riviana Foods, Inc.* adds a new dimension to resolving the issue of whether a transaction is a deemed sale or return. The result of the decision was to defeat the creditor's claim, despite the ostensible ownership by the debtor in the goods it held for another.

*Riviana* hinges on the ambiguity in section 2-326(3) that goods be "delivered to a person for sale" if a deemed sale or return transaction is to be found. By limiting the interpretation of the words "for sale" to denote actual sales or express actual authority to make those sales, the Fifth Circuit has undercut the extent to which section 2-326(3) applies to consignment transactions.

48. See supra note 9 (last sentence of U.C.C. § 2-326, Official Comment 2 (1978)).
49. See supra notes 45-47 and accompanying text.
51. See supra notes 27 & 28 and accompanying text.
52. See supra notes 42-44 and accompanying text.
53. See supra notes 45-47 and accompanying text.
54. To illustrate, every state, with the exception of Louisiana, has adopted § 2-326(3), and none has specifically treated the definitional problem engendered by the term "for sale." See supra note 42.
55. 648 F.2d 1059 (5th Cir. 1981).
56. The Official Comments to the section, set forth at supra note 9, state that the purpose of the three exceptions to § 2-326(3) is to determine the conditions under which a creditor is "deemed to have been misled." U.C.C. § 2-326 Official Comment 2 (1978). Thus, if the conditions of § 2-326(3) are met, and none of the exceptions is applicable due to noncompliance by the consignor, a creditor will be "deemed to have been misled."
Before examining the *Riviana* decision, however, this Note will consider the judicial interpretation of those specific provisions of section 2-326(3) which were at issue in *Riviana* as well as the deemed sale or return test as developed by the pre-*Riviana* decisions.

II. Tests for Determining a Deemed Sale or Return Under U.C.C. Section 2-326(3)

Two major tests are employed to determine whether a transaction constitutes a deemed sale or return for purposes of section 2-326(3). Under the criteria for misleading the creditor, a creditor can rely on the consignee's ostensible ownership to demonstrate the existence of a deemed sale or return. The distinct component test searches for the presence of a component in the final sales price reflecting payment for the consignee's services.

A. Misleading the Creditor Criteria

1. The Authority to Sell Requirement

The most controversial element of a deemed sale or return transaction is that the person receiving the goods actually sell or be given express actual authority to sell those goods.\(^{57}\) Although this controversy existed long before the promulgation of the Uniform Commercial Code, a solution was easily reached where the situation gave the appearance of ownership by the consignee. Thus, it was said that

if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. . . .

[Therefore, if] the principal send his commodity to a place,

\(^{57}\) This authority to sell requirement presumably arises from the statutory mandate that the goods be delivered to a dealer in those goods "for sale." See General Elec. Co. v. Pettingell Supply Co., 347 Mass. 631, 199 N.E.2d 326 (1964).
where it is the ordinary business of the person to whom it is
confided to sell, it must be intended that the commodity was
sent thither for the purpose of sale.\textsuperscript{58}

So long as the owner of goods intentionally or carelessly created
an appearance of ownership in another by delivering those goods
to, or allowing continued possession by, a person who ordinarily
deals in goods of a similar kind, no express actual authority to sell
was necessary to create a deemed sale or return.\textsuperscript{59} The Uniform
Commercial Code maintained this treatment of ostensible
ownership.\textsuperscript{60}

The first reported decision specifically interpreting the author-
ity to sell problem was \textit{General Electric Co. v. Pettingell Supply
Co.}\textsuperscript{61} In \textit{Pettingell}, a lamp manufacturer delivered a number of
lamps to its wholesaler, a dealer in goods of this kind, either for
sale by the wholesaler directly or for delivery to customers of vari-
ous retail agents. The court determined that the goods had been
delivered to the dealer "for sale," and were therefore subject to
claims of the dealer's creditors under section 2-326(3), by reason-
ing that \textit{some} authority to sell the lamps had been given, even
though all of the lamps were not sold by the consignee.\textsuperscript{62}

\textsuperscript{59} For a progression of the case law in this area, see citations in P. Mechem, Out-
\textsuperscript{60} The Uniform Commercial Code's policy of applying ostensible ownership princi-
ples to sales transactions resulted in the adoption of § 2-403, Power to Transfer; Good Faith
Purchase of Goods; Entrusting. This section was promulgated to protect persons who buy
in the ordinary course of business from a dealer's inventory. The drafters determined that
the power granted under this section to those who deal in goods to transfer all rights (in-
cluding title) was not inconsistent with the expectations of either consignors or creditors,
"since the very purpose of goods in inventory is to be turned into cash by sale." U.C.C. § 2-
403, Official Comment 2 (1978). Subsections 2-403(2) and (3) provide as follows:

(2) Any entrusting of possession of goods to a merchant who deals in goods of
that kind gives him power to transfer all rights of the entruster to a buyer in
ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of pos-
session regardless of any condition expressed between the parties to the deliv-
ery or acquiescence and regardless of whether the procurement of the
entrusting or the possessor's disposition of the goods have been such as to be
larcenous under the criminal law.


\textsuperscript{62} Only 26% of the lamps held by the consignee were "sold" directly to consumers.
\textit{Id.} at 635, 199 N.E.2d at 329. In interpreting § 2-326's application to the case, the court
observed that reading § 2-326(1)(b), defining a "sale or return," with § 2-326(1)(a), defin-
ing a "sale on approval," "does not . . . exclude a consignment of goods to be sold or to be
delivered to other agents as orders may require." \textit{Id.} (emphasis added). This statement may
appear misleading unless it is remembered that there are three separate transactions which
are treated in § 2-326. \textit{See supra} notes 6-8 and accompanying text. To clarify the matter,
this sentence might be paraphrased as follows: the subsections of § 2-326 determining a
The Pettingell court considered the applicability of section 2-326(3) in the event no actual sale by the consignee had been made, and explicitly stated that it was unnecessary to find an actual "sale" before determining that the transaction was a deemed sale or return.\textsuperscript{63} The court refused, however, to contemplate the result in the event the sole authority given the consignee had been to distribute, but not to sell, the lamps.\textsuperscript{64} The effect of the court's decision was to treat the consignee's entire inventory as part of a deemed sale or return transaction subject to the creditor's claims, even though only a fraction of the consigned goods were actually sold by the consignee. Indeed, this may be the only reasonable conclusion, since a consignee's "secret" arrangement with the consignor to sell none, part, or all of the goods does not diminish the consignee's ostensible ownership, and should likewise not diminish the protection afforded creditors under section 2-326(3)\textsuperscript{65}.

To be consistent with the intent of the drafters of the Uniform Commercial Code, section 2-326(3) should be applied to a wide variety of situations where a creditor is "deemed to have been misled" by the consignee's ostensible ownership of goods belonging to the consignor.\textsuperscript{66} The need for expanded creditor protection is particularly acute where the debtor deals not only in the type of goods involved, but also agrees to act as a delivery agent-consignee with respect to goods owned by another.\textsuperscript{67} Where there is

\textsuperscript{63} The court stated that "subsection [2-326(3),] by its terms [is] concerned with certain transactions which, although they may not be sales under the definition of... § 2-106(1), are nonetheless 'deemed to be on sale or return' with respect to claims of creditors of the person conducting the business... ." 347 Mass. at 633, 199 N.E.2d at 328. This finding is entirely consistent with the concept of consignment which, by definition, passes no title. \textit{See supra} notes 20 & 21 and accompanying text.

\textsuperscript{64} 347 Mass. at 635, 199 N.E.2d at 329.


\textsuperscript{66} \textit{See supra} note 9 (last sentence of U.C.C. § 2-326, Official Comment 2 (1978)).

\textsuperscript{67} The result of broadly applying § 2-326(3) to this situation was applauded in \textit{In re Novak}, 7 U.C.C. REP. SERV. (CALLAGHAN) 196 (Md. Cir. Ct. 1969). In Novak, business machines had been delivered by a manufacturer to the debtor, a repairer of such machines, for demonstration, as loans to previous purchasers during the period of their machine's repair, and for delivery against sales orders. The court found a deemed sales or return transaction since as § 2-326(3) "includes transactions in which the goods are delivered at least in great part for ultimate resale." \textit{Id.} at 201 (emphasis added). \textit{See also} Grady v. Gennett, 31 U.C.C. REP. SERV. (CALLAGHAN) 83 (S.D. Fla. 1981) (holding as irrelevant whether consignor left goods with debtor primarily for the purpose of free storage or sale in determining applicability of § 2-326(3)). \textit{Contra} Taylor Mobile Homes v. Founders Inv.
no objective indication that the debtor owns one particular good in his possession as distinguished from another, the authority to sell requirement should have no bearing on the viability of the creditor's claim. For one thing, the ease with which a consignor can indicate its ownership of the goods negates the need for such a requirement. Another factor militating against this requirement is that it places an undue burden on the creditor to uncover the existence of a secret arrangement between the consignor and consignee concerning the authority (or lack thereof) to sell. Such an onus would neglect the legitimate claims of the consignee's creditor.

2. The Commingling of Goods by the Consignee

Section 2-326(3) is premised on the notion that a creditor should be able to rely on the ostensible ownership of the goods held by its debtor, unless the creditor possesses actual or constructive knowledge to the contrary resulting from the consignor's compliance with the notoriety exceptions. In the context of a deemed sale or return, ostensible ownership may be evidenced by the consignee's commingling of consigned goods with those owned and regularly dealt in by the consignee. In such circumstances, unless some precaution has been taken to indicate a third party's ownership of the goods, the creditor should not be penalized for reasonably concluding that its debtor owns all that it appears to own. Thus, a consignor's sole assurance that the goods delivered to a consignee will remain subject to the consignor's re-

Corp., 238 So. 2d 116 (Fla. Dist. Ct. App. 1970) (holding that where mobile homes delivered "on consignment for display and retail sale," creditor's claim could not attach since the homes were not subject of sale, and no creditor interest could arise merely from transfer of possession). See generally Note, Consignments Under the Uniform Commercial Code, 39 UMKC L. Rev. 274 (1971) (analysis of Taylor Mobile Homes and determination that had the court considered § 2-326(3), a deemed sale or return transaction would have been found).

68. See supra notes 45-47 and accompanying text. As one commentator aptly notes, "people should be able to deal with a debtor upon the assumption that all property in his possession is unencumbered, unless the contrary is indicated by their own knowledge or by public records." W. Hawkland, supra note 24 and accompanying text.

69. The duty of the consignee to prevent commingling of the goods received in a consignment has long generated interest. Prior to the passage of such protective statutes as U.C.C. § 2-326(3), or the pre-U.C.C. factors' acts, the consignee's creditors did not fare well despite the commingling and appearance of ownership by the consignee. See S. Wiltiston, supra note 22, § 338 at 304-05. This, however, is not always the case today. See, e.g., Modular Hous. Inc. v. G.A.C. Trans-World Acceptance Corp., 288 Ala. 77, 257 So.2d 326 (1972) (transaction held to be a deemed sale or return where mobile homes were delivered by manufacturer to dealer and commingled on dealer's lot).
tained ownership interest, irrespective of the consignee’s treatment of those goods (including the commingling of the consignee’s own goods with those of the consignor) is by compliance with the notoriety exceptions of section 2-326(3).\(^7\)

The commingling of goods by a consignee would most likely result in creditor deception in the absence of some form of notification as to the true ownership of those goods. However, it may not be necessary for the consignor’s goods to be physically intermingled with the consignee’s goods in order to establish ostensible ownership in the consignee.\(^7\) Application of section 2-326(3) in this circumstance, although appropriate in light of the stated purpose of this section,\(^7\) emphasizes the extent to which a creditor should be protected. If the consignor fails to take advantage of one of the three section 2-326(3) safeguards to assure protection of the retained ownership interest,\(^7\) the creditor will be “deemed to have been misled,” whether or not commingling of goods has occurred.\(^7\)

3. The Individual Versus the Commercial Consignor Distinction

Different judicial rules have evolved in the deemed sale or return area where an individual, as opposed to a commercial, consignor is involved, despite the identical illusory effect on the creditor of ostensible ownership. The result has been that even in those cases where the court has found a sale or return, as in Allgeier v. Campisi,\(^7\) or a deemed sale or return transaction, as in

\(^7\) See Modular Hous. Inc., 288 Ala. 77, 257 So. 2d 326 (1972); see supra notes 45–47 and accompanying text.

\(^7\) Manufacturers Acceptance Corp. v. Penning's Sales, Inc., 5 Wash. App. 501, 487 P.2d 1053 (1971). In Manufacturers Acceptance Corp., a retailer agreed with supplier to hold the latter’s paint and ship it to dealers upon the supplier’s direction. The paint was stored in rear of consignee’s store; retail operations continued in the store proper. A security agreement containing an after-acquired property clause was entered into between the retailer and the creditor, prior to shipment of the paint by the supplier to retailer. The court labeled this a deemed sale or return transaction, not a mere warehousing transaction. Id. at 506, 487 P.2d at 1057. Since the supplier had not complied with one of the stated exceptions to § 2-326(3), all the goods, both in front and back of the retailer’s store, were subject to the creditor’s claim.

\(^7\) See supra note 9 and accompanying text.

\(^7\) See supra notes 45–47 and accompanying text.

\(^7\) See supra note 56.

\(^7\) 117 Ga. App. 105, 159 S.E.2d 458 (1968). An automobile owner in Allgeier placed the car in the dealer’s lot for solicitation of purchase offers and expressly reserved the right to reject any bids. The court found no sale or return transaction, and the car was therefore not subject to the claims of the dealer’s creditor since the dealer was not a “buyer.” The Allgeier court was sharply criticized for its failure to consider the implications of § 2-326(3). Had the court done so, it is argued that a deemed sale or return transaction
Founders Investment Corp. v. Fegett, the individual consignor can successfully recover the consigned goods, even though no attempt was made to prevent creditor deception. The rationale for this contrary result in the case of a noncommercial consignor is that the parties neither intended nor contemplated a transfer of ownership in the goods by the transfer of possession, and the literal application of section 2-326(3) would produce harsh results to the individual consignor who is unsophisticated in technical commercial matters.

The inherent difficulty with the individual/commercial consignor distinction is that it is totally unsupported by section 2-326(3), since that section is equally applicable to all deliverers of goods. Additionally, the dichotomy allows a subjective test to be applied to the virtual disregard of the preferable objective criteria. It is not surprising, therefore, that this distinction has been rejected in such cases as Bischoff v. Thomasson. There, the court

would have been found. See Note, Consignments Under the Uniform Commercial Code—How Safe Are They?, 7 AM. BUS. L.J. 304, 305 (1970).

Furthermore, not all authorities have agreed with the Allgeier court's concept of "sale," particularly since "U.C.C. § 2-326(3) is designed to embrace certain transactions which, although not deemed to be sales within § 2-106(1), are deemed to be a sale or return with respect to the claims of creditors of persons to whom the goods are delivered." 1 R. Anderson, UNIFORM COMMERCIAL CODE § 2-326:3, at 777 (2d ed. 1970); see also Bender, supra note 3, § 11.03[3], at 11-47 (requirement in § 2-326(3) that a consignee "deals in goods" need not mean a sale for purposes of ascertaining existence of deemed sale or return transaction).

76. 23 U.C.C. REP. SERV. (CALLAGHAN) 903 (Ky. Ct. App. 1978). The court in Fegett determined that the "mere placing" of a mobile home with a dealer for the purpose of obtaining offers, but with no authority given to the dealer to sell, was not a sale or return under § 2-326. Id. at 906. This result was based on the "unjust and unwise" effect § 2-326 would have on "an individual owner, as distinguished from a commercial one . . . ." Id. (emphasis supplied). The court also believed that transactions of this type were so infrequent that commercial creditors would not be oppressed as a result of this opinion. Id.

77. See supra note 56.

78. The intent approach has been severely criticized by the commentators, since "[s]ection 2-326(3) is not based on intent but rather objective circumstances to characterize a delivery as on sale or return with respect to the dealer's creditors. . . . Apparently the court [in Fegett, by using this approach,] was more concerned with the harshness of allowing consumers to be subjected to a provision which it feels should be restricted to transactions between commercial parties." [6C Reporter-Digest] (part 2) BENDER'S U.C.C. SERV. (MB), § 2-326, at 146 (Supp. Oct. 1982).


80. See supra note 78.

81. 400 So. 2d 359 (Ala. 1981). The court criticized both Allgeier and Fegett as "maverick" cases, adding that "[i]f the drafters of [§ 2-326] had intended to limit its scope to commercial consignors, they could have inserted a limiting phrase such as 'between merchants.'" Id. at 367.
CONSIGNMENT SALES AND CREDITORS' RIGHTS

described the test to be applied in the case of an individual consignor as follows:

The test is simply one of looking at the outwardly visible aspects of the transaction outlined in [section 2-326(3)], viz.: (1) delivery of possession to the consignee, (2) engaging in the business of selling such types of items by the consignee, and (3) failure of the consignor to give public notice of his retained interest in the goods.\(^{82}\)

Thus, since the individual/commercial distinction appears to be a weak excuse for applying a test which unquestionably operates to the detriment of the consignee's creditors and, therefore, in derogation of section 2-326(3),\(^{83}\) there is little reason to perpetuate its use. Accordingly, whether a consignor is an individual or a commercial organization should not be considered in determining whether a transaction is a deemed sale or return.

4. Extending Credit Only After Consignment is Effected

The last requirement for misleading the creditor and qualifying for section 2-326(3) protection is that the creditor extend credit to the debtor-consignee after the consignee acquires possession of the goods.\(^{84}\) A corollary to this requirement is that if the creditor actually knew that the goods in the consignee's possession were owned by the consignor at the time credit was extended, those goods will not be subject to the creditor's section 2-326(3) claims, since the creditor could not have been misled by the consignor's failure to warn.\(^{85}\) The rationale for these requirements is that a creditor can rely on the argument of ostensible ownership only after it appears that someone other than the actual owner has title to the goods. These latter requirements constrict the full range of situations to which section 2-326(3) applies, since the Code generally does not require an actual misleading of the creditor. Instead, the consignor's goods are subject to a creditor's claim where the consignor has failed to take the requisite precautions to prevent a

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82. *Id.* at 367. The objective test was also used in Bufkor, Inc. v. Star Jewelry Co., 552 S.W.2d 522 (Tex. Civ. App. 1977) (intention of parties in determining whether transaction was consignment or sale irrelevant for purposes of § 2-326; creditor can treat transaction as sale to possessor unless consignor adhered to notoriety exceptions). But *see* American Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970) (dominant purpose of the delivery determined whether transaction was sale or return).

83. *See supra* note 9 and accompanying text.


situation where the creditor is "deemed to have been misled."  

Where the security agreement between the consignee-debtor and the creditor contains an after-acquired property clause, the timing of the extension of credit is of little concern, since the agreement stipulates that any property which subsequently is to become a part of the consignee's inventory is also to be subject to the creditor's claims, whether or not the creditor actually has knowledge of or relies on the consignee's ownership of those goods. Under these circumstances, the requirement that the creditor rely specifically on those particular goods held by the consignee is relaxed and the creditor's claim will succeed so long as the consignor failed to comply with the section 2-326 notoriety provisions.  

**B. The Distinct Component Test**

Although not widely adopted by courts for determining the existence of deemed sales or returns, the distinct component test, raised in *Vonins, Inc. v. Raff*, is applicable to the analysis of the transaction occurring in *Riviana*.  

In *Vonins*, a consignee-installer was engaged by a consignor-supplier of plumbing and heating equipment as a subcontractor under a number of installment contracts. The consignee received a percentage of the total billings under the contracts in payment for his labor. In an action to determine the interest of the consignor and the assignee for the benefit of the consignee's creditors in the supplies, the court found section 2-326(3) to be applicable since the goods had been delivered to the consignee "for sale" to others. In reaching its determination, the court noted that

> [a]t all times in which [the consignee] was engaged in operations, it performed the same method of distribution of equipment from manufacturer to ultimate user . . . . Even though an over-all price would be charged for the installation of the equipment, it cannot be denied that the price of the equipment installed was a distinct component of that consideration. Thus,

86. *See supra* note 56.

87. *See* Sussen Rubber Co. v. Hertz, 19 Ohio App. 2d 1, 249 N.E.2d 65 (1969) (after-acquired property clause in security agreement extended creditor's claim to property in deemed sale or return transaction); Clark Oil & Ref. Co. v. Liddicoat, 65 Wis. 2d 612, 223 N.W.2d 530 (1974) (claim of attaching creditor given priority even though credit was extended to debtor-consignee before it possessed consignor's goods and creditor could, therefore, not have relied on debtor's ostensible ownership).


89. *See infra* notes 144-46 and accompanying text.

90. 101 N.J. Super. at 181, 243 A.2d at 841.
[the consignor] delivered goods to [the consignee] "for sale" to others. That resale need not have been consummated at [the consignee's] premises for the statute to apply. The essence of the distinct component test, thus, is that where the final purchase price to an ultimate consumer contains as a “distinct component” an amount attributable to the consignee's services with respect to the consigned goods, the goods will be considered to have been delivered “for sale” by the consignor to the consignee, and section 2-326(3) applies.

III. Walter E. Heller & Co. Southeast v. Riviana Foods, Inc. 92

On August 2, 1977, the predecessor in interest of Walter E. Heller & Company Southeast Georgia ("Heller") entered into an inventory loan security agreement with Bill Amos Brokerage Co., Inc. ("Debtor" or "Amos"). Amos operated a warehouse facility where it also engaged in a wholesale food distribution business as both broker and merchant. The agreement between Heller and Amos provided that Heller would make occasional loans to Amos in an amount not to exceed a certain percentage of the value of Amos' inventory either owned at the time of the loan or acquired thereafter by Debtor. Subsequently, on January 22, 1979, Debtor filed for voluntary bankruptcy. This triggered the default section under Heller's security agreement and, in accordance with the applicable provisions of that agreement, Heller sought to take possession of Amos' entire inventory.

Unknown to Heller at the time of its agreement with Debtor, Riviana Foods, Inc. ("Riviana"), a food supplier, had entered into

91. Id. at 181-82, 243 A.2d at 841-42.
92. 648 F.2d 1059 (5th Cir. 1981).
93. As evidenced by the financing statements Heller filed with Florida's Secretary of State, "Bill Amos Brokerage Co., Inc." was also doing business under the trade name "Merchants Transfer and Storage Co." Complaint, Exhibit "C," Walter E. Heller & Co. S.E. v. Riviana Foods, Inc., No. 79-403-CIV-J-B (M.D. Fla. July 18, 1980).
95. 648 F.2d at 1060.
96. Id.
98. Id. at 3.
an agreement with Debtor on February 4, 1976.\textsuperscript{100} Under the agreement, Debtor was to act as a "delivery agent" for orders received by Riviana for its grocery products, which were kept at Debtor's warehouse facility.\textsuperscript{101} In return, Debtor was to receive a fixed percentage of the invoice price paid to Riviana.\textsuperscript{102} Soon after Debtor had filed for voluntary bankruptcy, Riviana removed the goods it had stored with Debtor, worth approximately $23,000, in which Heller claimed a security interest.\textsuperscript{103} The parties made no provision for the sale of Riviana's goods by the debtor.\textsuperscript{104} Nonetheless, Riviana conceded that Debtor operated a place of business under its own name at which it dealt in food goods.\textsuperscript{105} Riviana also admitted that it took no steps whatsoever to evidence its retained ownership interest in a portion of the goods held by Debtor at the latter's facility.\textsuperscript{106}

A. Judicial Resolution

Based on these facts, the United States District Court for the Middle District of Florida granted Riviana's motion for summary judgment in an unpublished opinion.\textsuperscript{107} The court determined that the transaction between Riviana and Debtor was not a deemed sale or return under the Florida equivalent of U.C.C. section 2-326(3).\textsuperscript{108} The United States Court of Appeals for the Fifth Circuit subsequently affirmed this opinion \textit{per curiam}.\textsuperscript{109}

The principal issue in \textit{Riviana} was whether the goods had been delivered by Riviana to Debtor "for sale," since no specific authority had been conferred upon Debtor to sell.\textsuperscript{110} The courts determined that the present case was easily distinguishable from

\begin{itemize}
\item \textsuperscript{100} 648 F.2d at 1059-60.
\item \textsuperscript{101} Answer Brief for Appellee at 2, Walter E. Heller & Co. S.E. v. Riviana Foods, Inc., 648 F.2d 1059 (5th Cir. 1981).
\item \textsuperscript{102} 648 F.2d at 1060.
\item \textsuperscript{103} \textit{Id}.
\item \textsuperscript{104} Neither the District Court nor the Court of Appeals, by its \textit{per curiam} adoption of the District Court's opinion, believed that the distinction between authorization and prohibition should affect the outcome of this case. Since there was no specific agreement permitting the Debtor to sell, and since Debtor did not actually sell, both courts refused to further consider the matter. 648 F.2d at 1063.
\item \textsuperscript{105} \textit{Id}. at 1061.
\item \textsuperscript{106} \textit{Id}.
\item \textsuperscript{108} FLA. STAT. § 672.2-326(3) (1966).
\item \textsuperscript{109} 648 F.2d at 1059.
\item \textsuperscript{110} \textit{Id}. at 1061.
\end{itemize}
such cases as *Pettingell*\(^{111}\) and *Pennings' Sales*,\(^{112}\) where some authority to sell had been given to the consignee. Instead, they relied on *Allgeier*\(^{113}\) as applicable to this situation since no express actual authority to sell had been given.\(^{114}\)

The courts viewed section 2-326(3) as "strik[ing] a balance between the desire of the supplier to maintain an interest in his goods and that of the creditor in relying on the apparent wealth of his debtor."\(^{115}\) Having failed to find a "sale" of the goods,\(^{116}\) the balance was struck in favor of the owner of those goods. The courts had difficulty with the fact that Heller had extended credit to Debtor before any of the specific goods involved in the case were shipped by Riviana to Debtor. Even though Riviana failed to comply with the notoriety exceptions,\(^{117}\) and despite the inclusion of an after-acquired property clause in the security agreement between Heller and Amos,\(^{118}\) the courts found that the possibility that Heller had been misled was only "minimal," and therefore, "decline[d] to read § 2-326 literally."\(^{119}\)

**B. Riviana’s Analytical Ambiguities**

In light of the tests which have evolved to determine whether a transaction is a deemed sale or return, there are a number of difficulties with both courts’ analyses in *Riviana*. Perhaps most significant is the failure to find a "deemed misleading" of the creditor, Heller, in light of Riviana’s failure to comply with the notoriety exceptions to section 2-326(3).\(^{120}\) The following section will apply

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114. This is particularly remarkable in light of commentators’ urgings that this case be applied restrictively even where an individual consignor, rather than a commercial consignor like Riviana, is involved. See *supra* notes 75–83 and accompanying text.

115. 648 F.2d at 1062. *But see supra* notes 50–53 and accompanying text (illustrating that this is not the intention of § 2-326(3)).

116. 648 F.2d at 1062. There is no requirement, however, that a sale must be effected before a consignment or a deemed sale or return transaction is found. See *supra* note 63.

117. 648 F.2d at 1061.

118. *See supra* note 95 and accompanying text.

119. 648 F.2d at 1062.

120. *See supra* note 56. It is particularly surprising to note that although no case has been reported with *Riviana*’s same fact pattern, one commentator treated this situation in hypothetical form and concluded that "[t]he thrust of the decisions [considering application of § 2-326(3)] would include this distribution technique . . . ." Winship, *supra* note 19, at 853.
each test previously raised in this Note to the facts of *Riviana*, and will discuss that decision’s effect on the deemed sale or return transaction.

1. *Misleading the Creditor Criteria*

   a. *The Authority to Sell Requirement.* The *Riviana* courts held that since express actual authority had not been given to Debtor to sell the owner’s goods, no deemed sale or return could be found.121 Recent cases and commentators have relaxed this requirement, however, and have agreed that “ultimate” resale of the consignor’s goods is more consistent with the section 2-326 creditor protection purpose.122 That section does not specify that authority to sell is necessary to result in creditor protection, nor do the Official Comments so limit its application.123 However, the Official Comments do indicate that the consignee’s creditors are to be protected from secret reservations124 in ostensible ownership situations. With this stated purpose as the impetus, it should be clearly unnecessary to predicate deemed sales or returns upon the conferral of express actual authority upon the consignee to sell.

   b. *The Commingling of Goods by the Consignee.* Uncontroverted evidence was offered in *Riviana* that Riviana’s goods which were stored in Debtor’s facility were not segregated from, but instead were commingled with, goods owned by others which were stored at that facility.125 Riviana admitted that it made no attempt to notify Heller, in its capacity as Debtor’s creditor, of its ownership of goods in Debtor’s warehouse.126 Nor could Debtor demonstrate that its creditors knew of it as being substantially engaged in selling others’ goods.127 Since it was conceded that Debtor maintained a place of business at which it dealt in goods of the kind involved,128 it would appear that the criteria for finding a deemed sale or return were met.129 Furthermore, none of the exceptions was applicable.130

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121. 648 F.2d at 1062–63.
122. *See supra* notes 57–67 and accompanying text.
123. *See supra* note 56.
126. 648 F.2d at 1061.
127. *Id.*
128. *Id.*
129. *See supra* notes 42–44 and accompanying text.
130. *See supra* notes 45–47 and accompanying text.
Although the commingling of goods alone would suffice to produce a prima facie deceptive situation of ostensible ownership for purposes of applying section 2-326(3),\textsuperscript{131} it may only be necessary that all the goods be stored under the same roof for a deemed sale or return to be found.\textsuperscript{132} Thus, by failing to consider that Riviana’s goods were in fact commingled with goods owned by others in Debtor’s facility, the courts in \textit{Riviana} were rejecting a long-established method for determining whether a creditor was actually misled. Of course, it is unnecessary to pursue this level of analysis, since Heller could “reasonably be deemed to have been misled” by Riviana’s failure to comply with the recognized exceptions to section 2-326(3).\textsuperscript{133}

c. \textit{The Individual Versus the Commercial Consignor Distinction}. In drawing a positive comparison with \textit{Allgeier},\textsuperscript{134} the \textit{Riviana} courts stated that since “the debtor was authorized to act only as agent of the owner,”\textsuperscript{135} a deemed sale or return could not be found.\textsuperscript{136} Not only does this conclusion upset the definition of a consignment as an agency relationship,\textsuperscript{137} but it also ignores the individual versus commercial consignor dichotomy which distinguishes \textit{Allgeier} from \textit{Riviana}. In \textit{Riviana}, an individual did not innocently leave his family auto with the neighborhood car dealer; instead, an experienced commercial food company\textsuperscript{138} delivered its goods to an experienced commercial food broker and merchant.\textsuperscript{139} Unlike an individual consignor, who might arguably require heightened protection by a court,\textsuperscript{140} Riviana was in a better position to take the precautions required under section 2-326(3) than was any other party. Having failed to do so, it seems hardly appropriate that a court would countenance Riviana’s in-

\textsuperscript{131} See supra notes 68–70 and accompanying text.
\textsuperscript{132} See supra notes 71–74 and accompanying text.
\textsuperscript{133} See supra notes 9 & 56.
\textsuperscript{134} Allgeier v. Campisi, 117 Ga. App. 105, 159 S.E.2d 458 (1968); see supra note 75 and accompanying text.
\textsuperscript{135} 648 F.2d at 1062.
\textsuperscript{136} Id.
\textsuperscript{137} See supra note 2 and accompanying text.
\textsuperscript{138} The Articles of Incorporation of Riviana Foods, Inc., were filed with the Secretary of State of Delaware on April 29, 1946.
\textsuperscript{139} The Articles of Incorporation of Bill Amos Brokerage Co., Inc., were filed with the Secretary of State of Florida on January 28, 1965.
\textsuperscript{140} This argument has subsequently been rejected even in the context of an individual consignor. See supra notes 80–83 and accompanying text.
action, which prevented its underlying ownership of the goods from being suspected by anyone else.

In effect, the Riviana courts applied a subjective rather than objective test to the facts of the case; the courts determined that the parties did not intend a transfer of ownership interest, nor did they intend for the goods to be treated as if "for sale" by Debtor. Therefore, the courts reasoned, there could be no deemed sale or return. The fault with this analysis is that it is of little legal significance whether there was an actual transfer of ownership interest, nor does it matter what the parties actually intended. Rather, the test considers the objective circumstances which manifest the appearance of ownership to others. Had this test been applied, a deemed sale or return would have been found, since: (1) possession of the goods had been transferred from the owner to (2) another party which was engaged in the business of dealing in goods of that kind, where (3) the owner had failed to give public notice of its retained interest in the goods.

2. The Distinct Component Test

The Debtor in Riviana received six and one-half percent of the sales price of each item subsequently sold by Riviana as payment for its storage and delivery of the goods. A percentage of the overall sales price was also the compensation received by the consignee in Vonins for the role it played in the handling and disposing of consignor's goods. In both cases, the ultimate purchase price to be paid by the consumer of the goods contained as a "distinct component" an amount attributable to the consignee for services rendered. In Vonins, this service was installation; in Riviana, it was warehousing and delivering. Thus, it may be argued that where a person's activities substantially affect the final sale price of goods, as was the case in Riviana, the goods were

141. It is not necessary that ownership vest in the consignee for a creditor's claim to attach to goods possessed by the consignee. See, e.g., Sussen Rubber Co. v. Hertz, 19 Ohio App. 2d 1, 249 N.E.2d 65 (1969). Indeed, § 2-326(2) itself states that "goods held on sale or return are subject to [creditor's] claims while in the buyer's possession," U.C.C. § 2-326(2) (1978) and so long as the factual prerequisites of § 2-326(3) are met, goods held by a consignee will be subject to a creditor's claims in a deemed sale or return transaction. See also supra note 63 and accompanying text ("sale" is unnecessary for "deemed sale or return" transaction).

142. See supra notes 79–83 and accompanying text.

143. See supra note 82 and accompanying text.

144. 648 F.2d at 1060.


146. Id. at 181–82, 243 A.2d at 841–42.
delivered to such person "for sale," under the Vonins distinct component test, and the provisions of section 2-326(3) should apply.

IV. Conclusion

Wholesale financing is often rendered chaotic due to the inability to consistently perfect security interests. This difficulty arises when "secret" consignors appear with a superior interest in their debtors' inventory.147 Unfortunately, Riviana perpetuates this confusion. Indeed, the Riviana courts appear to have restructured the language of section 2-326(3), and effectively to have sanctioned the use of secret arrangements by consignors.

Unlike the U.C.C.,148 Riviana requires authority to make sales.149 Although the purpose of the Code is to minimize adverse consequences to a consignee's creditors,150 Riviana sets a new standard which a creditor must meet before it can benefit from section 2-326(3). Thus, unless a creditor can show that it was more than minimally misled by the consignor's secret reservation,151 not even the consignor's failure to comply with the notoriety exceptions will preserve the creditor's claim.

Perhaps the most disturbing aspect of Riviana is that the consignor there was unquestionably in the best position to protect itself. It had been in business for many years, and undoubtedly could have stored its goods with another consignee which did not deal in food goods itself. Alternatively, being a "sophisticated" consignor, Riviana could have complied with the Article 9 filing requirements.152 In either event, it is certainly unsettling that an experienced consignor is given added incentive to do nothing to protect an undisclosed ownership interest while the subject goods are creating the reasonable but inaccurate impression of ostensible ownership.

148. See supra note 56. The Code does not specifically exclude the finding of a deemed sale or return where the goods are delivered (as opposed to "sold") as orders may require. See General Elec. Co. v. Pettingell Supply Co., 347 Mass. 631, 635, 199 N.E.2d 326, 329. See supra note 62.
149. See supra note 114 and accompanying text.
150. See supra note 9 and accompanying text.
151. 648 F.2d at 1062 (a finding of minimal misleading, as it presents a quantitative factor which is neither found in § 2-326(3) nor defined in the decision itself).
152. This was the only exception to § 2-326(3) available to Riviana. Florida does not have an applicable sign-posting law by which a consignor can protect a retained ownership interest. Nor was it possible for Riviana to show that the debtor, Amos, was generally known by its creditors as being substantially engaged in selling the goods of others.
Although the intent of the drafters of the Code seems clear,\(^\text{153}\) the specific words which would prevent this abuse from recurring are not found in section 2-326(3) itself. Perhaps substituting the term "for purposes of sale" or "for ultimate sale" for the term "for sale" would alleviate some of the confusion which has been perpetuated.\(^\text{154}\) By adding these words, it would no longer be necessary to inquire whether the consignee sold the goods or held them with the express actual authority to sell. Another alternative might be to adopt a statutory test for determining whether the creditor had been sufficiently misled to require the protection afforded by section 2-326(3).\(^\text{155}\) In light of the above comments, however, it is doubtful that the drafters were anxious to create yet another statutory test different than the one which now suffices to determine a "deemed misleading."\(^\text{156}\) Indeed, if the existing judicial tests concerning the extent to which a creditor must be misled were to be abandoned,\(^\text{157}\) and the courts instead were to rely on the terms of the statute itself, the intent of the drafters would be followed and uniformity of interpretation of this section would ensue. It should be apparent, however, that some action is necessary to unify the decisions under section 2-326(3), and perhaps for the first time, create some stability in the consignment area.

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\(^{153}\) See supra note 9.

\(^{154}\) This has been suggested by at least one other commentator. See, e.g., UNIFORM COMMERCIAL CODE, Commentary, supra note 35, at 69 (sugesting that the section be changed to include the phrase: "Where goods are delivered to a person for sale, or distribution").

\(^{155}\) It is questionable whether this would be what the drafters had in mind. After all, nothing in § 2-326(3) indicates that the individual creditor's thoughts bear any relevance. The issue of knowledge is raised in the exception to § 2-326(3)(b) and applies only if the consignee is "generally known by his creditors" to deal substantially in others' goods. Ironically, this argument was raised in another case before the same District Court, involving the same creditor and consignee-debtor as in Riviana. Walter E. Heller & Co. of Ga. v. Lou Ana Foods, Inc., No. 79-460-CIV-J-B (M.D. Fla. Feb. 27, 1981). In that case, the security agreement contained an after-acquired property clause. The creditor had daily information available pertaining to the precise quantity of goods held by the debtor owned by the consignor. Despite the availability of this information, the court concluded that the consignor's claim was subordinate to that of the creditor since the former had not taken the steps necessary to evidence its ownership as delineated in § 2-326(3)(a)-(c).

\(^{156}\) See supra notes 27–28 and accompanying text.

\(^{157}\) See supra notes 57–87 and accompanying text.