Does inventory finance need purchase-money priority?
—A historical account on secured transaction law in the United States—

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Inventory finance has been advanced in Japan in recent years, and is expected to solve the financial problems that have distressed small Japanese companies. However, new legal problems have arisen with inventory finance because of its previous lack of popularity in the country. The most important of these problems is the conflict between the holder of the security interest in inventory and the seller of the inventory. This report suggests how we should treat this problem.

In the U.S., there is a rule to address this issue. UCC§9-324(a) provides that a perfected purchase-money security interest—a security interest for the seller—has priority over conflicting security interests in the same goods. However, inventory finance is an exception to this rule according to §9-324(b). It provides that a holder of a purchase-money security interest in inventory has to send notification to holders of the conflicting security interest in order to claim his priority over them. Due to this exception rule, the inventory seller is not protected from the conflicting security interest.

This distinction between subsections (a) and (b) might lead one to wonder why it is that inventory finance needs no purchase-money priority. Pre-UCC history tells us the reason.

At first, purchase-money priority was a rule for equipment finance. In the nineteenth century railroad mortgage cases, the Supreme Court established the validity of the after-acquired property clause in certain types of industrial mortgages and the priority of purchase-money interests over the mortgage claim. Through the second half of the nineteenth century, the use of mortgages with after-acquired property clauses spread from railroads to manufacturing companies, and the Supreme Court recognized, in the context of such companies, a broad rule of purchase-money priority. UCC§9-324(a) is derived from this rule.

On the other hand, there was no purchase-money priority rule for inventory finance. Courts were hostile to the after-acquired property clause covering inventory or receivables, so inventory finance was restricted to certain types. One of the inventory finance devices recognized by courts was trust receipt. In trust receipt finance, the secured lender pays for the inventory directly to the seller. Thus, priority litigation between the holder of the security interest in inventory and the seller never arose.

As UCC 9 allows security interest in all kinds of after-acquired property, priority disputes between after-acquired and purchase-money interests in inventory are theoretically possible. Cognizant of the potential conflict such a situation might yield, the authors of UCC 9 set forth therein a rule for resolving this dispute. Yet it remains typical that the arrangement between an inventory secured lender and its debtor requires the lender to make periodic advances against incoming inventory. Thus a situation where the debtor gives a purchase-money security on his inventory, even though he has already filed another security on the same inventory, is considered to

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be caused by a fraud of the debtor. Therefore §9-324(b) provides that the purchase-money secured party must give notification to the holder of a conflicting security interest. This rule serves to prevent fraudulent debtors from obtaining double financing against inventory. Such an approach to legislation might be useful for us in addressing the problem of conflict between the secured lender and the seller, whether or not Japanese practice adopts U.S. inventory finance devices.

Secondary victim’s cause of action for damages in the tort of negligence
—Concerning psychiatric illness suffered by the close relatives
of the primary victim—
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The injury or death of the primary victim having caused some damage to the third party, under which conditions can the third party have a cause of action for damages against the tortfeasor? For instance, an acute emotional trauma may occur as a result of witnessing a catastrophic event. A mother may suffer psychiatric illness in reaction to the violent or unexpected death of her child and bring action for damages based on her psychiatric illness. This problem has given rise to considerable debate in legal literatures.

Some have argued that the liability toward the secondary victim finds its justification in the legal responsibility of the tortfeasor for the primary accident. The secondary victim is included into the protection based on the liability toward another. It is enough that the psychiatric illness is within the zone of danger of such an event. This approach could be called an "absolute-fault" construction which is associated with the French law.

Others have counter-argued that in the person of the secondary victim, an independent condition of liability must be met. Thus the secondary victim has an independent cause of action for damages against the tortfeasor on the own legal ground. It is needed to confine any action in negligence to the primary victim; that is, to cease viewing the sufferer as a secondary victim. This approach could be called a "relative-fault" construction which is associated with the German law.

Although in not a few countries the courts are inclined to prefer to the latter construction of an independent negligence toward the secondary victim, it is less convincing to argue the validity of this approach because the court's finding of tortfeasore's fault toward the secondary victim is likely to be a pure fiction. The "absolute-fault" construction is rather preferable and the purpose of this report is to present an argumentation of the preference.

Under the "absolute-fault" construction, the scope of recovery should be subject to the normal rules of causation and remoteness of damage. It is not necessary to consider whether the psychiatric illness of the misery mother had been foreseeable because the proportionality of the consequences of the tort and the gravity of the tort-