PUBLICATION UPDATE

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Secured Transactions Under the Uniform Commercial Code

Publication 615 Release 134 June 2023

HIGHLIGHTS

Updated Chapters

- This release contains updates and revisions to several chapters to provide the current status of the law. The release includes discussion of important recent developments and adds new and revised material on several significant topics.

Chapter 6—Nine Ways of Perfecting Under Article 9. *Local filing of financing statements.* The definition of fixtures is not found in the U.C.C. but is left to real property laws in each jurisdiction. Recent cases involve whether a cooler was a fixture under South Carolina law (*ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 854 S.E.2d 171 (Ct. App. 2021)) and whether equipment qualified as fixtures (*In re Twin Pines LLC*, 2021 Bankr. LEXIS 209 (Bankr. D.N.M. Jan. 29, 2021)). *See* § 6.02[3][b].

Description of collateral. Courts have held that incorporation of another document by reference can satisfy the indication of collateral requirement; *see First Midwest Bank v. Reinbold (In re I80 Equip., LLC)*, 938 F.3d 866 (7th Cir. 2019). In a recent case, a court held that an indication of collateral covered is sufficient if the financing statement provides an indication that the financing statement covers all assets or all personal property; *see AVT N.J., L.P. v. Cubitac Corp.*, 2021 U.S. Dist. LEXIS 182616 (D. Utah Sept.

22, 2021). *See* § 6.02[3][d][iv].

2022 amendments. The 2022 amendments to the U.C.C. made important changes to the definitions of control for deposit accounts, chattel paper evidenced by an electronic record, electronic documents of title, and securities entitlements. For deposit accounts, the amendments added a fourth option for obtaining control of a deposit account. Control can be established through a third party if that person (other than the debtor) has control of the deposit account and acknowledges that it has control on behalf of the secured party, or the person obtains control of the account after having acknowledged that it will obtain control on behalf of the secured party. Similar changes were made to include this third-party option when perfecting by control of chattel paper in electronic form, control of an electronic document of title, and control of a securities entitlement. *See* § 6.07A[1].

The 2022 amendments also added four new types (or subtypes) of collateral to the Article 9 list of possible collateral categories: electronic money, controllable electronic records (CERs), controllable accounts and controllable payment intangibles. Electronic money means money in electronic form. The amendments also defined three additional types of controllable collateral: CERs; controllable accounts, and controllable payment intangibles. Security interests in all three of the controllable assets can be perfected by filing a financing statement. But as is the case with other types of collateral that are perfectable by possession or control, a stronger priority for the secured creditor results from perfecting interests in these assets by control. *See* § 6.07A[2].

Chapter 6D—Understanding Control as a Path to Perfection and Priority. *Deposit accounts.* The 2022 amendments added a fourth way of controlling a deposit account. Section 9-104(a)(4) provides that a secured party has control of a deposit account if "another person, other than the debtor: (A) has control of the deposit account and acknowledges that it has control on behalf of the secured party; or (B) obtains control of the deposit account after having acknowledged that it will obtain control of the deposit account on behalf of the secured party." Unlike the tripartite agreement in Section 9-104(a)(2), the acknowledgement under (a)(4) does not have to be in writing. *See* § 6D.02[7].

Electronic documents. Subsection 7-106(a) sets forth the general test for obtaining control of an electronic document, and subsection (b) provides a safe harbor that satisfies the more general rule in subsection (a). The 2022 amendments of the U.C.C. added a second safe harbor in subsection (c) to Section 7-106. *See* § 6D.02[9][b].

Electronic money. The 2022 amendments to the U.C.C. added four new types (or subtypes) of controllable collateral to the Article 9 list of collateral categories: electronic money, controllable electronic records (CERs), controllable accounts and controllable payment intangibles. Under the U.C.C. money means tangible currency—paper bills and metal coins adopted by a country as its national currency. Security interests in electronic money as defined under the amendments, if and when a central bank creates them, can only be perfected by a secured creditor taking control of the electronic money under new Section 9-105A. *See* § 6D.02[11].

Controllable electronic records, accounts or payment intangibles. In addition to electronic money, the 2022 amendments defined three additional types of controllable collateral: CERs; controllable accounts, and controllable payment intangibles. A CER is defined in new UCC Article 12-102(a) as a record stored in an electronic medium that can be subject to control under Section 12-105. Thus, CERs are defined as electronic records that are capable of being controlled as specified in Article 12. CERs are a sub-category of general intangibles, controllable accounts are a sub-category of accounts, and controllable payment intangibles are a sub-category of payment intangibles. Because they qualify in these subcategories, security interests in all three of these controllable electronic assets can be perfected by filing a financing statement. *See* § 6D.02[12].

Chapter 18A—Security Interests in Manufactured Homes. *Manufactured home as fixture.* Some assets are not fixtures because they lost their "goods" status when they became part of the real estate. *See In re Ojeda*, 2020 Bankr. LEXIS 2558 (Bankr. M.D. Fla. June 1, 2020) (in-ground swimming pool was not a fixture because it was not "goods" once installed). Cf. *ABCDW LLC v. Banning*, 241 Ariz. 427, 388 P.3d 821 (Ct. App. 2016) (alfalfa planted in ground were fixtures). Louisiana law prohibits the creation of a security interest in already attached fixtures, but it leaves open the possibility of creating an interest in fixtures under real-property (mortgage) law. *In re Motors Liquidation Co.*, 2019 Bankr. LEXIS 232 (Bankr. S.D.N.Y. Jan. 29, 2019). *See* § 18A.04[2].

Certificate of title. A credit union's mortgages on three acres of property were insufficient to place a lien upon a manufactured home where a certificate of title existed on the manufactured home; as a result, the only available method to perfect a security interest was by notation on the certificate of title. *See Bowling v. Appalachian Fed. Credit Union*, 515 S.W.3d 686 (Ky. Ct. App. 2017), at § 18A.05[2].

In Kansas, a manufactured home may be converted from personal property and may be permanently affixed to real estate if the owner files an affidavit of conversion and surrenders the certificate of title to the county clerk. If a manufactured home is legally converted from personal property to a permanent improvement upon real property, a valid lien upon such real property could constitute a valid lien upon the manufactured home. Otherwise, a mortgage or lien upon real property is insufficient to perfect a lien or security interest in a manufactured home, as it is personal property. *See Bowling v. Appalachian Fed. Credit Union*, 515 S.W.3d 686 (Ky. Ct. App. 2017), at § 18A.05[5].

In Pennsylvania, when the owner of a mobile home wishes to sell or transfer a mobile home after cancellation, the owner must obtain a new certificate of title; *see Bucks Cnty. Water & Sewer Auth. v. Ridge*, 2022 Pa. Dist. & Cnty. Dec. LEXIS 1490 (C.P. June 30, 2022), at § 18A.05[5].

If a new or "duplicate" certificate of title is issued by the same state as the original yet fails to note the lien on the title (either due to oversight or fraud), the lien noted on the original title is still effective unless it has been cancelled by issuance of the duplicate, which usually will not be the case. *See BMW Fin. Servs., N.A., LLC v. Felice*, 2017 IL App (2d) 160397, 412 Ill. Dec. 388, 75 N.E.3d 368, at § 18A.05[7].

Priorities. Creditor who took a purchase money security interest in manufactured home and recorded on the title remained perfected and had priority after the home was affixed to real estate; *see Riffe v. Vanderbilt Mortg. (In re Riffe)*, 2018 Bankr. LEXIS 2332 (Bankr. S.D. W. Va. Aug. 6, 2018), at § 18A.06[1].

Chapter 23—Security Interests in Investment Property. *Definition of security.* The Exchange Act defines a security broadly to include, among other things, any stock or investment contract; *see In re Phenomenon Mktg. & Entm't, LLC*, 2022 Bankr. LEXIS 1189 (Bankr. C.D. Cal. Apr. 28, 2022), at § 23.10[1].

Louisiana has an unconditional rule that ordinary corporate stock is a security; that is so whether or not the particular issue is dealt in or traded on securities exchanges or in securities markets. *See In re Succession of Goodman*, 54828 (La. App. 2 Cir 12/14/22) 353 So. 3d 415, at § 23.10[1].

The 2022 amendments to the UCC elaborated on the relationship between an uncertificated security and a "controllable electronic record," a new term defined in the amendments to address security interests in intangible assets such as cryptocurrencies. It states that a controllable electronic record is not itself a "security" as defined in Section 8-102(a)(15). *See* § 23.10[2].

Securities intermediary. The 2022 amendments to the UCC expanded Comment 14 to explain that a person may be a securities intermediary even if that person does not credit "securities" (as defined in Article 8) to the account. Rather, the securities accounts that a securities intermediary maintains may consist exclusively of financial assets described in Section 8-102(a)(9)(ii) and (iii). For example, a cryptocurrency exchange that holds only cryptocurrencies (and not securities) for customers might be a securities intermediary. *See* § 23.11[2][0a].

A securities intermediary or broker may be held liable to an adverse claimant only if it took action after being served with a restraining order or other legal process, it acted in collusion with a wrongdoer in violating the rights of an adverse claimant, or in the case of a security certificate that has been stolen, it acted with notice of the adverse claim. *See COR Clearing, Ltd. Liab. Co. v. Calissio Res. Grp., Inc.*, 2017 U.S. Dist. LEXIS 183405 (D. Neb. Nov. 6, 2017), at § 23.11[2][b].

Securities entitlements. The 2022 amendments kept the substance of the third party control option but changed the language to conform with revised control provisions in the new Article 12 of the UCC (addressing controllable electronic records) and corresponding changes to other UCC sections addressing control of other types of collateral. Official Comment 4 was also amended to emphasize that more than one person can have control under Section 8-106(d). The essential factor is whether a person may originate entitlement orders without further consent of the entitlement holder. *See* § 23.12[2][a].

Automatic perfection for interests granted by a broker or securities intermediary. The drafters of the 2022 amendments to the UCC attempted to clarify when a financial asset might qualify as a controllable electronic record governed by new Article 12. Amended Comment 9 to Section 8-102 ("financial asset") states: "If the parties agree to treat a digital asset as a financial asset under Article 8 and the digital asset is in fact held in a securities account for an entitlement holder, the rules applicable to controllable electronic records under Article 12 would not apply to the entitlement holder's security entitlement related to the financial asset. If the financial asset itself is a controllable electronic record, however, then the rules in Article 12 could apply to the securities intermediary's rights with respect to the controllable electronic record if the intermediary holds the asset directly." *See* § 23.14[1][a].

Chapter 28A—Chattel Paper in Electronic Form: Some Problems in Translation. *2022 amendments.* The 2022 amendments to the U.C.C. provided a second safe harbor for controlling chattel paper in electronic form. The safe harbor in Section 9-105(c) is similar to the second safe harbor for electronic documents in amended Section 7-106(c) and is similarly intended to address control when the chattel paper is maintained on a blockchain or similar platform. Whereas the safe harbor in subsection (b) requires the existence of only one authoritative copy of the chattel paper, the safe harbor in subsection (c) allows for either a single authoritative copy or multiple authoritative copies of the chattel paper. Chattel paper in any form can be perfected by filing a financing statement, but to ensure a stronger level of priority over certain competing parties, perfecting by control is the better method if practicable.

The 2022 amendments added four new types (or subtypes) of collateral to the Article 9 list of collateral categories that can be perfected by control in a manner similar to that for chattel paper but with some notable differences: electronic money, controllable electronic records (CERs), controllable accounts and controllable payment intangibles. *See* § 28A.03.

Chapter 37—Article 9 and Bond Financing. *Municipal bonds.* Section 928 did not mandate turnover by debtor of special revenues or require continuity of payments of municipal bonds to plaintiffs during pendency of Title III proceeding because it was silent about enforcement of liens or payment of secured obligation, and did not order any action on part of debtor. *See Assured Guar. Corp. v. Carrion (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 919 F.3d 121, 2019 U.S. App. LEXIS 8981 (1st Cir. 2019), at § 37.01[1].

Conduit financing. A conduit municipal bond is used to finance a project to be used primarily by a third party; *see* BOKF, NA v. Estes, 923 F.3d 558 (9th Cir. 2019). A court described conduit financing transaction as: (1) municipal bonds are sold by a public authority in a bond offering (2) the proceeds of the bond offering are then lent by the public authority to a private or non-profit entity in exchange for a debt instrument pursuant to which the borrower pays principal and interest; and (3) in the event of a default, the bondholders are limited to the assets of the borrower instead of having recourse against the public authority that issued the bonds. *See Palm Beach Mar. Museum, Inc. v. Hapoalim Sec. USA, Inc.*, 810 F. App'x 17 (2d Cir. 2020). *See* § 37.01[3].

Postpetition interest in bankruptcy. The Rule of Explicitness requires that, before a right to post-petition interest may be recognized, the agreement should clearly show that the general rule that interest stops on the date of the filing of the petition is to be suspended, at least vis-a-vis these parties. The contract must contain "precise, explicit and unambiguous language . . . to the effect that the contract abrogates the general rule regarding interest." Contracts that do not explicitly refer to post-bankruptcy interest often fall short. *See U.S. Bank N. A. v. T. D. Bank, Nat'l Ass'n*, 569 B.R. 12 (S.D.N.Y. 2017), at § 37.02[1].

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