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Secured Transactions Under the Uniform Commercial Code

Publication 615 Release 135 September 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 1A—Article 9: Review and Reevaluation. Beginning in 2019, a committee appointed by the American Law Institute and the Uniform Law Commission drafted amendments to the U.C.C. to address emerging technological developments. The sponsoring organizations approved the amendments, with official commentary, in the summer of 2022. The amendments respond to concerns about the lack of definitive commercial law rules for transactions involving digital assets, especially relating to (a) negotiability-type rules for virtual currencies, (b) certain electronic payment rights, (c) secured lending against virtual currencies, and (d) security interests in electronic money, such as central bank digital currencies. The amendments also address other technological developments affecting electronic chattel paper, negotiable instruments, payment systems, electronic documents of title, and sales and leases of goods. *See* § 1A.01[1]. *See* § 1A.12 for an overview of the 2022 amendments.

Chapter 2A—The Article 9 Security Agreement. *Definition of "sign."* Until the 2022 amendments of the UCC, § 9-203 stated that the

security agreement must be "authenticated" by the debtor. The 2022 amendments broadened the definition of "sign" to include electronic signatures, and replaced "authenticate" with "sign" throughout the UCC. *See* §§ 2A.01[1] and § 2A.02[1]. Email exchange did not create a security agreement in *In re Brainard*, 2022 Bankr. LEXIS 2232 (Bankr. D. Conn. Aug. 12, 2022). Sending an email is not enough to show an intent to enter into a contract. The court declined to follow other jurisdictions that have found that the "from" field alone is a valid electronic signature; *see Parish Transp. LLC v. Jordan Carriers Inc.*, 327 So. 3d 45 (Miss. 2021).

Creation of security interest. If security agreement is ambiguous, parol evidence can be admitted; *see In re Haymond*, 638 B.R. 853 (Bankr. S.D. Tex. 2022). Parol evidence cannot contradict language in security agreement; *see In re IDC Enters.*, 2021 Bankr. LEXIS 975 (Bankr. D. Idaho Apr. 13, 2021). *See* § 2A.03[1].

Financing statement as security agreement. Under New York law, when a creditor presents a standard financing statement to establish a valid and enforceable security interest, there must be some further documentation corroborative of the debtor's intent to pledge collateral; *see In re Ditech Holding Corp.*, 2020 Bankr. LEXIS 1840 (Bankr. S.D.N.Y. July 9, 2020). The security agreement, not the UCC-1 financing statement, is what is needed for a security interest to attach; *see In re Payroll Mgmt.*, 2020 Bankr. LEXIS 3711 (Bankr. N.D. Fla Dec. 8, 2020). Georgia law provides that a financing statement cannot serve as a security agreement because it does not grant the creditor a security interest in the collateral and does not identify the obligation owed to the creditor; *see Toland v. The Phx. Ins. Co.*, 2020 U.S. Dist. LEXIS 55000 (N.D. Ga. Feb. 12, 2020). In the absence of a valid security agreement, a financing statement does not create an enforceable security interest; *see United States v. Kennedy*, 2022 U.S. Dist. LEXIS 164039 (E.D. Cal. Sep. 12, 2022). *See* § 2A.03[4].

Disguised security agreements. A $300,000 "lease" of equipment with title to pass upon completion of payments was a security interest; *see* KCK Res., Inc. v. Schwarz Props., L.L.C., 2023 N.C. App. LEXIS 173 (Ct. App. Apr. 18, 2023), at § 2A.03[7].

Chapter 2B—Rights in the Collateral. *Ownership.* Where a security agreement was signed by the manager of an LLC on behalf of the LLC but the collateral was owned by the manager in his individual capacity, the court held that the manager had consented to LLC's use of the collateral to secure the loan; *see In re Rudick*, 639 B.R. 249 (Bankr. N.D. Okla. 2022). A security interest did not attach when the debtor, the sole owner and manager of an LLC, signed the security agreement but did not indicate that he was signing on behalf of his LLC, which was the record owner of the collateral; *see In*

re Clinkingbeard, 2020 Bankr. LEXIS 819 (Bankr. D. Kan. Mar. 30, 2020). *See* § 2B.03[2].

Estoppel. A court refused to find estoppel when a cattle owner/bailor did nothing more than deliver the cattle to the feedlot. It noted that the owner could have made a "UCC Caretaker Filing" but South Dakota law did not require such a filing to preserve the ownership interest and prevail over the feedlot's creditor. *See First Dakota Nat'l Bank v. Gregg*, 2021 S.D. 53, 965 N.W.2d 69, at § 2B.04[4].

Rights in purchased goods. When determining whether a buyer has rights in purchased goods, the PEB in a 2022 draft commentary reasoned that allowing a buyer without direct possession of the goods to take free of a security interest previously granted by the seller in the seller's goods could result in the seller's secured party not having notice that goods are owned by the buyer that appear to be owned by the seller. *See* § 2B.05[4][a].

Sale of financial assets. The PEB in a 2021 draft commentary recognized the confusion resulting from Section 9-318 and the differing views on whether the normal priority rules would apply to situations where a debtor grants a security interest in accounts that it had previously sold, or whether the nemo dat doctrine would preclude a security interest from attaching to the accounts in that scenario. The PEB concluded that the Article 9 priority rules, rather than the nemo dat doctrine, should determine the effect on each party when two transactions create security interests in the same receivables. *See* § 2B.09[1A].

Chapter 7B—Priority Roadmap: How Current Article 9 Changed the Game. *Purchase money security interests.* A purchase money security interest in an aircraft was not found when funds did not enable debtor to purchase the aircraft; *see Jet Midwest Int'l Co. v. Jet Midwest Grp.*, 2020 U.S. Dist. LEXIS 159166 (W.D. Mo. May 26, 2020). Purchase money security interest existed when a vehicle lease ended, the debtor exercised a purchase option at that time, and funds were used to exercise that option; *see In re Dennis*, 604 B.R. 690 (Bankr. D.S.C. 2019). *See* § 7B.04[2]. A loan to enable a farm to purchase seed and chemicals did not result in a purchase money security interest in the crops grown from the seeds; *see Agrifund, LLC v. First State Bank of Shallowater*, 662 S.W.3d 523 (Tex. App. 2022), at § 7B.04[3][c].

Enabling acquisition. Section 9-103(g) says the burden is on the lender "in a transaction other than a consumer-goods transaction," but most courts hold that the burden is on the lender even in consumer-goods transactions. *See In re Bunge*, 2018 Bankr. LEXIS 1153 (Bankr. W.D. Wash. Apr. 16, 2018), at § 7B.06[1].

Refinancing. There is a split of authority among the circuits concerning whether a purchase money security interest is extinguished when the original purchase money loan is refi-

nanced through renewal or consolidation with another obligation; *see In re Jett*, 563 B.R. 206 (Bankr. S.D. Miss. 2017), at § 7B.07[2][c].

Possession of collateral. In a recent case, a court interpreted Section 9-324(a) as requiring the existence of "collateral" before there can be a "debtor" for purposes of that statutory section. Consequently, the 20-day period for the perfection of the creditor's PMSI did not begin to run until the purchaser entered into an equipment lease agreement (deemed to be not a true lease but a security interest) on June 2; therefore, creditor's June 8 filing served to timely perfect its PMSI in the goods. *See Farmland Capital Sols., LLC v. Mich. Valley Irrigation Co.*, 335 Mich. App. 370, 966 N.W.2d 709 (2021), at § 7B.09[5][a].

Notification. A written notice must be sent to the inventory lender's address as it appears on its most current financing statement; sending notification to prior address was not effective. *See In re TSAWD Holdings, Inc*., 601 B.R. 599 (Bankr. D. Del. 2019), at § 7B.10[1].

Priority through control. In jurisdictions adopting the 2022 amendments to the U.C.C., security interests in controllable electronic records (CER), controllable accounts, and controllable payment intangibles can be perfected either by filing or control. Perfection in these assets by control has priority over perfection by filing. Under the 2022 amendments, a "qualifying purchaser" of a CER obtains special priority status roughly analogous to the special priority rules for innocent purchasers of investment property in Article 8. *See* § 7B.15.

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