

Personal Property Secured Transactions

By Steve Weise and Stephen L. Sepinuck*

A. SCOPE OF ARTICLE 9 AND EXISTENCE OF A SECURED TRANSACTION

1. GENERAL

Although Article 9 generally applies to security interests in personal property, it does not apply to all kinds of personal property nor does it apply to all transactions that involve the financing of personal property.

2. GOVERNMENT DEBTORS

Kentucky's non-uniform section 9-109(d) excludes from the scope of Article 9 "a public-finance transaction or a transfer by a government or governmental unit."¹ The court in *Delphi Automotive Systems, LLC v. Capital Community Economic/Industrial Development Corp.*² properly held that this provision applies only to transactions in which the government is a *debtor*, not to transactions where the government is a secured party.³ A state agency had leased equipment to a private entity for eighty-four months, after which the private entity was to become the owner of the equipment. The court ruled that the transaction constituted a sale with a retained security interest and was within the scope of Article 9.⁴ Because there is no public policy exception to Article 9's perfection requirements when a state agency is the secured party,⁵ the state agency's unperfected security interest was subordinate to the perfected security interest of a lender to the lessee.

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1. See KY. REV. STAT. ANN. § 355.9-109(q) (West, Westlaw through the 2015 Reg. Sess.). A few other states also have this exclusion. See, e.g., 810 ILL. COMP. STAT. ANN. 5/9-109(d)(13) (West, Westlaw through P.A. 99-3 of the 2015 Reg. Sess.); OHIO REV. CODE ANN. § 1309.109(d)(14) (West, Westlaw through 2015 Files 1 to 5 of the 131st Gen. Assemb.).

2. 434 S.W.3d 481 (Ky. 2014).

3. *Id.* at 487.

4. *Id.* at 485; see *infra* notes 13–19 and accompanying text.

5. *Delphi Auto. Sys.*, 434 S.W.3d at 488–89.

3. SALES OF PAYMENT RIGHTS

Article 9 applies generally to the sale of payment rights⁶ but excludes from its scope an assignment of payment intangibles “which is for the purpose of collection only.”⁷ The court in *Clinton v. Adams*⁸ held that, even if a law firm had a security interest in its client’s copyright infringement action, the security interest was outside the scope of Article 9 because the firm received only the client’s promise to pay proceeds of the action that might accrue in the future, as a means of collecting the firm’s fees.⁹ The court incorrectly applied that subsection, which addresses only when the holder of the payment intangible assigns the claim for someone to collect the claim on behalf of the assignor. The court’s broad application would improperly take a vast number of transactions outside of Article 9 because almost all collateral is provided to assist the secured party in “collecting” its claim (in the event of a default by the debtor).

4. INSURANCE

Article 9 excludes from its scope a “claim under a policy of insurance.”¹⁰ In *In re Montreal, Maine & Atlantic Railway, Ltd.*,¹¹ the court held that a security interest in the debtor’s accounts and payment intangibles did not extend to the debtor’s right to payment under the debtor’s business interruption insurance policy.

5. LEASES

When the parties to a transaction label their transaction as a “lease” of goods, the U.C.C. might re-characterize the transaction as a sale with a retained security interest if the economic substance is such that the putative lessor is unlikely to get the goods back while they still have value.¹² Every year, courts address this issue.

In *In re Purdy*,¹³ the U.S. Court of Appeals for the Sixth Circuit, reversing the bankruptcy court, held that fifty-month leases of dairy cows were true leases, even though the lessee had no right to terminate and the fifty-month term exceeded the economic life of dairy cows, 30 percent of which need to be culled each year. The court held that the relevant “good” was the herd of cattle as a whole, which had an economic life far greater than the lease term, not the indi-

6. U.C.C. § 9-109(a)(3) (2013).

7. *Id.* § 9-109(d)(5).

8. No. CV10-09476-ODW PLAX, 2014 WL 6896021 (C.D. Cal. 2014).

9. *Id.* at *7.

10. U.C.C. § 9-109(d)(8) (2013).

11. 83 U.C.C. Rep. Serv. 2d 461 (Bankr. D. Me. 2014), *aff’d*, 521 B.R. 703 (1st Cir. BAP 2014). Under Maine common law possession of the insurance policy is required, which the creditor did not have. Article 9 does apply to a claim under an insurance policy where it is proceeds of other collateral covered by Article 9. U.C.C. § 9-109(d)(8) (2013).

12. *See* U.C.C. § 1-203 (2011).

13. 763 F.3d 513 (6th Cir. 2014).

vidual cows originally provided.¹⁴ *Sunshine Heifers, LLC v. Moohaven Dairy, LLC*¹⁵ involved a lease of 240 cows to a dairy for forty-eight months. Data indicated that more than 57 percent of cows produce milk for longer than four years. In addition, the lessee did not have a low-priced option to purchase the cows or any obligation to renew the lease or to buy the cows. The court therefore ruled that the lease was a true lease because the term of the lease did not exceed the economic life of the cows.¹⁶

The court went the other way in *In re James*.¹⁷ In that case, the debtor leased a used vehicle for three years. Although the debtor could terminate the lease early, the debtor remained obligated for the rent due during the entire rental period. The debtor also had an option to purchase the vehicle during the lease term by paying the remaining rent, an option which a rational lessee would exercise. The court ruled that the transaction was a sale with a retained security interest.¹⁸

6. SALES

*In re C.W. Mining Co.*¹⁹ involved complex facts. A coal broker purported to prepay a mining company for coal to be mined. The agreement provided that the broker would be the owner of the coal upon severance of the coal from the land. The agreement also gave the broker an assignment of the proceeds of all of the mining company's coal sale contracts. The court held that the assignment of an interest in the proceeds from the contracts did not mean that the broker *owned* the receivables arising from those contracts.²⁰ Even though the broker was the party that sent the invoices, the mining company owned the receivable that arose from the sale of the coal and the broker had only a security interest in the receivables, which it did not perfect.²¹

7. CONSIGNMENTS

Article 9 governs most consignment transactions.²² Article 9 treats the consignment as a security interest, the consignor as a secured party, the consignee as the debtor, and the consigned goods as the collateral.²³ More important, if the consignor's security interest is unperfected, Article 9 treats the consignee as having sufficient rights in the consigned goods to grant a security interest

14. *Id.* at 519–20. For a criticism of the decision, see Stephen L. Sepinuck & Kristen Adams, *UCC Spotlight*, COM. L. NEWSL. (ABA Bus. Law Section, Chicago, IL), Summer 2014, at 15, available at http://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL190000/full-issue-201406.pdf.

15. 13 F. Supp. 3d 770 (E.D. Mich. 2014).

16. *Id.* at 777–82.

17. No. 12-23121, 2014 WL 5785316 (Bankr. D. Kan. Nov. 4, 2014).

18. *Id.* at *5–6.

19. 509 B.R. 378 (Bankr. D. Utah 2014).

20. *Id.* at 385.

21. *Id.* at 385–87.

22. See U.C.C. §§ 9-102(a)(20), 9-109(a)(4) (2013).

23. See *id.* § 9-102(a)(12), (28)(C), (73)(C); U.C.C. § 1-102(b)(35) (2011).

in them to someone else.²⁴ *In re Salander-O'Reilly Galleries, LLC*²⁵ involved a lender's unsuccessful effort to obtain such a security interest. The consignee-gallery borrowed \$29 million from the lender and granted the lender a security interest in "assets and rights of the Borrower wherever located, whether now owned or hereafter acquired or arising, . . . including without limitation all goods." When the gallery entered bankruptcy, the consignor of a Botticelli painting sought the painting back from the bankruptcy trustee, who had received an assignment of the bank's rights. Looking to the language of the security agreement, the court concluded that the phrase "whether now owned or hereafter acquired or arising" limited the security interest to property "*owned* or thereafter *owned*" by the gallery.²⁶ Because the gallery did not own the painting—the gallery had under Article 9 the power to create a security interest in the painting—the gallery had not granted a security interest in it.²⁷ The court characterized as "undisputed" the fact that the painting was never "owned" or "acquired" by the gallery.²⁸

8. REAL PROPERTY

The court in *In re Anderson*²⁹ considered a state statute that provides that water shares—rights to use water evidenced by shares of stock in a corporation—are transferred pursuant to U.C.C. Article 8. Nevertheless, the court held that the shares constituted real property, not personal property.³⁰ Thus, the holder of a security interest in the shares could not perfect under Article 9, rather the holder must perfect the security interest under real property law.³¹

B. SECURITY AGREEMENT AND ATTACHMENT OF SECURITY INTEREST

1. IN GENERAL

There are three requirements for a security interest to attach: (i) the debtor generally must authenticate a security agreement that describes the collateral; (ii) value must be given; and (iii) the debtor must have rights in the collateral or the power to transfer rights in the collateral.³²

2. EXISTENCE OF SECURITY AGREEMENT

The requirement of an authenticated security agreement is fairly easy to satisfy. The agreement must create or provide for a security interest.³³ That is,

24. See U.C.C. § 9-319 (2013).

25. No. 14 CV 3544 (VB), 2014 WL 7389901 (S.D.N.Y. Nov. 25, 2014).

26. *Id.* at *3.

27. *Id.*

28. *Id.* at *4. For further discussion of this case and the issue it deals with, see Stephen L. Sepinuck, *Collateralizing What the Debtor Does Not Own*, *TRANSACTIONAL LAW.*, Feb. 2015, at 2.

29. No. 10-31252, 2014 WL 172222 (Bankr. D. Utah Jan. 15, 2014).

30. *Id.* at *10.

31. *Id.*

32. See U.C.C. § 9-203(b) (2013).

33. See *id.* § 9-102(a)(73).

when the security interest secures an obligation, the agreement must include language indicating that the debtor has given a secured party an interest in personal property to secure payment or performance of an obligation.³⁴ The security agreement must describe the collateral.³⁵ No specific language is required and, if no single document satisfies these requirements, multiple writings may do so collectively, under what is known as the “composite document rule.”³⁶

Despite the simplicity of this requirement, a law firm failed in its efforts to obtain an enforceable security interest from a client.³⁷ In *Jackson Walker LLP v. FDIC*,³⁸ a law firm’s retainer agreement with its bank client stated that the firm could apply the retainer to the payment of fees and expenses from time to time. The FDIC took over the bank and challenged the law firm’s security interest in the retainer. The court ruled that the agreement did not create a security interest in the retainer because the agreement did not “commit the retainer . . . as a means to ensure . . . timely payment” and instead contemplated that the client would timely pay for services through direct billing.³⁹ The court treated the retainer as advanced payment because the agreement provided that the retainer would be applied toward the final statement.⁴⁰ The decision seems highly questionable. The fact that the agreement contemplated other forms of payment does not imply that the retainer was not security. In fact, it bolsters the argument that the retainer was provided to ensure that the client’s obligation would be satisfied if the other forms of payment failed. A lawyer or law firm obtaining a retainer from a client should consider obtaining a formal security interest in the retainer.

3. DESCRIPTION OF COLLATERAL

A security agreement’s description of the collateral generally need not be specific; it need only “reasonably identifi[y] the collateral.”⁴¹ In other words, the security agreement must “make possible” the identification of the collateral.⁴² There were two noteworthy cases about this requirement last year.

34. See U.C.C. § 1-201(b)(35) (2011).

35. See U.C.C. § 9-203(b)(3)(A) (2013).

36. See, e.g., *In re Weir-Penn, Inc.*, 344 B.R. 791 (Bankr. N.D. W. Va. 2006); *In re Outboard Marine Corp.*, 300 B.R. 308 (Bankr. N.D. Ill. 2003).

37. Another law firm failed to perfect any security interest it might have in its client’s copyright action because it failed to file a financing statement where the client was located. *Clinton v. Adams*, No. CV10-09476-ODW PLAX, 2014 WL 6896021 (C.D. Cal. Dec. 5, 2014). The court in the case also suggested that no security interest attached because the “Assignment of Monies” signed by the client did not expressly grant a security interest in or assign the action. Instead, the client merely agreed “to irrevocably assign any and all money due to [him] based on the claim(s) made” in the infringement action, and this language constituted merely a promise to pay future proceeds from the action. *Id.* at *7.

38. 13 F. Supp. 3d 953 (D. Minn. 2014).

39. *Id.* at 961.

40. *Id.* Even if the retainer agreement were a security agreement, the court concluded that an additional \$100,000 retainer provided later would not have been collateral because the agreement provided that it could be modified only by a signed writing. *Id.* at 962.

41. See U.C.C. § 9-108(a) (2013).

42. *Id.* § 9-108(a) cmt. 2.

In the first⁴³ case, *In re Inofin, Inc.*,⁴⁴ the debtor was a financial services company that purchased sub-prime receivables—classified by Article 9 as “chattel paper”⁴⁵—from used car dealers. The debtor, in turn, obtained most of its capital for purchasing chattel paper from several private lenders. One lender’s security agreement described its collateral as: chattel paper “purchased by Debtor with the proceeds of loans from Secured Party and assigned and delivered to Secured Party.” In short, the lender was to get a security interest only in the chattel paper that the lender financed and took delivery of. The court ruled that the security agreement was ineffective to create a security interest because the lender could not show that any of the chattel paper it received was traceable to the proceeds of its loans.⁴⁶ However, the parties’ course of performance over fifteen years, in which the debtor, in return for financing, weekly delivered chattel paper with allonges stating that the debtor “hereby assigns, with full recourse, [to lender] all of its right, title and interest in, to and under the following [chattel paper]”⁴⁷ was sufficient to serve as a security agreement and grant a security interest in the delivered paper, regardless of whether that paper was purchased with the loan proceeds.⁴⁸

4. RIGHTS IN THE COLLATERAL

In order to grant an effective security interest in personal property, the debtor must either have rights in the property or the power to convey rights in it.⁴⁹ There is no requirement that the debtor be personally liable for the secured obligation, and thus a debtor may grant a security interest to secure the debt of another.⁵⁰ However, unless an exception applies, a person with rights in the collateral must authenticate the security agreement.⁵¹ Several creditors encountered difficulty last year in getting the correct entity to authenticate the security agreement.

In *In re Eyerman*,⁵² a couple guaranteed the debts of two limited liability companies that they owned and signed a security agreement. Nevertheless, the court presiding over the couple’s bankruptcy ruled that the couple had not granted a security interest in their *own* personal property because they signed the security agreement only as “member[s]” of the LLCs, not in their individual capacities.⁵³

43. See *supra* notes 25–27 and accompanying text (discussing the second decision).

44. 512 B.R. 19 (Bankr. D. Mass. 2014).

45. U.C.C. § 9-102(a)(11) (2013).

46. *Inofin*, 512 B.R. at 70–71. Moreover, the subsequent loan agreements between the parties did not remedy the problem because they lacked granting language. *Id.* at 71.

47. *Id.* at 38.

48. *Id.* at 76–77. For further discussion of this case, see Stephen L. Sepinuck, *How Not to Describe the Collateral*, TRANSACTIONAL LAW., Aug. 2014, at 2.

49. See U.C.C. § 9-203(b)(2) (2013).

50. See *id.* § 9-102 cmt. 2 (distinguishing a “debtor” from an “obligor”).

51. See *id.* § 9-203(b)(3).

52. 517 B.R. 800 (Bankr. S.D. Ohio 2014).

53. *Id.* at 807. The court also concluded that the security agreement did not identify the couple as “borrowers.” A recital in the agreement stated: “Borrower, Kenneth E. Eyerman and Christi A. Eyerman have executed a Promissory Note and a Loan Agreement with Lender.” The absence of a comma

The lender tried to bypass this problem by pointing to other documents, including a promissory note that identified the couple and one of the companies collectively as “Borrower” and stated that it was secured by “certain business assets and general intangibles as set forth and described in the Security Agreement between Lender and Borrower.” In addition, a filed financing statement identified the couple as additional debtors. However, the court rebuffed this argument after concluding that the note did not contain an adequate description of the collateral and the couple had not authorized the filing of the financing statement.⁵⁴

In *In re STN Transport Ltd.*,⁵⁵ after an employee of a corporate trucking company had a falling out with the sole owner, the employee borrowed funds and signed a security agreement on behalf of the company purporting to grant a security interest in seven company trucks. As part of its due diligence, the lender confirmed that the company was the titular owner of the vehicles by checking the Texas Motor Vehicle Department website, obtained the title certificates from the employee, and confirmed from the company’s Certificate of Filing that the employee was a director of the company. Nevertheless, these efforts proved to be insufficient because, the court ruled, the director lacked authority to bind the corporation. The director lacked actual authority because the document purporting to grant that director authority to act for the corporation was signed only by that sole director, not by the board of directors.⁵⁶ The director lacked apparent authority because the corporation did nothing to create the appearance that the director was authorized to act on the corporation’s behalf.⁵⁷

In *Dougherty v. Trustmark National Bank*,⁵⁸ an individual debtor represented in a security agreement with a lender that he was the owner of specified property in which he purported to grant a security interest. However, the debtor’s sworn testimony three years later in bankruptcy that his corporation owned the property meant that the lender obtained no security interest. According to the court, the representation in the security agreement was insufficient to create an issue of fact to avoid summary judgment in the lender’s action against the bank that later obtained and foreclosed on a security interest granted by the corporation.⁵⁹

In *In re Webb*,⁶⁰ a husband and wife conducted farming operations pursuant to a joint venture agreement. During the couple’s bankruptcy, two lenders claimed a security interest in equipment and crops of the venture. In an early stage of the dispute, the bankruptcy court ruled that the joint venture was not a partnership or other legal entity, merely an agreement about how the couple would conduct their farming business together, and that ruling was affirmed

after Christi Eyerman’s name indicated that the couple’s names were not a description of the term “borrower” but other parties. *Id.* at 806–07.

54. *Id.* at 809–11.

55. No. 12-70617, 2014 WL 585311 (Bankr. S.D. Tex. Feb. 14, 2014).

56. *Id.* at *6.

57. *Id.* at *6–7.

58. No. 01-13-00474-CV, 2014 WL 2767380 (Tex. App. June 17, 2014).

59. *Id.* at *5–6.

60. 520 B.R. 748 (Bankr. E.D. Ark. 2014).

on appeal.⁶¹ A corollary to this ruling was that the couple personally owned the putative collateral.⁶² The trustee then claimed that the security agreements signed by the husband on behalf of the venture were ineffective to grant a security interest in property owned by the couple as individuals. The bankruptcy court rejected the trustee's argument.⁶³ The court characterized the issue not as whether the joint venture owned the collateral, but as whether the venture had sufficient rights in the collateral to grant a valid security interest.⁶⁴ The court then ruled that the venture had more than naked possession of the property and had sufficient rights to grant a security interest in it because: (i) the venture utilized the equipment in its farming operation, profited from its use, and was presumably responsible for its upkeep and maintenance; and (ii) the venture obtained the crops through the farming activities.⁶⁵ The decision seems a bit odd. If the joint venture was not a legal entity, then the issue should not have been whether the *venture* had sufficient rights to grant a security interest. Rather, the issue should have been whether signature of the husband on *behalf of the venture* was sufficient to bind the husband and wife as individuals. The court seems to have reached the correct result, however.

5. OBLIGATIONS SECURED

Although the Uniform Commercial Code does not expressly require that a security agreement describe or identify the secured obligation,⁶⁶ it arguably requires that obliquely by defining "security agreement" as an agreement that creates or provides for a security interest,⁶⁷ and defining "security interest" as an interest in personal property "which secures payment or performance of an obligation."⁶⁸ At a minimum, if the secured party desires to realize on the collateral, it would have to prove what obligation the collateral secures. Three cases last year dealt with security agreements that did not describe the secured obligation sufficiently.

The most notable of the three cases is *In re Duckworth*,⁶⁹ in which a security agreement described the secured obligation as a \$1.1 million note executed on "December 13, 2008," when the note was actually executed and dated December 15, 2008. After the debtor sought protection under Chapter 7 of the Bankruptcy Code, the bankruptcy trustee sought to invalidate the security interest. The court ruled that even though parol evidence could be used to reform the security agreement as between the debtor and the secured party, it could not be used

61. See *In re Webb*, 474 B.R. 891, 894 (Bankr. E.D. Ark. 2012), *aff'd*, No. 4:12-cv-578 (DPM), 2013 WL 427919 (E.D. Ark. Feb. 4, 2013), *aff'd*, 742 F.3d 824 (8th Cir. 2014).

62. *Webb*, 520 B.R. at 752.

63. *Id.* at 753.

64. *Id.* at 765 (citing U.C.C. § 9-203(b)).

65. *Id.* at 767–68 (citing U.C.C. § 9-203(b)).

66. Cf. U.C.C. § 9-203(a)(3)(A) (2013) (requiring that an authenticated security agreement provide a description of the collateral).

67. *Id.* § 9-102(a)(74).

68. U.C.C. § 1-201(b)(35) (2011).

69. 776 F.3d 453 (7th Cir. 2014).

against the debtor's bankruptcy trustee, who had the status of a judicial lien creditor.⁷⁰ The court's conclusion seems incorrect because under the law of reformation, a judicial lien creditor does *not* have the right to challenge a reformation.⁷¹

In *Mount Spelman & Fingerman, P.C. v. GeoTag, Inc.*,⁷² a law firm hired by the owner of a patent brought actions against more than 400 defendants to enforce the client's rights. After numerous settlements and dismissals, the client fired the law firm. The firm then brought an action against its former client for unpaid legal fees and claimed a lien on settlement proceeds pursuant to the parties' contingent fee agreement. After concluding that the firm's lien was not prohibited by applicable ethical rules,⁷³ the court turned to the language of the agreement, which granted the firm a lien on recoveries "for any amounts owing to us" and which also stated that "[f]ees are fully earned as of the date of execution of the settlement agreement between plaintiff and defendant." Based on this wording, the court concluded that the lien secured only amounts due in cases settled by the firm, even if the client owed the firm for services in connection with other cases or as a result of the client's termination of the firm.⁷⁴ The court then ruled that, because the firm must bear the risk of an "excessively broad and ambiguous lien provision," the lien on the settlement amount due in connection with any individual case secured only the fee owing in connection with that case, not fees owing in connection with other cases.⁷⁵

*In re Liquidation of Freestone Insurance Co.*⁷⁶ concerned a securities account of an insurance company. When the insurance company went into receivership, the bank that maintained the account turned over to the receiver \$19 million of the assets credited to the account but retained the balance of more than \$150 million, claiming that it secured the bank's contingent right to indemnification. The receiver sought a court order requiring the bank to turn over the remainder and the court granted that request.⁷⁷ The court noted that the account agreement granted the bank a security interest to secure "payment obligations," which, when the agreement was read in context, meant: (i) costs incurred by the bank in providing the limited administrative services contemplated by the agreement, (ii) fees charged for those services, (iii) advances of funds by the bank to make payment on or against delivery of securities, and (iv) overdrafts in the account.⁷⁸ Accordingly, the term "payment obligations" did not include claims for indemnification, future administrative fees, or future legal fees.⁷⁹

70. *Id.* at 456.

71. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 60 (2011).

72. No. 2:14-cv-00013, 2014 WL 4954632 (E.D. Tex. Nov. 12, 2014).

73. *Id.* at *2–3.

74. *Id.* at *3.

75. *Id.* at *5.

76. No. 9574-VCL, 2014 WL 7399502 (Del. Ch. Dec. 24, 2014).

77. *Id.* at *1.

78. *Id.* at *6–7.

79. *Id.* at *7–8.

C. PERFECTION

1. POSSESSION

A secured party may perfect a security interest in tangible collateral by possession of the collateral.⁸⁰ In *In re Inofin, Inc.*,⁸¹ a secured party financed the debtor's purchase of installment sales contracts from car dealerships. The secured party's financing statement did not adequately indicate the collateral. The secured party did have possession of the contracts that the dealerships entered into with their customers, but did not possess original Partial Purchase and Assignment agreements (the "PPAs") that the debtor entered into with the dealerships. The court ruled that the security interest was perfected by possession of the contracts and the failure to have original PPAs was not required because there was no proof that the PPAs were operative documents or part of the chattel paper.⁸²

2. CONTROL

Article 9 permits a secured party to perfect a security interest in several types of collateral by "control."⁸³ For this purpose, the term "control" is defined differently for each of those types of collateral.⁸⁴ In *In re SGK Ventures, LLC*,⁸⁵ a secured party obtained a security interest in a debtor's advance deposits for rent, utilities, legal services, and insurance. The court held that the deposits were not "deposit accounts" because they were not maintained with a bank.⁸⁶ Thus, the court ruled, control was not required to perfect a security interest in those deposits.⁸⁷

A significant decision last year analyzed the definitions of "securities account" and "deposit account." The distinction between them can be critical. Although a security interest in either can be perfected by control, a security interest in a securities account can also be perfected by the filing of a financing statement, while a security interest in a deposit account as original collateral cannot be.⁸⁸ In *Seitz v. Republic First Bank (In re Gem Refrigerator Co.)*,⁸⁹ the secured party both filed financing statements and entered into a control agreement with the intermediary. The assets credited to the account were then transferred to three sub-accounts at the same intermediary. The court ruled that the original investment account was investment property, not a deposit account, and the sub-accounts were also investment property even though they contained some cash.⁹⁰ Accordingly, the financing

80. See U.C.C. § 9-313 (2013).

81. 512 B.R. 19 (Bankr. D. Mass. 2014). For additional discussion of this decision, see *supra* notes 44–48 and accompanying text.

82. *Id.* at 81–84.

83. U.C.C. § 9-314(a) (2013).

84. See *id.* §§ 9-104, 9-105, 9-106, 9-107.

85. 521 B.R. 842 (Bankr. N.D. Ill. 2014).

86. *Id.* at 867. Cf. U.C.C. § 9-102(a)(29) (2013) (defining "deposit account").

87. *SGK Ventures*, 521 B.R. at 867; see U.C.C. §§ 9-312(b)(1), 9-314(a) (2013) (indicating that control is the only way to perfect a security interest in a deposit account as original collateral).

88. See U.C.C. § 9-312(a), (b)(1) (2013).

89. 512 B.R. 194 (Bankr. E.D. Pa. 2014).

90. *Id.* at 203–05.

statements covering “all investment property” were sufficient to perfect the security interest in both the original account and the sub-accounts.⁹¹ The court’s opinion offers a rare glimpse at how a court would evaluate relatively common account structures and is an important reminder of the complexities of deposit and securities account collateral.

The secured party in *In re Jessup & Lamont, Inc.*⁹² had a security interest in deposited funds perfected by control at the depository bank.⁹³ The funds were then transferred to a second bank and then a third bank. The court ruled that these transfers caused the security interest to detach from the deposit account because the second and third banks took free of the security interest under section 9-332(b).⁹⁴ As a result, the subsequent transfer of the funds back to the original bank during the preference period was an avoidable preference.⁹⁵

3. FINANCING STATEMENTS: DEBTOR AND SECURED PARTY NAME; INDICATION OF COLLATERAL

An equipment lessor in *In re Northern Beef Packers Ltd. Partnership Tax ID/EIN 26-2530200*⁹⁶ had a blanket security interest in the debtor’s assets and the original financing statement so indicated. The court ruled that the security interest became partially unperfected when the lessor amended its financing statement to “restate” the collateral as only the equipment covered now or in the future by a lease or security agreement between it and the debtor.⁹⁷

In *In re Baker*,⁹⁸ the secured party had a security interest in dairy cattle. The financing statement indicated the cattle by name and ear tag number. Some of the cattle’s ear tags had either fallen off or did not match one of the listed numbers. The names of the cattle were referenced in a certificate of registration for each cow, each certificate included a sketch of the cow’s distinctive markings, and those markings could be used to identify the cows. The court concluded that there was insufficient evidence that lenders to the industry, in the course of their due diligence, regularly used registration certificates to identify cattle subject to a prior interest for the certificates to overcome the deficiencies in the financing statement.⁹⁹

The court in *In re Sterling United, Inc.*¹⁰⁰ was more generous to the secured party. The court held that a financing statement that indicated the collateral as

91. *Id.* at 208. Such an indication of the collateral would not be sufficient in a consumer transaction. See U.C.C. § 9-108(e)(2) (2013).

92. 507 B.R. 452 (Bankr. S.D.N.Y. 2014).

93. See U.C.C. § 9-104(a)(1) (2013).

94. *Jessup & Lamont*, 507 B.R. at 461–62. In addition, “automatic” control under section 9-104(a)(1) no longer applied.

95. *Id.* at 469.

96. No. 13-10118, 2014 WL 948470 (Bankr. D.S.D. Mar. 11, 2014).

97. *Id.* at *7–8.

98. 511 B.R. 41 (Bankr. N.D.N.Y. 2014).

99. *Id.* at 48.

100. 519 B.R. 586 (Bankr. W.D.N.Y. 2014).

“all assets of the Debtor, including [x, y, and z] now owned and hereafter acquired by Debtor and located at or relating to [a specified place]”¹⁰¹ was sufficient even if the collateral is located elsewhere.¹⁰²

4. FILING OF FINANCING STATEMENT—MANNER AND LOCATION

A financing statement filed in the wrong location is not effective. In *Clinton v. Adams*,¹⁰³ a law firm’s Article 9 security interest in the debtor’s copyright infringement claim was unperfected because the law firm filed a financing statement in California, where the infringement claim was prosecuted, rather than in Florida, where the debtor was located.¹⁰⁴

A security interest in fixtures can be perfected either by a fixture filing or by a central filing. A central filing must be filed where the debtor (not the fixtures) is located,¹⁰⁵ as the court correctly held in *Sturtz Machinery, Inc. v. Dove’s Industries, Inc.*¹⁰⁶ As a result, a secured party that made a central filing had priority over another secured party that later made a fixture filing.¹⁰⁷

5. AMENDMENTS, TERMINATION, AND LAPSE OF FINANCING STATEMENT

In a prominent decision, *In re Motors Liquidation Co.*,¹⁰⁸ a debtor’s counsel filed termination statements for multiple secured transactions, only some of which were being refinanced. The court certified to the Delaware Supreme Court the question of whether a termination statement is authorized if the secured party of record reviewed and approved its filing or whether the secured party must also intend to terminate the security interest. The Delaware court held that “a termination statement is authorized by the secured party if the secured party of record reviewed and knowingly approved the termination statement for filing, regardless of whether the secured party subjectively intended or understood the effect of the filing.”¹⁰⁹

101. *Id.* at 588 (emphasis added).

102. *Id.* at 592–93. This conclusion is questionable. A financing statement need not identify the location of the collateral. Accordingly, the presumptive reason to include the location is to restrict the scope of the collateral covered and signal to the searcher that property located elsewhere is not covered. When a financing statement does limit the description to collateral at a particular location, the financing statement might be ineffective with respect to the collateral not described. See U.C.C. § 9-506(a) (2013).

103. No. CV10-09476-ODW PLAX, 2014 WL 6896021 (C.D. Cal. 2014); see *supra* notes 9–10 and accompanying text (discussing the case further).

104. *Id.* at *6; see U.C.C. § 9-301(1) (2013).

105. *Clinton*, 2014 WL 6896021, at *6.

106. No. 5:13CV404, 2014 WL 138340 (N.D. Ohio Apr. 8, 2014).

107. *Id.* at *5 (applying U.C.C. § 9-322(a)(1)).

108. 755 F.3d 78 (2d Cir. 2014). Each of the authors has provided advice to the secured party in connection with this litigation.

109. Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A., 103 A.3d 1010 (Del. 2014). Shortly after the New Year, the Second Circuit applied the Delaware court’s ruling and held that the termination statement was authorized and was therefore effective. *In re Motors Liquidation Co.*, 777 F.3d 100, 103 (2d Cir. 2015).

Still, a termination statement must be authorized by the secured party of record to be effective. In *Fjellin ex rel. Leonard Van Liew Living Trust v. Penning*,¹¹⁰ a termination statement filed without the knowledge or consent of the secured parties by the law firm representing the debtor was ineffective.¹¹¹

In *In re Colony Beach & Tennis Club, Inc.*,¹¹² the court correctly held that the post-petition lapse of a financing statement did not cause the secured party to lose its lien or make the lien avoidable under Bankruptcy Code § 544(a) because lapse makes the security interest retroactively unperfected *only* against purchasers, not lien creditors.¹¹³

D. PRIORITY

1. POSSESSORY LIEN CREDITORS

Under section 9-333, a possessory lien on goods—such as a statutory mechanic's lien that secures payment for services or materials provided to repair the goods—has priority over a perfected security interest unless the non-U.C.C. statute expressly provides otherwise.¹¹⁴ In *In re Cam Trucking LLC*,¹¹⁵ the court held that a secured party's perfected security interest in a vehicle had priority over a later statutory lien in favor of a person in possession who had furnished services with respect to the vehicle. The court considered whether Arizona or Colorado law applied and decided that it did not matter.¹¹⁶ Arizona enacted the official text of section 9-333 but its mechanic's lien statute *does* expressly provide otherwise.¹¹⁷ Colorado enacted a non-uniform version of section 9-333 that gives priority to a possessory lien only if the statute creating the lien so provides,¹¹⁸ but its mechanic's lien statute does *not* so provide.¹¹⁹ The holder of the possessory lien craftily tried to combine Arizona's section 9-333 with Colorado's mechanic's lien statute to obtain priority, but the court rejected that effort.¹²⁰

2. BUYERS AND OTHER TRANSFEREES

In general, a buyer of collateral takes free of an unperfected security interest and subject to a perfected security interest.¹²¹ However, a buyer in ordinary course of business takes free of a perfected security interest created by the seller

110. 41 F. Supp. 3d 775 (D. Neb. 2014).

111. *Id.* at 782.

112. 508 B.R. 468 (Bankr. M.D. Fla. 2014).

113. *Id.* at 480; see U.C.C. § 9-515(c) (2013).

114. See U.C.C. § 9-333 (2013).

115. No. 2:14-bk-09404-EPB, 2014 WL 4639923 (Bankr. D. Ariz. Sept. 9, 2014).

116. *Id.* at *2. This decision involved a question of priority, which should have been governed by the location of the vehicle. U.C.C. § 9-301(3) (2013).

117. *Cam Trucking*, 2014 WL 4639923, at *2 (quoting ARIZ. REV. STAT. § 33-1022(B)).

118. *Id.* (quoting COLO. REV. STAT. § 4-9-333).

119. *Id.* (quoting COLO. REV. STAT. § 38-20-106).

120. *Id.* at *3–4.

121. See U.C.C. §§ 9-201(a), 9-317(b) (2013).

and a buyer of consumer goods can take free of a perfected security interest if no filed financing statement covers the collateral.¹²²

The secured party in *Stanley Bank v. Parish*¹²³ had a security interest in a vehicle perfected by compliance with the applicable certificate of title statute. The Kansas Supreme Court affirmed a lower court's holding that the secured party had priority over a buyer who purchased the vehicle from a subsequent judicial lien creditor after the state issued a certificate of title omitting reference to the lien.¹²⁴ The court concluded that the buyer could not win under section 9-320(b) because compliance with the statute was the equivalent of filing a financing statement.¹²⁵

In *Chen v. New Trend Apparel, Inc.*,¹²⁶ buyers purchased the debtor's inventory at a liquidation sale at "closeout" prices. Because the debtor's desire to be paid exclusively in cash for large sums was, according to the court, a red flag obligating the buyers to investigate further into the ownership of the goods, but they failed to do so, the court ruled that the buyers did not qualify as buyers in ordinary course.¹²⁷

This result can be compared with *Guaranty Bank & Trust Co. v. FGDI Division of Agrex, Inc.*¹²⁸ Because two buyers of grain purchased not from a person engaged in farming operations, but from the farmer's buyer, they took free of any security interest in the grain held by the farmer's lender under section 9-320 and, thus, the lender's joinder of the subsequent buyers was without basis and would not be considered in determining whether there was diversity jurisdiction in the lender's action against the initial buyer.¹²⁹

The lender in *Heartland Bank & Trust Co. v. Leiter Group*¹³⁰ had a security interest in the borrower's equipment and accounts. The court held that the secured party had a claim for conversion against the law firm that first deposited into its IOLTA account checks from the borrower's customers and checks representing proceeds of the borrower's equipment, and then used the IOLTA account to pay its fees.¹³¹ The court ruled that the law firm was not a holder in due course of the checks because it knew of the lender's security interest.¹³² Moreover, the law firm did not take free under section 9-332(b) because the deposit account was not the debtor's, it was the law firm's.¹³³

122. *Id.* § 9-320(a), (b).

123. 317 P.3d 750 (Kan. 2014).

124. *Id.* at 754.

125. *Id.* at 754-55. The court also ruled that section 9-337, which deals with security interests perfected under the law of another jurisdiction, was inapplicable and the appellate court's discussion of that provision was dicta. *Id.* at 756.

126. 8 F. Supp. 3d 406 (S.D.N.Y. 2014).

127. *Id.* at 453-54.

128. No. 4:13CV100-B-V, 2014 WL 1289466 (N.D. Miss. Mar. 28, 2014).

129. *Id.* at *2.

130. 18 N.E.3d 558 (Ill. App. Ct. 2014).

131. *Id.* at 566.

132. *Id.* at 565 (applying U.C.C. § 3-302(a)(2)(iii)).

133. *Id.* at 566.

*Amegy Bank National Ass'n v. DB Private Wealth Mortgage, Ltd.*¹³⁴ involved a secured party with a perfected security interest in corporate stock. The debtor sold the stock and placed the proceeds in a deposit account. The court held that the secured party was not entitled to summary judgment against another bank that received some of the sale proceeds on the basis that the recipient acted in collusion with the debtor to violate the secured party's rights where the evidence of collusion was circumstantial and did not eliminate all material factual disputes.¹³⁵

In *In re Provider Meds, LP*¹³⁶ a secured party with a security interest in the debtor's intellectual property, including source code, was not entitled to rescind or terminate the debtor's licenses of the source code even though the licenses were allegedly perpetual, royalty-free, and permitted the licensees to modify the code, thus greatly reducing the code's value as collateral. The court ruled that the secured party had no claim for fraudulent inducement because the debtor made no false representation to the secured party (the term sheet contained no representations and the separate purchase and sale agreement, which did contain representations, related only to the debtor's patents and patent-related rights).¹³⁷ The court also ruled that the debtor's promise to provide a "senior security interest" was not breached by the license, and, in any event, a valid fraudulent inducement claim would not warrant rescission of the licenses; at most it might lead to rescission of the secured party's contracts with the debtor.¹³⁸ The court then added that even if the license agreements had been executed after the security agreement, and backdated to before the date of the security agreement, that did not render them fraudulent or forgeries where the signatories had authority to act and their signatures were authentic.¹³⁹ Finally, the licensees were not liable for tortious interference with contract because, even though the licensees might have known that the secured party's consent was needed to encumber the source code, the licenses were not an encumbrance.¹⁴⁰

3. PRIORITY—COMPETING SECURITY INTERESTS

The three main priority rules for two or more security interests in the same collateral are: (i) unperfected security interests rank in order of attachment; (ii) perfected security interests take priority over unperfected security interests; and (iii) among perfected security interests, priority goes to the first secured party to file or perfect.¹⁴¹ Priority can, however, be altered by agreement.¹⁴²

134. No. 2:12-cv-24-FtM-38UAM, 2014 WL 791503 (M.D. Fla. Feb. 24, 2014).

135. *Id.* at *6–8.

136. No. 13-30678-BJH, 2014 WL 4162870 (Bankr. N.D. Tex. Aug. 20, 2014).

137. *Id.* at *6–10.

138. *Id.* at *11–13.

139. *Id.* at *13–15.

140. *Id.* at *15–16.

141. See U.C.C. § 9-322(a) (2013).

142. See *id.* § 9-339.

The secured party in *Millennium Bank v. UPS Capital Business Credit*,¹⁴³ pursuant to intercreditor agreement, had priority in a subcontractor's general intangibles, but a subordinated security interest in the subcontractor's accounts. The court ruled that the subcontractor's breach of warranty claim against a paint seller was a general intangible, not an account, even though the damages were measured by the cost of the extra services provided by the subcontractor to the contractor in several repainting efforts, for which the contractor did not pay the subcontractor.¹⁴⁴ The court noted that subcontractor did not render any services to the paint seller and the contractor was not liable for the cost of the extra services.¹⁴⁵

The facts in *In re Brooke Capital Corp.*¹⁴⁶ were very complicated. A lender purportedly sold participations in a loan. The court concluded that the participants' interests were loans to the originator secured by a general intangible (the secured receivable that was the subject of the participation), not sales of fractional interests in the loan.¹⁴⁷ Thus, the court ruled the participants' interests were not automatically perfected as sales of payment intangibles.¹⁴⁸ More importantly, because the participants did not file a financing statement, the court concluded that their interests in the collateral securing the underlying loan were also unperfected and subordinate to the interest of another secured party with a perfected security interest in the collateral.¹⁴⁹

In *Co-Alliance, LLP v. Monticello Farm Service, Inc.*,¹⁵⁰ the secured party in the first priority position agreed to subordinate its interest to a secured party in third priority position. This subordination did not result in "complete subordination" to the benefit of the intermediate secured party, and instead resulted in "partial subordination," which effectively left the intermediate secured party unperfected.¹⁵¹ As a result, the junior secured party stepped into the shoes of the senior secured party only to the extent of the lesser of: (i) the amount owed to the senior secured party or (ii) the amount owed to the junior secured party.¹⁵²

143. 327 P.3d 335 (Colo. Ct. App. 2014).

144. *Id.* at 339.

145. *Id.*

146. *S. Fid. Managing Agency, LLC v. Citizens Bank & Trust Co.*, 82 U.C.C. Rep. Serv. 2d 412 (D. Kan. 2014), *rev'd*, 588 F. App'x 834 (10th Cir. 2014). For a discussion of the district court decision, see John F. Hilson, *The Perils of Participations (Redux)*, *TRANSACTIONAL LAW.*, Apr. 2014, at 1.

147. *S. Fid. Managing Agency*, 588 F. App'x at 841 (a ruling below not challenged on appeal).

148. *Id.* at 844 (citing U.C.C. § 9-309(3)).

149. *Id.* at 844-45. The court's analysis is questionable. At first, the court correctly recognized that the difference between the collateral for the original loan, for which the borrower was the debtor, and the participation transaction, for which the original lender was the debtor. But then the court ruled that section 9-310(c) did not apply and the participants had only an unperfected security interest in the borrower's collateral.

150. 7 N.E.3d 355 (Ind. Ct. App. 2014).

151. *Id.* at 360.

152. *Id.* at 361.

E. ENFORCEMENT

1. DEFAULT

Article 9 gives secured parties various rights upon default, including the rights to repossess, collect, and dispose of the collateral.¹⁵³ However, Article 9 does not define default, instead leaving that to the parties' agreement and other law. Occasionally, the agreement does not reach as far as the secured party intended. That is what happened in *Moniuszko v. Karuntzos*,¹⁵⁴ in which the parties' lease agreement expressly required the landlord to release its security interest in the tenant's equipment on a specified date unless, prior to that date, the tenant "was found to be in default of this Lease and failed to cure such default."¹⁵⁵ Although the security agreement permitted the landlord to declare a default in its sole discretion, the lease conspicuously omitted this language. Based on that, the court interpreted this passive language as requiring a judicial finding.¹⁵⁶ Because the landlord had not obtained by the specified date a court ruling that the tenant was in "default," the landlord was required to release its security interest.¹⁵⁷

In *Kinzel v. Bank of America*,¹⁵⁸ disputes about material facts prevented summary judgment for either party on whether the secured party breached the duty of good faith in liquidating the shares of stock in which it had a security interest. The security agreement authorized the secured party to liquidate the collateral if the secured party determined the value of the collateral was insufficient to secure the loan. While the secured party liquidated the stock after it fell below a designated floor price, on several prior occasions when the collateral fell below the designated floor price the secured party reduced the loan to maintenance ratio, accepted cash payments and collateral, and, most importantly, adjusted the floor price, and yet the secured party offered no explanation of why on this occasion it liquidated the collateral.¹⁵⁹ Moreover, the secured party had not shown that it acted reasonably in concluding that all of the pledged collateral was insufficient to support the loan solely because the share price of this stock fell.¹⁶⁰ The debtors, on the other hand, who had not bargained for an express restriction on the secured party's discretion, had not shown as a matter of law that the secured party acted unreasonably in refusing to make further accommodations before liquidating the collateral.¹⁶¹

153. See U.C.C. §§ 9-601(a), 9-607(a), 609(a)(1), 9-610(a) (2013).

154. No. 1-13-3959, 2014 WL 4657134 (Ill. App. Ct. Sept. 18, 2014).

155. *Id.* at *2.

156. *Id.* at *6.

157. *Id.*

158. No. 3:10cv2169, 2014 WL 346293 (N.D. Ohio Jan. 30, 2014).

159. *Id.* at *4.

160. *Id.* at *5.

161. *Id.*

2. REPOSSESSION OF COLLATERAL

Article 9 permits a secured party to repossess collateral without judicial process provided it can do so without causing a breach of the peace.¹⁶² This duty not to breach the peace is non-delegable; a secured party violates the rule even if an independent contractor causes a breach of the peace.¹⁶³

In *Thompson-Young v. Wells Fargo Dealer Services, Inc.*,¹⁶⁴ the debtors alleged that the secured party's repossession agents somehow entered the debtors' apartment building, despite a locked security door, "banged loudly on [their] apartment door at approximately 4:00 a.m., waking them," and demanded to speak with them. The debtors claimed to have been "terrified by the agents' behavior, in part because they had not buzzed anyone into their building and they believed the agents had broken through the front security door . . . and . . . might break through their front door as well." The debtors also alleged that the agents awakened several of their neighbors and that "their fear was 'heightened' because they 'reside in one of the highest crime areas in Chicago.'" The complaint further alleged that the debtors did not come out of the bedroom until 8:30 a.m., due to fear, and called police when they found a club on their car, placed by the agents. The agents returned and towed the car away before the police arrived. In spite of these allegations, the appellate court affirmed the trial court's dismissal of the debtors' breach-of-the-peace claim. The court stated that a breach of the peace means "conduct which incites or is likely to incite immediate public turbulence, or which leads to or is likely to lead to an immediate loss of public accord."¹⁶⁵ It then concluded that that no breach of the peace occurred because the debtors knew they were in default, agents identified themselves and their purpose, there were no threats of physical altercation, and the agents never entered the debtors' apartment or broke any barrier designed to exclude trespassers.¹⁶⁶

3. NOTIFICATION OF FORECLOSURE SALE

In general, a secured party must send reasonable advance notification to the debtor of a planned disposition of collateral.¹⁶⁷ The requirements applicable to a notification of disposition are fairly minimal and not difficult to satisfy. One of the few requirements is that the notification must state the method of disposition.¹⁶⁸ For transactions other than consumer transactions, there is a safe harbor as to timing, which provides that notification ten days in advance is suf-

162. See U.C.C. § 9-609(a)(1), (b)(1) (2013).

163. *Id.* § 9-609 cmt. 3. Some states have rules outside of Article 9 to the contrary. See, e.g., CAL. BUS. & PROF. CODE § 7507.13(b) (West, Westlaw through ch. 2 of the 2015 Reg. Sess.).

164. No. 1-13-2479, 2014 WL 3726900 (Ill. App. Ct. July 24, 2014).

165. *Id.* at *3 (quoting *Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171, 1082 (Ill. App. Ct. 1996)).

166. *Id.* at *6-7.

167. See U.C.C. § 9-611(b)-(d) (2013).

168. See *id.* § 9-613(1)(C).

ficient,¹⁶⁹ as well as a safe harbor form,¹⁷⁰ but a notification that fails to comply with either or both of these safe harbors might nevertheless be sufficient.¹⁷¹

In *In re Inofin, Inc.*,¹⁷² a secured party's first notification of a disposition of chattel paper incorrectly stated the sale date as "Tuesday, January 20, 2011" instead of Tuesday, January 18, 2011." A second, corrected notification was sent on January 13 only to the debtor, not to the secured parties that had financing statements on file.¹⁷³ And a third notification, sent on January 14 for a sale on January 26, failed to indicate that it superseded the prior notifications.¹⁷⁴ The court ruled that this secured party failed to provide reasonable notification of the dispositions.¹⁷⁵

In contrast, in *Wells Fargo Bank v. Witt*,¹⁷⁶ the court ruled that the secured party had no duty to notify the guarantor of a sale because the debtor—not the secured party—was the one who sold the collateral and thus Part 6 of Article 9 did not apply.¹⁷⁷

A secured party who fails to send a required notification of disposition can suffer serious consequences. In addition to being liable for any damages that its failure caused,¹⁷⁸ in a non-consumer transaction, the secured party will be presumptively not entitled to collect any resulting deficiency. That is, it will be presumed that, had the secured party complied with Article 9, the proceeds of the disposition would have fully satisfied the secured obligation, subject to contrary proof.¹⁷⁹ In *TCFIF Inventory Finance, Inc. v. Appliance Distributors, Inc.*,¹⁸⁰ a secured party successfully rebutted that presumption in its action to collect on a guaranty by showing that most of the collateral was sold back to the manufacturer pursuant to repurchase agreements, the guaranty agreement declared that to be a commercially reasonable disposition, and the bulk of the

169. See *id.* § 9-612(b).

170. See *id.* § 9-613(1).

171. See *id.* §§ 9-612(a) & cmt. 3, 9-613(2)–(4).

172. 512 B.R. 19 (Bankr. D. Mass. 2014).

173. *Cf.* U.C.C. § 9-611(c)(3)(B) (2013) (requiring that notification be sent to secured parties that, ten days before the notification date, held a security interest in the collateral perfected by a filed financing statement).

174. *Inofin*, 512 B.R. at 46.

175. *Id.* at 88–89.

176. No. 4:13-CV-477-VEH, 2014 WL 1373633 (N.D. Ala. Apr. 8, 2014).

177. *Id.* at *4. *Cf.* *Border State Bank v. AgCounty Farm Credit Serv.*, 535 F.3d 799 (8th Cir. 2008) (lenders were not required to give a junior secured party notification of a disposition of the collateral, although held at their insistence, because the debtor conducted the sale and remitted the proceeds to the lenders); *In re Reno Snax Sales, LLC*, No. NV-12-1512-DKICO, 2013 WL 3942974 (9th Cir. BAP 2013) (sale of collateral by a bankruptcy trustee was not a disposition by the secured party under Article 9 even though the secured party received most of the sale proceeds; thus the secured party had no duty to notify a co-obligor of the sale). But *cf.* *Regions Bank v. Trailer Source*, 72 U.C.C. Rep. Serv. 2d 434 (Tenn. Ct. App. 2010) (senior secured creditor's control over the debtor's sale of collateralized trailers after default was sufficient to trigger the requirement, with respect to junior secured creditor, that the sale be conducted in a commercially reasonable manner); see also Stephen L. Sepinuck, *Debtor's Negotiation of Foreclosure Sale Might Ease Secured Creditor's Burden in Complying with Article 9*, CLARK'S SECURED TRANSACTIONS MONTHLY, June 2010, at 7.

178. See U.C.C. § 9-625(b) (2013).

179. See *id.* § 9-626(a)(3), (4).

180. No. 12 C 332, 2014 WL 806961 (N.D. Ill. 2014).

secured obligation related to inventory that was apparently sold out of trust and hence never disposed of by the secured party.¹⁸¹

Occasionally, statutes outside Article 9 apply to a disposition under Article 9. Secured parties ignore such statutes at their peril. *Newman v. Federal National Mortgage Ass'n*¹⁸² involved a non-uniform New York rule requiring notification ninety days in advance of a disposition of shares in a residential cooperative apartment.¹⁸³ The secured party purchased the shares at a disposition conducted without the proper notification. The court treated compliance with the notification requirement as a condition precedent to a proper sale and enjoined the secured party from bringing an eviction action against the debtor.¹⁸⁴

4. COMMERCIAL REASONABLENESS OF FORECLOSURE SALE

Every aspect of a foreclosure sale must be “commercially reasonable.”¹⁸⁵ If a secured party’s compliance with this standard is challenged, the secured party has the burden of proof to show that the secured party acted in a commercially reasonable manner.¹⁸⁶ Although the duty to conduct a disposition of collateral in a commercially reasonable manner cannot be waived,¹⁸⁷ the parties are permitted by agreement to set the standards by which the reasonableness of a disposition will be evaluated, provided those standards are not themselves manifestly unreasonable.¹⁸⁸

In *In re Adobe Trucking, Inc.*,¹⁸⁹ the secured party made the winning bid of \$41 million at a public sale of collateralized drilling equipment. The debtor argued that the sale was not commercially reasonable because the secured party did not prepare the collateral for sale, did not give prospective buyers an opportunity to inspect it, and could have obtained a higher price if it had delayed the sale or sold the collateral in a different manner. The bankruptcy and district courts ruled for the secured party. They concluded that advertising the sale for one day in newspapers of general circulation was adequate because the security agreement provided that it would not be commercially unreasonable “to advertise dispositions of Collateral through publications or media of general circulation, whether or not the Collateral is of a specialized nature.”¹⁹⁰ They also

181. *Id.* at *11–12; see *ECC v. FPL Serv. Corp.*, 995 F. Supp. 2d 935 (N.D. Iowa 2014) (because secured party failed to send the debtor notification of a second disposition of equipment, there was a presumption that no deficiency was owing; however, the secured party rebutted the presumption by showing that the sale was conducted in a commercially reasonable manner and at the same price as the first sale, for which the lessor had sent notification to the debtor).

182. No. 505778/14, 2014 WL 7334192 (N.Y. Sup. Ct. Dec. 23, 2014).

183. See N.Y. U.C.C. § 9-611(f) (McKinney, Westlaw through L. 2015, chs. 1–13, 50–55, 58, 60–61).

184. *Newman*, 2014 WL 7334192, at *6–7.

185. U.C.C. § 9-610(b) (2013).

186. *Id.* § 9-626(a)(1), (2).

187. See *id.* § 9-602(7).

188. See *id.* § 9-603(a).

189. 551 F. App’x 167 (5th Cir. 2014).

190. *Id.* at 173; see also *In re Adobe Trucking, Inc.*, No. 10-70353-RBK, 2011 WL 6258233, at *12 (Bankr. W.D. Tex. Dec. 15, 2011) (quoting the security agreement).

concluded that the secured party had no duty to clean or paint the equipment prior to the sale or make it available for inspection given the debtor's refusal to turn the collateral over, identify its location, or otherwise cooperate and because the security agreement provided that the secured party need not prepare the collateral for sale or have possession at the time of sale.¹⁹¹ The U.S. Court of Appeals for the Fifth Circuit summarily affirmed.¹⁹²

Several other secured parties did not fare so well. In *Provident Bank v. Steele*,¹⁹³ the court ruled that the debtor raised a colorable claim that the secured party, which spent more than \$50,000 to tow and repossess a boat that the secured party sold for only \$16,000, either incurred unreasonable expenses or conducted the sale in a commercially unreasonable manner.¹⁹⁴ In *In re Inofin, Inc.*,¹⁹⁵ the court held that the secured party did not conduct a commercially reasonable sale of chattel paper because it made no reasonable efforts to market the loan portfolio, it provided limited and conflicting notification of the sales, and the auctioneer made no effort to solicit bids from individuals or entities in the industry by placing ads in trade publications and instead merely placed ads in a general newspaper, which resulted in insignificant interest and only the single bid from the secured party.¹⁹⁶

5. OTHER ENFORCEMENT ISSUES

Instead of disposing of collateral or collecting on collateral, a secured party may enforce a security interest by accepting the collateral in full or partial satisfaction of the secured obligation.¹⁹⁷ This process, known as "strict foreclosure," requires the debtor's consent after default,¹⁹⁸ a requirement that cannot be waived or varied by pre-default agreement.¹⁹⁹ Prior to the 1999 amendments to Article 9, some courts treated the debtor's surrender of the collateral to the secured party, followed by a delay before sale, as a strict foreclosure. The amendments expressly rejected this approach by conditioning an acceptance of collateral on the secured party's consent.²⁰⁰ Several courts last year struggled a bit in applying these rules.

191. *Adobe Trucking*, 551 F. App'x at 173.

192. *Id.* at 174.

193. No. H-13-2953, 2014 WL 1379880 (S.D. Tex. Apr. 8, 2014).

194. *Id.* at *4; see *TAP Holdings, LLC v. Orix Fin. Corp.*, No. 600691/10, 2014 WL 5900923 (N.Y. Sup. Ct. Nov. 7, 2014) (debtor's creditors raised a claim that the senior lenders failed to act in good faith by taking control of the debtor's board, acquiring all of the debtor's assets in satisfaction of the secured obligation, and then transferring those assets to a newly formed entity, all in a very quick process without involvement of the junior creditors or equity holders and without competitive dynamic).

195. 512 B.R. 19 (Bankr. D. Mass. 2014).

196. *Id.* at 88–89. However, the court also ruled that the failure to conduct the sale in a commercially reasonable manner did not render the sale void and the debtor's bankruptcy trustee failed to prove that any damages resulted. *Id.* at 89–91.

197. See U.C.C. §§ 9-620, 9-622 (2013).

198. See *id.* § 9-620(a)(1), (c).

199. See *id.* § 9-602(10).

200. See *id.* § 9-620(b)(1) & cmt. 5.

In *Born v. Born*,²⁰¹ the secured party in an intra-family transaction had a security interest in corporate stock and in a membership interest in a limited liability company. The security agreement contained the following clause on remedies after default:

[Secured party] shall accept the Collateral by giving notice of such fact to [Debtors] in which case [Secured Party] shall forthwith take possession of the Collateral and all interest of [Debtors] therein shall be forfeited and shall cease and terminate, and neither [Secured Party] nor [Debtors] shall have an[y] further liability to the other under this Agreement.

After a non-payment default, one of the debtors sought to pay off the secured obligation, but the secured party refused to accept it. The debtor sued, seeking to enjoin the secured party from taking control of the stock and membership interest. The court ruled for the secured party. The court began its analysis by interpreting the security agreement as limiting the secured party to a single remedy: accepting the collateral in full satisfaction of the debt.²⁰² The court then concluded that the secured party had properly proposed to accept the collateral in satisfaction of the secured obligation, even though her post-default letters to the debtor neither expressly stated that the debtor had the right to object nor indicated either the amount due or a means of calculating that amount.²⁰³ This conclusion was correct. Nothing in section 9-620 requires that a proposal to accept collateral inform the debtor of the right to object or describe the secured obligation.

The court then ruled that, because the security agreement limited the secured party's remedy to acceptance of the collateral in satisfaction of the secured obligation, the only way that the debtor could properly object was if, in addition to expressing objection, it redeemed the collateral within a reasonable time.²⁰⁴ Because the debtor had not tendered full payment and a reasonable time for doing so had passed, the secured party was now the owner of the collateral.²⁰⁵ This portion of the court's analysis is flawed. To accept collateral in full or partial satisfaction of the secured obligation, the debtor must consent after default. A communication of objection negates consent.²⁰⁶ Nothing in the U.C.C. requires that the debtor must also redeem the collateral to make a proper objection. Even if the security agreement limited the secured party's rights upon default to accepting the collateral, it could not require redemption or make redemption a condition to an effective objection. More importantly, the court's notion that redemption must occur within a reasonable time is simply not correct. Section 9-623 expressly states that the debtor has the right to redeem until the secured party conducts a disposition, collection, or acceptance,²⁰⁷ and this rule too cannot

201. 320 P.3d 449 (Kan. Ct. App. 2014).

202. *Id.* at *7.

203. *Id.* at *7-8.

204. *Id.* at *10.

205. *Id.* at *11.

206. See U.C.C. § 9-620(c)(2)(C) (2013) (referring to a "notification" of objection); see U.C.C. § 1-202(d) (2011) (defining what it means to give a notification).

207. U.C.C. § 9-623(c) (2013).

be waived or varied by agreement.²⁰⁸ Thus, the debtor's right to redeem does not expire after a reasonable time passes.

In *TAP Holdings, LLC v. Orix Finance Corp.*,²⁰⁹ senior lenders took control of the debtor's board. They then orchestrated a transfer of assets to a newly formed entity in exchange for a promissory note, which the debtor then assigned to the senior lenders in return for a release from the secured obligations. The court concluded that this was not, as a matter of law, an acceptance of collateral and appeared instead to be a private sale of the collateral.²¹⁰ As a result, triable issues remained about whether the senior lenders had provided the required notifications and conducted a commercially reasonable disposition.²¹¹

In *395 Lampe, LLC v. Kawish, LLC*,²¹² a secured party with a security interest in the debtor's one-third ownership of a limited liability company transferred title to that ownership interest to itself after default. The court ruled that this action did not constitute a disposition of the collateral because a secured party cannot buy at a private sale and there was no public sale.²¹³ Moreover, section 9-619 allows a secured party to transfer title to collateral to itself, as a means of later enforcing its rights, and provides that such a transfer is not a disposition.²¹⁴ The court ruled that the action was not an acceptance of the collateral because there was no proposal therefor and the debtor had objected.²¹⁵

In *3455 LLC v. NP Properties, Inc.*,²¹⁶ a landlord had a security interest in the tenant's equipment to secure the obligation to pay rent. The court ruled that the landlord was entitled to retain the equipment remaining on the leased premises after the tenant defaulted and vacated because the lease also provided that upon being dispossessed, the tenant's "equipment shall be deemed conclusively to be abandoned and may be appropriated, sold, stored, destroyed or otherwise disposed of by Landlord without written notice . . . and without obligation to account for them," and such a term is enforceable under Georgia law.²¹⁷ To the extent that the court's decision is based on the landlord's security interest, and not some common-law lien, the decision is incorrect.²¹⁸

208. *Id.* § 9-602(11).

209. No. 600691/10, 2014 WL 5900923 (N.Y. Sup. Ct. Nov. 7, 2014).

210. *Id.* at *16–17.

211. *Id.* at *17.

212. No. C12-1503RAJ, 2014 WL 221814 (W.D. Wash. Jan. 21, 2014).

213. *Id.* at *4–5.

214. *Id.* at *6 (citing U.C.C. § 9-619(c)).

215. *Id.* at *4.

216. No. 1:12-cv-01020-WSD, 2014 WL 3845696 (N.D. Ga. Aug. 5, 2014).

217. *Id.* at *7.

218. A secured party is not permitted to become the owner of the collateral after default without complying with the provisions of Part 6 of Article 9. Although a few courts have, without much analysis, ruled to the contrary, e.g., *Corsair Special Situations Fund, L.P. v. Engineered Framing Sys., Inc.*, 694 F. Supp. 2d 449 (D. Md. 2010) (because patent security agreement provided that the creditor's interest would "become an absolute assignment" after debtor defaulted, and debtor had defaulted, the security interest had become an absolute assignment of the patent), they are simply wrong. *Cf. In re Crossover Fin. I, LLC*, 477 B.R. 196 (Bankr. D. Colo. 2012) (clause in security agreement providing that, upon default, the debtor's rights as the sole member of limited liability company to vote and give consents, waiver, or ratifications shall cease and that the secured party may vote any or all of the

6. LIABILITY ISSUES

Principles of law and equity supplement the Uniform Commercial Code.²¹⁹ Accordingly, a person can be held liable for wrongdoing in connection with a secured transaction even if nothing in Article 9 expressly deals with the wrongdoing. Three notable cases from last year illustrate this.

In *First Hill Partners, LLC v. Bluecrest Capital Management Ltd.*,²²⁰ a debtor that had defaulted on its secured obligation hired an advisor to find a buyer of its assets and negotiate a sale. In return, the debtor agreed to pay the advisor a monthly retainer, a success fee, and reimbursement of expenses. After several months of work, the advisor identified a potential buyer, facilitated negotiations between the buyer and the debtor, and made sure that the secured party was fully informed of the deal's progress. The buyer submitted a letter of intent, which the debtor signed with the secured party's approval. Thereafter, the buyer stopped negotiating with the advisor and the secured party sold the assets to the buyer in a private sale under section 9-610 on terms virtually identical to the terms of the deal orchestrated by the advisor. In the advisor's subsequent action against the secured party, the court ruled that the advisor had stated claims for unjust enrichment and tortious interference with contract.²²¹

In *Jennings v. Shuler*,²²² a lawyer who drafted a security agreement failed to file a financing statement to perfect his client's security interest. The debtor defaulted and, years later, the secured party sued the lawyer for malpractice. The court ruled that whether the lawyer's failure to file a financing statement constituted negligence is a case-by-case, fact-intensive question and that the trial court erred in ruling for the lawyer as a matter of law.²²³ However, it nevertheless ruled for the lawyer because the secured party received the value of the collateral in the debtor's bankruptcy and thus could not show that the failure to perfect caused it injury.²²⁴

In *Fjellin ex rel. Leonard Van Liew Living Trust v. Penning*,²²⁵ secured parties brought an action against the law firm representing the debtor for filing an unauthorized termination statement. The court dismissed the claim brought under

pledged interest did not operate automatically; Colorado law requires a secured party to enforce the security agreement and become admitted as a member before the secured party may exercise voting rights associated with a membership interest pledged as collateral).

219. See U.C.C. § 1-103(b) (2011).

220. No. 13-cv-7570 (RJS), 2014 WL 4928987 (S.D.N.Y. Sept. 30, 2014).

221. *Id.* at *9–11. The court dismissed the advisor's claims for fraud, fraudulent inducement, and conversion. *Id.* at *6–8.

222. 147 So. 3d 847 (Miss. Ct. App. 2014).

223. *Id.* at 852.

224. *Id.* at 853–54. The court also ruled that the malpractice claim was barred by the statute of limitations because the secured party did not file the claim until eight years after the secured party should have discovered the negligence. *Id.* at 854–55.

225. 41 F. Supp. 3d 775 (D. Neb. 2014).

section 9-625 because, the court concluded, that section deals with the liability of the secured party, not of others.²²⁶ The court also ruled that the secured parties had no cause of action for negligence because the unauthorized termination statement was ineffective—the security interest remained perfected and continued to encumber the collateral, even after the debtor sold it—and thus the act of filing it did not cause any damages.²²⁷

226. *Id.* at 780–81.

227. *Id.* at 782.

