

# Personal Property Secured Transactions

By Steven O. Weise and Stephen L. Sepinuck\*

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

### A. IN GENERAL

The first job of a lawyer in a financing transaction is to determine whether Article 9 applies to the transaction. An error in making this determination can be fatal. On one hand, a failure to recognize that Article 9 applies can result in a failure to perfect a security interest. On the other hand, an incorrect belief that Article 9 does apply may result in not using the proper method of perfection.

### B. LICENSING

Laws outside of Article 9 may affect the application of Article 9 to a transaction. In *Waite v. Cage*,<sup>1</sup> a putative buyer of chattel paper, consisting of retail installment contracts for vehicles, did not acquire any interest in the chattel paper, because the buyer was not licensed to hold retail installment sales contracts as required by Texas law. Conversely, in *Lopes v. Fafama Auto Sales*,<sup>2</sup> the fact that a car dealer was not licensed as a sales finance company did not invalidate the dealer's security interest in a car sold by the dealer or make the dealer's repossession unlawful. The lack of a license only subjected the dealer to the specified statutory penalties.

### C. CONSIGNMENTS

A secured party will sometimes try to avoid the application of Article 9 by providing that the law of a jurisdiction that does not have Article 9 will apply to the transaction. That did not work in *In re Salander O'Reilly Galleries*.<sup>3</sup> In that case, the court held that the law of New York—where the debtor was located—governed the effect of the debtor's consignment agreement, not the foreign law chosen in the parties' agreement. As a result, a clause calling for arbitration under the law of the Channel Islands would not be enforced.

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1. No. H-11-1067, 2011 WL 2118803 (S.D. Tex. May 27, 2011).

2. No. 10-ADMS-70008, 2011 WL 6258818 (Mass. App. Ct. Dec. 8, 2011).

3. 453 B.R. 106 (Bankr. S.D.N.Y. 2011).

#### D. REAL PROPERTY

Other times a secured party will try to avoid Article 9 by having an agreement that the collateral is a type of property that is not subject to Article 9. But that will not work either. In *In re Ocean Place Development, LLC*,<sup>4</sup> the language of an assignment agreement provided that a hotel's room revenues were real property rents and, thus, not governed by Article 9. Nevertheless, the court held that there were accounts or payment intangibles and that Article 9 governed an assignment of the rents.

#### E. LEASING

Every year lessors of personal property forget that a "lease" can sometimes create a "security interest." The "lease" in *Gibraltar Financial Corp. v. Prestige Equipment Corp.*<sup>5</sup> ran for six years and the lessor gave the lessee options to buy the leased equipment both in year five and at the end of the lease term. None of the bright-line tests of U.C.C. section 1-203 applied, but that did not prevent the lease from being a "security interest." The court requested further evidence regarding the economic expectations of the parties at the time they entered into the transaction, including factors such as the expected value of the equipment on the option dates and whether the only economically sensible course for the lessee would have been to exercise the option.

#### F. SALES

Financing parties sometimes structure a transaction as a "sale" of the relevant property and then a repurchase of the property by the original seller. In *Palmdale Hills Property, LLC*,<sup>6</sup> the court held that loan repurchase transactions documented under master repurchase agreements are true sales, not secured transactions, based on the unambiguous intent of the parties as stated in the master repurchase agreement. The court cited two earlier decisions in support of its conclusion and relied on statements in the master repurchase agreement that the parties intended the transaction to be a sale, the use of the terms "Buyer" and "Seller," and the use of other purchase-related terms.<sup>7</sup> While the decision is consistent with prior repurchase agreement decisions, it is inconsistent with the true sale/property of the estate analysis typically applied for other types of transactions—in which the analysis typically focuses on the economic terms of the transaction, not stated intent.<sup>8</sup>

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4. 447 B.R. 726 (Bankr. D.N.J. 2011).

5. 949 N.E.2d 314 (Ind. 2011).

6. 457 B.R. 29 (B.A.P. 9th Cir. 2011).

7. *Id.* at 41 (citing the court's reasoning in *In re Am. Home Mortg. Holdings, Inc.*, 388 B.R. 69 (Bankr. D. Del. 2008) and *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275 (S.D.N.Y. 1998)).

8. See Stephen L. Sepinuck & Kristen Adams, *UCC Spotlight*, COM. L. NEWSL. (Am. Bar Ass'n), Dec. 2011, at 13, available at <http://apps.americanbar.org/buslaw/committees/CL710000/pub/newsletter.shtml> [hereinafter *UCC Spotlight*].

## G. TORT CLAIMS

Article 9 applies to a security interest in a commercial tort claim as original collateral and Article 9 also applies to a security interest in a commercial tort claim as proceeds of other collateral. The court had difficulty applying Article 9's rules regarding commercial tort claims in *In re American Cartage, Inc.*<sup>9</sup> First, the court properly held that a security agreement's after-acquired property clause could not encompass a commercial tort claim that did not exist when the parties entered into the security agreement.<sup>10</sup> The court went astray, however, when it held that the *right* to a tort recovery can be proceeds of other collateral, but the commercial tort claim itself—and hence standing to pursue a commercial tort claim—cannot be “proceeds” of other collateral.<sup>11</sup>

## II. ATTACHMENT OF SECURITY CLAIMS

In general, there are three requirements for a security interest to attach—that is, to come into existence: (i) the debtor must have rights in the collateral, (ii) value must be given, and (iii) the debtor must authenticate a security agreement that describes the collateral.<sup>12</sup>

### A. RIGHTS IN COLLATERAL

To grant a security interest in personal property, the debtor must either have rights in the property, or the power to convey rights in it.<sup>13</sup> Sometimes a debtor acquires rights in the assets of one of its customers and then grants a security interest in those assets, much to the surprise and displeasure of the customer. This occurred in *Lonely Maiden Productions, LLC v. Goldentree Asset Management, LP*,<sup>14</sup> a case involving a payroll processor. The payroll processor provided payroll processing and other services to various employers in the film industry. The written service agreements provided that the processor's clients would provide all relevant payroll details to the processor, who would calculate the wages and withholdings due, invoice the clients for those amounts, and after the clients remitted the invoiced amounts, issue payroll checks to the clients' employees and pay the withholdings to the appropriate entities.<sup>15</sup> When the processor defaulted on its secured loan, the secured party foreclosed on the processor's deposit accounts, which contained \$28 million in funds provided by its customers, including \$500,000 as a security deposit.<sup>16</sup> The customers sued for conversion, claiming that no security interest could have attached to the deposit accounts

9. 656 F.3d 82 (1st Cir. 2011).

10. See U.C.C. § 9-204(b)(2) (2009).

11. See *id.* at 88–89. For a more detailed criticism of this portion of the decision, see *UCC Spotlight*, *supra* note 8, at 14–15.

12. See U.C.C. § 9-203(b) (2009).

13. See *id.* § 9-203(b)(2).

14. 135 Cal. Rptr. 3d 69 (Ct. App. 2011).

15. See *id.* at 73.

16. See *id.*

because the processor held the funds in an express or resulting trust.<sup>17</sup> The court ruled for the secured party, even as to the security deposit, because the service contracts disclaimed any agency relationship, failed to create a trust, and, although requiring the processor to pay its clients' employees, it did not require that payment be made out of the funds provided.<sup>18</sup> Thus, the funds had become the property of the processor and the secured party's security interest had attached to them.

*Farm Credit of Northwest Florida, ACA v. Easom Peanut Co.*<sup>19</sup> involved a dispute between peanut growers and the secured party of the peanut broker that had purchased their crop. The growers' sales contracts with the broker provided that the growers retained all beneficial interest in, and title to, the peanuts (in effect a "security interest") until the peanuts were delivered to the broker and the warehouse receipts therefore were delivered to the broker.<sup>20</sup> The court ruled that delivery of the peanuts to a third-party processor at the broker's direction gave the broker sufficient rights in the peanuts for its lender's security interest to attach.<sup>21</sup> The court declined to resolve the relative priority of the lender's and growers' security interests, however, concluding that the lender may have acted in bad faith in assuring the growers that they would be paid.<sup>22</sup>

If the person who authenticates the security agreement is purporting to act on behalf of someone else who owns the property, the authenticator must in fact have the authority to act for the owner under non-U.C.C. law.<sup>23</sup> In *Zaremba Group, LLC v. FDIC*,<sup>24</sup> the husband of the managing member of an LLC authenticated a security agreement purporting to grant Citizens State Bank a security interest in two certificates of deposit owned by the LLC. The husband had no interest in, or management authority over, the LLC. Yet, when he applied for a \$1.85 million commercial loan for his own purposes, and the loan officers advised him he had too little collateral, the husband notified the bank that a large sum of money would be deposited to act as collateral. Shortly thereafter, the LLC deposited more than \$1.8 million to purchase the certificates of deposit. Four days later, the husband authenticated a security agreement pledging the CDs to secure his loan.<sup>25</sup> After the husband defaulted, the bank refused to relinquish or honor the CDs and the LLC sued. The bank acknowledged that

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17. See *id.* at 75.

18. See *id.* at 76–82.

19. 718 S.E.2d 590 (Ga. Ct. App. 2011).

20. See *id.* at 596.

21. See *id.* at 598. With respect to priority, the court rejected the argument that the growers were entitled to priority under U.C.C. section 9-110(4) because the debtor never obtained possession of the peanuts. The court concluded that delivery of the peanuts to the processor, at the broker's direction, gave the broker "constructive possession." *Id.* at 598–99. That conclusion is correct, but use of the phrase "constructive possession" was unfortunate. It is a phrase that Article 9 carefully avoids and has led to several questionable decisions. See, e.g., *In re W. Iowa Limestone, Inc.*, 538 F.3d 858 (8th Cir. 2008); *In re Havens Steel Co.*, 317 B.R. 75 (Bankr. W.D. Mo. 2004).

22. *Easom Peanut*, 718 S.E.2d at 599–600.

23. See U.C.C. § 1-103(b) (2011).

24. No. 10-11245, 2011 WL 721308 (E.D. Mich. Feb. 23, 2011).

25. See *id.* at \*1–2.

the husband lacked actual authority to bind the LLC, but claimed that he had apparent authority and that the LLC had ratified the security agreement.

The court rejected both of the bank's contentions. First, it ruled that apparent authority must arise from acts of the principal, not the agent, and the LLC did nothing other than make the initial deposit shortly after the husband said it would occur.<sup>26</sup> Second, the court ruled that the LLC did not ratify the security agreement by signing a bank resolution ratifying all transactions purportedly done on the LLC's behalf because the LLC had no knowledge of the husband's actions at the time and the loan purportedly secured by the CDs was not for the LLC's benefit.<sup>27</sup> The decision seems correct and serves as a reminder to secured parties that they should confirm that the person authenticating the security agreement has actual authority to do so.

A somewhat different result was reached in *In re WL Homes, LLC*.<sup>28</sup> In that case, the court ruled that the debtor had sufficient rights in the deposit account of a wholly owned subsidiary to grant a security interest in the deposit account because (i) the debtor funded the deposit account, had access to it (five of the seven authorized signatories were officers of the debtor and the other two were officers of both the debtor and the subsidiary), and controlled access to the funds by requiring approval of the debtor's controller and (ii) the subsidiary implicitly consented to the use of the deposit account as collateral because the person who signed the security agreement on behalf of the debtor was also the president of the subsidiary.<sup>29</sup>

Over the last several years, several courts have ruled that the owner of a state-issued liquor license cannot grant a security interest in the license because the license is not property.<sup>30</sup> In *In re Jojo's 10 Restaurant, LLC*,<sup>31</sup> the court followed that line of authority. Although the debtor purported to pledge a liquor license as collateral, the court concluded that Massachusetts law gives limited property rights in such a license only if the licensing authority approves the pledge

26. See *id.* at \*6–8.

27. See *id.* at \*8–9.

28. 452 B.R. 138 (Bankr. D. Del. 2011).

29. See *id.* at 145–48. Because of this, the subsidiary was likely a “secondary obligor.” See U.C.C. § 9-102(a)(71) (2009). The court also ruled that even if the grant of the security interest violated state insurance law, the only consequence of the violation would be revocation or non-renewal of the subsidiary's license, not invalidation of the security interest. *WL Homes, LLC*, 452 B.R. at 148–49.

30. See, e.g., *In re Chris-Don, Inc.*, 367 F. Supp. 2d 696 (D.N.J. 2005) (holding that a New Jersey liquor license is not property to which a security interest may attach); *Bischoff v. LCG Blue, Inc.*, 67 U.C.C. Rep. Serv. 2d (West) 899 (Cal. Ct. App. Jan. 22, 2009) (ruling that no security interest can attach to a liquor license under California law); *Banc of Am. Strategic Solutions, Inc. v. Cooker Rest. Corp.*, No. 05AP-1126, 2006 WL 2535734 (Ohio Ct. App. Sept. 5, 2006) (ruling that an Ohio liquor license is not property under Ohio law and, thus, no security interest can attach to it), *appeal denied*, 861 N.E.2d 144 (Ohio 2007). But cf. *In re Kanoff*, 408 B.R. 53 (Bankr. M.D. Pa. 2009) (ruling that a liquor license is a general intangible; a security interest in the license could not perfect by possession of the license certificate or by “control” over the license through payment of renewal and transfer fees); *Concorde Equity II, LLC v. Bretz*, No. A131206, 2011 WL 5056295 (Cal. Ct. App. Oct. 25, 2011) (ruling that although state law prohibited the granting of a security interest in a liquor license, the lender's security interest could and did attach to the proceeds of a liquor license sold by a court-appointed receiver).

31. 455 B.R. 321 (Bankr. D. Mass. 2011).

and, because no approval was granted, the court concluded that the debtor had no property rights in the license and no security interest attached to it.

## B. EXISTENCE OF SECURITY AGREEMENT

The requirement of an authenticated security agreement is fairly easy to satisfy. The agreement must merely create or provide for a security interest,<sup>32</sup> that is, it 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 (or in connection with a sale covered by Article 9),<sup>33</sup> and it must describe the collateral.<sup>34</sup> If no single document satisfies these requirements, multiple writings may do so collectively, under what is known as the “composite document rule.”<sup>35</sup> Last year, two courts reached opposite conclusions in applying the composite document rule.

In *re Jojo's 10 Restaurant, LLC*,<sup>36</sup> the court ruled that no authenticated security agreement existed even though the asset purchase agreement signed by the buyer provided that the buyer's obligation “shall be secured by a standard form UCC Security Agreement,” and a filed financing statement described the collateral. The court noted that the asset purchase agreement lacked granting language and the buyer had not authenticated the financing statement.<sup>37</sup> In contrast, in *Lopes v. Fafama Auto Sales*,<sup>38</sup> the court held that a combination of two documents signed by a car buyer—a bill of sale stating that the car dealer had a right to repossess the car for nonpayment and a certificate of title application listing the dealer as sole lien holder—constituted an authenticated security agreement.<sup>39</sup>

Traditional principles of contract law are available to reform a writing that has errors. In *First Premier Capital LLC v. Brandt*,<sup>40</sup> in connection with a negotiated modification of some equipment leases, the lessee agreed to give the lessor a security interest in all of the lessee's assets. The authenticated security agreement, however, mistakenly stated that the lessee was granting a security interest in the lessor's assets. The court ruled that the security agreement could potentially be reformed due to mutual mistake, and thus the lower court did not abuse its discretion in approving a settlement of an avoidance action.<sup>41</sup>

32. See U.C.C. § 9-102(a)(73) (2009).

33. See U.C.C. § 1-201(b)(35) (2011).

34. See U.C.C. § 9-203(b)(3)(A) (2009).

35. 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).

36. 455 B.R. 321 (Bankr. D. Mass. 2011).

37. See *id.* at 327.

38. No. 10-ADMS-70008, 2011 WL 6258818 (Mass. App. Ct. Feb. 25, 2011).

39. See *id.* at \*3.

40. 465 B.R. 801 (N.D. Ill. 2011).

41. See *id.* at 807.

## C. ADEQUACY OF COLLATERAL DESCRIPTION

A security agreement's description of collateral generally need not be specific; it must only reasonably identify the collateral and, for most types of property, may refer to the collateral by its Article 9 type.<sup>42</sup> Several courts applied this standard in a lenient manner last year.

In *Pearson v. Wachovia Bank*,<sup>43</sup> the security agreement described the collateral as “[a]ll of the investment property . . . held in or credited to” three designated securities accounts. The secured party later issued one monthly statement for all three accounts using a different, single account number. The court held that the collateral description was sufficient because the three pledged accounts were not in fact consolidated into a new account.<sup>44</sup> The court then added that even if the bank had consolidated the three accounts, the new account would still be covered by the security agreement, which expressly extended to “additions, replacements, and substitutions” of the listed collateral, and, in any event, would be proceeds of the prior accounts.<sup>45</sup>

In *In re O & G Leasing, LLC*,<sup>46</sup> the security agreement described the collateral as “Performance Drilling Rig # 3” and four other numbered rigs. The court ruled that this was sufficient even if the exhibit providing a more complete description was not attached when the debtor signed the security agreement because the description was sufficient “to raise a red flag to a third party, so as to indicate that more investigation may be necessary to determine whether an item is subject to a security interest.”<sup>47</sup> The court also ruled that the exhibit containing a more complete description was part of the security agreement even though it was not affixed to the security agreement until after the debtor signed the agreement.<sup>48</sup>

Perhaps the most lenient decision on this subject was *In re Taylor*,<sup>49</sup> in which the security agreement described the collateral as “155 head of mixed breed cows and calves” without specifying which particular cattle were covered. In fact, the debtor owned more than 155 cattle when he authenticated the security agreement.<sup>50</sup> The debtor later sold all of his cattle and the court had to decide whether all or a portion of the proceeds were subject to the security interest. In the absence of any other reasonable approach, the court decided to treat the last 155 cattle sold by the debtor, and the proceeds thereof, as the secured party's collateral.<sup>51</sup> Secured parties should not assume that other courts will be so willing to

42. See U.C.C. § 9-108 (2009).

43. No. 10-60612-CIV, 2011 WL 9505 (S.D. Fla. Jan. 3, 2011).

44. See *id.* at \*5.

45. See *id.*

46. 456 B.R. 652 (Bankr. S.D. Miss. 2011).

47. Compare *id.* at 665 (explaining that mere notice that furthers investigation will suffice to adequately describe collateral), with *Monticello Banking Co. v. Flener*, No. 1:10-CV-121-R, 2010 WL 5158989 (6th Cir. Dec. 13, 2011) (stating that providing the account number without more may not be sufficient notice because such number may not reveal the security agreement in question after an appropriate search).

48. *In re O & G Leasing, LLC*, 456 B.R. at 665–67.

49. No. 10-50039, 2011 WL 841511 (Bankr. E.D. Ky. Mar. 4, 2011).

50. See *id.* at \*3.

51. See *id.* at \*4.

protect a secured party if the security agreement contains a description of collateral that is so vague that the items cannot be readily identified.

Secured parties do not always fare so well. In *In re McKenzie*,<sup>52</sup> the debtor had authenticated a security agreement purporting to pledge his interest in numerous LLCs and corporations to his law firm as collateral for his obligation to pay legal fees. The entities were listed on an exhibit to the security agreement, but there were slight errors in the names of eight entities. The court looked to whether the entities were reasonably determinable and noted that this standard is less strict than for the debtor's name on a financing statement.<sup>53</sup> For most of the entities, the errors were very minor and there was no difficulty in determining to which entity the agreement was referring. Similarly, even though the agreement's reference to "Spectrum Health, LLC" may have referred to one of two entities whose legal name began with "Spectrum Health," because the debtor owned an interest in only one of those entities, the court ruled there was no problem identifying the correct entity.<sup>54</sup> The court ruled that the agreement's reference to "Exit 20, LLC" was inadequate, however, because the debtor had a membership interest in two entities whose names began with "Exit 20"—Exit 20 Properties, LLC and Exit 20 Development, LLC—and there was no evidence about which interest had been pledged.<sup>55</sup>

In *In re Southeastern Materials, Inc.*,<sup>56</sup> the security agreement described the collateral as "all of the Debtor's . . . equipment, wherever located," but also stated that "the address where the Debtor keeps and maintains the equipment is . . . Columbus County." The court ruled that this additional language created a factual issue as to whether the parties intended to encumber equipment located in a different county.<sup>57</sup>

Finally, and most disconcerting, is the Sixth Circuit's unpublished opinion in *Monticello Banking Co. v. Flener*.<sup>58</sup> In that case the debtor deposited funds at Monticello Bank ("Monticello") to acquire certificates of deposit in the Certificate of Deposit Accounts Registry. In essence, Monticello sent the funds to Bank of New York Mellon ("Mellon"), which used the funds to acquire CDs from other banks. Those CDs were created in the name of Mellon, which in turn created an account in favor of Monticello, which created and credited an account for the debtor. As the Sixth Circuit noted, the CDs credited to Mellon were deposit accounts while Mellon's account for Monticello and Monticello's account for the debtor were securities entitlements.<sup>59</sup> The court incorrectly ruled that investment property is not subject to the "reasonably identifies" standard of U.C.C. section 9-108(a); instead, the court incorrectly held that the description must

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52. No. 08-16378, 2011 WL 2118689 (Bankr. E.D. Tenn. May 27, 2011).

53. *See id.* at \*7.

54. *See id.*

55. *See id.*

56. 452 B.R. 170 (Bankr. M.D.N.C. 2011).

57. *See id.* at 175.

58. No. 1:10-CV-121-R, 2010 WL 5158989 (6th Cir. Dec. 13, 2011).

59. *See id.* at \*2.



either describe the underlying financial asset or refer to security entitlements, securities accounts, commodity accounts, or investment property.<sup>60</sup>

The debtor purported to grant a security interest in its Monticello account to Monticello. The security agreement described the collateral as all of the debtor's deposit accounts, including the "Certificate of Deposit #-9536 at Monticello Banking Company . . . [and the] Certificate of Deposit #-2581 at CDARS."<sup>61</sup> Despite the specific reference to the account at Monticello and the underlying CD in the registry, the court ruled the description was inadequate. According to the court, the description failed to identify the account at Monticello because that was a security entitlement and the language referred to deposit accounts, but did not mention "security entitlements," "investment property," or describe the "underlying financial asset."<sup>62</sup> Moreover, the agreement could not grant a security interest in the underlying CDs because Mellon owned those.<sup>63</sup>

#### D. RESTRICTIONS ON TRANSFER

Even if the debtor owns the property offered as collateral, the debtor may lack the ability to create a security interest in that property if some law or contract restricts or prevents the debtor from granting a security interest. Last year, two important cases resulted in inconsistent holdings on whether the owner of an FCC broadcast license could grant a security interest in the proceeds of the license.

The issue in these cases arises from the interaction of U.C.C. Article 9, the Federal Communications Act of 1934, and section 552 of the Bankruptcy Code. The Federal Communications Act provides that "[n]o . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner," without the advance approval of the FCC.<sup>64</sup> The FCC had long interpreted this language as prohibiting the creation of a security interest in a broadcast license. However, in 1994, the FCC issued a clarifying order in which it concluded that a creditor could take a security interest in the proceeds of a broadcast license, because this would not interfere with the policy underlying the prohibition.<sup>65</sup>

Relying on this order, some lenders have taken a security interest in the future proceeds of a borrower's FCC licenses, rather than in the licenses themselves. The problem with this approach is that section 552 of the Bankruptcy Code prevents an after-acquired property clause from operating post-petition unless the post-petition property is proceeds of prepetition collateral. Thus, the argument goes, because the license itself is not and cannot be collateral, any receivable generated by a post-petition contract to sell the license cannot be proceeds of prepetition collateral. It is at best after-acquired property, to which no prepetition

60. See *id.* at \*5–6 (citing U.C.C. § 9-108(e) (2009)).

61. See *id.* at \*4.

62. See *id.* at \*5–7; U.C.C. § 9-108(d) (2009).

63. *Monticello Banking Co.*, 2010 WL 5158989, at \*7.

64. 47 U.S.C. § 310(d) (2006).

65. *In re Cheskey*, 9 FCC Rcd 986, 987 (1994).

security interest can attach. This was the holding of the bankruptcy court last year in *In re Tracy Broadcasting Corp.*

The court rejected this analysis in *In re TerreStar Networks, Inc.*,<sup>66</sup> concluding that the prepetition security interest in the broadcaster's general intangibles encompassed the economic value of the licenses. Thus, when the licenses were sold post-petition, the receivables generated were proceeds of the economic value. The decision rests on good policy. The legitimate concerns of the FCC would not seem to be implicated if the FCC retains the authority to approve any sale by the secured party.

Nevertheless, lenders and their counsel should continue to tread carefully here.<sup>67</sup> Just twelve days after the *TerreStar Networks* decision, the contrary ruling from last year in *In re Tracy Broadcasting Corp.* was affirmed on appeal.<sup>68</sup>

Another recurring issue involving transfer restrictions deals with the debtor's interest in a business entity, such as a corporation or LLC, if the governing documents of the entity or an agreement among co-owners purports to prevent the debtor from assigning the debtor's rights.

In *In re Garrison*,<sup>69</sup> the debtors offered, as collateral, shares of stock in a closely held Oregon corporation. The stock certificate stated on the reverse that the shares "may not be offered, sold, transferred, pledged or hypothecated in the absence of an effective registration statement for the shares under the [Securities Act of 1933] and under any applicable state securities laws, or an opinion of counsel to the corporation that such registration is not required as to such sale or offer."<sup>70</sup> In addition, a shareholder agreement prohibited shareholders from transferring or encumbering any stock without the express written consent of all the shareholders.<sup>71</sup> Despite these restrictions, the debtors purported to grant a

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66. 457 B.R. 254 (Bankr. S.D.N.Y. 2011).

67. In *TerreStar Networks, Inc.*, the court cited several prior decisions in support. *Id.* at 264. However, only three of these prior decisions concluded that a security interest in the proceeds of a broadcast license somehow attaches when the security agreement was executed. See *MLQ Investors, L.P. v. Pac. Quadracasting, Inc.*, 146 F.3d 746 (9th Cir. 1998); *Urban Communicators PCS L.P. v. Gabriel Capital, L.P.*, 394 B.R. 325 (S.D.N.Y. 2008); *In re Media Props., Inc.*, 311 B.R. 244 (Bankr. W.D. Wis. 2004). One of us believes that the analysis by the first two of these courts was not particularly sophisticated. In *MLQ Investors, L.P.*, the Ninth Circuit wrote, "[W]e see no reason why the proceeds should not be considered 'general intangibles,' therefore subject to perfection prior to sale." 146 F.3d at 749. But the conclusion does not follow from the premise. The mere fact that the debtor's contractual right to proceeds could potentially be classified as a general intangible says nothing about whether or when that right comes into existence. The decision in *Urban Communicators PCS L.P.* simply followed the Ninth Circuit's lead, and thus is subject to the same criticism. 394 B.R. at 337. The court in *Media Properties, Inc.*, on the other hand, held something more persuasive. It concluded that the prepetition security interest could attach to the broadcaster's right to sell the licenses (with FCC approval), and that a post-petition contract for sale was proceeds of this prepetition right. 311 B.R. at 248. The trouble with this approach is that it has not been approved by the FCC. To say that a security interest can attach to the broadcaster's right to sell the broadcast license is different from saying that a security interest can attach to proceeds of the license, and might be closer to the prohibited side of the dichotomy that the FCC tried to draw.

68. No. 10-cv-02522-WYD, 2011 WL 3861612 (D. Colo. Aug. 31, 2011), *aff'g* 438 B.R. 323 (Bankr. D. Colo. 2010).

69. 462 B.R. 666 (Bankr. W.D. Ark. 2011).

70. See *id.* at 671.

71. See *id.*

security interest in the stock to a bank to secure a \$55,000 line of credit, as well as later refinancings of that debt. The bank took possession of the certificate. Subsequently, the debtor sold some of his shares, and the corporation, without obtaining the original certificate from the bank, issued a new certificate to the debtors, which referred to the shareholder agreement restricting transfer.<sup>72</sup> The debtors filed for bankruptcy protection and a dispute arose concerning whether the bank had a security interest in the stock and, if so, whether that interest was perfected.

In addressing these issues, the court first ruled that restrictions on transfer of corporate stock are governed by the state of incorporation.<sup>73</sup> Oregon corporate law validates restrictions on transfer of corporate stock if noted on the certificate.<sup>74</sup> The court further ruled that the restriction relating to registration was ineffective to prevent the debtors from granting a security interest in the stock because it prevents only a public offering and the debtors' pledge was not covered by the requirement.<sup>75</sup> The court ruled that the shareholder agreement was effective to prevent the creation of a security interest once the bank had knowledge of the restriction.<sup>76</sup> However, the court did not explain why, given that the debtors authenticated the security agreement before that time, subsequent refinancings triggered the effectiveness of the restriction.

Several cases in the last year dealt with attempts to grant a security interest in the debtor's interest in an LLC, despite restrictions in the membership agreement or operating agreement that prohibit such a transfer or require the consent of all members. Although some think that the rules of U.C.C. section 9-408 override those restrictions, that section overrides contractual restrictions only if the contract is between the relevant account debtor and a debtor. The LLC may be an account debtor as to the obligations owed to its members,<sup>77</sup> but the LLC is rarely a party to the membership agreement and, in any event, the other members are not account debtors with respect to the LLC's obligations. Therefore, Article 9 typically does not affect the validity of the contractual restriction on transfer in a contract among the members.<sup>78</sup> A pending commentary by the Permanent Editorial Board for the U.C.C. will explain this very thoroughly.<sup>79</sup>

72. See *id.* at 682.

73. See *id.* at 675; see also U.C.C. § 1-105 (2011). Article 9 does not contain a rule on which state's law governs attachment. See U.C.C. §§ 9-301 cmt. 2, 9-401(a) (2009). That matter is generally left to the law governing the security agreement, which the parties are generally free to select. See U.C.C. § 1-301 (2011). Under traditional conflicts-of-law rules, however, attachment of a security interest in an entity is subject to limitations on transfer under the law under which that entity was formed. See U.C.C. § 9-401 cmt. 3 (2009).

74. *Garrison*, 462 B.R. at 678 (citing OR. REV. STAT. ANN. § 60.167 (West 2003)).

75. See *id.* at 678–79.

76. See *id.* at 679–82.

77. U.C.C. § 9-102(a)(3) (2009) (defining “account debtor” to include a person obligated on a general intangible).

78. See Stephen L. Sepinuck, *Analyzing Restrictions on Assigning Ownership Rights in a Business Entity*, 2 TRANSACTIONAL LAW, 2 (Feb. 2012), available at [http://www.law.gonzaga.edu/Transactional\\_Lawyer\\_2012-02.pdf](http://www.law.gonzaga.edu/Transactional_Lawyer_2012-02.pdf).

79. Draft PEB Commentary: Application of UCC Sections 9-406 and 9-408 to Transfers of Interests in Unincorporated Business Organizations (Feb. 2012), available at [http://ali.org/index.cfm?fuseaction=proj\\_ip&projectid'4](http://ali.org/index.cfm?fuseaction=proj_ip&projectid'4).

Nevertheless, two cases have indicated that consent of the other members to the grant of a security interest can, at least in some instances, be presumed. In the first of these cases, *In re Westbay*,<sup>80</sup> an LLC agreement required the written consent of all members to use of the debtor's membership interest as collateral. The court ruled that this requirement was impliedly waived because all the members knew of and benefitted from the transaction, which was in exchange for a loan of working capital to the LLC. In the second case, *In re McKenzie*,<sup>81</sup> the court ruled that the debtor could grant a security interest in its wholly owned LLCs regardless of restrictions in the membership agreement because consent to the grant of the security interest is presumed when the same person is the debtor and the sole owner of the LLC.

If the LLC is not wholly owned by the debtor and the secured party's advance does not benefit the LLC itself, then consent will not be presumed and the security interest will not attach without sufficient evidence of consent (assuming the consent requirement is enforceable under law outside the U.C.C.).<sup>82</sup>

#### E. OBLIGATION SECURED

Article 9 expressly permits a security agreement to secure future indebtedness as well as existing debt.<sup>83</sup> Moreover, a comment rejects the holdings of some cases decided under former Article 9, which required that the future indebtedness be of the same type as, or otherwise related to, the original debt.<sup>84</sup> In *In re Alaska Fur Gallery, Inc.*,<sup>85</sup> the debtor granted a bank a security interest in all of the debtor's inventory, equipment, accounts, chattel paper, and general intangibles in return for a \$500,000 loan to acquire inventory. The security agreement contained a cross-collateralization clause providing that the collateral would secure future loans, even if those loans were unrelated to the original loan transaction. The debtor paid off the inventory loan, but later borrowed funds to acquire real estate. The court correctly ruled that the personal property secured the subsequent real estate loans, noting that revised Article 9 rejects any requirement that the loans have a related purpose, which had previously been the law in Alaska.<sup>86</sup>

80. No. 09-81889, 2011 WL 2708469 (Bankr. C.D. Ill. July 11, 2011).

81. No. 08-16378, 2011 WL 6140516, at \*9 (Bankr. E.D. Tenn. Dec. 9, 2011). In an earlier ruling in the same case, the court held that no security interest attached to the debtor's interest in an LLC because the operating agreement required the prior written consent of the LLC's Board of Governors, and no such consent was obtained. See *In re McKenzie*, 74 U.C.C. Rep. Serv. 2d (West) 489 (Bankr. E.D. Tenn. 2011).

82. See *Meecorp Capital Mkts., LLC v. PSC of Two Harbors, LLC*, No. 09-2067, 2011 WL 6151487 (D. Minn. Dec. 12, 2011) (ruling that the guarantor did not grant a security interest in his LLC interest because there was no evidence that written notice, required by the member control agreement, was provided to all members; the guarantor did not grant a security interest in his general partnership interests because the member control agreements prohibited transfer of governance interests without the unanimous, written consent of all other members and the resolutions of the Boards of Governors consenting to the pledge were insufficient to satisfy this requirement).

83. See U.C.C. § 9-204(c) (2009).

84. See U.C.C. § 9-204 cmt. 5 (2009).

85. 457 B.R. 764 (Bankr. D. Alaska 2011).

86. See *id.* at 771-75.

The court limited its ruling to commercial transactions, perhaps suggesting that the relatedness requirement might still apply in consumer transactions.<sup>87</sup>

Three months later, however, the same court correctly held that consumer transactions are in fact no different, and that the relatedness doctrine has been abrogated.<sup>88</sup> Other courts ruled similarly last year.<sup>89</sup>

## F. PROCEEDS

A security interest in collateral automatically extends to identifiable proceeds of the collateral.<sup>90</sup> For this purpose, the definition of proceeds is broad, but not limitless.<sup>91</sup> In *In re Wright Group, Inc.*,<sup>92</sup> a secured party had a security interest in the equipment of a miniature golf course. The debtor's customer paid to use the course and, in connection with that, received permission to use a golf club, ball, scorecard, and pencil. The court held that the payments were in exchange for licenses to use the facility, not for licenses to use the golf clubs and other equipment. Thus, the transactions did not generate proceeds of the equipment at the golf course. Further, because they were cash transactions, they did not generate accounts to which a security interest could attach.<sup>93</sup>

## III. PERFECTION

### A. CERTIFICATES OF TITLE

At times, courts must apply Article 9's general rules for perfection of a security interest by filing of a financing statement to the use of a certificate of title. In *Parks v. Mid-Atlantic Finance Co.*,<sup>94</sup> for instance, the court correctly held that the assignee of a car loan had no duty to have the certificate of title amended to replace the seller's name as secured party with its own. Thus the buyer did not have a claim against the assignee for negligence, slander of title, wrongful repossession, or conspiracy arising from the seller's repossession.<sup>95</sup> A secured

87. See *id.* at 775.

88. See *In re Zaochney*, 76 U.C.C. Rep. Serv. 2d (West) 340 (Bankr. D. Alaska 2011).

89. See *In re Renshaw*, 447 B.R. 453 (Bankr. W.D. Pa. 2011) (ruling that the cross-collateralization clause in the bank's line of credit to a consumer that purported to make all collateral also secure, "all other loans you have with us," was effective to cover the debt on a previously issued credit card). Cf. *In re Dumlao*, No. NV-10-1505-JuHKW, 2011 WL 4501402 (B.A.P. 9th Cir. Aug. 5, 2011) (ruling that a clause in a consumer's car loan agreement with credit union providing that the vehicle secured "any other amounts or loans, including any credit card loan, you owe us for any reason now or in the future" was effective to cover credit-card debt but remanding the case to determine if the clause violated the duty of good faith or was unconscionable given the adhesive nature of the agreement and the small font used).

90. See U.C.C. § 9-315(a)(2) (2009).

91. See *id.* § 9-102(a)(64).

92. 443 B.R. 795 (Bankr. N.D. Ind. 2011).

93. See *id.* (ruling that the debtor's postpetition receipts from its customers were cut off by section 552 of the Bankruptcy Code); see also *In re Premier Golf Props., LP*, No. 11-07388-PB11, 2011 WL 4352003 (Bankr. S.D. Cal. Sept. 1, 2011).

94. 343 S.W.3d 792 (Tenn. Ct. App. 2011).

95. See also *In re Rice*, 462 B.R. 651 (6th Cir. B.A.P. 2011) (ruling that because the assignee of perfected security interest in motor vehicle covered by a certificate of title did not need to have its

party might be too eager to use the certificate of title laws, to its detriment. In *In re Moye*,<sup>96</sup> a secured party's purchase-money security interest in motor vehicles held by the debtor as inventory was not perfected by possession of unmarked certificates of title. Perfection required that the debtor file a financing statement.<sup>97</sup>

These same provisions apply to the perfection of a security interest in an airplane. For instance, the court correctly held in *In re McConnell*<sup>98</sup> that a security interest in civil aircraft must be recorded with the FAA to be perfected. The mere filing of a financing statement is inadequate to perfect the security interest. The rules for determining whether such a filing must be continued are governed by federal law. In *Travel Express Aviation Maintenance, Inc. v. Bridgeview Bank Group*,<sup>99</sup> the court held that a secured party is not required to file a continuation statement with the FAA for its security interest in aircraft to remain perfected.

## B. CONTROL

By the nature of its name, a control agreement must be an "agreement." In *Smith v. Powder Mountain, LLC*,<sup>100</sup> the court held that an "agreement" is required for control over a securities account pursuant to U.C.C. section 8-106(d)(2). While that agreement may be less than a formal written contract, there must be evidence of some meeting of the minds. Evidence of a general willingness of the securities intermediary to enter into an agreement to acquiesce to the secured party's entitlement orders, or evidence of past acquiescence, is insufficient to show an "agreement" for control.

Control agreements are often heavily negotiated. The securities intermediary in *Fifth Third Bank v. Lincoln Financial Securities Corp.*<sup>101</sup> agreed to some terms in a control agreement that it later regretted. The court held that the securities intermediary breached the control agreement with the entitlement holder's secured party by either: (i) misrepresenting the value of the customer's account by including in the stated value securities purchased with funds from a check that was later dishonored; or (ii) reversing trades after the check was dishonored despite clauses in the control agreement by which the securities intermediary promised not to execute sell orders without the secured party's consent and "waive[d] and release[d] all liens, encumbrances, claims and rights of setoff it may have."<sup>102</sup> The control agreement was not rendered unenforceable for lack of consideration or mutuality or mistake.<sup>103</sup>

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interest noted on the certificate to have a perfected interest, the assignee had standing to seek relief from the bankruptcy automatic stay).

96. 437 F. App'x 338 (5th Cir. 2011), *remanded to* No. 07-37770, 2011 WL 4808124 (Bankr. S.D. Tex. Oct. 7, 2011).

97. See U.C.C. § 9-311(d) (2009).

98. 455 B.R. 824 (Bankr. M.D. Ga. 2011).

99. 942 N.E.2d 694 (Ill. App. Ct. 2011).

100. No. 08-80820-CIV-HURLEY, 2011 U.S. Dist. LEXIS 64650 (S.D. Fla. June 16, 2011).

101. 453 F. App'x 589 (6th Cir. 2011).

102. See *id.* at 591.

103. See *id.* at 600-01.

A security interest in a deposit account as original collateral can be perfected only by control. Because of this, it is important for a secured party to recognize when an item of collateral referred to by a different name is in fact a deposit account. In *In re Perez*,<sup>104</sup> the court held that a non-negotiable non-transferable CD was a deposit account, even though it was certificated. Accordingly, the secured party credit union, which maintained the deposit account represented by the CD, was perfected by control as the depository with which the deposit account was maintained.<sup>105</sup> Additionally, the court also ruled that the credit union's statutory floating lien on all member accounts under the Federal Credit Union Act<sup>106</sup> was perfected because the Act preempts state law, including the U.C.C.<sup>107</sup>

### C. FINANCING STATEMENTS: DEBTOR AND SECURED PARTY NAME

A financing statement that contains an error in the debtor's name will be ineffective unless a search under the debtor's correct name using the filing office's standard search logic discloses the filing.<sup>108</sup> Properly indicating the debtor's name on a financing statement continues to be a problem for some secured parties. For example, in *In re Harvey Goldman & Co.*,<sup>109</sup> a filed financing statement identified the corporate debtor by its registered assumed name, "Worldwide Equipment Co.," rather than the name in its articles of incorporation "Harvey Goldman & Company." Because the filing was not disclosed by a search under the debtor's corporate name, the court ruled that the financing statement was seriously misleading and, therefore, ineffective to perfect the secured party's security interest.<sup>110</sup> Similarly, in *In re PTM Technologies, Inc.*,<sup>111</sup> the court concluded that a filed financing statement was ineffective because the secured party omitted the "h" in the word "Technologies" in the debtor's name.

Even when the secured party manages to get the debtor's name right, it sometimes finds another way to make a mistake. In *In re Camtech Precision Manufacturing, Inc.*,<sup>112</sup> the secured party filed a financing statement that listed additional debtors on a separate piece of paper attached to the financing statement. The financing statement did not indicate, by checking the additional debtor box, to look beyond the first page or use the official addendum (form UCC1Ad) to indicate that additional debtors were listed on the exhibit. The only reference on the financing statements to the additional pages was in the description of the collateral.<sup>113</sup> Further, the filings were not indexed by or discoverable under the

104. 440 B.R. 634 (Bankr. D.N.J. 2010).

105. See *id.* at 640.

106. See c. 750, § 1, 48 Stat. 1216 (1934) (codified at 12 U.S.C. §§ 1751–1795k (2006)).

107. See *Perez*, 440 B.R. at 640–41.

108. See U.C.C. § 9-506(a)–(c) (2009).

109. 455 B.R. 621 (Bankr. E.D. Mich. 2011).

110. See *id.* at 628.

111. 452 B.R. 165 (Bankr. M.D.N.C. 2011).

112. No. 11-80419-CIV, 2012 WL 1105627 (S.D. Fla. Mar. 30, 2012), *rev'g* 443 B.R. 190 (Bankr. S.D. Fla. 2011).

113. See *Camtech Precision Mfg.*, 443 B.R. at 193.

names of the additional debtors.<sup>114</sup> The court concluded that there was a factual question about whether the error was by the secured party or whether the filing office failed to index the financing statement properly.

In contrast, the identity of a *secured party* is likely to be analyzed with less rigorous scrutiny,<sup>115</sup> and minor errors in that name are unlikely to matter.<sup>116</sup> In *In re Borges*,<sup>117</sup> the security agreements authenticated by the debtor secured all present and future debts owed by the debtor to the secured party and the secured party's affiliates. Because only the secured party was listed on the financing statement, however, the court ruled that the affiliates' security interests were unperfected.<sup>118</sup> The affiliates did not allege that the named secured party was their representative;<sup>119</sup> had they done so, the result might well have been different.

#### D. LOCATION TO FILE FINANCING STATEMENT

Revised Article 9 has been the law in almost all states since July 1, 2001. Occasionally, secured parties still file in the place required under former Article 9, rather than under current law. Such was the case in *In re Qualia Clinical Service, Inc.*<sup>120</sup> In connection with a 2007 factoring transaction, the secured party first filed a financing statement in Nebraska, where the debtor had its principal place of business. This would have been the correct place for intangible collateral under former Article 9.<sup>121</sup> Eighteen months later, the secured party realized its error and filed in Nevada, the state in which the debtor was incorporated. Under revised Article 9, this is the correct place to file.<sup>122</sup> Unfortunately for the secured party, the new filing was one month before the debtor's bankruptcy. As a result, the secured party's security interest was an avoidable preference.

#### E. TERMINATION AND LAPSE OF FINANCING STATEMENT

Considerable consternation was generated by the 2010 decision of *Roswell Capital Partners*,<sup>123</sup> which held that an unauthorized termination statement filed by the debtor could, nevertheless, be effective. Several recent decisions have correctly held, however, that only a termination statement, that is authorized by the secured party of record, can do that.<sup>124</sup> In *AEG Liquidation Trust on Behalf of American Equities Group, Inc. v. Toobro NY LLC*,<sup>125</sup> the court declined

114. *See id.*

115. *See* U.C.C. §§ 9-502(a)(2), 9-503(d) (2009).

116. *See id.* § 9-506 cmt. 2.

117. No. 11-10-12800 S11, 2011 WL 4101096 (Bankr. D.N.M. Sept. 6, 2011).

118. *See id.* at \*5.

119. *See id.* at \*5 n.9.

120. 441 B.R. 325 (B.A.P. 8th Cir.), *aff'd*, 652 F.3d 933 (8th Cir. 2011).

121. *See* U.C.C. § 9-103(3)(b) (repealed 1998).

122. *See* U.C.C. § 9-301(1) (2009).

123. *Roswell Capital Partners LLC v. Alt. Constr. Techs.*, No. 08 Civ. 10647(DLC), 2010 WL 3452378 (S.D.N.Y. Sept. 1, 2010).

124. *See* U.C.C. § 9-509(d) (2009).

125. 932 N.Y.S.2d 759 (Sup. Ct. 2011).



to follow *Roswell Capital Partners* and held that a U.C.C. termination statement not authorized by the secured party was ineffective. The court in *Official Committee of Unsecured Creditors v. City National Bank*<sup>126</sup> came to a similar conclusion. In that case, a secured party, in connection with the debtor's sale of some collateral, provided the title company serving as escrow agent with UCC-3s releasing specified collateral but not terminating the filings. The court concluded that the secured party had not authorized the title company to check the termination box. As a result, the termination statements were unauthorized and did not render the security interest in the remaining collateral unperfected.<sup>127</sup>

In contrast, in *In re Negus-Sons, Inc.*,<sup>128</sup> a secured party signed a payoff letter prepared by a refinancing lender. The letter stated that the secured party "agree[d] to terminate its security interest in all the collateral" and consented to the refinancing lender filing "an amendment to [the filings] to effect these terminations."<sup>129</sup> The bankruptcy court held that this language was sufficient to authorize the refinancing lender to file termination statements under U.C.C. sections 9-513, 9-509, and 9-510.<sup>130</sup> The bankruptcy appellate panel affirmed, noting that it was "hesitant to endorse" the *Roswell Capital Partners* decision, which treated the debtor as authorized to file termination statements, on the grounds the decision "appears to be contrary to the plain language of the Uniform Commercial Code."<sup>131</sup>

## IV. PRIORITY

### A. BUYERS

A buyer of goods in ordinary course of business normally takes the goods free of any security interest created by its seller.<sup>132</sup> However, a buyer does not qualify as a buyer in ordinary course if the buyer acquires goods in bulk, in total or partial satisfaction of a debt owed by the seller, or with knowledge that the transaction violates the rights of the secured party.<sup>133</sup>

In *In re Black Diamond Mining Co.*,<sup>134</sup> a buyer bought a large quantity of goods. A termination clause in the sales agreement permitted the buyer to set the purchase price off against liquidated damages for any breach by the seller. Because a termination had not occurred prior to the sales transactions, the court ruled that the buyer did not acquire the goods in satisfaction of a money debt.<sup>135</sup> Although the volume of goods sold was large, the court ruled that the buyer was not a buyer in bulk because the volume was not so large as to provide the buyer

126. No. C09-03817, 2011 WL 1832963 MMC (N.D. Cal. May 13, 2011).

127. See *id.* at \*5.

128. No. BK09-82518-TJM, 2011 WL 2470478 (Bankr. D. Neb. June 20, 2011), *aff'd*, 460 B.R. 754 (B.A.P. 8th Cir. 2011).

129. See *id.* at \*4.

130. See *id.* at \*5.

131. *In re Negus-Sons, Inc.*, 460 B.R. 754 n.10 (B.A.P. 8th Cir. 2011).

132. See U.C.C. § 9-320(a) (2009).

133. See U.C.C. § 1-201(b)(9) (2011).

134. No. 08-70066, 2011 WL 6202905 (Bankr. E.D. Ky. Dec. 13, 2011).

135. See *id.* at \*21-22.

with notice that the seller would not continue in the same kind of business.<sup>136</sup> Moreover, the secured party had approved the sales agreement before providing financing and had approved each individual sale before agreeing to advance against the resulting account. Thus, the sales did not violate the terms of the secured party's subsequent security agreement in inventory and, even if they did, the buyer had no knowledge that the sales violated the secured party's rights.<sup>137</sup> Accordingly, the court concluded that the buyer was a buyer in ordinary course of business that took free of a secured party's security interest in inventory.<sup>138</sup>

A buyer in ordinary course takes free only of a security interest created by its immediate seller. For example, in *Madison Capital Co. v. S & S Salvage, LLC*,<sup>139</sup> a scrap metal buyer did not take free of a security interest created by a mining company in metal shields. The buyer either purchased from an intermediate entity, in which case the security interest was not created by the seller, or the buyer purchased from the mining company, through the agency of the intermediate entity, in which case the seller (the mining company) was not in the business of selling metal shields. The fact that the intermediate company was engaged in the business of selling scrap metal was immaterial. As the court explained, status as a buyer in ordinary course of business is not determined from the perspective of the buyer but the perspective of the secured party.<sup>140</sup>

## B. SUBORDINATION AND SUBROGATION

Article 9 recognizes that secured parties can alter their priorities through a subordination agreement.<sup>141</sup> While courts are and should be reluctant to alter Article 9's priority rules based on equitable principles, common-law doctrines such as subrogation are available in some circumstances.<sup>142</sup>

In *SEC v. Kaleta*,<sup>143</sup> a seller of goods agreed to subordinate its payment rights and security interest to its buyer's secured party. The agreement extended the seller's subordination to others who provide "replacement financing." Investors bilked in the buyer's Ponzi scheme were unable to show that they qualified as replacement lenders under the terms of the subordination agreement because most could not trace the funds they invested to the buyer and those that could did not get a security agreement, as the subordination agreement required to qualify for replacement financing.<sup>144</sup>

Sorting out subrogation claims can be difficult. In *In re Siskey Hauling Co.*,<sup>145</sup> a debtor granted a security interest in its accounts to SP-1, who filed the first

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136. See *id.* at \*25–26.

137. See *id.* at \*26–27.

138. See *id.* at \*28.

139. 765 F. Supp. 2d 923 (W.D. Ky. 2011).

140. See *id.* at 930–31.

141. See U.C.C. § 9-339 (2009).

142. See U.C.C. § 1-103(b) (2011).

143. No. 4:09-3674, 2011 WL 6016827 (S.D. Tex. Dec. 2, 2011).

144. See *id.* at \*5–7.

145. 456 B.R. 597 (Bankr. N.D. Ga. 2011).

financing statement. The debtor then granted a security interest in its accounts to SP-2, who filed the second financing statement. Subsequently, the debtor sold its accounts receivable to SP-3, who filed a financing statement. SP-3, in exchange for paying off the debtor's obligation to SP-1, obtained a release and termination of SP-1's security interest. SP-3 subsequently claimed that its interest was prior to the interest of SP-2 because SP-3 was equitably subrogated to SP-1's claim. The court rejected this assertion, on the grounds that: (i) the transaction was not an assignment from SP-1 to SP-3, but a release; (ii) SP-3 knew of an intervening creditor and could not jump ahead of it; and (iii) the equities did not lie in favor of subrogation.<sup>146</sup>

### C. EQUITABLE CLAIMS

Although, as noted above, Article 9 recognizes some equitable claims, it does not look with favor on others. In *Diesel Props S.r.l. v. Greystone Business Credit II LLC*,<sup>147</sup> a debtor's supplier was held not liable to the debtor's secured party for unjust enrichment resulting from the supplier's acquisition of the debtor's order book, in which the secured party had a security interest. The court ruled that the supplier had a contractual right to the order book that predated the secured party's and a later-in-time assignee has no greater rights than its assignor.<sup>148</sup> It is not clear whether an unperformed contractual right amounts to a transfer of an interest in property.

### D. COMPETING SECURITY INTERESTS

In general, priority contests between or among secured parties are governed by the first-to-file-or-perfect rule.<sup>149</sup> However, Article 9 contains numerous exceptions to this rule and many of those exceptions accord priority to a secured party that has not filed or perfected first. In *Platte Valley Bank v. Tetra Financial Group, LLC*,<sup>150</sup> the court properly applied U.C.C. section 9-327 to conclude that a secured party with a security interest in a deposit account perfected by control had priority over a secured party whose collateral was sold and the proceeds deposited into the deposit account.

The relative rights of secured parties sometimes depend on how their interests are characterized. In *In re Brooke Capital Corp.*,<sup>151</sup> a subsidiary loaned cash to its parent and took back a security interest in the parent's interest in a sister subsidiary. The lending subsidiary's agent took possession of the pledged stock certificate and the lending subsidiary sold participation interests in this loan

146. See *id.* at 604–06.

147. 631 F.3d 42 (2d Cir. 2011).

148. See *id.* at 55–57; Stephen L. Sepinuck & Kristen Adams, *UCC Spotlight*, COM. L. NEWSL. (Am. Bar Ass'n), Spring 2011, at 9, available at <http://apps.americanbar.org/buslaw/committees/CL710000pub/newsletter.shtml> (criticizing the court's decision in *Diesel Props. S.r.l. v. Greystone Business Credit II LLC*).

149. See U.C.C. § 9-322(a)(1) (2009).

150. No. 8:10CV59, 2011 WL 335595 (D. Neb. Jan. 31, 2011).

151. No. 08-22786-7, 2011 WL 204278 (Bankr. D. Kan. Jan. 20, 2011).

to third parties. No financing statements were filed to reflect the participation. The parent later granted an unaffiliated lender a security interest in the pledged stock, perfected by filing a financing statement and perhaps by possession through the subsidiary lender's agent. The unaffiliated secured party sought summary judgment that its interests in the shares were senior to those of the lending subsidiary and its participants, in part arguing that the participations should be re-characterized as loans to the lending subsidiary. If the transaction were a "loan," then the participants would have to perfect their security interest in the loan to the parent. But that should not matter as between a secured party of the parent and a secured party of the subsidiary. If a "participation," then the participants, as buyers of a payment intangible, would be automatically perfected in the subsidiary's rights in the loan to the parent and the subsidiary's security interest to secure that loan. After significant analysis of legal precedent on "true" participation interests and the relevant facts, the court concluded there was not enough evidence to grant summary judgment in the unaffiliated secured party's favor.<sup>152</sup>

#### E. PURCHASE-MONEY SECURITY INTERESTS

A purchase-money security interest ("PMSI") can have priority over the perfected security interest of an earlier secured party if the PMSI secured party complies with some specified rules.<sup>153</sup> In the bizarre facts of *In re Damon Pursell Construction Co.*,<sup>154</sup> PMSI priority was obtained but then lost. The case concerns a non-PMSI secured party that had a perfected security interest in two excavators. Each of two other secured parties had a perfected PMSI in one of the excavators, but not the same one. The debtor sold one excavator and used the funds to pay the *wrong* PMSI creditor. The court concluded that the PMSI secured party that was paid no longer had a security interest at all because it was not owed a secured obligation. That left the non-PMSI secured party as the only creditor with the security interest in the unsold excavator because the unpaid PMSI secured party had no interest in that excavator.<sup>155</sup> Presumably, the security interest of the unpaid secured party remained attached to the excavator sold if the buyer was not a buyer in ordinary course of business.<sup>156</sup>

### V. ENFORCEMENT

#### A. REPOSSESSION OF COLLATERAL

A secured party may repossess collateral without judicial process if the secured party can do so without breaching the peace.<sup>157</sup> Of course, this authorization

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152. See *id.* at \*6–9.

153. See U.C.C. § 9-324(a), (b) (2009).

154. No. 44965-11, 2011 WL 6130528 (Bankr. W.D. Mo. Dec. 8, 2011).

155. See *id.* at \*3.

156. See U.C.C. § 9-315(a)(1) (2009); *id.* § 9-317(b).

157. See *id.* § 9-609(b)(2).

extends only to the collateral itself, not to other personal property that may be inside or attached to the collateral.<sup>158</sup>

In *Reed v. Les Schwab Tire Centers, Inc.*,<sup>159</sup> the court ruled that a tire seller that had a security interest in a customer's tires did not commit conversion by removing tires and wheels from the customer's car, bringing them to the seller's place of business to separate the tires from the wheels, and returning the wheels the following day. The court concluded that the seller's actions were justified and the customer suffered no damages for the temporary loss of the wheels.<sup>160</sup>

## B. NOTIFICATION OF FORECLOSURE SALE

In general, a secured party must send advance notification to the debtor of a planned disposition of collateral.<sup>161</sup> In *Cappo Management V, Inc. v. Britt*,<sup>162</sup> the court ruled that this notification requirement applied to an automobile seller that had repossessed a car subject to a conditional sale contract after the financing fell through. The court concluded that even though a "Supplement to Purchase Contract" declared that the car remained property of the dealer pending approval of the lender, other contract documents treated the vehicle as belonging to the buyer and the ambiguity had to be construed against the dealer.<sup>163</sup> The court did not mention a decision from three years earlier, which held there was no such duty on similar facts.<sup>164</sup>

The requirements applicable to a notification of disposition are fairly minimal and not difficult to satisfy.<sup>165</sup> One of the few requirements is that the notification indicate the method of disposition, including whether the disposition will be by private sale or public sale.<sup>166</sup> Of course, the secured party must also comply with any more stringent requirements of law that may exist outside Article 9.

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158. Compare *Giles v. First Va. Credit Servs., Inc.*, 560 S.E.2d 557 (N.C. Ct. App.) (denying the appeal of a trial court's refusal to grant summary judgment for secured party on debtors' claim that the secured party had committed conversion of property in their car when the secured party repossessed the car), *rev. denied*, 563 S.E.2d 568 (N.C. 2002), with *Terra Partners v. Rabo Agrifinance, Inc.*, No. 2:08-CV-194-J, 2010 WL 3270225 (N.D. Tex. Aug. 18, 2010) (holding secured party not liable for conversion allegedly committed during repossession to entity that claimed to own some of the property repossessed because the secured party acknowledged the claimant's potential ownership rights, made a reasonable request that the claimant identify its property so that it could be returned, but the claimant refused to do so).

159. No. 29069-7-III, 2011 WL 692904 (Wash. Ct. App. Mar. 1, 2011).

160. See *id.* at \*2.

161. See U.C.C. § 9-611(b)-(d) (2009).

162. 711 S.E.2d 209 (Va. 2011).

163. See *id.* at 211-12.

164. See generally *Drewry v. Starr Motors, Inc.*, No. 3:07CV624, 2008 WL 2035607 (E.D. Va. May 12, 2008) (holding an automobile seller to whom buyer had returned car subject to a conditional sale when the buyer's financing fell through was not required to give the buyer notification of a resale because the buyer, who had made no payment, had not yet obtained a property interest in the car).

165. See U.C.C. §§ 9-613, 9-614 (2009).

166. See *id.* § 9-613(1)(C).

In *Scott v. Nuvel Financial Services LLC*,<sup>167</sup> several debtors brought class actions against a secured party for giving improper notification of a “public” sale pursuant to Maryland’s Credit Grantor Closed End Credit law. The court held that the collateralized vehicles were sold at a public sale, not a private sale, because the public was invited through weekly advertisements in the *Baltimore Sun* and the forum was open to the public, even though non-dealers had to provide a refundable \$1,000 deposit to attend. As a result, notification of the sale was proper.<sup>168</sup>

### C. CONDUCTING A COMMERCIALLY REASONABLE DISPOSITION

Every aspect of a foreclosure sale must be “commercially reasonable.”<sup>169</sup> In *In re Inofin, Inc.*,<sup>170</sup> for instance, the court ruled that even if the lender had a security interest in chattel paper sold at a foreclosure sale, the sale was not commercially reasonable because (i) the first and third notifications contained the wrong date and the second was sent only two days before the date of sale; (ii) the secured party’s attorney was unaware whether the debtor was in default and did not cause notification of default to be sent to the debtor; and (iii) no effort was made to solicit bids from individuals or entities in the industry by placing ads in trade publications—instead there were only two ads placed in the *Boston Herald*.<sup>171</sup> It seems that the court’s reasoning was confused because notification to the debtor and commercial reasonableness are two independent requirements.<sup>172</sup> Thus, the defects with the notifications may be a problem, but have no bearing on whether the sale itself was commercially reasonable.<sup>173</sup> In contrast, the inadequate advertising that formed the third basis for the court’s conclusion does bear on commercial reasonableness and could support the court’s decision.

Although parties cannot waive the requirement of commercial reasonableness,<sup>174</sup> the parties are free to agree to standards by which commercial reasonableness will be measured, provided those standards are not themselves manifestly unreasonable.<sup>175</sup> This limited authority can be very useful for the secured party, as evidenced by the decision last year in *In re Adobe Trucking, Inc.*<sup>176</sup>

In that case, the secured party conducted a public sale of collateralized drilling equipment, at which the secured party bid \$41 million.<sup>177</sup> The debtors attacked the sale as not commercially reasonable. The court looked to both the “proceeds”

167. 789 F. Supp. 2d 637 (D. Md. 2011).

168. See *Scott*, 789 F. Supp. 2d at 642.

169. U.C.C. § 9-610(b) (2009).

170. 455 B.R. 19 (Bankr. D. Mass. 2011).

171. See *id.* at 47.

172. See U.C.C. §§ 9-610(b), 9-611(b)–(d) (2009).

173. See *UCC Spotlight*, *supra* note 8, at 17.

174. See U.C.C. § 9-602(7) (2009).

175. See *id.* § 9-603(a).

176. No. 10-70353-RBK, 2011 WL 6258233 (Bankr. W.D. Tex. Dec. 15, 2011).

177. See *id.* at \*3.

test and the “procedures” test to evaluate commercial reasonableness.<sup>178</sup> As to the former, the court concluded that the sale was commercially reasonable given that the price was higher than the amount of one appraisal, another appraisal had to be discounted because it was prepared well before the sale and the market for such equipment was declining, and the secured party resold the equipment four months later for only \$9 million.<sup>179</sup> With respect to the “procedures” test, the court ruled 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.”<sup>180</sup> Moreover, the debtors could not complain about the secured party’s failure to clean or paint the equipment prior to the sale or make it available for inspection given the debtors’ refusal to turn the collateral over, identify its location, or otherwise cooperate and because the security agreement provided that the secured party need not incur expenses to prepare the collateral for sale and need not have possession at the time of sale.<sup>181</sup>

A secured party’s rights are cumulative,<sup>182</sup> and thus a secured party may seek a judgment on the secured obligation before it forecloses on the collateral.<sup>183</sup> An interesting twist on that rule came up in *Spizizen v. National City Corp.*,<sup>184</sup> in which the court ruled that the secured party was entitled, after the debtors’ default, to freeze indefinitely the collateralized securities account, to which were credited securities entitlements valued at \$1.9 million, to secure a total obligation of \$1.1 million. The court noted that the security agreement expressly gave the secured party the right to refuse the debtor access to the account and both the agreement and the U.C.C. gave the secured party the *right* to sell the entitlements but not the *obligation* to do so.<sup>185</sup>

#### D. COLLECTING ON COLLATERAL

A secured party need not dispose of collateral to extract value from it. If the collateral consists of a right to payment, the secured party may instead collect

178. *See id.* at \*8.

179. *See id.* at \*10–11.

180. *See id.* at \*12.

181. *See id.* at \*12–13.

182. *See* U.C.C. § 9-602(c) (2009).

183. *See, e.g.,* Suntrust Equip. Fin. & Leasing Corp. v. A & E Salvage, Inc., No. 2:09-CV-66, 2009 WL 3584333 (E.D. Tenn. Oct. 26, 2009) (concluding that the secured party could maintain an action against the debtor and the guarantors for the full amount of the debt even though the secured party had repossessed but not sold the collateral); Banc of Am. Leasing & Capital, LLC v. Walker Aircraft, LLC, No. 09-1277 (JNE/AJB), 2009 WL 3283885 (D. Minn. Oct. 9, 2009) (holding that the secured party was entitled to judgment for full amount of accelerated debt even though it had already replevied the collateral, and that no double recovery would result because the secured party must apply any proceeds of a disposition to the secured obligation); Nat’l Loan Exch., Inc. v. LR Receivables Corp., No. 08-527-GPM, 2009 WL 466459 (S.D. Ill. Feb. 25, 2009) (ruling that the secured party could bring action on the debt and was not limited to seeking to enforce its security interest).

184. No. 09-11713, 2011 WL 1429226 (E.D. Mich. Apr. 14, 2011).

185. *See id.* at \*4.

on the collateral by instructing the account debtor or other obligor to pay the secured party directly.<sup>186</sup> In general, once the secured party has instructed an account debtor to pay the secured party, the account debtor pays the debtor at its own peril.<sup>187</sup> An account debtor, however, normally has a right of setoff or recoupment for any claim or defense arising before it receives notification of the assignment to the secured party or arising under the agreement or transaction with the debtor.<sup>188</sup> Several secured parties experienced unexpected difficulty collecting on collateral last year.

In *In re Black Diamond Mining Co.*,<sup>189</sup> several account debtors who purchased coal from the debtor pursuant to a master sales agreement owed no obligation to the debtor's factor because their liquidated damages for the debtor's breach exceeded the remaining balance of the purchase price.<sup>190</sup> Moreover, the court ruled that the amounts the account debtor paid directly to the debtor to amend the master sales agreement did not violate the factor's rights because those payments were not "accounts" under Article 9 and did not arise from the sale of inventory, which were the only rights to payment that the factor had acquired an interest in.<sup>191</sup>

In *Maple Trade Finance, Inc. v. Lansing Trade Group, LLC*,<sup>192</sup> an account debtor signed the debtor's invoices acknowledging receipt of the goods before the debtor assigned the invoices to a factor. When the factor sought to collect, the account debtor defended on the basis that it had not received the goods. The factor argued that the account debtor should be estopped from denying receipt but the court concluded otherwise. It reasoned that, under Article 9, an account debtor is entitled to raise defenses arising under the contract unless it has agreed otherwise but estoppel is not an agreement to waive those rights.<sup>193</sup> Accordingly, the court allowed the account debtor to defend based on its claim that it had not received the goods. The decision is clearly wrong.<sup>194</sup>

186. See U.C.C. § 9-607(a)(1) (2009).

187. See *id.* § 9-406(a).

188. See *id.* § 9-404(a); see also *Miss. Cnty. v. First Tenn. Bank*, No. 3:10CV00173 BSM, 2011 WL 2160281 (E.D. Ark. June 1, 2011) (finding that the secured party that had a security interest in a hospital's Medicare accounts took those accounts subject to the government's right to reimbursement for overpayments by the government).

189. No. 08-70066, 2011 WL 6202905 (Bankr. E.D. Ky. Dec. 13, 2011).

190. See *id.* at \*28–32. The court also stated that the factor had no standing to allege that it was the account debtor who breached because the factor was not a party to any agreement with the account debtor. *Id.* at \*33. This is incorrect. The factor, in actuality, had statutory authority to enforce the obligations of the account debtor, see U.C.C. § 9-607(a)(3) (2009); this should give it the requisite standing.

191. See *Black Diamond Mining Co.*, 2011 WL 6202905, at \*36–39.

192. No. 10-2066-JTM, 2011 WL 1060961 (D. Kan. Mar. 21, 2011).

193. See *id.* at \*15–17. The court added that even if estoppel were available, the factor would not be entitled to summary judgment because there was evidence indicating that it had not followed its own procedures. *Id.* at \*17–18.

194. See U.C.C. § 9-403 cmt. 6 (2009) (indicating that the absence of an agreement not to assert defenses does not displace an assignee's right to assert that an account debtor is estopped from asserting a claim or defense); see also Stephen L. Sepinuck, *Factors Beware: Court Rules that Account Debtor Can't Be Estopped from Denying Receipt of the Goods*, 27 CLARK'S SECURED TRANSACTIONS MONTHLY 7 (May 2011).



In *Citywide Banks v. Armijo*,<sup>195</sup> a bank with a security interest in and possession of a negotiable promissory note could not enforce the obligation of the maker who had paid the note in full to the debtor because the bank had allowed the debtor to service the loan and thus the debtor was the bank's agent for that purpose.

If the secured party has any recourse against the debtor, a secured party must exercise collection rights in a commercially reasonable manner.<sup>196</sup> In *Rapid Circuits, Inc. v. Sun National Bank*,<sup>197</sup> the court refused to dismiss the debtor's claim for intentional interference with contractual relations against a secured party and its counsel for instructing the debtor's customers to pay the secured party directly. Even though the security agreement authorized the secured party to collect accounts, the court concluded that it may not have been appropriate for the secured party to rely on an outdated customer list and send collections letters to customers who were not account debtors.<sup>198</sup>

#### E. LIABILITY FOR A DEFICIENCY

In general, a buyer of collateral at a foreclosure sale acquires the assets free of the security interest being foreclosed, as well as all junior liens.<sup>199</sup> Moreover, the buyer has no liability for whatever remains of the secured obligation (or other debts of the debtor), unless non-Article 9 principles of successor liability apply. The fact that the sale occurs under the auspices of Article 9 does not insulate the buyer from potential successor liability, though.<sup>200</sup>

In *Premier Pork, LLC v. Westin Packaged Meats, Inc.*,<sup>201</sup> the entity that purchased some of the debtor's assets from a foreclosure sale buyer did not have successor liability as a "mere continuation" of the debtor's business because the purchaser and the debtor did not share the same stock, business operations, or location. In contrast, the court reversed a summary judgment denying successor liability in *Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Publishing Corp.*<sup>202</sup> In that case, a newly formed corporation purchased all the assets of the original debtor at a foreclosure sale. The court concluded that successor liability, as a "mere continuation" of the debtor, does not require a continuity of ownership and there were sufficient facts to preclude summary judgment: some of the managers, the majority of employees, the physical location of

195. 75 U.C.C. Rep. Serv. (West) 2d 789 (Colo. Ct. App. 2011).

196. See U.C.C. § 9-607(c) (2009).

197. No. 10-6401, 2011 WL 1666919 (E.D. Pa. May 3, 2011).

198. See *id.* at \*6-8.

199. See U.C.C. § 9-617 (2009).

200. See, e.g., *Elvis Presley Enters., Inc. v. Passport Video*, 334 F. App'x 810 (9th Cir. 2009); *Percepton, Inc. v. Silicon Video, Inc.*, No. 5:06-CV-0412 (GTS/DEP), 2010 WL 3463098 (N.D.N.Y. Aug. 27, 2010); *Miller v. Forge Mench P'ship Ltd.*, No. 00 Civ. 4314 (MBM), 2005 WL 267551 (S.D.N.Y. Feb. 5, 2005); *Glentel, Inc. v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992 (N.D. Ind. 2005); *Milliken & Co. v. Duro Textiles, LLC*, 887 N.E.2d 244 (Mass. 2008); *Cont'l Ins. Co. v. Schneider, Inc.*, 873 A.2d 1286 (Pa. 2005).

201. 406 F. App'x 613 (3d Cir. 2011).

202. 635 F.3d 48 (2d Cir. 2011).

the business, and most of the services provided were the same; the purchaser assumed at least some of the liabilities of the debtor; and the purchaser was formed for the purpose of acquiring the debtor's assets.<sup>203</sup>

#### F. OTHER LIABILITY ISSUES

A secured party has a duty to use reasonable care in the custody and preservation of collateral in its possession.<sup>204</sup> But this duty does not extend to preserving the value of the collateral. In *KeyBank v. Bingo, Coast Guard Official No. 1121913*,<sup>205</sup> the court held that a secured party had no liability for failing to act to protect the value of the investment property collateral when the markets declined dramatically in 2008 because the loan documents created no fiduciary relationship and the security agreement's requirement to maintain a 75 percent loan-to-value ratio was placed on the debtors, not on the secured party.<sup>206</sup>

In *United States v. Gilbert*,<sup>207</sup> the court rejected the debtors' guilty plea for embezzlement or theft of public property in connection with their sale without permission of cattle in which the United States had a security interest and their use of the proceeds. The court concluded that the offense requires government ownership of the property, not just a security interest in the property.<sup>208</sup> However, the court later ruled that a subsequent indictment for violating a different federal statute that criminalizes the conversion of property pledged to the Commodity Credit Corporation would stand.<sup>209</sup>

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203. See *id.* at 52–55.

204. See U.C.C. § 9-207(a) (2009).

205. No. C09-849RSM, 2011 WL 1559829 (W.D. Wash. Apr. 22, 2011).

206. See *id.* at \*3–4. The court also ruled that the secured party had no liability for failing to allocate proceeds of collateral sales to the debtor's vessel loan and failing to relinquish the vessel because the debtors could point to no requirement in the security agreement or in the law requiring the secured party to prioritize sale proceeds this way. *Id.* at \*9.

207. No. 10-CR-20505, 2011 WL 652830 (E.D. Mich. Feb. 14, 2011).

208. See *id.* at \*3–6 (interpreting 18 U.S.C. § 641).

209. See *United States v. Gilbert*, No. 11-CR-20490-02, 2011 WL 5904429 (E.D. Mich. Nov. 22, 2011) (interpreting 15 U.S.C. § 714m).