Secured Transactions  
  
a Law school outline *by* corbin dodge  
  
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Fall 2014 | Professor John Worley | South Texas College of Law

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ABOUT THIS OUTLINE

**A Note About this Outline**

* My outlines utilize the styles feature in Microsoft Word. An investment of your time in learning how to use the styles feature will allow you to use some of Microsoft Words most powerful features. But be warned, styles can be tricky. The styles that are used in this document are demonstrated below. The Table of Contents can be dynamically updated b/c it is based on these styles. To learn more about the benefits of using styles, as well as tips and tricks, visit\_\_\_\_\_. For more outlines, visit [www.corbin-dodge.com](http://www.corbin-dodge.com).

**FAQs**

* **How do I apply a different font to any style?**   
  On the main menu, select Format/Style. Highlight the style that you would like to modify. Select modify. Choose your font. Make sure that the option to “Automatically update style” is not checked. Click Apply.
* **How do I update the Table of Contents?**
* Right-click and select “Update Field.” Choose the option to update all page numbers.

H1 (optimized for Helvetica, 16 pt)

H2

* **List paragraph (+Bold) (Optimized for Helvetica 9pt)**
  + List paragraph
    - List paragraph (+ indent)
      * List paragraph (+ indent)
        + etc.

H3

* **List paragraph (+Bold)**
  + List paragraph
    - List paragraph (+ indent)
      * List paragraph (+ indent)
        + etc.

The Typical Secured Transaction

Basic Terminology

* **∆ Secured Party** **(SP) § 9-102(a)(13)(A)**
* A person in whose favor a SI is created or provided for under a SA, whether or not any obligation to be secured is outstanding
* **☐Debtor** – a person having an interest, other than a SI or other lien in collateral (not req’d to be an obligor) **§ 9-102(a)(?)**
* **Collateral** – the property subject to a SI **§ 9-102(a)(12)**
* **Obligor** – A person that, w/ respect to an obligation secured by a SI in collateral: **§ 9-102(1)(59)**
  + Owes payment or other performance on obligation
  + Has provided property other than the collateral
  + Is otherwise accountable in whole or part for payment
* **Security Interest** **(SI)** **§ 9-201(b)(35)**
  + An interest in personal property or fixtures which secures payment or performance of an obligation
  + The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to buyer…is limited to a reservation of a security interest
* **SA**: Security Agreement
* **FS**: Financing Statement
* **SI:** Security Interest
* **Agreement** – Bargain of the parties in fact, as found by their language or from other circs
* **Signed** – Any symbol executed or adopted w/ present intent to adopt or accept writing
* **Security Agreement** – Agreement that creates or provides for a SI
* **Record** – Info that’s inscribed on a tangible medium or stored in an electronic or other medium and is retrievable in perceivable form.
* **Authenticate** – to sign **or** w/ present intent to adopt or accept a record, to attach to or logically associate w/ the record an e-sound, symbol, or process.
  + Authentication doesn’t require any particular form
    - Signs nickname instead of full name 🡪 OK *if* the symbol is executed w/ the req’d intent
    - No signature & e-mail 🡪 OK *if* had present intent to identify themselves as the sender and adopt the message
* **Attachment** – SI attaches to collateral when it becomes enforceable against the debtor**.** A SI is enforceable against the debtor and third parties w/ respect to the collateral only if: *(a.k.a. Attachment occurs when…)*
  + Value has been given
  + The debtor has rights in collateral **&**
  + 1 of the following conditions met:
    - Debtor has authenticated a SA that provides a description of the collateral **or**
    - Collateral is not a certificated security and is in the possession of the SP **or**
    - Collateral is a certificated security and has been delivered to the SP **or**
    - Is deposit accounts, etc, and SP has control

Overview

* **Elements of Article 9**
  + A transaction, regardless of form
  + That **creates** a SI
  + In personal property (or fixtures?)
  + By K
* **Secured Credit**
  + **Advantages of Secured Credit** *(these reduce the risk that a secured creditor confronts)*
    - * Secured creditor has right of self-help repossession
        + Secured creditors are treated better (than unsecured creditors) during bankruptcy proceedings.
      * Eliminates search for assets: Specific property is earmarked for payment of secured creditor’s debt
      * Establishes priority over other claimants
  + **Policy: Supports reduced secured creditor risk**
  + *Makes credit available more readily*
    - Stimulates economy, creates jobs
    - Helps poor credit risks obtain credit when not otherwise available
  + *Makes credit available more cheaply*
    - Secured creditors can charge less (than unsecured creditors) b/c secured credit is less risky

|  |  |
| --- | --- |
| Problems 1.1 to 1.4 | |
| *1.1(a)* | * Yes Art. 9 applies to a transaction that 1) creates a SI 2) in personal property or fixtures 3) by K |
| *1.1(b)* | * No, doesn't change anything b/c it applies “regardless of it’s form §9-109(1)(1). It’s an Art 9 transaction b/c Ed has given a watch to Alexandria that’s personal property & the purpose of that interest is to secure the loan. |
| *1.1(c)* |  |
| *1.2* |  |
| *1.3* |  |
| *1.4 K says “No other document shall govern…”* | You can’t K yourself out of it. Art. 9 governs any transaction regardless of its form. |

Characterization of Collateral

* **The role of Collateral Classification in Article 9**
* Description or ID of Collateral
  + **Security Agreement** 🡪 Creates the SI
  + **Financing Statement** 🡪 Perfects the SI
* Perfection of SI
* Priority of Secured Interests
* **Goods** – all things that are movable at the time the SI attaches.
  + **Consumer Goods** – used or bought for use primarily for personal, family, or household purposes.
  + **Farm Products** – debtor is engaged in Farming Operations **&**:
    - Crops e.g., raspberries as they are growing or once harvested)
    - Livestock e.g., cows, sheep, pigs
    - Supplies used or produced in farming operation **or** e.g., seed, fertilizer, gas used in tractor
    - Unmanufactured products of crops or livestock
  + **Farming Operations** - raising, cultivating, propagating, fattening, grazing, other farming, livestock, or aqua cultural operation
* **Inventory** – Not farm products **&**
  + Leased by lessor
  + Held for sale or lease or to be furnished under K of service
  + Furnished under K of service **or**
  + Raw materials, work in process, or materials used
  + **Cmt 4a –** products of crops or livestock lose their status as farm products if they are subjected to a manufacturing process
* **Equipment** – goods *other than* inventory, farm products, or consumer goods *residuary category*
* **Investment Property** – a security (certificated or uncertificated), security entitlement, or securities account **§ 8-102(15)**
  + ***To transfer you must indorse and deliver***
    - **Indorsement** – a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security
    - **Delivery occurs when:**
      * Transferee acquires possession of the security certificate **or**
      * Another person acquires possession of the security certificate on behalf of the transferee **or**
      * Having previously taken possession acknowledges that it holds it for the purchaser.
* **Issuer** – includes a person that:
  + Places or authorizes the placing of its name on a security certificate to evidence a share **or**
  + Creates a share, participation, or other interest in its prop or in an enterprise, or undertakes an obligation that’s an uncertificated security **or**
  + Directly/indirectly creates a fractional interest in its rights or prop, if that interest is represented by a security certificate **or**
  + Becomes responsible for, or in place of, another person described as an issuer.
* **Securities Account -** An account to which a financial asset is or may be credited in accordance w/ an agreement under which the person maintaining the account undertakes to treat the account holder as entitled to exercise the rights that comprise the financial asset **§ 8-501(a)**
  + **Securities Intermediary** – ~~(1) a clearing corporation; or~~ (2) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others & is acting in that capacity.
  + **Security Entitlement**
    - The rights and property interest of an entitlement holder w/ respect to a financial asset
    - You get it if an intermediary indicates by book entry that a financial asset has been credited to your account **§ 8-501(b)(1)**
  + **Entitlement Holder** – A person identified in the records of the securities intermediary as the person having a security entitlement against the securities intermediary  **§ 8-102(a)(7)**
  + **Entitlement Order ­–** a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement**. § 8-102(a**

Classifications of Collateral

* **2 Problems w/ Classification**
  + **Debtor *changes* the use to which the collateral is put**
    - Classification is determined at time SI is made. The classification doesn’t change b/c of a later change in use.
    - No creditor is req’d to monitor use of collateral in order to ascertain proper classification.
  + **Debtor misrepresents collateral use**
    - **Majority**: SP may rely on debtor’s written representation. Creditor protected even if representation turns out to be erroneous
      * + **Is the debtor’s representation re: their intended use relevant?**

EX: Consumer Goods

The definition says “goods *used or bought for use*”, so they could *be used* for *bought* for household purposes

If debtor’s intended use appears relevant 🡪 debtor may represent that use to show goods were “bought for use” as consumer goods.

* + - * EX: Equipment
        + The definition says *“goods that are not consumer goods, farm products, or inventory”*
        + Since debtor’s intention doesn’t seem to be relevant, a representation of “commercial use” doesn’t seem relevant

|  |  |
| --- | --- |
| * Intangible | Quasi-Tangible |
| Valuable types of **personal property** that take no material form | There may be something tangible that you can touch |
| * **Account** **§ 9-102(a)(2)**   + A right to payment of a monetary obligation, whether or not earned by performance:     - For property that’s been or is to be sold, leased, licensed, assigned, or otherwise disposed of     - For services rendered or to be rendered. * **General Intangible *(the catch-all)* § 9-102(a)(42)**   + Any personal property, including things in action, *other than* accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, $, and oil, gas, or other minerals before extraction.   + **Includes** payment intangibles and software * **Software** **§ 9-102(a)(?)**   + **Applies:** A computer program & any supporting info provided in connection w/ a transaction relating to the program.   + **Doesn’t apply**     - The programs associated w/ the goods in such a manner that it’s customarily considered part of the goods **or**     - By becoming the owner of the goods, a person acquires a right to use the program in connection w/ the goods. * **Payment Intangible § 9-102(a)(?)**   + **Applies:** A general intangible under which the account debtor’s principal obligation is a monetary obligation   + EX: borrow $ and promise to pay back in monthly installments (it’s not in writing)     - Not an account b/c there’s no property being sold, leased, or licensed. The primary obligation is monetary. And, the definition of accounts specifically excludes rights to payment for money or funds advanced or sold     - If we put it in writing such as *“to the order of”* 🡪 It’s a negotiable instrument.     - If you add SI to this paper 🡪 It becomes chattel paper * **Deposit Account**  **§ 9-102(a)(?)**   + **Applies:** A demand, time, savings, passbook, or similar account maintained w/ a bank   + **Doesn’t apply to:** investment property or accounts evidenced by an instrument. | * **Instrument §9-102(a)(47)**   + Negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation   + is not itself a SA or lease, **&**   + is a type that in ordinary course of business is transferred by **delivery** w/ any necessary **indorsement** or assignment. * **Chattel Paper** **§9-102(a)(?)** EX: Promissory note & SA taken together   + A record or records that evidence both a **monetary obligation** & a **SI** in specific goods   + **Tangible Chattel Paper**     - Chattel paper evidenced by a record consisting of info inscribed on a tangible medium **&** retrievable in perceivable form.   **Document** |

|  |  |
| --- | --- |
| Examples: Investment Property & Intangibles | |
| *Is an account w/ stock company, as a single unit, considered investment property?* | Security Account |
| Customer wants to purchase shares of stock, what form are they? | Security Entitlement 🡪 Entitlement Holder |
| *Mutual fund created, customer given a letter from the fund manager stating she’s the owner of stock shares. She receives quarterly reports. What type of property is this?* | Security 🡪 Uncertificated Security  Doesn’t own shares of *stock*, she owns shares of the *fund* |
| *What are the stocks created w/ a certificate classified as?* | Security 🡪 Certificated Security |
| *Invoice that doesn’t call for immediate payment, it’s due 60 days after delivery* | Account 🡪 a right of payment of monetary obligation for services rendered |
| *Used Car trade-in 🡪 goods 🡪 inventory (being held for sale typically)* |  |
| *Check for down payment 🡪 instrument 🡪 negotiable instrument 🡪 check* |  |
| *“Pay to the order of” 🡪 instrument 🡪 promissory note 🡪 negotiable instrumentThe Security Agreement* |  |

1. Attachment

* **A SI attaches to collateral when it becomes enforceable against the debtor. A SI is enforceable against the debtor and third parties w/ respect to the collateral when: *(a.k.a. Attachment occurs when…)* § 9-203(b)**
  + 1) Value has been given **&**
  + 2) Debtor has rights in the collateral **&**
  + 3) *One of the following:*
    - Security Agreement
      * 1. Authenticated by debtor
      * 2. Describing the collateral
    - Collateral is not a certificated security and is in the possession of the SP per the SA
    - Collateral is a certificated security in registered form & the security certificate has been delivered to the SP **or**the collateral is deposit accounts, electronic chattel

Value has been given

* + Value is given if person acquires them in return for a binding commitment to extend credit **or**

for extension of immediately available credit

* + A person gives value for rights if the person acquires them:
    - In return for a binding commitment to extend credit or for the extension of immediately available credit, *whether or not drawn upon* and whether or not a charge-back is provided for in the event of difficulties in collection;
    - As security for, or in total or partial satisfaction of, a preexisting claim;
    - By accepting delivery under a preexisting contract for purchase; **or**
    - In return for any consideration sufficient to support a simple K.”

Debtor has rights in the collateral

* **Doesn’t Apply:**
  + Outright ownership, mere naked possession 🡪 Doesn’t create rights in collateral
  + Can’t be a Certificated Security

One of the following:

* + - ***Security Agreement***
      * ***1. Authenticated by debtor***

Signed or execute/adopt a symbol w/ present intent to identify the person and adopt/accept the record

* + - * ***2. Describing the collateral***

Description of personal or real property is sufficient if it *reasonably identifies* what’s described:

Specific listing

Category

Type of collateral defined in UCC

Collateral is not a certificated security and is in the possession of the SP per the SA

**Includes:** tangible negotiable documents, goods, instruments, $ or tangible chattel paper

Collateral is a certificated security in registered form & security certificate delivered to SP **or**

Collateral is deposit accounts, electronic chattel paper, investment property, letter of credit rights, or e- documents, and the SP has control pursuant to SA

Quantity

Computational or allocational formula or procedure **or**

Any other method, if the identity of the collateral is objectively determinable

A description of *“all of the debtor’s assets”* or *“all of the debtor’s personal property”* or using words of similar import 🡪 Doesn’t reasonably identify the collateral (b/c the collateral isn’t objectively determinable. ?)

**Purpose**

Identify property that’s subject to the SI

Minimizes disputes as to what collateral is covered (if it’s not in the description 🡪 it’s not included)

* A security agreement must be a bargain-in-fact
* A financing statement (FS) may be filed before a security agreement is made
* A financing statement (FS) may be a security agreement per Worley, unlike *American Card* (which

says a FS, alone, may not be a SA)

2. Perfection

* + Filed FS
  + SP possession of collateral
  + SP control of collateral
  + Automatic perfection

3. Terminology

* *See Basic Terminology (pg. 5)*

4. SP Possession

* SP possession of the collateral satisfies the evidentiary purpose of a written SA b/c it evidences debtor’s agreement to use its property as collateral for the debt. A written security agreement minimizes disputes about why SPs have possession.
* **Requirement:** Identifies that precise property

5. Written SA

* A secured transaction normally involves **2 key documents:**
  + **Security Agreement (SA):** evidences the parties agreement that the debtor’s property, described in the agreement, will stand as collateral for the debt owed secured party
  + **Financing Statement (FS):** brief document filed in a public office (usually Secretary of State) giving notice that SP may claim an interest in debtor’s property (which must be identified in the document)
* **Composite Document Rule** *Outboard Marine (supp.)*
  + **How it works:** If parties neglected to sign a separate SA 🡪 look at the transaction as a whole in order to **determine if there’s** writing authenticated (i.e. signed) by the debtor describing the collateral, which demonstrates evidence of a bargain-in-fact , showing intent to create a SI in the collateral.
  + **Purpose:** In the absence of a well drafted SA, this rule permits reading multiple documents as a group to satisfy the elements of *an authenticated SA containing a description of the collateral*

|  |  |
| --- | --- |
| *Outboard Marine* | |
| *Can FS alone serve as a SA?* | * A standard form FS can’t be a SA b/c it doesn’t evidence the parties intent to create SA. |
| *Will the FS, together w/ the invoices, constitute a SA?* | * Invoices contain a description of collateral, but are not signed.  The FS is signed, but neither is evidence of intent to create a SI |
| *Does the Ct correctly apply the composite document rule?* | * Evidence of a bargain-in fact 🡪 No. It doesn’t evidence a present intent to authenticate |



|  |  |
| --- | --- |
| **Is the Composite Document Rule Justified?** | |
| PROS | * CONS |
| *Statutory language*  §§ 9-203(b); 9-102(a)(73); 1-201(b)(35); 1-201(b)(3).  *Intent of the parties*  The rule gives effect to the parties intentions & prevents unfairness to the SP who bargained for the right to the collateral.  *Policy* The composite documents rule evidences an intent of the parties to create a SI and satisfies the §oF. |  |

* **Test for Sufficiency of a Description § 9-108(a); \**per* Cmt 2**
  + A description of personal or real property is sufficient, whether or not it *reasonably identifies* *{****\*****the collateral that}* is described.
  + A description of collateral reasonably identifies the collateral if it identifies the collateral by: **§ 9-108(b)**
    - * Specific listing
      * Category
      * A type of collateral defined in the UCC *See (e) for exceptions*
      * Quantity
      * Computational or allocational formula or procedure or
      * Except as otherwise provided in (c), any other method, if the identity of the collateral is objectively determinable
* **Has a SI Attached?**
  + **Authenticate** means to execute or adopt a symbol…w/ present intent to adopt or accept a record **§ 9-102(b)(7)(b)**
  + **Record** means…

|  |  |
| --- | --- |
| **Problem 5.2: Has a SI attached?** | |
| *(a) Has Alexandra’s SI attached to the watch?* | Yes. A SI attaches to collateral when 1) value has been given, 2) it becomes enforceable against the debtor and 3) one of the following: […]9-203(1). The test of whether a SI has attached depends upon *whether there was an expression of intent to adopt the record.* |
| *(b) What if Edwin signed the email simply as “Ed” (vs using his full legal name)* | The test of whether an SI attaches depends upon whether there was an expression of intent to adopt the record. § 9-102(b)(7)(b). A SI attaches whether or not a full name is used. Here, Edwin had present intent to adopt the emails as a record when he signed the email simply as “Ed.” *See* § 1-201 (“signed”) |
| *“All inventory, now held or hereafter acquired”* | The test of sufficiency of a description is whether the description *reasonably identifies* the collateral. § 9-108(a) A description of collateral reasonably identifies the collateral if it identifies a type of collateral defined in the UCC. § 9-108(b) Here, the description was **sufficient** to create a SI b/c the collateral was described as “equipment,” which is a **type of collateral defined in the UCC**. § 9-108(b)(3), also after-acquired property clause |
| **Problem 5.3: Do these descriptions reasonably identify the collateral?** | |
| *(a) “All pianos owned by the debtor”* | The test of sufficiency of a description is whether the description *reasonably identifies* the collateral. § 9-108(a) A description of collateral reasonably identifies the collateral if it identifies the collateral by category. Here, the description was **sufficient** to create a SI b/c the description reasonably identifies the category of the collateral as “all pianos”. § 9-108(b)(2) |
| *(b) “All equipment”* | The test of sufficiency of a description is whether the description *reasonably identifies* the collateral. § 9-108(a). A description of collateral reasonably identifies the collateral if it identifies a type of collateral defined in the UCC. § 9-108(b) Here, the description was **sufficient** to create a SI b/c the collateral was described as “equipment,” which is a **type of collateral defined in the UCC**. § 9-108(b)(3) |
| *(c) “All inventory, now held or hereafter acquired”* | The test of sufficiency of a description is whether the description *reasonably identifies* the collateral. § 9-108(a) A description of collateral reasonably identifies the collateral if it identifies a type of collateral defined in the UCC. § 9-108(b) Here, there was a **sufficient** description to create a SI b/c the description reasonably identifies the collateral as “inventory”, which is a **type of collateral defined in UCC**. § 9-108(b)(3)   Furthermore, § 9-204(a) expressly permits after-acquired property clauses. |
| *(d) “all consumer goods”* | The test of sufficiency of a description is whether the description *reasonably identifies* the collateral. § 9-108(a) A description only by type of collateral is an **insufficient** description of a consumer transaction and consumer goods. Here, the description was insufficient b/c it described only the type of collateral as “all consumer goods”. |
| *(e) “All of debtor’s personal property”* | The test of sufficiency of a description is whether the description *reasonably identifies* the collateral. § 9-108(a) A description of collateral, such as *“all debtor’s assets” or “all debtor’s personal property”* doesn’t reasonably identify the collateral. § 9-108(c). Here, the description was **insufficient** to create a SI b/c the collateral was described as “all debtor’s personal property”, which is an insufficient description b/c it fails to reasonably identify the collateral.  *Note: You can circumvent this by listing all the property specifically.* |
| *(f) “One tractor” w/ Serial #, which is written incorrectly* | The test of sufficiency of a description is whether the description *reasonably identifies* the collateral. § 9-108(a). A description of collateral won’t be deemed insufficient simply b/c it lacks detail. § 9-108 (Cmt 2.) A description of collateral reasonably identifies the collateral if it identifies the collateral by quantity. Here, the description of the collateral was **sufficient** to create a SI b/c the description “one tractor” reasonably identifies the collateral by **quantity**. § 9-108(b)(4)  *Is the serial # necessary if he only owns 2 tractors?*  No, under the Serial Number Test, the serial number is superfluous. §9-108 (Cmt 2, 2nd ¶)  *Is the serial # necessary if he owns 5 tractors?* The test is *reasonable identification,* not *w/o a doubt.* A description of collateral *may* be sufficient if the collateral is objectively identifiable. § 9-108(b)(6) (e.g., if first part of the serial # matches one of the tractors). |
| *Problem 5.4* | |
| *Each of the 6 paintings is entitled, “Untitled” If the painting looks like a Pollock painting, how can it be described?* |  |
| *In re Southern Illinois Rail Car Co.* | |
| *Is the description of the collateral adequate?* | The Ct says no b/c [of the comma]. Worley disagrees b/c it says “all inventory.” For clarity, it could be re-drafted to read: *“All inventory, whether now owned or hereafter acquired.”* Sometimes simple is best. |
| *Rice v. Miller* | |
| *Is the description of the collateral adequate?* | Yes. |

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| **Problem 6.1** | |
| *(a) Attachment: tables, chairs, stoves, etc?* | A SI attaches to collateral when it becomes enforceable against the debtor. A SI is enforceable against the debtor and third parties w/ respect to the collateral when: (a.k.a. Attachment occurs when…) it I (1) authenticated by the debtor, containing a description of the collateral, (2) the debtor has rights in the collateral, and (3) […] § 9-203(b)  *Is there a SA authenticated by the debtor containing a description of the collateral?*  *Does the debtor have rights in the collateral?* Yes  *Has value been given?* Yes |
| *(b) Attachment: fish, meat, produce?* | *Is there a security agreement authenticated by the debtor containing a description of the collateral?* No! Security agreement describes the collateral as “equipment,” but the fish, meat, and produce are “inventory.”  *Does the debtor have rights in the collateral?*  Yes, but this doesn’t present a problem for attachment  *Has value been given?* |
| *(c) Practical reason not to disburse the loan proceeds this way?* | She‘ll pay interest on the full loan balance, even though she doesn’t use the full 50K immediately. *Note: She can invest the excess loan, but the interest rate for the loan will exceed the interest rate on her savings.* |
| *(d) Available line of credit?* | This is the preferred way to set up the loan b/c it avoids the problem |
| *(e) Does the immediately available line of credit constitute value even if not drawn upon?* | A person gives value for rights if the person acquires them: (1) in return for a binding commitment to extend credit or an extension of immediately available credit, whether or not drawn upon. § 1-204(1). |

“Value” Given & the Debtor’s “Rights In” the Collateral

Value

* A person gives value for rights if the person acquires them: **§ 1-204(4)**
  + In return for a binding commitment to extend credit or for the extension of immediately available credit, *whether or not drawn upon* and whether or not a charge-back is provided for in the event of difficulties in collection;
  + As security for, or in total or partial satisfaction of, a preexisting claim;
  + By accepting delivery under a preexisting contract for purchase; **or**
  + In return for any consideration sufficient to support a simple K

**Inadequate Consideration**

* + A person gives value if he acquires them in return for any consideration sufficient to support a simple K **§1-204(4)**
  + But the consideration doctrine doesn’t require “adequacy” or “equivalency” of exchange.
    - *Recall, the “peppercorn” theory from Contracts*
  + That the collateral is worth more, even substantially more, than the amount of the debt is irrelevant.
  + ***Antecedent Debt ≠ Consideration***
    - Under the bargain theory, the antecedent debt can’t be consideration for the grant of the SI
    - Granting a SI today couldnt have induced the making of a loan yesterday
* **Past Consideration**
  + But § 1-204 doesn’t equate *value* & *consideration*
  + ***Antecedent Debt = Value***
    - Value includes acquiring rights “as security for, or in total/partial satisfaction of a preexisting claim **§1-204(2)**

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| **Hypothetical** | |
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| **Problem 6.2** | |
| *Has a SI in the jewelry attached in favor of Friendly Finance?* | *(let’s go through the analysis)  Any problem w/ the …*  *…with the value given?* No  *…with any rights the debtor has in the collateral?* No  No!  The derivative title doctrine: *Nemo dat non quod habet.*  The thief acquires no rights in the stolen personal property so he has no rights to convey. |

* **§§ 1-201(b)(35), 2-401(1).**
* **Purchaser § 1-201(b)(29)**
* A purchaser of goods acquires all title which his transferor had or had power to transfer. A person w/ voidable title has power to transfer a good title to a good faith purchaser for value. The purchaser has such power even if […] (b) delivery was in exchange for a check which is later dishonored….” **§ 2-403(1)(b)**
* “Negative pledge” clauses **§ 9-401(b)**

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| ***National Pawn Brokers Unlimited v. Osterman*** | |
| *Do the pawn shops qualify?* | “Purchaser” - § 1-201(b)(29)  “Value” - § 1-204(4)  “Good faith” - § 1-201(b)(20) |
| *What policy justifies this result in the bad theft case?* | Less costly risk avoider. For example, seller could require payment by bank check. |
| *Does it also justify the result in the stolen property case?* | There are only limited precautions against theft. Purchaser can ask thief to provide evidence of ownership, but it wont necessarily avoid the issue. (e.g., Pawnbrokers could ask for proof of ownership, and Pippin would show his perfectly good bill of sale!) |

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| ***MIKO Enterprises, Inc. v. Allegan Nursing Home, LLC, 89*** | |
| *What asset is the subject of the dispute?* | The accounts receivable (i.e., the Article 9 “accounts”) owing to the Allegan Nursing Home. |
| *Which parties claim an interest in that property?* | Capital Funding Group (and HUD as loan guarantor)  Piersma Trust |
| *What is the basis for each party’s claim?* | Capital Funding: the 2000 Note and SA  Piersma Trust: the 2006 Note and SA |
| *What’s at issue?* | The rights of the nursing home to get paid by its residents |
| *How to put this in § 9-203 terms?* | The LLC doesn’t have rights in the collateral. Allegan Real Estate, LLC signed a security agreement having rights in the accounts, but the nursing home residents aren’t ‘accounts’ owing to the real estate company.  Value was given when Capital made a $2.9 million loan |
| **Problem 6.3** | |
| *Debtor authenticated a security agreement describing the collateral?* | Original SA described the collateral as “inventory.”  Description included after-acquired property. § 9-204(a) |
| *Has value been given?* | Bank committed to the line of credit |
| *Does the debtor have rights in the collateral?* | When Louie’s acquired rights in the jewelry under the K of purchase, the SI attached to it.  *Illustrates operation of the after-acquired property clause.*  *Typical of inventory and accounts financing.* |

After-Acquired Property

* A SI doesn’t attach under a term constituting an after-acquired property clause to: **§ 9-204(b)**
  + (1) consumer goods … unless the debtor acquires rights to them w/in 10 days after the SP gives value.
* A SI in inventory and accounts receivable presumptively include after-acquired property. Rebut by showing the parties didn’t mean it. *In re: Filtercorp*

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| ***In re: Filtercorp*** | |
| *How did Paulman purport to document his SI?* | A promissory note which also served as the SA **&**  A UCC-1 FS identifying the collateral as accounts receivable and materials inventory. |
| *How did the note/SA describe the collateral?* | *“This note is secured by 75,000 shares of Filter Corp. stock owned by Robin Bernard, the accounts receivable and inventory of Filter Corp. (See UCC-1 filing a attached inventory listing), and John Gardner personally.”* |
| *What’s the Issue?* | Whether it includes after-acquired property when there’s no after-acquired property clause |
| *Holding?* | The SIs in inventory and accounts receivable presumptively include after-acquired property. It can be rebutted by showing the parties didn’t mean it. |
| *What’s the minority rule? Why is it inferior?* | If you don’t include after-acquired property, then after-acquired property isn’t covered  Requires express language evidencing the parties’ intent to cover after-acquired inventory and accounts. p. 6.  Requiring an express AAPC is in part based on what an inquiring creditor would infer from a SA not containing a reference to AAP. |
| *What’s wrong w/ this view?* | * It misconceives the role of the SA * A confidentiality agreement may bar disclosing the SA.   More importantly, a prospective creditor’s inquiry is directed at the FS, not the SA, b/c the order of filing the FS determines priority. Thus, even if a SA didn’t cover after-acquired property, a properly filed prior FS covering that type of collateral will give priority to the filer (so a searcher won’t care what the SA says.) |

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| **Problem 6.4** | |
| *Does the SI extend to the bracelet?* | A SI doesn’t attach under an after-acquired property clause to: (1) consumer goods…unless the debtor acquires rights to them w/in 10 days after the SP gives value. § 9-204(b)  Here, the jewelry is held by a consumer b/c they use it for personal, family or household purposes. Thus, the after-acquired property clause is not effective as to that bracelet. |
| *What is the rationale for this limitation?* | * Presumably the drafters believed a SP had no legitimate expectation in after-acquired consumer goods, unless the debtor expected to get them very shortly after the loan. * Contrast inventory and accounts financing where ordinary commercial expectations would extend to AAP.(?) |

* **Basic legal principle:** Debtor must have rights in the collateral for attachment. *Jerke Constr. v. Home Fed. Savings*
* **Basic practical principle:** SP must take steps to assure debtor owns the “collateral.”
* **How to harmonize law and practice**
  + Contractually?
    - *“Debtor represents and warrants and agrees that (a) Debtor has full title to the Collateral, free from any liens, leases, encumbrances, defenses, or other claims….”*
  + Due diligence
    - SP must conduct its own investigation and cannot rely on debtor’s representations.

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| **Planning Problem**  You are an associate in a law firm that represents California Western Bank, N.A. (Cal-West), a California-based national bank w/ branches in 25 states. Pacifica Pharmaceutical Company, Inc. (Pacifica) has applied to Cal-West for a $1 million loan. Pacifica is a multi-state company that manufactures, distributes, and sells pharmaceutical products throughout the United States. It is incorporated in Delaware and maintains its chief executive offices in Los Angeles, California. It maintains regional offices in Los Angeles; Chicago, Illinois; Wilmington, Delaware; and Atlanta, Georgia.  Cal-West is willing to make the loan but only on a secured basis, but Pacifica is unwilling to grant a SI in any of its main assets. However, Pacifica has recently acquired a small, up-and-coming pharmaceutical company called The Dr. Elliot Anders Labs, Inc. (Anders Labs). Named for its founder, Anders Labs is incorporated in Texas and now is a wholly-owned subsidiary of Pacifica (*i.e.*, Pacifica owns 100% of the Anders Labs shares). It does business under its registered trade name, “Anders Labs,” and maintains its chief executive offices and production facilities in a single building located in Houston, Texas. Pacifica is willing to cause Anders Labs to grant a SI in all the assets owned by Anders Labs (except for its real property) to secure the Cal-West loan to Pacifica.  Cal-West has ordered an appraisal report on the Anders Labs personal property. That report identifies the assets described on the attached Exhibit A.  **EXHIBIT A**  An audit of the Anders Labs assets discloses the following items of personal property:  1. A supply of polio and hepatitis vaccines*. Note: Anders Labs doesn’t currently have in stock any influenza vaccine, but management reports that it will produce an influenza vaccine in time for the next flu season.* **Inventory**  2. A variety of cell cultures used in making vaccines. **Inventory**  3. A wide array of chemicals and other materials used in drug production. **Inventory**  4. Laboratory supplies, including such items as ampules, bottles, calipers, dishes, syringes, vials, etc. **Equipment**  5. Laboratory equipment, including centrifuges, evaporators, incubators, pumps, purifiers, scales, etc. **Equipment**  6. An assortment of laboratory instruments, like balances, meters, microscopes, probes, etc. **Equipment**  7. Laboratory and office furniture. **Equipment**  8. Numerous laboratory test animals. **Equipment**  9. Computers and assorted computer peripherals. **Equipment**  10. Receivables owed by numerous customers arising out of their purchase of products that Anders Labs already has delivered to its purchasers or that Anders Labs is contractually obligated to deliver in the near future. **Accounts but this is vague. Receivables broadly received might include Art. 9 accounts, instruments, or chattel paper.**  The loan transaction documents will include a promissory note, security agreement, and a FS. Your boss has asked you to answer the following questions and to perform the following tasks: | |
| **1. Security Agreement & Note**  *(a) Which party or parties should (i) sign the promissory note and (ii) authenticate the security agreement? In each case, briefly explain your answer.*  *(b) Draft language that sufficiently describes the collateral for purposes of the security agreement. Then explain why the language you have drafted is legally sufficient.* | * Only the parent, Pacifica, needs to sign the note. * “All accounts, inventory, and equipment whether now owned or hereafter acquired” 🡪 Incomplete b/c a broader description is needed * “All assets…” 🡪 Not a sufficient description   [very specific description] 🡪 Good b/c it defines the term “collateral” To get the ‘all assets” description under Art. 9 the SI has to list them all |
| 2. **Rights and Liabilities of the Parties**  *Explain the legal exposure of both Pacifica and Anders Labs in the event that Pacifica defaults on the loan. That is, will Cal-West be entitled to pursue Pacifica and its assets, and will it be entitled to pursue Anders Labs and its assets?* |  |

Intro to the Purchase Money SEcurity Interest

* A **PMSI** is a SI in goods.

Is it a SI?

Not a PMSI

* You can’t have a PMSI, if you don’t have an SI.

No

Yes

Is it a PMSI? . §9-103(a)(1)

* The goods must be **Purchase-Money Collateral**:
  + goods or software
  + that secures a **purchase-money obligation**
  + incurred w/ respect to that collateral.
* An obligation of an obligor…
* Incurred as all or part of the [purchase] price of collateral (**seller’s PMSI**)
* For value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used. (**lender’s PMSI**)

OR

No

Yes

It is a PMSI

* A SI is NOT a PMSI if a debtor acquires property on unsecured credit **&** subsequently creates the SI to secure the purchase price

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| **Problem 7.1** | |
| *Does First Federal have a PMSI?* | Yes, the lenders variety of PMSI. The collateral is goods b/c it’s a car (check). The goods must be purchase-money collateral, which they are here b/c the car is being used to secure the debt. The debt is a PMO b/c it is an obligation of Carlos b/c it was incurred as part of the price of the car. |
| **Problem 7.2** | |
| *(b) Instead he uses his gambling earnings to purchase it. Does the bank have a PMSI?* | The value given must be given to acquire rights in the collateral. Here, no PMSI exists b/c he didn’t use the loan proceeds (the value given) to acquire rights in the collateral (he used his gambling earnings) |
| *(c) Does the bank have a PMSI?* | No PMSI b/c the bank doesn’t have a SI. |
| (d) | The value given must be given to acquire rights in the collateral. Here, No PMSI. The value given (the loan) did not 1) enable him to acquire rights in the collateral; his mother’s loan did. 2) In any case, it was not “in fact so used” to acquire rights in the collateral |
| *(e)* | The bank needs to take steps to preserve its PMSI by assuring that the loan proceeds are used to acquire the collateral.  Direct disbursement to the seller (e.g., wire transfer)  Connecting disbursement to the seller (check payable to seller or to customer and seller jointly). |
| **Problems** | |
| *(7.3) Is Sarah’s SI in the lawn mower a PMSI?* | The title retention language only creates a SI § 1-201(b)(35).  That SI is a PMSI, b/c it secures payment of all or a part of the purchase price of the collateral. § 9-103(a)(2). |
| *(7.4) Does Restaurant Supplies have a PMSI in the new linens?* | No. Restaurant Supplies doesn’t have a SI, so it can’t have a PMSI. Nothing indicates that Gabriella’s granted a SI in the goods it was purchasing.  This is just a sale made on unsecured trade credit. An unpaid seller of goods doesn’t have a SI just b/c it sold the goods on credit. |

After-Acquired Funds

* **Rule**
* After-acquired funds may qualify for purchase-money security status as long as there is a **close nexus** b/w the acquisition of collateral and the secured obligation
* **Factors**
  + *Temporal Proximity:* Whether value is given by the creditor “more or less contemporaneously w/ debtor’s acquisition of the property
  + *Intention of the Parties:* Circs confronting the parties when the K was made
  + Is the arrangement common in the trade and that party’s course of dealing?
  + Whether the availability of the loan was a factor in negotiating the sale, &/or  
     whether the lender was committed at the time of the sale to advance the amount req’d to pay for the items purchased
  + Whether or not title passed to the borrower before the loan was issued?
  + Receiving title before they got the loan, doesn’t necessarily mean it’s not closely allied
    - If they got title only b/c they knew they could receive funds in advance 🡪 it favors “closely allied”

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| ***North Platte* and *General Electric* Cases** | |
| *What factual element is common to both cases and raises a question about PMSI status?* | In both cases, the debtor acquired rights in the collateral before the SP advanced the funds |
| *Why is the debtor’s obtaining rights in the collateral before the loan is made relevant to PMSI status?* | * To be a PMSI in goods, the goods must be “purchase-money collateral ” – i.e., they must secure a “purchase-money obligation.” * Purchase-money obligation: means an obligation … for value given to enable the debtor to acquire rights in or use of the collateral if the value is in fact so used.” § 9-103(a)(2). * But if the debtor acquired rights in collateral *before the loan was made* 🡪 then arguably the loan did not “enable the debtor” to acquire rights in it. * A SI doesn’t qualify as a PMSI if a debtor acquires property on unsecured credit and subsequently creates the SI to secure the purchase price. § 9-103, Cmt 3, ¶2. |
| *What legal test does General Electric adopt?* | * If the loan transaction appears to be *closely allied* to the purchase transaction, that should suffice. *Gilmore* p.107. PMSI requires a *close nexus* b/w the acquisition of collateral and the secured obligation. Cmt 2: ¶2. |
| *How does that test explain the different results in the 2 cases?* | * *North Platte*: (1) SP hadn’t committed to make the loan when debtor acquired rights in the cattle. (2) The availability of the loan didn’t determine whether to buy the cattle. (3) 6 weeks lapsed b/w the purchase and the subsequent loan. * *General Electric*: (1) SP was committed to making inventory loans. (2) Debtor counted on reimbursement when it bought the cars. (3) Only a few days b/w the purchase and loan. |

**Rationale for auto-perfection of PMSIs in consumer goods**

* + Many transactions involving PMSI’s in consumer goods, so requiring a SP to file a FS would clog the system w/ many records.
  + Very few people would ever check the UCC records for a FS as to consumer goods.
    - * Secured lenders unlikely to check. Used consumer goods have little value, so few lenders will ever lend against them.
      * Prospective buyers are un likely to check. Most buyers of the used consumer goods will be other consumers, and they won’t know to check the UCC records.
  + In short, requiring filing will burden the system but will achieve little value in giving notice.
* **Definitions**
* **Household goods**  **FTC Credit Practices Rules § 444.1 (i)**
* Clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the consumer and his or her dependents, provided that the following are not included w/in the scope of the term *household goods:*
  + (1) Works of art;
  + (2) Electronic entertainment equipment (except 1 TV & 1 radio)
  + (3) Items acquired as antiques &
  + (4) Jewelry (except wedding rings).
* **Unfair credit practices FTC Credit Practices Rules § 444.2(a)**
* In connection w/ the extension of credit to consumers in or affecting commerce, as commerce is defined in the FTC Act, it is an unfair act or practice w/in the meaning of § 5 for a lender or retail installment seller directly or indirectly to take or receive from a consumer an obligation that … (4) Constitutes or contains a nonpossessory SI in household goods other than a PMSI

**Auto-Perfection**

**Requirements**

* + A PMSI **&**
  + Consumer Goods

**Purpose:** Just another way to perfect

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| **Problem 14.1** | |
| *(a) Does Fred’s have to do anything to perfect its SI in the furniture?* | * *How should the collateral be classified?* * Goods —specifically, consumer goods. * *How does one perfect a SI in goods?* * By *filing* (§ 9-310(a)) *or* by taking *possession* (§ 9-313(a)). * *But does Fred’s need to file a FS or take possession?* * No. A PMSI in consumer goods is perfected when it attaches. § 9-309(1) * **1st, Fred’s SI is a PMSI**: The furniture secures Tanya’s obligation to pay all or part of the purchase price of the furniture. **2nd, the furniture is consumer goods**: Tanya bought it for personal, family, or household purposes. |
| *(b) Does Friendly have to do anything to perfect its SI in the furniture?*  *Does Friendly need to file a FS or take possession of the furniture to perfect its SI?* | No, its SI is auto-perfected, too. **First, Friendly’s SI is a PMSI**. The furniture serves as collateral for the loan Friendly made to enable Tanya to acquire rights in the furniture. **Second, the furniture is consumer goods**. Tanya bought the furniture for personal, family, or household use.   * + N.B. The auto-perfection principle operates for both seller PMSI’s and lender (or enabling loan) PMSI’s. |

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| **Problem 14.2** | |
| *Is Sarah’s SI in the lawn mower auto-perfected?* | The title retention language only creates a SI. § 1-201(b)(35). The lawn mower will be consumer goods. § 9-102(b)(23). The SI is a PMSI b/c it secures payment of all or a part of the purchase price of the collateral. § 9-103(a)(2). Therefore, the SI is perfected upon attachment. § 9-309(1). |

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| **Problem 14.3** | |
| *(a) Does Sarah have to file a FS?* | If the collateral (computers) are **consumer goods** 🡪 She doesn’t have to file a FS, b/c it will auto-perfect.§ 9-309(1) (but she can if she wants to) § 9-509  If the collateral (computers) is **equipment** 🡪 she will be unperfected if she doesn’t file a FS, w/ all the risks entailed by being unperfected. |
| * *(b) Is Sarah barred from filing a FS? Does she have to have the debtor authorize that FS?* | * Even if § 9-309(1) applies, nothing prevents her filing a FS for protection. § 9-509(b) authorizes her to file a FS. |
| * *(c) What advice would you give?* | * She must assess the risks of being unperfected if she doesn’t file a FS. If those risks are great enough, she should file. * If customer strenuously objects, perhaps there’s a reason to pass on the deal. At least, she must monitor the transaction. |

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| **Problem 14.4** | |
| *Does DFS need to file or to take some other action to perfect its SI?*  *i.e., does DFS get the benefit of auto-perfection?* | Auto-perfection applies to PMSIs in consumer goods. Here, the collateral is consumer goods. (They could be investment property, but they’d have to be a security) Yes; it must file a FS or take possession of the collateral.  But the SI interest doesn’t qualify as a PMSI.  a) The paintings do not secure an obligation incurred as all or a part of their purchase price.  b) They also do not secure an obligation for value given to enable Essie to obtain rights in or use of the paintings.  Therefore, the auto-perfection rule for PMSI’s in consumer goods is not applicable So either must take possession of the artwork or file a FS. |
| *Does DFS Violate the FTC Rules by taking a non-PMSI into her paintings?* | Yes. It’s not a household good b/c it’s art. See § 444.1   Definitions.  (*maybe, don’t depend on this answer…)* |

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| **Problem 14.5** | |
| *Does Oven Boys need to file an initial FS to perfect its SI?* | Yes. It must file a FS or take possession of the collateral. Here, the SI *is* a PMSI, b/c the stove is collateral securing the obligation incurred as all or a part of the purchase price. But the stove *isn’t* consumer goods, since it’s not used or bought for use for personal, family, or household purposes. Therefore, the auto-perfection rule for PMSI’s in consumer goods doesn’t apply either. **Both** elements of the auto-perfection rule must be satisfied: **(1) A PMSI and (2) Consumer Goods** |

Default

* It must have attached, but it doesn’t have to be perfected

Common Forms of Default

* + Failure to make an installment payment when due
  + Failure to make a payment on other obligations, whether or not cross-collateralized
  + Breach of a warranty that the debtor owns the collateral free and clear
  + Filing of a competing FS against the collateral, even if it’s later
  + Failure to defend the collateral against competing claims
  + Sale of the collateral (except in the ordinary course) w/o the secured creditor’s consent
  + Failure to keep the collateral adequately insured, w/ a loss payable clause in favor of the secured creditor and the right of the creditor to make up delinquent premiums and add them to the loan balance
  + Failure to permit the creditor to inspect the collateral upon demand at any reasonable time
  + Failure promptly to pay taxes on the collateral
  + Loss, theft, damage or destruction of the collateral
  + Any levy, attachment or garnishment of the collateral by a competing creditor
  + Failure of the account debtors to pay obligations in due course when the collateral is accounts, chattel paper, or instruments
  + Debtor’s (or guarantor’s) death, dissolution, termination, or insolvency (defined broadly to include liabilities exceeding assets and inability to pay debts as they become due
  + Assignment for the benefit of creditors, appointment of a receiver, or bankruptcy proceedings
  + In commercial agreements, failure to maintain various financial ratios or other material adverse changes in financial health of the debtor
  + A change in the debtor’s location or of the collateral w/o SP’s consent (or w/o notice to SP)
  + A change in the debtor’s name
  + A change in the debtor’s corporate ownership or structure
  + SP’s belief in good faith that the prospect for payment, performance, or collateral realization is impaired (or any event that leads the SP to “deem itself insecure”)

Rights of Secured Party After Default

* After default, a SP has rights provided in this part and those provided by agreement of the parties. A SP: **§ 9-601(a)**
  + May reduce a claim to judgment, foreclose, or otherwise enforce the claim or SI, by any available judicial procedure; **&**
  + If the collateral is documents 🡪 May proceed either as to the documents or as to the goods they cover.
* If a SP has reduced its claim to judgment 🡪 The lien of any levy that may be made upon the collateral   
  by virtue of an execution based upon the judgment relates back to the earliest of:
  + Date of perfection of the SI in the collateral **or**
  + Date of filing a FS covering the collateral
* A sale pursuant to an execution is a foreclosure of the SI by judicial procedure. SP may purchase at the sale & thereafter hold the collateral free of any other req’ts of this article
* No duties imposed upon a SP that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes.

Usual Sequence of Events

Default § 1-309

Acceleration of the Debt (only if there’s an acceleration clause, e.g., *In the event of default, the remainder of the balance shall be due immediately…*)Repossession of the collateral

Disposition of the Collateral (usually by sale)

Default

* + SA will specify events of default (Not defined in Art. 9)
  + Default must be based on good faith belief that the prospect of payment or performance is impaired § **1-309**
* **Limitation on the Right to Accelerate: Good Faith**
  + **Trigger question to look for on exam:** I[In the event of a default] Is there any limitation on the right to accelerate where the default is an event that leads the SP to “deem itself insecure”? **🡪 Yes. Must act in good faith**
  + **Test for Good Faith § 9-102(a)(43); §1-201(b)(2)**
    - Honesty-in-fact **&** *Subjective: Did SP feel insecure?*
    - Act in reasonable commercial standards of fair dealing *Objective*
    - A general insecurity clause doesn’t mean a change in the economy – that is not personal to the debtor

Acceleration of the debt

* + Upon default, SP has right to declare debtor’s obligations immediately due & payable
  + K must have an acceleration clause for this to happen
  + No acceleration clause
    - * 🡪 No right to accelerate
      * 🡪 SP can only realize past due amounts &   
        🡪 debtor isn’t responsible for paying any future amounts to get the collateral back
  + ***Repossession of the collateral*** – SP seizure of collateral by self-help or judicial process

Disposition of the collateral (by sale or otherwise)

* + Debtor remains liable for deficiency
  + SP must account to the debtor for any surplus

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| **Problems based on pp. 497, 499** | |
| *Payments are due on 9/1 and debtor doesn’t pay it until 9/10. Is this a default?* | It depends on how default is defined in the SA.  Note, ¶4(a) – “default in payment when due of any installment.”  SA, ¶6(a), (b). |
| *Debtor is a tech firm founded by A, B, and C. A has the marketing expertise, B the financial expertise, C the tech expertise. C resigns. Was there a default* |  |

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| **Problem 31.1** | |
| *(a)* Discovered that loan didn’t meet credit standards. *Can the bank consider him in default?* |  |
| *(b)* Decline in the economy generally. *Can the bank consider him in default by invoking the general insecurity clause he agreed to?* | *First*, *has the good faith test been met?*  Subjective test 🡪 Will it be met if lender is honestly concerned about the effect of the lost job on the borrower’s ability to pay.  Objective test 🡪 Most lenders would regard it as fair to declare a default by a borrower who has lost his sole or primary source of income, especially if it had used employment and income information in deciding to approve the loan.  *Note: Just b/c the lender could declare a default doesn’t mean it should, since there might be other options* |
| *(c)* Carlos’ employer may have to close the plant. *Can the bank consider him in default?* |  |
| *(d) Carlos gets laid off. Can the bank consider him in default* |  |
| *(e) Late payments to bank; reliable rumors re: rent. Can the bank consider him in default?* |  |

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| **Problem 31.2** | |
| *(a) If Audrey declares a default and repossesses, what possible argument might Benny make?* | Waiver or condonation of any breach or default by SP on one occasion shall not constitute a waiver of any other subsequent breach of default. (i.e., waiving once doesn’t mean future breaches are waived)  Estoppel, course of performance, & waiver  § 1-103(b): common law principles, including waiver and estoppel, continue to operate under the UCC, unless specifically displaced.  Waiver: acceptance of late payments waives the terms of the K.  Estoppel: acceptance of late payments estops the SP from repossessing because of the debtor’s justifiable reliance that late payments are okay.  Course of performance: Under § 1-303(a), a course of performance has arisen to modify the terms of the agreement. |
| *(b)* |  |

Defenses to Default

Waiver: acceptance of late payments waives the terms of the K

* Voluntary relinquishment of a known right
* Proven by pattern of conduct – ie: tolerating late payments – must evidence the lender’s intent to not to insist on timely payments
* **How can a SP “undo” the waiver?**
  + **“Strict Compliance” Notice** – Notice to debtor that from that point fwd they insist on strict adherence to agreements
  + **Non-Waiver Clause**
    - Waiving once doesn’t mean future breaches are waived
      * Waiver or condonation of any breach or default by SP on one occasion shall not constitute a waiver of any other subsequent breach of default.
    - **Effect**
      * **Majority:** Non-waiver provision has no independent effect. If creditor has tolerated late payments in the past, it must send a strict compliance notice before it can declare a default
      * **Minority:** Acceptance of late payments doesn’t constitute waiver or affect a creditor’s right to declare a default.

Estoppel words or conduct that leads another party reasonably to change his position to his detriment

* + Acceptance of late payments estops the SP from repossessing b/c of the debtor’s justifiable reliance that late payments are ok.
  + **How does one prove estoppel?** Must show a pattern of conduct
    - **i.**e., tolerating the late payments has led debtor to behave differently (to pay late thinking it’ll be ok)

Course of Performance

* + **Definition § 1-303**
    - A sequence of conduct between parties to particular transaction that exists if:
      * The agreement of the parties w/ respect to the transaction involves repeated occasions for performance by a party **&**
      * The other party, w/ knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces w/o objection
  + **Effect**
    - Relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and *may supplement or qualify the terms of the agreement*
      * i.e., change due date from the 1st of the month to sometime before the 10th
    - *Debtor may argue:*
      * The express terms of agreement call for payment on the 1st day of each month
      * But we have established a course of performance of payment during the 1st week of the month, and that course of performance “qualifies the terms” of our express agreement.

Examples of acceptable acceleration

* + Discovers loan doesn’t meet credit standards 🡪 No default on part of debtor, must be change in debtors circs
  + General economic decline 🡪 Lender may be concerned about debtor, but must be actual change in circs re: debtor or loan
  + Debtor employer may close location 🡪 Too generalized to justify ‘default’
  + Debtor laid off 🡪 Lender must be genuinely concerned of effect of lost job, most lenders are ok w/ declaring this a default.
    - Just b/c lender *could* doesn’t mean they *should*
  + Late pmt to bank, reliable rumors 🡪 may still need to be something else to back up acceleration claim

Repossession

SP’s Options upon Default

* A SP:
  + May reduce a claim to judgment, foreclose, or otherwise enforce the SI, or agricultural lien by judicial procedure; **&**
  + If the collateral is documents 🡪 May proceed either as to the documents or as to the goods they cover
* These rights “are cumulative and may be exercised simultaneously

Repossession

* After default, a SP: **§9-609**
  + may take possession of the collateral; **&**
  + w/o removal, may render equipment unusable & dispose of collateral on a debtor’s premises.
* **Purpose:** To allow self-help, so long as violence doesn’t ensue
* **Includes:** Any act or action manifesting force or violence, or naturally calculated to provide a breach of the peace. It’s a disturbance of public tranquility, by any act or conduct inciting to violence or tending to provoke or excite others.
* No (1) actual use of force, (2) no threats of force; & (3) no conduct likely to provoke others to violence
* A SP may proceed:
  + w/ judicial process; **or**
  + w/o judicial process IF proceeds w/o breach of the peace
* SA not req’d to provide for the right to repo
* SP interest doesn’t need to be perfected for it to be repossessed
  + The right to self-help is based on having an enforceable SI
  + It must have attached
* SP not req’d to give notice (b/c some debtors might hide the collateral)
* Can repossess from public street or from private driveway e.g., can’t go inside home or garage
  + Some Cts allow you to go in the garage if the door is open
* Debtors non-violent objections to repossession are irrelevant
  + EX: Debtor’s blanket letter 🡪 Can’t render an otherwise peaceful repossession wrongful
  + EX: Shouts ‘STOP!’ from upstairs 🡪 Can’t render an otherwise peaceful repossession wrongful
  + EX: If the debtor has a gun 🡪 Repossession is wrongful b/c violence likely
* Your duty not to breach can’t be delegated to an independent contractor to avoid liability
  + EX: If independent contractor breaches the peace 🡪 you're still liable
* Fraud and trickery not allowed (but some Cts allow trickery if no breach of peace)
* The incidental taking of property inside of a car results in a conversion unless the SA contains a clause consenting to the incidental taking (most do)
  + Should give the person a reasonable time to get their belongings out of the car upon request
  + Should also give them notice of where their possessions are

Assembly of Collateral

* If so agreed, and in any event after default, a SP may require the debtor to assemble the collateral and make it available to the SP at a place to be designated by the SP which is reasonably convenient to both parties

Police Officers

* If police is present and actively participates in conducting repo🡪 It’s a breach of peace. Police represent a threat of force.
  + Some cases allow passive presence of police, e.g., just standing by in case of trouble, b/c officer isn’t compelling debtor to surrender collateral. *This view is questionable...*
* If repo agent impersonates a police officer 🡪 It's a breach of peace, use of constructive force or implied threat of force.
* **Policy:** Opposes impersonation of police officers

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| **Problem 32.1** | |
| *(a) If Audrey declares a default and repossesses, what possible argument might Benny make?* | § 1-103(b): common law principles, including waiver and estoppel, continue to operate under the UCC, unless specifically displaced.  Waiver: acceptance of late payments waives the terms of the K.  Estoppel: acceptance of late payments estops the SP from repossessing because of the debtor’s justifiable reliance that late payments are okay.  Course of performance: Under § 1-303(a), a course of performance has arisen to modify the terms of the agreement.  *Does the SI have to be perfected?*  No, but it must have attached. |
| *(b)* | No. Mere objections to repossession do not constitute a wrongful or unlawful repossession. |
| *(c)* | The issue is whether this is conduct that might precipitate the likilhood of a violent confrontation. Here, the form of protest is unlikely to result in a breach of the peace b/c it is unlikely that present violence is likely to take place. |
| *(d) What if debtor has a gun and starts shooting, yet creditor safely gets away?* | A secured creditor cannot use actual force or present force. When a debtor threatens w/ a gun, regardless of whether it's loaded w/ blanks, there is an issue of present violence that could give rise to a breach of the peace. |
| *(e) From the driveway?* | Although this involves a technical trespass, courts treat this like repossession from a public street or parking lot. *Callaway,* p. 442.  A secured creditor enjoys a limited privilege to commit a trespass to do a self-help repossession, however they may not break and enter a premises. |
| *From a closed and locked garage?* | are mixed. Better not to do it, particularly if it’s an attached garage. |
| *From a closed but unlocked garage?* | More likely to be a breach of the peace whenever the repo agent must break a lock or force entry onto the property. |

The Foreclosure Sale

Introduction

* + After repossession, the SP must sell or otherwise dispose of the collateral
* **Both debtor and secured party want the collateral to bring a good price, but the debtor’s interest is especially acute. Why?**
  + Application of sales proceeds **§ 9-615(a)**
    - * Expenses of repossession and disposition
      * Secured debt for which the disposition is made
      * Subordinate obligations secured by the collateral
  + Surplus or deficiency  **§ 9-615(d)**
    - * Debtor gets to keep the surplus goes to the debtor
      * Obligor remains liable for any deficiency

*See slide [distribution of Proceeds]*

Resale Price

* **Does Art 9 require the SP’s resale to bring the best possible price?**
  + No! The sale need only be commercially reasonable (including “terms”)
  + Expressly provides that commercial reasonableness doesn’t require the sale to bring the best possible price **9-627(a)**
* **Why not require the best possible price?**
  + A foreclosure sale is a ***distress sale***, not at arms length, so it’s unlikely to bring anything close to FMV
  + So long as the sale is conducted in a commercially reasonable manner, the assumption is that the price will be the best possible *under the conditions*

Statutory Protections

Notice of Resale

* **Notice of Resale §9-611**
* Except as otherwise provided in (d), a secured party that disposes of collateral under § 9-610 shall send to the persons specified in (c) a reasonable authenticated notification of disposition.” **§ 9-611(b).**
* **Commercial Reasonableness § 9-610**
  + (a) …a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable
  + (b) If commercially reasonable 🡪 SP may dispose of collateral by public or private proceedings, by 1+ Ks, as a unit or in parcels, and at any time and place and on any terms.”
* **Monitoring Resale**
* Notifying debtor re: time and place of resale permits debtor to monitor the SP’s disposition to ensure it’s conducted in a commercially reasonable manner.
* **Soliciting Buyers**
* The notice affords the debtor an opportunity to generate interest in the resale, to find interested buyers, and thereby to improve the resale prospects. Often the debtor will know better who are prospective buyers.
* **Protect Debtor’s Redemption Right § 9-623(b)**
* The debtor has a right to redeem the collateral by tendering the full outstanding balance of the debt. Knowing when the resale will occur is essential to exercising this right, since the debtor likely will need to arrange financing.
* Must send notice in a reasonable authenticated notification of disposition.  **§ 9-611(b)**
* Sending the notice is enough. It doesn’t have to be received by the debtor.
* **Send**
  + Mail, deliver for transmission, or other usual means of communication, w/ postage or costs covered, addressed to any address reasonable under the circs **or**
  + (B) to cause the record or notification to be received w/in the time it would have been received if properly sent under (A) § 9-102(a)(75).
* **In a Nutshell**
  + §’ory focus is on the SP’s sending the notice (not on debtor’s receiving the notice)
  + Best to send via regular AND certified mail. b/c if regular mail isn’t returned, you have the ability to still show that you sent it, but that you reasonably thought they got it b/c the regular mail wasn’t returned.

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| * Nashville v. Wimmer | |
| *What’s the issue?* | * Whether Auto Credit provided Wimmer w/ “reasonable authenticated notification of the disposition” (§ 9-611(b)) when it sent the notice by certified mail but Wimmer never received it. |
| What are the pertinent facts? | * Auto Credit sent a certified letter to Wimmer’s home address on 1/18. * On 2/20, the letter was returned “unclaimed.” * Notations on the letter showed attempts to deliver it on 1/24, 2/ 7, & 2/ 9. * Wimmer testified she didn’t receive the letter. * Auto Credit sold the car on 2/7, unaware the letter hadn’t been delivered. |
| * *What does the § say re: notice?* | A SP that disposes of collateral … **shall send** to the persons specified in (c) a reasonable authenticated notification of disposition.” § 9-611(b).   * **Send**, in connection w/ a record or notification, means:   + (A) to deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, w/ postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or   + (B) to cause the record or notification to be received w/in the time it would have been received if properly sent under (A) § 9-102(a)(75). * Statutory focus is on SP’s sending notice, not on debtor’s receipt of notice. |
| * *Holding?* | * Auto Credit satisfied the reasonable notification of resale req’t by sending a proper notification and wasn’t req’d to verify its receipt. § only requires that notice be sent. * Requiring verification of receipt would impose an unreasonable burden on secured creditors. * Debtors might deliberately evade receipt of the notice. * Many innocent scenarios in which debtor might not receive a properly-sent notice. * Requiring SP to verify receipt delays disposition of the collateral, thereby increasing the cost of resale. |
| * *Suppose Auto Credit had sent the notice on January 18 and it had been returned “unclaimed” on 2/ 2. Auto Credit then resold the car on 2/ 7. What result?* | * shall send … a reasonable authenticated notification of disposition. § 9-611(b). The Article leaves to judicial resolution, based upon the facts of each case, the question whether the req’t of ‘reasonable notification’ requires a ‘second try. § 9-611(b), Cmt 6: (i.e., whether a SP who sends notification and learns that the debtor didn’t receive it must attempt to locate the debtor and send another notification. * Some cases hold that SP fails to send notice of resale if it goes fwd w/ the sale knowing the debtor didn’t receive its attempted first notification. Mallicoat, p.463. |

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| * **Hypo 1** | |
| Suppose the collateral was 200 shares of Google stock (instead of a car). What effect on SP’s obligation to give notice of resale? | (b) doesn’t apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market. § 9-611(d). |
| *What’s the rationale for these exceptions?* | If the collateral is “perishable” or “threatens to decline speedily in value” 🡪 Prompt resale necessary to preserve the value of the collateral. Notice may jeopardize the collateral’s value (b/c delay)  If the collateral is “sold on a recognized market,” 🡪 Prices aren’t individually negotiated. Market establishes the resale price.  e.g., SP can obtain the price at which the Google stock is currently trading |

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| * **Hypo 2** | |
| Would this provision in the SA eliminate the notice req’t?  *“In the event the SP takes possession of the collateral following a default, Debtor hereby waives any right to notification of the disposition of collateral.”* | No. Only a post-default authenticated waiver is effective in a security agreement. Thus, the waiver of notice won’t be enforceable.  “A debtor or secondary obligor may waive the right to notification of disposition of collateral under § 9-611 only by an agreement to that effect entered into and authenticated after default.” § 9-624(a) |

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| * **Hypo 3** | |
| Suppose Wimmer’s brother personally guaranteed the promissory note made to Auto Credit. Is the brother also entitled to notice of resale? | § 9-611(b): must send notice to persons in (c).  § 9-611(c): (1) the debtor and (2) any “secondary obligor”  Secondary obligor - an obligor to the extent that […]the obligor has a right of recourse w/ respect to an obligation secured by collateral against the debtor….”§ 9-102(a)(72)(B) |
| What justifies requiring notice to a guarantor? | The guarantor has an interest like the debtor’s in seeing that the collateral is sold for as high a price as possible, because the guarantor will be personally liable for any deficiency remaining after resale of the collateral.   * + e.g., in *Wimmer*, there was a $3,098 deficiency remaining after the car was sold, plus interest, fees, and costs. The guarantor would have been liable for that deficiency, just as Wimmer herself was. |

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| * **Hypo 4** | |
| **2008**: Bank lends Manufacturing Co. $1 million secured by “all equipment,” inc. AAP. Bank perfects by filing a FS covering “equipment.”  **2010**: Manufacturing buys a new manufacturing machine on credit from Seller. Seller retains a PMSI in the machine and files a FS covering “equipment.” Seller’s PMSI in the machine has priority over Bank’s SI in the machine as AAP.  **2011**: Finance loans $500,000 to Manufacturing secured by “all equipment,” inc. AAP. Finance perfects by filing a FS covering “equipment.”  **September 2012**: Manufacturing defaults on Bank loan and surrenders equipment to Bank.  *To whom must Bank give notice of resale?* | SP shall send authenticated notification of the disposition to: … (3) if the collateral is other than consumer goods:   * + (A) any other person from which the SP has received … an authenticated notification of a claim of an interest in the collateral;   + (B) any other SP or lienholder that, 10 days before the notification date, held a SI in … the collateral perfected by the filing of a FS ….” § 9-611(c) |
| *What rights does the buyer of the collateral get?* | The Bank’s and Finance’s SIs are discharged, but Seller’s isn’t. A SP’s disposition of collateral after default:  (1) transfers to a transferee for value all of the debtor’s rights in the collateral  (2) discharges the SI under which the disposition is made **&**  (3) discharges any subordinate SI §9-617(a). |
| *What are the practical implications?* | Prospective foreclosure sale buyer must do its homework.  Purchase price will reflect the amount of surviving lien. |

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| * **Hypo 5** | |
| *(a) Suppose Auto Credit mailed its letter 1/18, and Wimmer received it 2/2. Car is sold at auction on 2/7. Is the notice of resale timely?* | Except as otherwise provided in (b), whether a notification is sent w/in a reasonable time is a question of fact. §9-612(a)  In a transaction **other than a consumer transaction**, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent w/in a reasonable time before disposition.” **§ 9-612(b)** (i.e. 10 days notice sufficient in non-consumer transactions) |
| *(b) What facts should be relevant to timeliness?* | A notification that is sent so near to the disposition date that a notified person could not be expected to act on or take account of the notification would be unreasonable. § 9-612, Cmt 2 |

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| ***Brunswick Acceptance Co., LLC v. MEJ, LLC*** | |
| *(a)* *Why does MEJ say BAC’s notice of resale was deficient?* | * - Notice went to its counsel (vs directly to it) * - A related company sent the notice (rather than BAC) * - It didn’t state the time after which a private disposition would occur * - It didn’t allow MEJ an opportunity to find buyers * - Notice re: 2 boats was deficient, b/c the noticed sale did not occur * - It didn’t describe the parties * - It didn’t state that debtors entitled to an accounting |
| *(b) What info must the notice contain?* | * Notice req’ts for a non-consumer transaction 🡪 §9-613 * Notice req’ts for a consumer transaction 🡪 §9-614 |
| *Why does the court say that BAC’s notice was sufficient?* | * “Whether the contents of a notification that lacks any of the info specified in ¶ (1) are nevertheless sufficient is a question of fact.” § 9-613(b). * - Principal of MEJ had actual knowledge of the dispositions. * - He knew the boats would be sold at private sale. * - For 2 boats, he got actual notice of the sales and sale prices. * - For the 2 that did not initially sell 🡪 original notice was sufficient. For a private sale 🡪 notice must state only the time after which the sale will occur. * - MEJ had 4 months to solicit buyers before the first sale. |

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| * **HYPO 6** | |
| *(a) Suppose SP sends a proper notice stating that it intends to sell the collateral at a* ***public sale*** *on a particular date. The date arrives, but no one shows. Later, SP sells the collateral in a* ***private sale****. Is the notice req’t met?* | Maybe not. Nothing [in §] prevents a SP from electing not to conduct a disposition after sending a notification. Nor does it prevent a SP from electing to send a revised notification of its plans to change disposition. This assumes, however, that the SP acts in good faith, the revised notification is reasonable, and the revised plan for disposition and any attendant delay are commercially reasonable. **§ 9-611, Cmt 8.**  Thus, if a SP changes its mind and doesn’t complete the public sale 🡪 Best practice is to send a 2nd notice if there’s enough time |

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| ***Callaway v. Whittenton, p 444*** | |
| What testimony leads the Ct to decide that the directed verdict was improper? | Christopher testified that, while the vehicle was hooked to the wrecker but still in the driveway, he was beating on the side of the tow-truck and yelling loudly as Whittenton pulled away.  He also said Whittenton ran over his foot and dragged him down the driveway as he clung to the side of the towed vehicle. This act would be naturally calculated to arise a breach of the peace |
| How are those facts different from *James v. FMCC*? | “Once a repossession agent has gained sufficient dominion over collateral to control it, the repossession has been completed.” pp. 445-46.   * + *Callaway* Ct must think that the repossession wasn’t complete, the events taking place in the debtors’ driveway.   + By contrast, in *James*, the debtor found the repossessed car an hour after the repossession and several miles away from the parking lot from which the repossession occurred. |

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| **Problem 32.2** | |
| *(a)* Can the secured party insulate itself from liability by hiring an independent contractor to perform the repossession? | Some cases (including TX) had held under the pre-Revision Art. 9 that the duty not to breach the peace was a non-delegable duty, so that the independent contractor status of the repo agent doesn’t shield the SP from liability for wrongful repossession.  In considering whether a SP has engaged in a breach of the peace, Cts should hold the SP responsible for the actions of others taken on the SP’s behalf, including independent contractors engaged by the SP to take possession of collateral. *See* § 9-609, Cmt 3 |
| **Problem 32.3** | |
| Is deception permissible? | It really depends on the Ct. Neither may a creditor resort to constructive force, such as ‘threats or intimidation, or to ‘fraud, trickery, chicanery, and subterfuge. *Callaway*, p.442.  If trickery involves an outright lie 🡪 Cts more likely to find a breach of the peace  But trickery doesn’t involve force, the threat of force, or conduct that risks present violence; so why does it involve a breach of peace?  Cts treat deception differently.   * + Many cts permit use of deception or trickery, especially when it doesn’t involve outright fraud.   + Other cts treat deception or trickery as a kind of “constructive force” & thus a breach of peace.     - This view is hard to justify in terms of preventing violence. Instead, it appears to be more concerned w/ discouraging dishonesty. |
| *Repo agent brings an off-duty police to avoid trouble.* | If the officer is present and actively participates in conducting the repossession 🡪 Clearly a breach of peace b/c the officer represents a tacit threat of force.  Some cases allow the passive presence of an officer “just standing by in case of trouble” – based on the *(somewhat questionable)* theory that the officer is not compelling the debtor to surrender collateral. |
| *Repo agent impersonates a police officer? Why?* | This is always a breach of peace b/c there is use of constructive force or implied threat of force + impersonating a police officer violates public policy |

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| **Problem 32.4** | |
| *What alternatives to self-help repossession?* | A SP may use the judicial process. § 9-609(1). Procedures vary from state to state. In TX, SP may obtain a “writ of sequestration, which is available to a π in a suit if: 1) the suit is for title or possession of personal property or fixtures or **for foreclosure or enforcement of a** mortgage, lien, or **SI on personal property or fixtures** and a reasonable conclusion may be drawn that there‘s immediate danger that ∆ or the party in possession will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county during the suit.” Tex. Civil Prac. & Rem. Code § 62.001(1). |

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| **Problem 32.5** | |
| *What argument will the debtor make about the personal property in the car?* | SP doesn’t have the right to take possession of the personal property inside it (even if they had the right to take possession of the car)  The unauthorized assumption and exercise of the right of ownership over the goods or personal property of another to the exclusion of the true owner is a conversion.   * + “Conversion may occur when a valid repossession of collateral results in an incidental taking of other property, *unless* the loan agreement includes the debtor’s consent to the incidental taking.” *Clark, quoted* p. 451.   + Most SAs contain some provision purporting to shield the SP from liability in such cases, but should the result turn on what the security agreement says? |
| *What argument might the SP make?* | Just as the SP or its agent enjoys a limited privilege to come onto the debtor’s property, w/o committing a trespass, for the purpose of repossessing the collateral, so also should they enjoy a limited privilege to temporarily exercise control over personal property contained in the car being repossessed.  So long as SP notifies the debtor promptly of the repossession and either returned the contents or made them available to the debtor🡪 should be no conversion.   * + *Cf. Eley*: The court upholds the finding that the repo agent failed to give the plaintiff a reasonable time to unload the 350 watermelons before taking it away. By the time it offered to let her do so, it was too late – the melons were worthless. |

**Waiver**

* + A voluntary relinquishment of a known right, whether manifest expressly or impliedly.
  + **Requirements to Prove a Waiver**
    - * The pattern of conduct must evince an intention of the lender not to insist on timely payment.
      * *e.g.,* tolerating the late payments
  + What could Audrey do to “undo” the waiver?
    - A so-called “strict compliance” notice: “Under the terms of the Note, you are required to make payments on the first day of each month. Although we have tolerated late payments since October, hereafter we shall insist on your strict compliance w/ the terms of the Note. Accordingly, should you fail to make any future payment when it is due, we will exercise all of our rights under the Note, including but not limited to the right to accelerate the Note and demand the entire unpaid balance to be paid immediately.”

Commercial Reasonableness

* + Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a SP may dispose of collateral by public or private proceedings, by 1+ K’s, as a unit or in parcels, and at any time and place and on any terms.
  + **§ 9-610(a)**: SP may dispose of the collateral “in its then condition or following any commercial reasonable preparation or processing.”
    - Might read this language as giving the SP an absolute right to sell in its “as is” condition (but cts generally don’t)
    - Some cases impose a duty to clean and repair or touch up, at least where the cost of doing so is relatively small in relation to the likely benefit
    - Comment 4 seems to endorse a case-by-case, cost-benefit approach.
    - **Factors:** cost, likely benefit, fact that the SP must advance the costs.
    - **Test:** Whether a similarly situated owner of the boomlift selling it for its own account would engage in the proposed preparations.

Dividing Up the Proceeds of Disposition

* **Application of sales proceeds**
  + Expenses of repo and disposition
  + Secured debt for which the disposition is made
  + Subordinate obligations secured by collateral
* **Surplus or deficiency**
  + Any surplus to the debtor
  + Obligor remains liable for any deficiency
* **Send** – in connection w/ a record or notification means:
  + To deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, w/ postage or cost of transmission provided for, addressed to anuy address reasonable under the circs **or**
  + To cause the record or notification to be received w/in the time that it would have been received if properly sent
  + Send requirement doesn’t apply if collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market
* **What must notice contain?**
  + **Consumer Transaction**
    - * Description of any liability for deficiency, phone # for redemption account, phone # or mailing address for information about the disposition or the debt
  + **Non-Consumer Transaction**
    - * Describes ∆ and SP, describes collateral, method of intended disposition, ∆’s right to accounting of unpaid debt and charge, time and place of public disposition or time after which any other disposition will be made
* **Purposes of Notice of Resale**
  + Monitoring Resale
    - * Notification of time and place of resale allows the debtor to monitor the SP’s disposition to ensure that it is conducted in a commercially reasonable manner
  + Soliciting Buyers
    - * The notice affords debtor an opportunity to generate interest in the resale, to find interested buyers, and improve the resale prospects. Often the debtor will be in the better position to identify prospective buyers.
  + Protect Debtor’s Redemption Right
    - * Debtor has a right to tender the full outstanding balance of the debt. Knowing when resale will occur is essential to exercise this right since the debtor will likely need to arrange financing

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| **Problem 33.1 Public or Private Sale** | |
| *(a)* |  |
| *(b) What does the § say?*  *---------------*  *What are the issues?* | Every aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable. If commercially reasonable, a SP may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms. **§ 9-610(b).**  -------------  *i) Whether it would be commercially reasonable to sell a large piece of construction equipment by way of private sale.*   * + Private sales should be encouraged when they’re the best prospect for realizing a higher return § 9-610, Cmt 2   + Some cases suggest that exotic or sophisticated or highly specialized collateral should *not* be sold at a public auction.   + It‘s possible that this equipment is sufficiently specialized that it would only be commercially reasonable to employ a broker.   *ii) Whether Heavy Lifting can justify its having immediately settled on one possible buyer and having negotiated only w/ him.*   * + Even if a private sale is commercially reasonable, doesn’t reasonableness require soliciting competing bids? |
| *(c) What procedures must Heavy Lifting follow?* | He must provide reasonable authenticated notification of the resale. |

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| **Problem 33.2** | |
| *(a q1)* *How should SP advertise the sale?* | Center Capital Corp. (Collateral: Learjet 55B)   * + Advertising: (1) in several trade journals, (2) on the Internet, (3) directly to the debtor’s customer list. Held: Commercially reasonable.   Commercial Credit Group (Collateral: Heavy-duty waste recycler)   * + Advertising: 2 daily ads in 2 newspapers of general circulation but none in trade publications and no direct contacts. Ads said sale was “as-is,” although manufacturer warranties still active. Held: Not commercially reasonable. |
| *(aq2) What lessons do we learn from these cases?* | Advertising should be appropriate for the kind of collateral. So here it would be: how would people in the construction industry go about publicizing the sale?   * + For specialized collateral 🡪 publicity in generally circulated newspapers may be insufficient. Instead, advertising in trade journals or direct contact w/ known interested or potentially interested parties may be req’d.   Whatever is publicity given **must be accurate**. |
| *When should the sale take place?* | *Center Capital 🡪 Private sale took place 2 months after the Learjet was turned over to the SP 🡪 Commercially reasonable.*  *Commercial Credit: public auction took place 1 month after the recycler was repossessed 🡪 Not commercially reasonable.* |
| *How do we explain the difference?* | **The test is still commercial reasonableness.** Center Capital actively marketed the plane and fielded a number of offers until it received an offer that approximated its expert’s appraisal, whereas Commercial Credit held the auction 2 days after Christmas.  **No specific time is necessary. § 9-610, Cmt 3**   * + Risky to sell in a depressed market, but waiting too long risks depreciation.   + Risky to sell too soon, especially where the collateral is so specialized or sophisticated that it takes longer than usual to attract potential buyers. |
| *Must buyers have an opportunity to inspect?* | **The test remains whether selling equipment like this w/o affording prospective buyers an opportunity to inspect it would be commercially reasonable.**   * + Some cases indicate that the collateral should be available for inspection by interested parties (unless its impracticable) |
| Center Capital finds sale of the Learjet commercially reasonable w/o a pre-sale inspection. Why? | .b/c it reduced the sales price by $50,000  (but expert testified an inspection would have identified < $50,000 in defects that SP would have had to repair) |
| *Center Capital hired a broker to sell the Learjet. Is that necessary for the sale to be commercially reasonable?* | No. *The test is whether every aspect of the disposition – including the method, manner, time, place and other terms – is commercially reasonable.* That doesn’t necessarily require a broker.  But commercial reasonableness will be determined by industry standards. How would parties in the relevant industry sell this kind of thing?   * + Industry practice may dictate using a broker.   + A broker may be useful for determining industry practice, especially where the collateral is specialized or idiosyncratic. |
| *Can the sale be at wholesale (to dealers) or must it be at retail (to the general public)?* | *The test is whether every aspect of the disposition – including the method, manner, time, place and other terms – is commercially reasonable.*  Cases usually recognize wholesale sales (i.e., sales to dealers) as commercially reasonable, except in the unusual case where the secured creditor has its own retail facilities.   * + A secured creditor usually doesn’t have capacity to sell at retail, so selling to a dealer is often the most commercially reasonable course of action.   + But even in cases where the SP has its own retail facilities, arguably it should not be req’d to sell the repossessed collateral in competition w/ its own inventory. |

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| **Problem 33.4** | |
| *(a) Public or private sale?* | Sale at a so- “dealers-only” auction is considered a private sale b/c it’s not an auction that any member of the public can attend. For a sale to be public, the public must have access to the sale. § 9-610, Cmt 7 |
| *(b) Procedures?* | Notice of resale must state:   * + that the disposition will be a private sale (method of intended disposition) § 9-613(1)(C) **&**   + “the time after which any other disposition will be made.” § 9-613(1)(E). |
| *May SP purchase the repossessed collateral? Explain.* | A SP may purchase collateral at a:   * + public disposition **or**   + private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.” § 9-610(c). * The danger is that the SP is selling the collateral to itself, so that it might give itself a “sweetheart deal.”   + But a public auction protects against that risk, since the presence of rival bidders establishes a competitive market that will drive the price.   For collateral sold on a recognized market 🡪 the price is not set by individual negotiations, so that market will establish the price |

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| **WE’LL COME BACK TO THIS ONE Problem 33.5** | |
| *(a) Can the SP purchase the collateral?* | A SP may purchase collateral:   * + (a) at a public disposition; or   + (b) at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.” § 9-610(c).   Not all used cars (even of the same make, model, and year( are worth the same.   * + A market in which prices are individually negotiated or the items aren’t fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions. § 9-610, Cmt 9   + If the dealer’s auction is a private disposition, then SP may not purchase, since it ‘s not a recognized market. * *What problem does this provision address?*   + When the foreclosing SP or a related party is the buyer, the SP can’t have an incentive to get the best possible price for the collateral. Thus, the resale may be conducted in a procedurally unimpeachable fashion, but still bring a low price. * *How does it solve address that problem?*   + If the price paid by the SP, a related person, or a secondary obligor is “significantly below the range of proceeds that a complying disposition” to an unrelated person would have brought 🡪 deficiency is calculated on the basis of what would have been obtained in a commercially reasonable sale to an unrelated person. |

Remedies

Injunctive Relief RE: N oncompliance 9-6215(a)

* If it’s SP is not proceeding in accordance w/ Art 9🡪 Ct may order or restrain collection, enforcement, or disposition of collateral on appropriate terms & conditions.

Damages

* **Actual DAS 9-6215(b)**
  + Liable for DAS in the amount of any loss caused by a failure to comply
    - **Includes:**
      * Debtor’s loss from inability to obtain alternative financing **or**
      * Debtor’s increased costs from inability to obtain alternative financing
* **Statutory DAS When Collateral is Consumer Goods 9-6215(b)**
* If collateral is consumer goods 🡪 A person that was a debtor when SP failed to comply may recover ***not less than***:
  + credit service charge + 10% of the principal amount of the obligation **or**  
    time-price differential + 10% of the cash price
    - * + **Time-Price Differential:** Accounts for the time value of financing (gets around calling it interest)
        + Difference b/w cost to pay in cash now **vs.** what you’d pay total over time **[Interest]**

Effect on Deficiency (pre-revision art 9): 3 Approaches 9-626(a)

* **1) *Majority:* Rebuttable Presumption Rule** 
  + SP failed to comply 🡪 Ct presumed FMV of collateral was = to amount of debt, in absence of any proof of no deficiency
  + SP must prove resale brought a fair price)
* **2) *Minority:* DASonly**
  + Debtor liable for deficiency (but can set it off w/ DAS)
  + Non-consumer cases 🡪 **Revised** § 9-626 **adopts** the rebuttable presumption approach
  + Consumer cases 🡪 It’s silent
* **3) *TX Rule:* Absolute bar***-* If SP fails to comply 🡪 they don’t have the right to claim deficiency
* **TX Rule for Commercial Cases: Rebuttable Presumption Rule § 9-626** 
  + Debtor credited w/ greater of actual proceeds of the disposition **or** proceeds that would’ve been realized had SP complied
  + Unless SP proves its compliance would have yielded a smaller amount, the amount a complying disposition would have yielded is deemed to be equal to the amount of the secured debt + expenses and attorney’s fees.
  + The limitation of the rules in (a) to transactions other than consumer transactions is intended to leave to the Ct the determination of the proper rules in consumer transactions. Ct may not infer from that limitation that nature of the proper rule in consumer transactions and may continue to apply established approaches  **§ 9-626(b)**
  + Pre-revision TX rule for all cases (consumer & commercial) 🡪 Absolute bar rule (same as in *Coxall)*
    - Will the TX SupCt do as *Coxall* did and continue to apply the absolute bar rule to consumer cases?
    - Will the current TX SupCt be hospitable toward a pro-consumer approach?

***SEE SLIDE ON 9-626 example***

* **Effect on Deficiency § 9-626**
  + SP brings action for deficiency
  + Debtor puts lack of notice or commercial reasonableness of sale in issue
  + SP can’t prove reasonable notice or commercial reasonableness
  + SP may recover only the amount by which the secured debt exceeds the amount that would have been realized had the sale been compliant w/ Art/ 9
    - * *Amount that would have been realized* = presumed to be the amount of the secured debt (unless SP proves otherwise)
* **Injunctive Relief:** May order or restrain collection, enforcement or disposition of collateral **§ 9-625(a)**
* **Statutory DAS § 9-625(c)**
  + **If the collateral is consumer goods** 🡪 a person that was a debtor … at the time a SP failed to comply, may recover for that failure in any event an
    - amount not less than the credit service charge + 10% of the principal amount of the obligation **or**
    - the time-price differential plus 10% of the cash price
    - This is the alternative to actual DAS
  + *Coxall*
    - Suppose debtor had bought car by making a $3,798 down payment & borrowed $4,970 from Bank, a 3P lender. Bank violates Art 9.
      * Debtor may recover for that failure in any event an amount not less than the credit service charge + 10% of the principal amount of the obligation or the time-price differential + 10% of the cash price.” § 9-625(c).
    - The formula calls for:
      * 10% of $4,970 [ i.e., $497 (the “principal amount of the obligation”)]
      * + $1,036 [(the “credit service charge”), which totals $1,533.]
  + DAS shouldn’t be a function of whether the seller financed or a 3P lender financed
  + If SP fails to give reasonable notice or fails to conduct sale in a commercially reasonable manner, may the debtor **both** invoke § 9-626 against the SP’s deficiency claim **and** recover DAS?
    - A debtor whose deficiency is eliminated under § 9-626 may recover DAS for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under § 9-626 can’t otherwise recover under (b) for noncompliance **§ 9-625(d)**
      * Actual DAS?
      * Statutory DAS?

Strict Foreclosure and the Right of Redemption

* **Conditions to Acceptance in Satisfaction § 9-620(a)**
* SP may accept collateral in full or partial satisfaction of the obligation it secures *only if*:
  + Debtor consents *see 9-620(c)*
  + SP doesn’t receive notification of objection
  + If consumer goods, is not in possession of debtor when debtor consents to acceptance
* In a consumer transaction 🡪 SP can’t accept collateral in partial satisfaction of the obligation
* Partial strict foreclosure may be accomplished only by debtor’s express post-default consent
* **Debtor’s Consent § 9-620(c)**
* A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default
  + **The agreement can only be binding if it’s** entered into after default **&** in writing
  + Sending debtor a proposal that is unconditional if collateral is held by SP *after default*
  + In the proposal, accepts collateral in full satisfaction **&**
  + Doesn’t receive an authenticated objection from debtor w/in 20 days.
* **Once strict foreclosure has occurred, debtor has:**
  + No rights in collateral
  + No say in how used or disposed of **&**
  + No right to any add’l value (a.k.a. surplus) the SP receives

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| **Problem 34.1** | |
| *(a) Is this agreement binding on them?* | The agreement can become binding if it is (a) entered into after default & (b) in writing. A SP may accept collateral in full or partial satisfaction of the obligation it secures only if the debtor consents to the acceptance under §9-620(c). **§ 9-620(a)(1).**  A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default. **§ 9-620(c)(2).**  *Why enter into this agreement?*   * Debtor   + Avoids adding the expenses of repossession & disposition to the amount of the debt   + Avoids the risk of a deficiency * SP…   + Believes there would be no deficiency or   + Believes the deficiency would be small or uncollectible |
| *(b)* | * “… or the SP:   + (A) **sends to the debtor after default a proposal** that is unconditional or subject only to a condition that the collateral not in the possession of the secured party be preserved or maintained;   + (B) in the proposal, **proposes to accept collateral in full satisfaction of the obligation it secures**; and   + (C) **does ’t receive a notification of objection authenticated by the debtor w/in 20 days after the proposal is sent**.” § 9-620(c)(2). * Irving cannot *force* Flora to accept, but her failure to object w/in 20 days is treated as an acceptance.   + She’s not req’d to give her reason for objecting   + She’s not req’d to act ‘reasonably’   + But if she fails to object 🡪 a strict foreclosure will have occurred |

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| ***In re* CBGB Holdings** | |
| *(a) How did the lender seek to effectuate a strict foreclosure?* | Debtor defaulted on 2/12 (re: amended note)  Debtor and Lender entered into a *Consent to Strict Foreclosure*, which  gave debtor until 5/18 to satisfy its obligations by repaying the debt or selling the collateral and repaying on terms the lender approved.  If debtor failed to satisfy the debt w/in time provided 🡪 Lender could exercise its rights. |
| *(b)* Why did debtor say this wasn’t effective? | It argues that the 2/12 default wasn’t relevant, b/c it had until 5/18 to satisfy its obligations under the Agreement.  It defaulted on 2/12 b/c it failed to repay during this “Compliance Period.” Therefore, lender should have obtained debtor’s post-default consent to strict foreclosure after 5/18. Since it didn’t, the strict foreclosure was invalid. |
| What did the Ct decide? | * It agreed w/ the lender :   + 1) Default occurred on 2/12, not May 18     - * Default is the failure to perform a legal or contractual duty.       * But debtor wasn’t obligated during the Compliance Period to sell or redeem the collateral, so its failure to do so was not a default.       * By contrast, the Agreement simply gave debtor a right to *cure* the default, so no new consent to strict foreclosure was req’d.   + 2) The Agreement didn’t violate §9-620(c)(2)(A) by making a “conditional” proposal.     - * The proposal wasn’t really conditional.       * Even if it was, the limitation on conditional proposals for strict foreclosure relates only to the implied consent alternative. |

[a] SP may accept collateral in full or partial satisfaction of the obligation it secures ***only if***:” § **9-620(a)**

* + (1) debtor consents to the acceptance under (a);
  + (2) SP doesn’t receive notification of an objection to the proposal from persons w/ an interest in the collateral;
  + (3) if the collateral is consumer goods 🡪 Debtor doesn’t have possession of the collateral when it consents to acceptance **&** (4) SP isn’t req’d to dispose of consumer goods in which there is a PMSI and 60% of the cash price has been paid.

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| **CIT Group v. Landreth** | |
| *What is the basis of CIT’s claim against LSBS and Landreth?* | CIT has taken possession of the buses – ∆s voluntarily surrendered them – & disposed of them. Π seeks to recover the deficiency remaining after the sales proceeds have been applied to the balances owing on the notes. |
| *What defense do they assert?* | ∆’s claim they aren’t liable for the deficiencies b/c CIT strictly foreclosed on the buses. |
| *What is the factual basis for this defense?* | They say a CIT employee told them when they turned over the buses that return of the collateral would discharge the debt. |
| (b) What does CIT say about this factual claim? | It denies the EE said returning the buses would satisfy the debt |
| How does the ct address this factual question? | It ignores it as irrelevant. Even if she said what the ∆s claim she said, the reqt’s of strict foreclosure aren’t met. A purported or apparent acceptance of collateral is ineffective unless: (1) SP consents to the acceptance in an authenticated record or sends a proposal to the debtor & (2) the conditions of (a) are met. § 9-620(b).  Here, SP neither consented in an authenticated record nor sent a proposal to the debtor. Even if the EE said what ∆s claim, it was oral. |

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| **Problem 34.2** | |
| *(a)* | * No. She loses any right to a surplus, just as she avoids any liability for a deficiency. This is the effect of the strict foreclosure on the debtor * Once a strict foreclosure has occurred, the debtor has   + no rights in the collateral,   + no say in how it is used or disposed of, and   + no right to any additional value the SP manages to get out of the collateral. * The debtor must make a careful assessment of the collateral’s value before consenting to the SP’s retention of it in satisfaction of the debt. |
| *(b)* |  |

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| **Problem 34.3** | |
| *(a) Are they both bound if Flora agreed to the deal and it’s in writing.* | * Yes; this is a “partial strict foreclosure.”   + “Except as otherwise provided in (g), SP may accept collateral **in full or partial satisfaction** of the obligation it secures….” **§ 9-620(a)**.   + “In a consumer transaction, a SP can’t accept collateral in partial satisfaction of the obligation it secures.” **§ 9-620(g)**.   + A partial strict foreclosure is permitted, except in consumer cases (Rev. Art. 9)   + **A partial strict foreclosure may be accomplished only by debtor’s express post-default consent. § 9-6201(c)(1)** |

* **Mandatory Disposition of Consumer Goods § 9-6209(e)**
  + A SP that has taken possession of collateral shall dispose of the collateral w/in the time specified if:
    - * 60% of cash price has been paid in the case of a PMSI in consumer goods **or**
      * 60% of the principal amount of the obligation secured has been paid in the case of a non-PMSI in consumer goods

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| **Problem 34.4** | |
| *(a) Can Irving claim he’s successfully taken the auto under strict foreclose? Does he get to keep the proceeds?* | No. Strict foreclosure is prohibited in a consumer case where < 60% of the price has been paid. § 9-620(e). Here, Carlos has paid nearly 75% of the price, thus strict foreclosure is prohibited b/c it exceeds the 60% cap.  *Rationale?*  There’s likely to be a surplus available for the debtor, so any debtor who consented would either be acting under duress or ill-advisedly. |

Right to Redeem Collateral

* **Rule:** A debtor may redeem collateral
* **Requirements:** To redeem collateral, a person shall tender:
  + Fulfillment of all obligations secured by the collateral **&**
  + Reasonable expenses + attorney’s fees
  + After acceleration of debt 🡪 SP may require debtor to pay full amount of the outstanding indebtedness before he can assert his right of redemption
* **Waiver of Redemption Right**
* Except in consumer goods transaction, a debtor or secondary obligor may waive the right to redeem collateral only by agreement (in writing?) entered into & authenticated after default

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| **Problem 34.5** | |
| *(a)* | Except in consumer cases, there’s no mandatory time w/in which the SP must dispose of the collateral.   * + SP’s holding the collateral for “too long” 🡪 Not a “constructive” strict foreclosure. Cmt 5     - * ~~Some pre-Revision cases held that the SP’s delay is disposing of the collateral amounted to a strict foreclosure, thereby depriving it of any right to a deficiency.~~   + “Delay is a factor relating to whether the SP acted in a commercially reasonable manner for purposes of § 9-607 or §9-610.” Cmt. 5.   *Any other option for the debtor?*   * + Seek injunctive relief compelling the lender to dispose of the collateral on the grounds that it was “not proceeding in accordance w/ the article.” § 9-625(a).     - The debtor would have the burden of showing that the delay in resale was “commercially unreasonable,” a heavy burden given the reason for delay. |

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| **Problem 34.6** | |
| *(a)* | No!   * + “(a) A debtor … may redeem collateral.   + “(b) To redeem collateral, a person shall tender:     - * (1) fulfillment of all obligations secured by the collateral; and       * (2) the reasonable expenses and attorney’s fees described in Section 9-615(a)(1).” § 9-623.   After acceleration of the debt, the SP may require the debtor to pay the full amount of the outstanding indebtedness before he can assert his right of redemption.   * + To redeem the collateral a person must tender fulfillment of all obligations secured, plus certain expenses. If the entire balance of a secured obligation has been accelerated, it would be necessary to tender the entire balance. § 9-620, Cmt 2 |

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| **Automotive Finance Corp. v. Smart Auto Center** | |
| *Why does the ct hold that Schwibinger wasn’t entitled to redeem the automobiles?* | A debtor must *tender* the full amount due. Tendering payment means offering payment in full of all monetary obligations then due and performance in full of all other obligations then matured. Schwibinger never did that as his offer was contingent of the sale of his dealership. He only offered to enter into a new agreement extending his payment time on the loans. What he did falls short of ‘tendering payment’ which requires more than a new promise to perform an existing promise. Thus, since Schwibinger never tendered payment, AFC was not req’d to release the vehicles. pp. 493-94. |

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| **Problem 34.7** | |
| * *(a)* *Can the debtor effectively waive the right to redemption in the security agreement?* | No. A debtor or obligor may not waive or vary the rules stated in the following listed sections: … (11) § 9-623, which deals w/ redemption of collateral. § 9-602(11). However, *except in a consumer-goods transaction*, a debtor or secondary obligor may waive the right to redeem collateral under Section 9-623 only by an agreement to that effect *entered into and authenticated after default*.” § 9-624(c). But this is a consumer goods transaction, so even the post-default waiver would be ineffective. |
| *(b)* |  |

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| **Bar Problem 34.7** | |
| * *(a)* *Can the debtor effectively waive the right to redemption in the SA?* | No. “… [T]he debtor or obligor may not waive or vary the rules stated in the following: … (11) § 9-623 redemption of collateral.” § 9-602(11). However, except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under § 9-623 only by an agreement to that effect entered into and authenticated after default. § 9-624(c) Thus, the post-default waiver is ineffective since this is a consumer goods transaction. |
| *(b)* |  |

**Did a default Occur?**

**Was Repossession dones Properly?**

* + Can turn to judicial process **or**
  + w/o judicial process 🡪 Can’t incite a breach of the peace

Introduction to Perfection

Governing Law of Perfection & Priority

* **3 rules**
  + Determine the law governing perfection
  + the effect of perfection or non-perfection **&**
  + the priority of a SI in collateral
* **Which state law governs the perfection of a SI? 🡪** The location of the debtor **§ 9-301(1)**
  + i.e., While a **debtor** is located in a JSD 🡪 local law of that jsd governs perfection, the effect of perfection or non-perfection, and the priority of a SI in collateral
  + Don’t say anything about where the collateral is
    - * While **collateral** is located in a JSD 🡪 *Same as above*
* Except as otherwise provided, while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a JSD, the local law of that JSD governs:
  + Perfection of a SI in goods by filing a fixture filing
  + Perfection of a SI in timber to be cut **&**
  + The effect of perfection or non-perfection and the priority of a non-possessory SI in the collateral
  + The local law of the JSD in which the wellhead or minehead is located governs perfection, the effect of perfection or non-perfection, and the priority of a SI in as-extracted collateral
    - * In this situation the FS must also include:

Indication the collateral is ‘as-extracted’ collateral

Indicate that FS is to be filed in real estate records

Describes the real property

* + - * It’s sufficient if reasonably identifies what is described.

Determine the Location of the Debtor

* **If Debtor is an “Individual”** 🡪 Use their principal residence
  + - *Individual =* A person in their own capacity **OR** a sole proprietorship
    - A person that ceases to exist, have a residence, or have a place of business 🡪 Located in their last location
* **If Debtor is an Organization** – has only one place of business and is located at its place of business
  + - * **Place of Business**: a place where a debtor conducts it's affairs
      * **Organization:** A person other than an individual e.g., not a human

**Includes:**  Partnership

**Why? Look to how do you create a partnership?**

by agreement of the partners

Nothing needs to be recorded

A partnership only has a partnership agreement therefore, there’s no public record and it’s an “organization”

If organization registered outside of US 🡪 It’s not a registered organization (b/c not organized under state law)

* + - * A debtor that’s an organization and has <1 place of business is located at its “chief executive office”

Where debtor mainly manages its business **§ 9-307 Cmt. 2**

* + - * **Registered Organization**
        + Organized under the law of a State **&**
        + Located in that State

An organization organized solely under the law of a single State or the US and as to which the State or the S <?> must maintain a public record showing the organization to have been organized

e.g: Corps

* + These rules only apply if debtor is located in a JSD that requires a legal regime w/ a filing system
    - If they do 🡪 You can file there
    - If they don’t 🡪 You can file in D.C. sometimes best to file in both

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| **Problem 9.1** | |
| *Is this a possessory or non-possessory SI?* | * Non-possessory. DFS won’t take possession of the collateral |
| What jsd’s law controls perfection of a non-possessory SI? | * Debtor’s location § 9-301(1) |
| * *(c)* What fact determines a debtor’s location? | * Individual * Non-registered organization * Registered organization |
| * Where is cashmere located? | * A debtor who is an individual is located at the individual’s principal residence. § 9-307(b)(1) Cmt 2. She is an individual and her principal residence is in IL, which is the only place she lives, so the law of IL applies. |
| * What will the law of IL tell DFS to do? | * Make a central filing in the Office of the Secretary of State of IL. § 9-501 |

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| **Problem 9.2** | |
| *(a) Where should the searcher of the records perform his search?* | A searcher should search where the SP should file. Since cashmere’s principal residence is in IL, a SP should file in the Office of the Secretary of State of IL. So Stringer should search the filings in the office of the SOS of IL. |
| *(b) What info will help determine Lance’s principal residence?* | Driver’s License, tax returns, voting records |
| *Better way to handle the problem?* |  |

* A debtor who is an individual is located at the individual’s principal residence **§ 9-307(b)(1)**
* An individual debtor is deemed to be located at the individual’s principal residence *w/ respect to both personal & business assets***. Cmt 2**
* A debtor that is an organization and has < 1 place of business is located at its chief executive office **§ 9-307(b)(3)**
  + **Chief executive office**: Place from which the debtor manages the main part of its business operation or other affairs.
    - * Where persons dealing w/ the debtor would look for credit info &
      * is the appropriate place for filing….” **§ 9-307, cmt 2**
  + May be obvious where the chief executive office is located.
  + If not, it may be possible to narrow the likely options to 2/3 states.
  + “[W]hen a doubt arises, there’s rarely <2 possibilities. A SP in such a case may protect itself by perfecting under the law of each possible jsd. **§ 9-307, Cmt 2**

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| **Problem 9.3** | |
| * *What info will help determine Lance’s principal residence?* | * Driver’s license * Income tax returns * Voting records |
| * *Is there a better way to handle the problem?* | * When doubt arises [re: choice of law], prudence may dictate perfecting under the law of each jsd that might be the debtor’s ‘principal residence. § 9-307, Cmt 2. * Economics of the transaction * Expense and risk minimized * “Belt-and-suspenders” approach |

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| **Problem 9.4** | |
| * *(a) Where is Gabriellas Place located?* | * Gabriella’s Place is an individual, *viz.* Gabriella.   + The business is a sole proprietorship, so ***Gabriella*** is the debtor.   + A debtor who is an individual is located at the individual’s principal residence. § 9-307(b)(1). “An individual debtor is deemed to be located at the individual’s principal residence w/ *respect to both personal and business assets*. Cmt 2 * Gabriella lives only in New Jersey and her principal residence is in New Jersey. Thus, the law of New Jersey applies. The bank will file in office of New Jersey Secretary of State. § 9-501(a)(2) |
| * *(a) Where should the “searcher” of the records perform his search?* | * A “searcher” should search where the SP should file. Since Cashmore is an individual whose principal residence is Illinois, a SP should file in the Office of the Secretary of State of Illinois. So, Stringer should *search* the filings in the Office of the Secretary of State of Illinois. * In short, the searcher should search for a possible filing only in those filing systems where a filing would have to be made if it were to be effective. |
| * *(b) What kind of entity is a partnership?* | * **Organization** means a person other than an individual.” § 1-201(b)(25). * **Registered organization** is an organization organized solely under the law of a single State or the US and as to which the State or the US must maintain a public record showing the organization to have been organized. § 9-102(b)(70). * *Where is a non-registered organization located?* * “A debtor that is an organization and has only one place of business is located at the place of business.” § 9-307(b)(2). * Since the restaurant has only one place of business, it is located at that place of business. Therefore, the law of NY will apply. |
| * (c) Where is the restaurant located? Where is the restaurant’s chief executive office? | A debtor that is an organization and has < 1 place of business is located at its chief executive office. § 9-307(b)(3).  Chief executive office means the place from which the debtor manages the main part of its business operation or other affairs. This is the place where persons dealing w/ the debtor would normally look for credit info, and is the appropriate place for filing….” § 9-307, Cmt 2.   * May be obvious where the chief executive office is located. * If not, it may be possible to narrow the likely options to 2 or 3 states.   When a doubt arises, it would be rare that there could be more than two possibilities. A SP in such a case may protect itself by perfecting under the law of each possible jurisdiction.” § 9-307, Cmt 2. |

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| **Problem 9.4** | |
| * *Where should the “searcher” of the records perform his search?* | * A searcher should search where the SP should file. (i.e., A searcher should search for a possible filing only in those filing systems where a filing would have to be made if it were to be effective.) Since Cashmore is an individual whose principal residence is IL, a SP should file in the Office of the Secretary of State of IL. So, Stringer should *search* the filings in the Office of the Secretary of State of IL. |

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| For *Miller*, pp. 138-141, substitute the District Court opinion (on Stanley)  Compare UCC § 9-503 w/ the revised TX version of § 9-503 (on STANLEY)  Search Logic Test §9-506(c)  Search Methodology [TX Admin. Code §95.503](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&amp;app=9&amp;p_dir=&amp;p_rloc=&amp;p_tloc=&amp;p_ploc=&amp;pg=1&amp;p_tac=&amp;ti=1&amp;pt=4&amp;ch=95&amp;rl=503%22%3Ehttp://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&amp;app=9&amp;p_dir=&amp;p_rloc=&amp;p_tloc=&amp;p_ploc=&amp;pg=1&amp;p_tac=&amp;ti=1&amp;pt=4&amp;ch=95&amp;rl=503)  Browse the UCC Administrative Rules on the Secretary of State website |
|  |

Perfection by Filing

* **Attachment:** makes the SI enforceable against debtor **§ 9-203**
  + If debtor defaults 🡪 SP can take possession of the collateral and enforce its rights against it **§ 9-609**
  + But a SP also wants its SI protected against the claims of 3P to the collateral.
  + Perfection is important for that purpose, for an unperfected SI is subordinate to the claims of many rivals, especially the bankruptcy trustee.
    - See § 9-317
      * “Lien creditor” includes “a trustee in bankruptcy from the date of the filing of the petition.” **§ 9-102(a)(52)**
* **Perfection & Priority**
  + **Basic lien priority principle**: Liens rank according to order they were created
  + **The planning issue**: A creditor must be able to know when it extends credit how it will fare in a priority contest.
  + **The statutory solution**: Priority is almost always a function of whether a creditor has taken the appropriate steps to make public the existence of one’s lien.
* **Perfection & Article 9**
  + The steps for making a lien public *i.e.,* steps req’d to perfect a SI – vary as a function of the kind of collateral
  + In Art. 9, the main methods for doing so are:
    - Filing a FS in a public place (usually the SOS office) \*Most common method **§ 9-310(a)**
    - SP taking possession of the collateral
    - SP taking control of the collateral
  + **Main idea**: Perfection involves some steps by which those who might deal w/ the debtor’s property can learn that someone may claim a SI in that property.

Where to file the Financing Statement?

* **General Rule**: The law of **debtor’s location** governs. A debtor’s location depends on debtor’s nature **§ 9-301(1)**
  + Individual **§ 9-307(b)(1)**
  + Non-registered Organization **§ 9-307(b)(2), (3)**
  + Registered Organization **§ 9-307(e)**
    - * A registered organization that’s organized under a law of a state is located in that state **§ 9-307(e)**

A debtor that’s an organization and has only 1 place of business is located at the place of business **§ 9-307(b)(2)**

A debtor that’s an organization & has <1 place of business is located at its chief executive office **§ 9-307(b)(3)**

* + - * + **Organization**: A person other than an individual  **§ 1-201(b)(25)**
        + **Registered organization**: **§ 9-102(b)(70)**  
          An organization organized solely under the law of a single State **or**   
          the US and as to which the State or the US must maintain a public record showing the org to have been organized

Exceptions

* **1. Exception for Non-US Debtors**
  + - * Whether the foreign law generally requires info concerning the existence of a non-possessory SI to be made generally available in a filing, recording, or registration system as a condition or result of the SI’s obtaining priority over the rights of a lien creditor w/ respect to the collateral. §9-307(c). If not, then the debtor is deemed located in the District of Columbia, so the SP must file in the D.C. § 9-307(c)
      * 9-307(c) will override §9-307(b) only if where the foreign jsd directs to a non-UCC-like registration system.
        + Mexico doesn’t meet that test 🡪 File in DC. *Dayca & Hackett, LLC v. Del Monte Fresh Produce, Inc*

May be limited to pre-2009 transactions

* ***2. Exception for As-extracted collateral***
  + - The **local law of the jsd where the wellhead or minehead is located** governs perfection, the effect of perfection or nonperfection, and the priority of a SI in as-extracted collateral **§ 9-301(4)**
    - **Applies:** Oil and Gas Accounts = “As-extracted collateral” **§ 9-102(a)(6)**
    - Filing remains effective after extraction **§ 9-501, Cmt 3**
    - Indicate that the collateral is as-extracted collateral
    - FS must include add’l information **§ 9-502(b)**
* **3. Exception for Real Estate**
  + - File in the office where a mortgage on the real property would be filed. **§ 9-501(a)(1)(A)**
      * Indicate that FS is to be filed in real estate records
    - Describe the collateral (real property)
      * Sufficient if it “reasonably identifies” what is described **§ 9-108(a)**
      * The description need not be metes and bounds **§ 9-502, Cmt 5**
* **4. Exception for Agricultural Lien**
  + - If the local state law governs perfection of a SI or agricultural lien 🡪 file a FS to perfect the SI or agricultural lien in:
      * + The designated office to file/record a record of a mortgage on the real property, if:

The collateral is as-extracted collateral or timber to be cut **or § 9-301(3)(B)**

FS is filed as a fixture filing & the collateral is goods that are to become fixtures **or § 9-301(3)(A)**

In all other cases 🡪 Office of the SOS

including a case in which the collateral is goods that are or will become fixtures **&**

FS is not filed as a fixture filing

* **5. Fixtures § 9-301(3)(A)**
* **6. Timber to be Cut § 9-301(3)(B)**

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| **Problem 9.5** | |
| * *(a) Where should the bank file?* | * Debtor is a registered organization. A registered organization that is organized under a law of a state is located in that state. § 9-307(e). Here, the debtor is incorporated under the law of DE; therefore, debtor is located in DE. In conclusion, the bank may file in the Office of the Secretary of State of Delaware. § 9-501. |
| * *(b) Any different result if the collateral were “all equipment, now held or hereafter acquired”?* | * No. The rule of is that the law governing perfection of SI interests is the law of the jurisdiction where the debtor is located. § 9-301(1). The type of collateral is not relevant. The law of a single jsd governs perfection w/ respect to most types of collateral, *both tangible and intangible*.” § 9-301(1), Cmt 4. * This approach departs from that of the former Article 9, which stated different rules for different kinds of collateral. But collateral might move after FS was filed, causing a change in governing law. Presented difficult collateral classification issues. |

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| **Problem 9.6** | |
| * (a) What kind of entity is Do-All Ltd.? | * Whether debtor is a registered organization. *Organization* means a person other than an individual.” § 1-201(b)(25). *Registered* *organization* means an organization organized solely *under the law of a single State or the US* and as to which the State or the US must maintain a public record showing the organization to have been organized. § 9-102(b)(70). Here, debtor is not an individual and is governed and incorporated under the law of the state of NY. Therefore, debtor is a registered organization. * Whether the action should be filed in NY. An action should be filed in the location of the debtor. §9-301. A registered organization that is organized under a law of a state, is located in that state. § 9-307(e). Here, debtor is incorporated under the law of NY; therefore, the debtors’ location is in NY. Therefore, the action should be filed in NY. * Where is a non-registered organization located? A debtor that is an organization and has only one place of business is located at the place of business. § 9-307(b)(2). A debtor that is an organization and has more than one place of business is located at its chief executive office. § 9-307(b)(3). The chief executive office is in NYC, so the law of the State of NY will apply. Therefore, file in the Office of the Secretary of State of NY. |
| * *(b) What kind of entity is Do-All?* | * It’s still a non-registered organization. * *Where is it located?* Chief executive office is in Toronto, Ontario, Canada. * *What principle governs now?* * “ (b) applies only if a debtor’s residence, place of business, or chief executive office, as applicable, is located in a jsd whose law generally requires info concerning the existence of a nonpossessory SI interest to be made generally available in a filing, recording, or registration system as a condition or result of the SI’s obtaining priority over the rights of a lien creditor w/ respect to the collateral. If (b) doesn’t apply, the debtor is located in the District of Columbia.” § 9-307(c). |
| *(c)* *Incorporated in Mexico; headquartered in Mexico City. What do we need to know? Why?* *How do we reach this result? (Assume Mex ≠ UCC.)* | * The general rule is that the law of debtor’s location governs. § 9-301(1). Here, debtor is an organization b/c it is not an individual. A *registered organization* means an organization organized solely under the law of a single State or the US § 9-102(b)(70). The debtor is not a registered organization, b/c it is organized under the law of Mexico. * Non-registered organizations w/ multiple places of business, is located at its chief executive office. § 9-307(b)(3). Here, the main headquarters appear to be the chief executive office, which is located in Mexico City. Thus, the law of Mexico would apply. * However, § 9-307(c) overrides § 9-307(b) where the latter directs to a jsd w/o a UCC-like registration system. Here, the chief executive office is NOT located in a UCC-like jsd (Mexico), therefore the override applies. Thus, debtor will be considered to be located in in D.C. Thus, Mexico is where the action should be filed * Whether Mexican law generally requires info concerning the existence of a non-possessory SI to be made generally available in a filing, recording, or registration system as a condition or result of the SI’s obtaining priority over the rights of a lien creditor w/ respect to the collateral. §9-307(c). If not, then the debtor is deemed located in the District of Columbia, so the SP must file in the D.C. in pre-2009 filings. § 9-307(c); *Dayca & Hackett, LLC.* |
| * *Assume Mexican law doesn’t satisfy the § 9-307(c) test. Incorporated in Mexico; headquartered in New York City. Where should Bank file? Why?* | * The general rule is that the law of the debtor’s location governs. § 9-301(1). This debtor is an organization, b/c it is not an individual. However, debtor is not a registered organization. Non-registered organizations w/ more than one place of business will be deemed to be located in the jsd where its chief executive office is located. § 9-307(b)(3). Here, the use of the term “headquarters” suggests that chief executive office is in NY. Thus, the law of NY applies. But § 9-307(c) overrides § 9-307(b) where the latter directs to a jsd w/o a UCC-like registration system. Here, the chief executive office is locatedin a UCC-like jsd (NY), so the override doesn’t apply. |

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| **Hypothetical Question** | |
| * *(a) Must Sooner State Bank do anything special w/ the FS?* | * Oil and Accounts is considered to be *as-extracted collateral* § 9-102(a)(6). FS must include add’l info. § 9-502(b). The bank must indicate that the collateral is as-extracted collateral and indicate that FS is to be filed in real estate records. The bank should describe the real property by to the extent where the description reasonably identifies the property. §9-108(a) |
| * *(b)* Where should Sooner State Bank file the FS? | * The general rule is that an action should be filed where the debtor is located. § 9-301. However, an exception applies for *as-extracted collateral,* such as for oil and gas. Here, the collateral is as-extracted collateral b/c it’s oil and gas. Therefore, the bank should file in TX. So, Texas law will control, because the wellhead is in TX. |
| * *(c)* What will TX law tell the bank to do? | * File in the office where a mortgage on the real property would be filed. § 9-501(a)(1)(A) |

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| * **Problem 10.1** | |
| *(a) What name should appear on the FS? Where?* | Louie Glitz; Box 1b |

Contents of a Financing Statement

Analysis !!!

* **A FS must: § 9-502(a)**
  + Provide the debtor’s name **&**
  + Provide the SP’s name or S’s representative **&**
  + Indicate the collateral covered by the FS

1. A FS sufficiently provides the Name of the Debtor…

* A FS sufficiently provides the name of the debtor:
  + - **If debtor is a registered organization** 🡪 only if it provides the name of the debtor indicated on the public record of the

debtor’s JSD it was organized

* + - ***In other cases 🡪***
      * **If debtor has a name** 🡪 Must provide the individual or organization name of the debtor
      * **If debtor doesn’t have a name 🡪** Must provide the names of partners, members, associates, or other persons comprising the debtor.
* **A FS that…**
  + …provides only the debtor’s trade name 🡪 Insufficient b/c doesn’t sufficiently provide the debtor’s name **§ 9-503(c)**
  + …provides the debtor’s name but not the debtor’s trade name 🡪 Sufficient **§ 9-503(a)**
  + …provides the name of <1 debtor and the name of <1 SP 🡪 Sufficient
  + …fails to indicate the representative capacity of a SP or representative of a SP 🡪 Sufficient
* **TX § 9-503(1) / 2012**
  + FS sufficiently provides the name of the debtor […] (1) if the debtor is a registered organization 🡪 only ifthe FS provides the name that is stated to be the registered organization’s name on the public organic record most recently filed w/ or issued or enacted by the registered orgs jsdof org which purports to state, amend, or restate the registered orgs name….
* A filing office that accepts written records 🡪 can’t refuse to accept a written initial FS in the standard form
* **Texas Search Logic**
  + No distinction b/w upper and lowercase
  + Punctuation & accents ignored
  + Organizational words disregarded
  + The result: See slide (they do not exactly match)

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| **Problem 10.2** | |
| (a) What name should be used for a partnership? | When the debtor is not a registered organization, a FS sufficiently provides the name of the debtor […] ~~(A~~*~~) if the debtor has a name~~*~~, only if the FS provides the organizational name of the debtor; and~~ (B) *if the debtor doesn’t have a name*, only if it provides the names of the partners, members, associates, or other persons comprising the debtor, in a manner that each name provided would be sufficient if the person named were the debtor. § 9-503(a)(46).  Here, the debtor is not a registered org and the partnership has no name. Therefore, the FS will sufficiently describe the name of the debtor if it includes the names of “Dominique, Gabriela” and “Rivera, Rauol” since they are the partners. |
| *(a)(cont)If the partnership has a name, where will we find it?* | Presumably, in the partnership agreement itself. |
| *(b) “Gabriella’s Place”* | A FS is clearly deficient it it provides only the trade name, as if it were the name of the org. § 9-503(c). Here, the FS stated the trade name “Gabriella’s Place” on the FS as if it was the name of the org, b/c the true name of the org was ###. Therefore, |

Errors or Omissions

* **General Rule:** A FS substantially satisfying the req’ts is effective, even if it has minor errors or omissions *unless* they make the FS seriously misleading. A FS that fails sufficiently to provide the name of the debtor is seriously misleading.
* **Exception:** if a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, would disclose a FS that fails to sufficiently provide the name of the debtor 🡪 the name provided doesn’t make the FS seriously misleading.

Identification of the Collateral

3. A FS sufficiently Indicates the collateral covered by the FS

* A FS sufficiently indicates collateral that it covers if it provides: **§ 9-504;** *see below*
  + A description of the collateral sufficient for the SA **or**
  + An indication that the FS covers all assets or all personal prop
* **General Rule**
* A FS is sufficient only if it “indicates the collateral covered by the” FS **§ 9-502(a)(1)**
* A FS sufficiently indicates the collateral that it covers if the FS provides: **§ 9-504**
  + A description of the collateral pursuant to § 9-108 **or**
  + An indication that the FS covers all assets or all personal property
    - *So… can say A description of the collateral that describes it as “all assets”, “all the debtor’s assets” “all the debtor’s personal property”, etc is sufficient for purposes of authenticating the FS.*
    - *Recall, that the “all assets” description is INSUFFICIENT for the SA* **!!!**
* **Personal or Real Property**
  + A description of personal or real property is sufficient if it reasonably identifies what is described. **§ 9-108(a)**
  + UCC rejects requiring specificity in detail
  + SA and FS perform different roles.
    - * **SA**: ***creates*** the SI in favor of SP. The description must specify just which property is subject to that interest.
      * **FS**: is only a “notice filing” indicating only that a person *may* have an interest in the collateral indicated.

**§ 9-502, Cm 2, ¶¶ 1,2**

**§ 9-504, Comment 2, ¶ 1**

**Notice Filing**

* + A FS sufficiently indicates collateral claimed to be covered by the FS if it satisfies the purpose of conditioning perfection on the filing of a FS
    - i.e., if it provides notice that a person may have a SI in the collateral claimed **§ 9-504, Cmt 2**
  + Notice itself *indicates merely that a person may have a SI in the collateral indicated*. Further inquiry from the parties is necessary to disclose the complete state of affairs. **§ 9-502, Cmt 2**

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| **Problem 10.3** | |
| *(c) “Esq.” in suffix box*  *What are the implications of this practice?* | “(2) Titles, prefixes (e.g., “Ms.”) and suffixes or indications of status (e.g., “M.D.”) are not typically part of a debtor’s name. However, when entering a “name” into the UCC information management system, the data will be entered exactly as they appear.” Tex. Admin. Code § 95.302(3) |
| *(a) Miller under Alternative A (adopted in TX)* | *Only* Bennie A. Miller would be sufficient. If the debtor is an individual to whom this state has issued a DL that hasn’t expired, only if the FS provides the name of the individual which is indicated on the DL. |
| *Miller under Alternative B* |  |

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| **TX Hypotheticals** | |
| *Rodger House Roger House* | Under the Tex. Admn. Code there is no name equivalence. However, the fact that both names begin w/ “R” may save it |
| *Driver’s license: Catherine Andrea Borden*  *FS: Kathy Borden* | Here, the first names would be treated as equivalent in the search b/c there is a name equivalent listed in the [TAC § 9-503(1)(H) tables](http://info.sos.state.tx.us/fids/201202984-2.html) |

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| **Problem 10.6** | |
| * (a) * Search under kniftyknitsandknacks * Indexed under niftyknitsandknacks | They do not exactly match |
| *(b) Nifty Knits and Knacks, Incorporated* | Using the erroneous one will be harmless |
| *(c) Knifty Knits & Knacks, Incorporated* | Does it contain the debtor’s name? No  Will it be seriously misleading? No, b/c the search logic substitutes “and” for the ampersand |

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| ***In re* C.W. Mining Company** | |
| *Debtor’s legal name on the public record?* | CW Mining Co. |
| *Debtor’s name appearing on the FS?* | CW Mining Co. |
| *Does the FS contain the debtor’s name?* | No! A FS sufficiently provides the name of the debtor: (1) if the debtor is a registered org… *only if*the FS provides the name that is stated to be the registered org’s name on the public organic record most recently filed w/ or issued or enacted by the registered org’s jsd of org which purports to state, amend, or restate the registered org’s name. § 9-503(a)(1) |
| *Is the error seriously misleading?* | Yes. If a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, if any, would disclose a FS that fails sufficiently to provide the name of the debtor in accordance w/ § 9-503(a), the name provided doesn’t make the FS seriously misleading. § 9-506(c).  But under the Utah search logic, a search for “C. W. Mining Company” ***doesn’t*** produce a FS indexed under “CW Mining Company.”   * + The filing is not saved under § 9-506(c).   + So, “a FS that fails sufficiently to provide the name of the debtor in accordance w/ Section 9-503(a) is seriously misleading.” § 9-506(b). |
| *Under TX Law?* | * **Legal name**: C. W. Mining Company * **Financing Statement**: CW Mining Company * *Does the FS contain the debtor’s name?* No. C.W. Mining Company ≠ CW Mining Company * *Is the error seriously misleading?*   + Texas search logic     - Not case sensitive     - Ignores punctuation and accents     - Ignores “noise” words, including “company” and “co”   + So cwmining = cwmining |

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| **Problem 10.7** | |
| *(a) “all pianos owned by the debtor”* | …sufficient, whether or not it is specific, if it reasonably identifies what’s described. § 9-108(a). A description reasonably identifies the collateral if it identifies the collateral by: (2) category. § 9-108(b)(2): |
| *(b) “all equipment”* | …sufficient, whether or not it is specific, if it reasonably identifies what is described.” § 9-108(a). A description reasonably identifies the collateral if it identifies the collateral by: (3) … a type of collateral defined in the UCC. § 9-108(b)(3): |
| *(c) “all inventory, now held or hereafter acquired”* | “reasonably identifies”; § 9-108(b)(3): “by: (3) … a type of collateral defined in the UCC.” § 9-108(a): The after-acquired property clause is permissible but unnecessary |
| *(d) “all inventory”* | reasonably identifies”; § 9-108(b)(3): “by: (3) … a type of collateral defined in the UCC § 9-108(a): The after-acquired property clause is permissible but unnecessary |
| *(e) “all of debtor’s assets”* | A FS sufficiently indicates the collateral that it covers if the financing statement provides: (2) an indication that the financing statement covers all assets or all personal property. § 9-504(2) |
| *(f) “ one tractor, International Haybaler, serial # 1234576,” when the serial number of the debtor’s sole tractor is actually #1234567* | The collateral is described improperly.  But is it seriously misleading? § 9-506(a). Debtor has only one tractor, and it is an International Haybaler. |

Planning Problem, PT III – Financing Statement

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| **Planning Problem, PT III – Financing Statement**  **Anders Labs= debtor; Pacifica=SP** | |
| * *(A) Which party or parties should authorize filing of the FS?* | The debtor authorizes the filing of the FS. §9-509(a). Authenticating the SA (signing it) itself authorizes the FS |
| * *(B) Where should Cal-West file its FSs? Explain.* | The FS should be filed in the Office of the Secretary of State of the jsd in which it |
| * *(C) What name or names should Cal-West use for the debtor(s) in the FS(s)? Explain.* | * A FS sufficiently provides the name of the debtor […] If debtor is a registered organization 🡪 only if it provides the name of the debtor indicated on the public record of the debtor’s jsd it was organized. §9-503(a)(1). Thus, they should use the name “Anders Labs”, since that is the name that is on the public organic record. |
| * *(D) Draft appropriate language regarding the collateral for a valid or sufficient FS. Then explain why the language you have drafted is legally sufficient.* | Could simply say *“all assets”, “all the debtors assets”* A FS sufficiently indicates the collateral that it covers if it provides a (1) description of the collateral **or** if it indicates it covers all assets. § 9-504  *Note: “all assets”* is insufficient for the SA but sufficient for the FS |

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| **In re: Pickle Logging** | |
| *Issue?* | Whether Deere Credit had a perfected SI in the Model skidder, Serial # DW…, where both the SA & the FS described the collateral as a model 648G skidder Serial # DW…. |
| *The Arguments* | * A description of personal or real property is sufficient if it reasonably identifies what is described. § 9-108(a). A description is reasonably identifiable it if it is not seriously misleading. Specificity isn’t req’d. |
| *Holding* | * The identification is seriously misleading, so the SI is unperfected |
| *Rationale* |  |
| *If the description in the SA and FS says:*  *648 skidder S/N #####, is that ok* | * Whether the description can identify what is covered vs. what is not covered. Here, the one digit error can probably be resolved. This one can probably be saved. |

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| **Problem 10.8** | |
| *Is this sufficient? “Certain equipment as listed in Exhibit A hereto” Exhibit A is not attached, but SP can show the document prepared at that time. Perfected?* | It hould be adequate b/c the term “equipment” was used notwithstanding the blunder. Equipment gives enough info to go look for it. |

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| **Problem 10.9** | |
| *(a) “all pianos owned by the debtor”* | …sufficient, whether or not it is specific, if it reasonably identifies what’s described. § 9-108(a). A description reasonably identifies the collateral if it identifies the collateral by: (2) category.” § 9-108(b)(2) |
| *(b) “all musical equipment”* | It has an interest in pianos and that SI is perfected. Here, the SI covers the pianos, but b/c the pianos are a musical instrument, the FS perfects the pianos, and thus it covers nothing else. It has no SI in the tubas and trombones. |
| *(c) “all trombones & tubas”* | The FS would still be effective as to the SI later created & so that SI wouldn’t arise until that SA was created. (or something like that…) |

Persons Entitled to File a Record

* **(for authentication a FS) § 9-509(a)**
* A person may file an initial FS, amendment that adds collateral covered by a FS, or amendment that adds a debtor to a FS only if:
  + The debtor authorizes the filing in an authenticated record **or**
* **Security Agreement as Authorization §9-509(b)**
  + By authenticating or becoming bound as debtor by a SA, a debtor or new debtor authorizes the filing of an initial FS, and an amendment, covering:
    - The collateral described in the SA **&**
    - Property that becomes collateral whether or not the SA expressly covers proceeds.

Effectiveness of Filing

* + Except as otherwise provided, communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office 🡪 constitutes filing
  + **Filing doesn’t occur w/ respect to a record that is a filing office refuses to accept b/c:**
    - * The record is not communicated by a method or medium of communication authorized;
      * An amount equal to or greater than the applicable filing fee is not tendered;
      * The filing office is unable to index the record b/c:

If an initial FS 🡪 record doesn’t provide debtor’s name

If an amendment or correction statement 🡪 the record:

Doesn’t identify the initial FS as req’d **or**

Identifies an initial FS whose effectiveness has lapsed

The record doesn’t identify debtor’s last name **or**

The record doesn’t provide a sufficient description of the real property to which it relates;

* + - * The record doesn’t provide a name and mailing address for the SP of record;
      * **In the case of an initial FS or an amendment that provides a name of a debtor which was not previously provided in the FS to which the amendment relates 🡪 the record doesn’t**

Provide a mailing address for the debtor

Indicate whether the debtor is an individual or organization **or**

If the FS indicates that the debtor is an organization, provide

A type of organization for the debtor

A JSD of organization for the debtor **or**

An organizational identification # for the debtor or indicate that the debtor has none

* + - * + In the case of an assignment reflected in an initial FS or an amendment 🡪 the record doesn’t provide a name and mailing address for the assignee; or
        + If a continuation statement 🡪 the record is not filed w/in the 6-month period
      * For purposes of (b):

A record doesn’t provide info if the filing office is unable to read or decipher the info **&**

A record that doesn’t indicate it’s an amendment or identify an initial FS to which it relates 🡪 is an initial FS.

* + - * A record that is communicated to the filing office w/ tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in (b) 🡪 is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

Effect of Indexing Errors

* The failure of the filing office to index a record correctly doesn’t affect the effectiveness of the filed record.
  + (a) Hand delivery
    - Secretary of State  
      Uniform Commercial Code  
      1019 Brazos, Suite 505 (or Room B-13 for delivery service)  
      Austin, TX 78701
    - Filing Office is open M-F, 8-5, except for state holidays
  + (b) Mail delivery
    - Secretary of StateUniform Commercial Code  
      PO Box 13193Austin, TX 78711-3193
  + (c) e- filing
    - SOSDirect online
      * Must have an online account or call to apply for an account.
      * Free
      * Received and processed 24/7
    - Telefacsimile.
      * (512) 463-1423
      * Received 24/7; processed during regular business hours
  + (d) Fees
    - Paper filing **or** Filing in Person
      * 2 pages or less – $15
      * 3 pages or more – $30
    - Fax
      * 2 pages or less - $32
      * 3 pages or more - $47
    - e-filing through SOSDirect
      * $5

Claim Concerning Inaccurate or Wrongfully Filed Record

* A person may file in the filing office a correction statement w/ respect to a record indexed there under the person’s name if the person believes that the record is inaccurate or was wrongfully filed
* Fling a correction statement 🡪 doesn’t affect the effectiveness of an initial FS or other filed record.

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| **Problem 11.1** | |
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| **Problem 11.2** | |
| (a) No corp listed in corporate records – reject? | No. Filing office *shall refuse to accept* a record for filing for a reason set forth in § 9-516(b) and may refuse to accept a record for filing *only for* a reason set forth in § 9-516(b).” § 9-520(a). § 9-516(b) doesn’t include this reason. *Cf.* § 9-516(b)(3)(A). |
| (b) Effect if accepted? | Permissible, indeed obligatory, to accept. § 9-520(a).  But FS insufficient if name is erroneous, § 9-502(a), and if the error is seriously misleading, § 9-506(c). |
| (c) Filed correctly but indexed under incorrect name | Failure of the filing office to index a record correctly doesn’t affect the effectiveness of the filed record. § 9-517. |

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| **Problem 11.3** | |
| (a) FS fails to indicate jsd of debtor’s incorporation. *Must* the filing officer accept this filing? | No. The filing office *may* refuse a FS w/ a § 9-516(b) defect. § 9-520(a). § 9-516(b)(5)(C) requires the jsd of the debtor’s org |
| (b) *May* the filing officer accept it? | No. The filing office *must* refuse a FS w/ a § 9-516(b) defect. § 9-520(a) |
| (c) What effect if the filing officer accepts? | Communication of a record to a filing office and tender of the filing fee ***or acceptance of the record by the filing office*** constitutes filing. § 9-516(a).  A FS is sufficient only if it…. § 9-502(a). |

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| **Problem 11.4** | |
| * Identifies SP as “Loan Star” rather than “Lone Star”; include correct address; filing office accepts. Effect? | * Filing office may reject only for § 9-516(b) reasons. § 9-520(a).   + § 9-516(b)(4) requires a name and mailing address for the SP, and this FS contains them (even though the name is wrong).   + Therefore, the filing office should have accepted it, as it did. |
| Whether the FS is effective is governed by § 9-502(a). | * It fails to contain the SP’s name. * But § 9-506(a) will protect it, if the error is minor and not seriously misleading.   + Accuracy in the SP’s name is not as crucial as w/ the debtor’s name, because FS is indexed under debtor’s name.   + Correct address permits contacting SP for info. |

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| **United States v. Orrego** | |
| Was Orrego authorized to file the FSs as to the judge and the others? | No. A person may file a FS only if:  (1) the debtor authorizes the filing in an authenticated writing. § 9-509(a)(1).  (2) the debtor authenticates or becomes bound by a security agreement. § 9-509(b) |
| What legal effect did the unauthorized filings have? | None. A filed record is effective only to the extent that it was filed by a person that may file it under § 9-509.” § 9-510(a) |
| What Article 9 remedies are available for filing an unauthorized FS? | * Actual damages: § 9-625(b). * Statutory penalty ($500): § 9-625(e)(3). * Correction statement: § 9-518(a). |
| * Did the NY SOS act improperly in accepting the FSs for filing? | * No! The filing office may reject a filing only for a reason set out in § 9-515(b). § 9-520(a). That the FS is unauthorized or not genuine is not a ground listed in § 9-516(b). |

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| **Problem 11.5** | |
| *(a) When does the bank’s SI attach?* | A SI attaches when value has been given, the debtor has rights in the collateral, and the debtor has authenticated a security agreement describing the collateral. § 9-203(b). Here, the debtor had rights in the collateral in July and earlier. Value was given when the SP made a commitment on Sept. 1. SA authenticated SA on Sept. 1. Therefore, attachment occurred on Sept. 1. |
| *(b) When does the bank’s FS become effective?* | Sept 10. § 9-516(a); § 9-102(b)(18)(A). |
| *(c) When does the bank’s SI become perfected?* | On Sept 10. A SI is perfected if it has attached and all of the applicable req’ts for perfection … have been satisfied. § 9-308(a). |

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| **Problem 11.6** | |
| *(a) When does the bank’s SI attach?* | A SI attaches when value has been given, the debtor has rights in the collateral, and the debtor has authenticated a security agreement describing the collateral. § 9-203(b). Here, the debtor had rights in the collateral in July and earlier. Value was given when the SP made a commitment on Sept. 1. SA authenticated SA on Sept. 1. Therefore, attachment occurred on Sept. 1. |
| *(b) When does the bank’s FS become effective?* | Becomes effective *as a filing o*n July 8. § 9-516(a). |
| *(c) When does the bank’s SI become perfected?* | On Sept 10. A SI is perfected if it has attached and all of the applicable req’ts for perfection … have been satisfied.” § 9-308(a). |

Acceptance and Refusal to Accept Record

* A filing office shall refuse to accept a record for filing for a reason set forth previously. It’s the only time they may refuse to accept a record.
* **If a filing office refuses to accept a record for filing** 🡪 it shall communicate to the person that presented the record (1) the reason for refusal & (2) the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing-office rule but in not <2 business days after the filing office receives the record.

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| **Problem 12.1** | |
| * *(a) Filing perfects SI when it attaches on 9/1/09. How long will the FS remain effective?* | * A FS is effective for 5 yrs from the date of filing. § 9-515(a) A SI perfects when all the req’ts for attachment plus all the steps for perfection have been satisfied. Here, the SI perfected on July 1 and it was filed on 7/9/2014. Therefore, the FS will cease to be effective until 7/10/2015. |
| * *(b) Continuation statement would be effective, b/c it ‘s made w/in the 6-month period specified in § 9-515(d). How long will the FS remain effective?* | * A FS is effective for 5 yrs from the date of filing. § 9-515(a) A SI perfects when all the req’ts for attachment plus all the steps for perfection have been satisfied. However, a continuation statement will extend the effectiveness of the initial FS for an additional 5 years. § 9-515(e). Here, the SI perfected on 9/1/2009 and was filed on 7/8/2009. The effectiveness of the initial filing statement was effective until 7/10/2014, however the continuation statement extends the effectiveness of the initial FS an add’l 5 years. Therefore, the filing statement will remain effective until 7/10/19. |
| * *(c) Why does Art. 9 provide for the SP’s extending the effectiveness of the FS, evidently an unlimited number of times?* | * Communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing. § 9-515(a). Here, the subsequent filing of the continuation statement has no effect because the FS was filed too late. §§ 9-515(d); 9-510(c). Thus, FS will lapse at the end of 7/10/14. § 9-515(c). |
| * *(d) Continuation statement was filed too early. § 9-515(d).* | * Communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing. § 9-515(a). Here, the subsequent filing of the continuation statement has no effect, even if the filing office accepts it. § 9-510(c); Cmt 4 |
| * *(e) Suppose that instead the continuation statement was filed on 1/5/2014. Why is Art. 9 so harsh on the “premature” continuation statement?* | * Communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing. § 9-515(a). Here, the subsequent filing of the continuation statement … The original initial FS, filed on 7/08/2009, was accepted on 7/10/2009, resulting in it’s perfection that day. The initial FS lapses on 7/10/14. The new initial FS (5/13/14) is not effective as a continuation statement. § 9-515(c). The new FS is effective as a new FS only. * *Beware! Last part might not be correct!* |

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| ***Barnes v. Turner, p. 167*** | |
| *What conduct of attorney Turner constitutes the malpractice?* | Turner failed to safeguard the perfection of Barnes’s SI. Since the filed FS statement lapsed in 5 years but the length of the financing period was 10 years, he was obligated *either:*   * + To inform Barnes of the need to file a continuation statement in order to extend the effectiveness of the initial FS (so Barnes could take steps to extend the effectiveness of his initial FS), or   + To file the continuation statement himself w/in the 6-month period preceding the lapse of the initial FS. |

Later Filings and Changes in the Situation

Duration & Effectiveness of the FS

* A FS is effective for 5 years after the date of filing. **§ 9-515(a)**
* Effectiveness lapses on the expiration of the period of its effectiveness unless a continuation statement is filed **before the lapse**
  + Upon lapse 🡪 a FS ceases to be effective. Any SI that was perfected by the FS becomes unperfected
    - unless the SI is perfected otherwise.
  + If SI becomes unperfected upon lapse 🡪 Deemed to never have perfected as against a purchaser of the collateral for value
  + A continuation statement may be filed only w/in 6 months before the expiration of the 5 yrs.
    - If not filed w/in the 6 month period 🡪 It’s ineffective
  + Upon timely filing of a continuation statement, the effectiveness of the initial FS continues for 5 years commencing on the day on which the FS would have become ineffective in the absence of the filing. Upon expiration of the 5-year period, the FS lapses, unless, before the lapse, another continuation statement is filed. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial FS.

*Effectiveness of a FS lapses on the expiration of the period of its effectiveness. Upon lapse, a FS ceases to be effective and any SI that was perfected by the FS becomes unperfected.*

Amendments of FS

* **Who can file certain amendments**
  + A person may file an amendment other than an amendment that adds collateral covered by a FS or an amendment that adds a debtor to a FS only if SP of record authorizes the filing
* **Amendment of information in FS**
  + A person may add or delete a collateral covered by, continue or terminate the effectiveness of, or otherwise amend the info provided in a FS by filing an amendment that identifies, by its file number, the initial FS to which the amendment relates;
  + Filing an amendment doesn’t extend the period of effectiveness of the FS
  + A FS that’s amended by an amendment that **adds collateral** is effective as to the added collateral only from the date of the filing of the amendment
  + A FS that’s amended by an amendment that **adds a debtor** is effective as to the added debtor only from the date of the filing of the amendment
  + Amendment is ineffective to the extent it:
    - Purports to delete all debtors or SP’s and fails to provide the name of a debtor to be covered by the FS or a new SP

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| **Problem 12.2** | |
| * *What further investigation and “paperwork”?* | * Search UCC records to determine whether there’sanother SI in “Untitled #3.” * If no problem, must amend the SA to provide for a SI in “Untitled #3,” the new collateral. |
| * *What additional filing?* | * Must file an amendment to the initial FS. *See*  § 9-521(b). * Number of initial FS in Box 1a and a revised Indication of Collateral in Box 8. Check the 3rd box at the top of Box 8. |
| * *What legal consequences?* | * No perfection as to #1 (indeed, no SI if amended SA omits it). * Perfected as of amendment as to #3. * Amendment doesn’t extend lapse date of initial FS. § 9-512(b). |

Termination Statement

* + A SP shall cause the SP of record for a FS to file a termination statement for the FS if the FS covers consumer goods **&**
    - No obligation secured by collateral covered by FS and no obligation to give value **or**
    - The debtor did not authorize the filing of initial FS
  + A SP shall cause the SP of record to file the termination statement the earlier of:
    - *w/in 1 month after there is no obligation secured* by the collateral and no commitment to make an advance 🡪 incur an obligation, or otherwise give value **or**
    - w/in 20 days after the SP receives an authenticated demand from a debtor 🡪 SP shall cause the SP of record for a FS to send to the debtor a termination statement for the FS or file the termination statement in the filing office if there’s no obligation secured by the collateral and no commitment to make and advance, incur an obligation, or otherwise give value;
  + Upon filing a termination statement 🡪 FS to which the termination statement relates ceases to be effective

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| **Problem 12.3** | |
| * *(a) Is DFS obligated to file a termination statement?* | * Collateral classification: consumer goods. § 9-513(a) and § 9-513(b) * *Why should the burden fall on the SP?* They understand the role of the FS. Therefore, they’re the one who should take the initiative once it’s paid off. Remedy: § 9-625(e) |
| * *(b) Suppose collateral was used in office not home?* | * The collateral will no longer be classified as consumer goods. Instead, the collateral will be classified as equipment. § 9-513(c) |
| * *What does the Termination Statement look like?* | * Debtor may file a termination statement if SP fails to comply w/ its § 9-513 duties. N.B. § 9-509(d)(2) The debtor must make a written demand. § 9-521(b) Upon receipt of that demand, the SP must comply w/ its § 9-513 duties. |

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| **Problem 12.4** | |
| * *What risk is present w/ filed Termination Statement?* | * It might be bogus. Nothing prevents the debtor from filing the termination statement on its own, even though that filing would be unauthorized and (hence) ineffective. |
| * *What steps can SP take?* | * SP must investigate further by approaching the other SP. N.B. § 9-210. The SP shouldn’t ask the debtor. However, investigation may not be cost-justified in complex situations. |

Name Change

* **General Rule:** A FS isn’t rendered ineffective, if after it’s filed, the info in it becomes seriously misleading under § 9-506 **§ 9-507(b)**
* **Exception:** **…**unless the debtors name changes **§ 9-507(c)**
* **Reason:** Searchers can’t find a filed FS if debtors name changes
* **i.e.,** If a debtor changes their name 🡪 a filed FS becomes seriously misleading but is still effective. However, there is only a 4 month grace period, after which you must file an amendment to the FS. If you don’t file the amendment, it will no longer be considered effective.*it’s not effective after the 4 month period unless an amendment is filed*
* **What the § says**
* **The 4 month rule (a grace period)**
  + **Before or w/in 4 months after it changes** 🡪 FS is effective to perfect a SI in collateral acquired by the debtor **&**
  + **< 4 months after it changes** 🡪 FS is not effective to perfect a SI in collateral acquired by the debtor unless an amendment to the FS was filed w/in 4 months after it changes, which renders the FS not seriously misleading
* **If Debtor’s name change makes the filed FS seriously misleading…**
  + (1) the FS is effective to perfect a SI in collateral acquired by the debtor before, or w/in 4 months after, the change **&**
  + (2) the FS isn’t effective to perfect a SI in collateral acquired by the debtor <4 months after the change, unless an amendment to the FS renders the FS not seriously misleading is filed w/in 4 months after the change. § 9-507(c)
  + **In a Nutshell:** The sale of collateral doesn’t have any effect on the SI or the FS
    - SI continues in the hands of the transferee
    - Old FS still effective

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| **Problem 12.5** | |
| * *(a) Store relocates & changes its trade name* | * No need to amend FS or to file a new one b/c it’s the debtor’s location that matters, not location of the collateral. * *Debtor* (*i.e*., Louie) hasn’t changed *his* location, so there’s no need to re-file in NY. * *Debtor* (*i.e*., Louie) hasn’t changed *his* name, so there’s no need to amend the debtor’s name on the Connecticut FS. * *N.B.* A well-drafted SA still will prohibit relocation of the collateral w/o the SP’s consent. See Sample, ¶ 3(d): “Debtor represents, warrants and agrees that : …, except as otherwise provided herein, the collateral shall be kept at debtor’s address set forth herein ….” |
| * *(b) Store remains in CT, but Louie relocates to NY.* | * A SI perfected pursuant to the law of the jsd designated in § 9-301(1) … remains perfected until the earliest of: (2) the expiration of 4 months after a change of the debtor’s location to another jsd….” § 9-316(a)(2). SP must file a new initial FS *in NY* before the expiration of the 4-month period to avoid any gap in perfection. * *How can SP be sure it learns of the debtor’s relocation w/in the 4-month period?* In the SA, the SP could prohibit relocation w/o consent or require the debtor to notify of any move. * *But what if debtor, deliberately or otherwise, fails to do so? (e.g what if they file in 6 months, rather than the 4 month period)* If they re-file 2 months later, it perfects, but there’s an issue b/c there’s a gap where it wasn't’ perfected. * *But how to enforce this? Perhaps by some monitoring system? Visit? Check utility bills? How likely is this?* |

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| **Problem 12.6** | |
| * *What is the practical effect of a name change?* | * Searchers can’t find the filed FS. |
| * *How does Art. 9 deal w/ changes that render the FS incorrect?* | * A FS isn’t rendered ineffective, if after it’s filed, the it becomes seriously misleading under § 9-506. § 9-507(b). However, there’s an exception .When a debtor changes their name, a filed FS becomes seriously misleading under § 9-506. |
| * *Will the change in name from “Louie Glitz” to “Louie Williams-Glitz” be seriously misleading?* | * Yes. A search for “Glitz, Louie” won’t find a FS filed under “Williams-Glitz, Louie.” * A FS isn’t rendered ineffective, if after it’s filed, the info in it becomes seriously misleading under § 9-506. § 9-507(b). However, there’s an exception. When a debtor changes their name, a filed FS becomes seriously misleading under § 9-506. |

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| **Problem 12.8** | |
| * *What effect does the sale of collateral have?* | * **Security interest**: A SI continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof. § 9-315(a)(1). (“the continuity principle”) * **Perfection**: A filed FS remains effective w/ respect to collateral that’s sold, exchanged, leased, licensed, or otherwise disposed of and in which a SI continues, even if SP knows of or consents to the disposition. § 9-507(a). * If transferee located in same jsd 🡪 SI is preserved & no need to file a new FS. * Note the effect on later party dealing w/ buyer |

There was something here we didn’t cover this semester.

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| **Problem 12.7** | |
| * *Reincorporation is accomplished by merging CA corp into DE corp and transferring assets to the newly-incorporated corp. What effect on the CA FS?* | * This is just the transfer of collateral from one org to another, that’s in another jsd. This is that “shell game” professor Leahy makes so illusive. A SI perfected pursuant to the law of the jsd designated in § 9-301(1) remains perfected until the earliest of: (3) the expiration of 1 yr after a transfer of collateral to a person that thereby becomes a debtor & is located in another jsd. § 9-316(a)(3). * The SI remains perfected for 1 year after the transfer. If a FS is filed in DE w/in 1 year, then the SI remains perfected. Cmt 2, Ex. 4. |

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| **Problem 13.1** | |
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Continued Perfection of SI Following Change in Governing Law

* + A SI perfected pursuant to the law of the jsd remains perfected until the earliest of:
    - * The time perfection would have ceased under the law of that jsd **or**
      * 4 mths after change of debtor's location to another jsd **or**
      * 1 yr after a transfer of collateral to a person that thereby becomes a debtor & is located in another jsd.
  + If SI perfects under the other jsd’s laws *before* the earliest time or event 🡪 Remains perfected thereafter
  + If SI doesn’t perfect under the law of the other jsd before the earliest time or event🡪 Becomes unperfected & deemed to never have perfected as against a purchaser of the collateral for value.

Effect of Certain Events on Effectiveness of FS

* + A filed FS remains effective w/ respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of, even if SP knows of or consents to the disposition.
  + A FS is not rendered ineffective if, after the FS is filed, the info provided in the FS becomes seriously misleading.
    - However, if a debtor so changes its name that a filed FS becomes seriously misleading:
      * + FS is effective to perfect a SI in collateral acquired by the debtor before, or w/in 4 months after, the change **&**
        + FS is not effective to perfect a SI in collateral acquired by the debtor <4 months after the change

unless an amendment to the FS, which renders the FS not seriously misleading, is filed w/in 4 months after the change.

Perfection by Possession

A SP may perfect a SI in tangible negotiable documents, goods, instruments, $, or tangible chattel paper by taking **possession** of the collateral. A person has possession if the debtor has effectively been deprived of dominion and control.

A SP may perfect a SI in certificated securities by   
taking **delivery** of them. In the case of certificated securities, delivery occurs when the purchaser acquires possession.

**Rationale**

Why allow SP possession to perfect a SI in lieu of filing a FS?

* + - Debtor doesn’t have “dominion and control” over the collateral.
    - A 3P dealing w/ the debtor will be put on notice as to a possible competing interest when debtor can’t produce the property.
  + What test should determine whether the SP has possession?
    - Possession by the SP gives notice if it effectively deprives the debtor of dominion and control.
    - A 3P will be alerted to the risk of a competing interest if the debtor lacks effective control over the collateral, b/c it then appears another party has rights over the collateral.

When Possession by or Delivery to SP Perfects SI w/o Filing

* **Rule § 9-313**
  + A SP may perfect a SI in [ tangible negotiable documents, goods, instruments, $, or tangible chattel paper ] by taking **possession** of the collateral
  + The only way to perfect a SI in money is by taking possession
    - * Must determine whether the “coins” are $ or goods
      * Depending on whether they are collectors/antiques they may not be money
* A SP may perfect a SI in certificated securities by taking delivery of the certificated securities
  + Delivery of a certificated security to a purchase occurs when the purchaser acquires possession of the security certificate.
    - * Diff than delivery by control (which requires possession & indorsement for delivery)
      * Higher priority
* w/ respect to collateral other than certificated securities and goods covered by a document, a SP takes possession of collateral in the possession of a person other than the debtor, the SP, or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business, when:
  + Person in possession authenticates a record to acknowledge it holds possession of the collateral for the SP’s benefit **or**
  + Person takes possession of the collateral after authenticating a record to acknowledge it will hold possession of collateral for SP’s benefit
* **When does perfection by possession occur?**
* If perfection of a SI depends upon possession of the collateral by a SP, perfection occurs no earlier than the time the SP takes possession and continues only while the SP retains possession. **§ 9-313(d)**
* **In a Nutshell**
  + So if party loses possession 🡪 It becomes unperfected.
  + When they regain possession 🡪 it’s only perfected from the date they regained possession.
  + As long as their possession continues 🡪 remains perfected

Do they have possession?

* **Rule of Possession:** A person has possession if the debtor has effectively been deprived of dominion and control.
* **Purpose:** Give notice. If debtor still has some control 🡪 No notice is given
* **Agency as an Alternative to SP Possessing**
  + If the collateral is in the possession of an agent of the SP for the purposes of possessing on behalf of the SP **&**   
    if the agent is not also an agent of the debtor 🡪 SP has taken actual possession
    - * (1) They consent to be an agent **&**
      * (2) they’re under the SP’s control (different from being a bailee)
  + If police seize your property 🡪 You don’t lose possession for purposes of perfection
  + Just b/c a debtor retains possession of a photocopy of the collateral (such as chattel paper) 🡪 Doesn’t mean that perfection by possession is invalid – nobody would accept a photocopy – as long as the SP has the ORIGINAL they have possession
* **Rights and Duties of SP having Possession or Control of Collateral**
  + A SP shall use reasonable care in the custody and preservation of collateral in the SP's possession.
  + If chattel paper or an instrument 🡪 Reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.
  + **If a SP has possession of collateral:**
    - Reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;
    - The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage.
      * + No failure to exercise due care for loss caused by hurricane or flood.
  + The SP shall keep the collateral identifiable, but fungible collateral may be commingled
  + The SP may use or operate the collateral:
    - * To preserve the collateral or its value **or**
      * As permitted by an order of a Ct having competent jsd **or**
      * Except w/ consumer goods, in the manner and to the extent agreed by the debtor.
* In many cases a SP in possession of collateral may satisfy this duty by notifying the debtor of action that should be taken and allowing the debtor to take the action itself. If the SP takes action 🡪 its reasonable expenses may be added to the secured obligation.
* Possession by someone associated w/ debtor 🡪 won’t convey notice that the debtor has lost control over the property.

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| **Problem 13.1** | |
| * *(a)* Does Alexandra have a perfected SI? | * *First, analyze attachment….* * Attachment occurs when 1) value has been given, 2) the debtor has rights in the collateral, and 3) the collateral isn’t a certificated security and is in the possession of the SP under § 9-313, pursuant to the debtor’s SA. § 9-203(b) * *Then, analyze perfection…* * A SP may perfect a SI in goods (among other things) by taking possession of the collateral. § 9-313(a). Therefore, Alexandra has a perfected possessory SI that is both created and perfected by her taking possession of the collateral. |
| * *(b)* Arnold’s possession sufficient to perfect? | * The principles of agency apply when determining whether a person has possession. EX: If the collateral is in possession of an agent of the SP for the purposes of possessing on behalf of the SP, and if the agent is not also an agent of the debtor, the SP has taken actual possession, and (c) doesn’t apply.” § 9-313, Cmt 3.  *So the concern is that notice isn’t relevant if possession was through a 3P agent.* * Comments 3 and 4 contemplate either a 3P holding the collateral *as a bailee* for the SP or a 3P holding collateral *as an agent* for the SP. Aka, Cmts 3 & 4 considers that there will be these tricky techniques * In the case of an agency relationship, § 9-313(c) doesn’t apply.   Here, there’s a concern that \_\_ is acting as \_\_’s agent…  *Ugh.* |
| * *(c)* Gary Owens’s possession sufficient to perfect? | The debtor can’t qualify as an agent for the SP for purposes of the SP’s taking possession. And, under appropriate circs, ct may determine that a person in possession is so closely connected to or controlled by the debtor… that the debtor has retained effective possession, even though the person may have agreed to take possession on behalf of the SP. If so the person’s taking possession would not constitute the SP’s taking possession and would not be sufficient for perfection. § 9-313, Cmt 3.   * Possession by someone associated w/ the debtor won’t convey notice that the debtor has lost control over the property. * The cousin’s possession would not be unusual and so would not alert a potential lender that the coins might be subject to another’s property interest. |
| * *(d) Has Alexandra lost perfected status in the watch?* | If perfection of a SI depends upon possession of the collateral by a SP, perfection occurs no earlier than the time SP takes possession and continues only while the SP retains possession. § 9-313(d).   * + Perfection lapsed upon loss of possession.   + Perfection was regained when possession was restored, but now perfection dates only from the date the watch was returned.   *What is the lesson of National Pawn Brokers?*  b/c possession isn’t interrupted when law enforcement officers levy on the collateral, possession should be deemed continuous even if the police seize it. p.179. Although the pawnbrokers couldn’t themselves reach the property while the police had it, the important thing for purposes of perfection is that Pippin didn’t and couldn’t obtain dominion and control over it.  The debtor’s continuing loss of possession gives notice of a competing interest to prospective 3Ps. |

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| **Problem 13.2** | |
| * *Can Bank perfect its SI in accounts by taking possession of anything or everything relating to the accounts?* | * No, b/c accounts are intangibles. Except as otherwise provided in (b) and § 9-312(b), a FS must be filed to perfect all SIs and agricultural liens. § 9-310(a). A SP may perfect a SI in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. § 9-313(a). * Accounts are intangible, so there’s nothing to possess. Perfection is about obtaining rights against 3Ps, and that entails giving them notice of some form. Where the collateral is of a type as to which there is nothing legally significant to possess, perfection by possession is not available. Therefore, a SI in accounts can only be perfected by filing a FS. |

A SI in chattel paper can be perfected by filing a FS or by taking possession of the chattel paper.

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| ***In re* Equitable Financial Management, Inc.** | |
| * *What kind of collateral is the lease?* | * It’s chattel paper. Chattell paper is a record or records that evidence both a monetary obligation and a SI in specific goods … or a lease of specific goods. § 9-102(b)(11). Here, the monetary obligation is the lessee’s promise to pay the lease. The SI is * **Tangible chattel paper**: chattel paper evidenced by a record or records consisting of info that’s inscribed on a tangible medium. § 9-102(b)(78). |
| * *By what method is a SI in chattel paper perfected?* | * Possession: A SP may perfect a SI in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. § 9-313(a). * Filing: A SI in chattel paper, negotiable documents, instruments, or investment property may perfected by filing. § 9-312(a). * A SI in tangible chattel paper by be perfected *either* by SP taking possession of it **or** by filing a FS. |
| * *Why is CPL’s SI unperfected, according to the trustee?* | * Debtor retained possession of “duplicate originals” of the leases. |
| * *Why does the ct reject this argument?* | * The documents retained by the debtor were preliminary versions of the leases. * They didn’t constitute chattel paper, b/c they evidenced neither a monetary obligation nor a lease. * The equipment schedules debtor possessed were only photocopies of the originals CPL possessed. As such they have no more binding legal effect than would a photocopy of, say, a $10 bill. No reasonably prudent purchaser of chattel paper would have accepted the photocopied equipment schedules as original equipment schedules constituting a portion of the lease agreements. pp. 176-77. |

Perfection by Possession   
when collateral is held by a 3P who isn’t the SP’s agent § 9-313(c)

* + A SP takes possession of collateral in the possession of a person other than the debtor, the SP, or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business, when:
    - * the person *in* possession of the collateral authenticates a record  
        acknowledges *it holds* possession of the collateral **Use when they possess it now**   
        for the SP’s benefit

**OR**

* + - * the person *takes* possession of the collateral *after* authenticating a record

acknowledging that *it will hold* possession of collateral **Use when they’ll possess it later**  
for the SP’s benefit

* + **Purpose:**  Requires 3Ps consent
  + Neither the SP alone nor the SP and debtor together can compel the third person to hold the collateral for the SP’s benefit.

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| **Problem 13.3** | |
| * *(a) Will DFS’s notification to Library perfect its SI?* | * A SP takes possession of collateral in the possession of a person other than the debtor, the SP, or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business, when: (1) the person in possession (the library) authenticates a record acknowledging it holds possession of the collateral for the SP’s benefit. § 9-313(c). |
| * *(B) Suppose Whiplash authenticates the notification.* | * The notice (signed by both SP & the debtor) is insufficient to perfect the SI. * The “person in possession” must authenticate a record acknowledging it holds possession of the collateral for the SP’s benefit. Here, the person in possession would be an authorized library representative, who must give their consent. * Neither the SP alone nor the SP and debtor together can compel the third person to hold the collateral for the SP’s benefit. |

* **~~Duty of Care when SP has possession § 9-207~~**
  + ~~A SP shall use reasonable care in the custody and preservation of collateral in the SP’s possession~~
    - * ~~(a) Failure to exercise reasonable care by leaving watch in plain view and not locking the door~~
      * ~~(b) No failure to exercise due care for loss caused by hurricane or flood.~~ *~~See~~* ~~§ 9-207(b)(2)~~
* ~~(a) Loss in value of the collateral~~

~~(b) Loss in value coupled w/ direction of debtor to sell~~

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| **Problem 13.4** | |
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| **Problem 13.5** | |
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Perfection on Instruments

* **How can one Perfect a SI in Instruments and Documents?**
  + A SI in chattel paper, negotiable documents, instruments, or investment property 🡪 may be perfected by filing
  + A SP may perfect a SI in tangible negotiable documents, goods, instruments, money, or tangible chattel paper 🡪 by taking possession of the collateral as well
* CD: Possession is the preferred method of perfection for a negotiable instrument.
* *CD: Recall, from payment systems— a holder in due course takes free of any claim to property*
* **Negotiable Document**
* While goods are in the possession of a bailee that has issued a negotiable document covering the goods:
  + A SI in the goods may be perfected by perfecting a SI in the document **&**
  + A SI perfected in the document has priority over any SI that becomes perfected in the goods by another method during that time
* **20 Day Grace Period for New Value Given**
* A SI in certificated securities, negotiable documents, or instruments is perfected w/o filing or the taking of possession or control for 20 days from when it attaches, to the extent that it arises for new value given under an authenticated SA
  + - **New Value** 
      * + $
        + $’s worth in property, services, or new credit
        + Release by a transferee of an interest in property previously transferred to the transferee.
    - **Doesn’t include:** an obligation substituted for another obligation
* **20 Day Grace Period when Collateral is Made Available to Debtor**
* A perfected SI in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, *remains perfected for 20 days w/o filing* if the SP makes available to the debtor the goods or documents representing the goods for the purpose of:
  + Ultimate sale or exchange **or**
  + Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing w/ them in a manner preliminary to their sale or exchange.
* **Expiration of Temporary Perfection**
* After the 20-day period specified expires, perfection depends upon compliance w/ Art. 9
* **Priority for Purchaser of an Instrument**
* A purchaser of an instrument has priority over a SI in the instrument perfected by a method other than possession if:
  + Purchaser gives value
  + Takes possession of the instrument
  + In good faith **&**
  + w/o knowledge that the purchase violates the rights of the SP.

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| **Problem 15.3** | |
| * *How should we classify the patient notes as collateral?* | * The notes are instruments. They are an instrument b/c it qualifies under Art. 3. – a negotiable instrument. § 9-102(a)(47). An instrument is a ‘note’ if it is a promise. § 3-103(e). We know they’re instruments b/c there’s indorsement and delivery in the marketplace (*or something like that…)* |
| * *How do you perfect a SI in instruments?* | * **Possession**: A SP may perfect a SI in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. § 9-313(a). * **Filing**: A SI in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing. § 9-312(a). * **Bank’s taking possession of the notes perfects its SI in them.** |
| * *Why is taking possession of negotiable instruments the preferred method for perfection?* | * This article doesn’t limit the rights of a holder in due course of a negotiable instrument. These purchasers take priority over an earlier SI, even if perfected, to the extent provided in Art. 3. § 9-331(a). Filing under this article doesn’t constitute notice of a claim or defense to the holders described in (a). §9-331(c). |

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| **Problem 15.4** | |
| * *(a) Does Woodward Bank’s SI extend to these new notes? If so is that interest perfected? When?* | * (a) Credit extended 2/1; new notes sent 2/4 * Attachment * After-acquired property clause: SI attaches when debtor acquires rights in the collateral. * Perfection * A SI in instruments is perfected w/o filing or the taking of possession for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated SA. § 9-312(e). * New value means $, $s worth in property, services, or new credit, or release by a transferee of an interest in property previously transferred to the transferee. § 9-102(a)(57). The Bank’s interest is temporarily perfected for 20 days commencing on 2/1 when the new value is given. |
| * (b) *Would your answer (a) change if the Dr. had dawdled in sending on the notes so that they didn’t arrive at the Detroit bank until 3/ 3?   What if they were never sent to the bank?* | * If Bank doesn’t obtain possession of the notes until after the 20-day period has expired, then its SI becomes unperfected until it does obtain perfection. * If it never obtains possession 🡪 then its perfection lapses. * *How can the Bank deal w/ these risks?* * The SA could make it an event of default if the instruments aren’t received w/in 15 days. This Provides SP w/ leverage to get the instruments delivered timely or to require substitute collateral. Makes certain the value of the other collateral exceeds the debt before extending additional credit. * Alternately, could file a FS (but protects against only some risks).   + N.B. – These risks explain why SP req’d immediate surrender of notes at the inception of the transaction. |

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| **Problem 15.5** | |
| * *(a) Has the status of the bank w/ respect to these 2 notes been affected in any way by what has transpired?* | * (a) Effect of temporary delivery * A perfected SI in an instrument remains perfected for 20 days w/o filing if the SP delivers the … instrument to the debtor for the purpose of: * (1) the ultimate sale or exchange **or** * (2) presentation, collection, enforcement, renewal, or registration of transfer. § 9-312(g)(2). * (b) Effect of payment * Nolens will use a portion of what she has paid by Peepers to pay off the appropriate portion of her loan from the bank. The rest is $ in her pocket. Thus, the transaction has played out exactly as each party would have expected. |
| * *(b) Will she be in trouble w/ her lender?* |  |

Priorities Between Secured Parties &  
 Buyers of the Collateral 297-315; 321-24

I. Rights Against the Debtor

* 1) Default 🡪 Bring an action on the debt
* 2) Conversion 🡪 Bring an action in tort

II. Rights Against the Buyer

* **General rule (aka Continuity Principle):** A SI survives the debtor’s sale of the collateral **§ 9-201; § 9-315(a)(1)**
  + - i. SI enforceable against buyers of the collateral **§ 9-201**
    - ii. SI continues in collateral despite its sale **§ 9-315(a)(1)**
  + **Exceptions**
    - * **(1) Unperfected SIs § 9-317(b)**
      * *“An unperfected SI is subordinate to a non-ordinary course of business buyer who (1) gives value and (2) takes delivery of the collateral (3) w/o knowledge of the SI (4) before it is perfected.”*
      * **(2) Authorized sales § 9-315(a)**
        + *“Unless the SP authorized the disposition free of the SI”*
      * **(3) Buyers in the ordinary course of business § 9-320(a)** 
        + *“…a* ***buyer in ordinary course of business****, other than a person buying farm products from a person engaged in farming operations,* ***takes free*** *of a SI interest created by the buyer’s seller, even if the SI is perfected and the buyer knows of its existence.”*

**BIOCB:** *A BIOCB is “a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. §9-320(a). A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or W/ the seller’s own usual or customary practices. § 1-201(b)(9).*

**Rationale**

SP Protection:After-acquired property (inventory financing); Proceeds

Buyer’s Expectations: Expects to acquire goods unencumbered

General Commercial Expectations: Market expects buyers can purchase from dealer w/o dealing w/ it’s financer

* + - * **(4) “Garage sale” – Consumer buyer from a consumer seller § 9-320(b)**

*A buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:*

*(1) w/o knowledge of the SI*

*(2) for value*

*(3) primarily for the buyer’s personal, family, or household purposes* ***&***

*(4) before the filing of a FS covering the collateral.*

* + - * ~~v. Future advances~~  **~~§ 9-323(d)~~**

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| **Problem 24.1 Continuity Principle: Unperfected SI w/ no value given (exception)** | |
| * *What effect does the gift of the painting have on DFS’s SI?* | * The general rule is that the SI continues. §9-201; §9-315(a)(1). However, an exception is that unless the SP authorized the disposition free of the SI. § 9-315(a)(1). Here, there was no authorization b/c there was nothing to indicate authorization was given. In fact, SA probably *prohibits* disposition without consent. * An exception: “An unperfected SI is subordinate to a non-ordinary course of business buyer who (1) gives value and (2) takes delivery of the collateral (3) w/o knowledge of the SI (4) before it is perfected.” Here, the museum didn’t give value. |

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| **Problem 24.2 Continuity Principle: Unperfected SI w/ value given** | |
| * *(A) What effect does the sale of the painting gave on DFS’s SI?* | * The general rule is that the SI continues. §9-201; §9-315(a)(1). However, an exception is that unless the SP authorized the disposition free of the SI. § 9-315(a)(1). Here, there was no authorization b/c there was nothing to indicate authorization was given. * An exception: “An unperfected SI is subordinate to a non-ordinary course of business buyer who (1) gives value and (2) takes delivery of the collateral (3) w/o knowledge of the SI (4) before it is perfected.” * Here, Nettie does give “value,” and she has taken delivery “w/o knowledge of the security interest” before perfected. * N.B. “Knowledge” ≠ “Notice” |
| * *(b) Suppose DFS had filed FS with an incorrect name?* | * Same. If the FS doesn’t contain the debtor’s name or the name is seriously misleading, then the FS is defective; & the SI is unperfected. |
| * *What’s the rationale of § 9-317(b)?* | * Where the SP’s SI is *unperfected*, even if the buyer had been concerned about the existence of a possible SI and had performed a search of the UCC filings, she would have found nothing to provide notice of that interest. The lack of notice results regardless of the reason for unperfection – whether no FS was filed or whether a defective FS was filed. |

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| **Problem 24.3(a) Continuity Principle: Buyer in Ordinary Course of Business (exeption)** | |
| * *(a) Is Ben a “buyer in the ordinary course of business”?* | * The general rule is that the SI continues. **§9-201; §9-315(a)(1)**. However, an exception is that: A buyer in the ordinary course of business can take free of a perfected SI. **§ 9-320(a).** A BIOCB is “a person that buys goods *in good faith*, *w/o knowledge that the sale violates the rights of another person* in the goods and *in the ordinary course* from a person, other than a pawnbroker, *in the business of selling goods of that kind*. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. **§ 1-201(b)(9).** |
| * *(b)* | * Would Ben’s knowledge of the existence of Bank’s SI affect the result? * No! *See Indianapolis Car Exchange, Inc. v. Alderson,* p. 302. * § 9-320(a): “…*takes free* of a SI … even if the SI is perfected ***and the buyer knows of its existence***.” * § 1-201(b)(9): A BIOCB is “a person that buys goods in good faith, ***without knowledge that the sale violates the rights of another person in the goods***….” * “Reading the definition together with the rule of law results in the buyer’s taking free if the buyer merely knows that a security interest covers the goods but taking subject if the buyer knows, in addition, that the sale violates a term in an agreement with the secured party.” Comment 3, § 9-320.   Rationale:   * Why is knowledge of an inventory financers’ SI irrelevant to the BIOC doctrine?   + A retail seller’s inventory is frequently financed and thereby subject to a SI, so most commercial buyers in fact will probably be aware of a SI.   + Both SP and Debtor have an interest in the inventory being sold.     - The SA may contain various reqt’s for accountability of inventory and its proceeds, but it won’t prohibit the sale of inventory.     - The sale of inventory will produce the revenues the debtor uses to service the debt.   + There’s no reason to prevent a buyer’s taking free just because it knows the goods are subject to a financer’s SI. Knowledge is irrelevant to the aims of the BIOCB doctrine. |

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| ***International Harvester Co. v. Glendenning*** | |
| * *Why does Glendenning take the tractors subject to IH’s SI?* | * He doesn’t qualify as a BIOCB, so he can’t take advantage of the BIOCB doctrine in § 9-320(a). He’s not a BIOCB b/c he didn’t buy the tractors “in good faith.” He knew about how “floor plan” inventory financing worked (that the dealer would have to remit proceeds of the sale to the financer), yet he bought the tractors for below their FMV. He collaborated with Barnes in falsifying the order form to show the non-existent trade-ins. He lies to IH about the trade-ins. |

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| **Problem 24.4** | |
| * *Does Advert qualify as a BIOCB?* | * *The general rule is that a SI … continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof. § 9-201; § 9-315(a)(1).* * No! A BIOCB doesn’t include a personal that acquires goods in a transfer in bulk [not relevant here] or ***as security for or in total or partial satisfaction of a money debt***.” § 1-201(b)(9). * N.B. The buyer who acquires inventory from a dealer in satisfaction of an antecedent debt doesn’t provide any proceeds for the inventory. Thus, one reason for allowing the BIOCB to take free – the SP’s receipt of proceeds – isn’t present. |

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| **Problem 24.5** | |
| * *Does Gabriela’s qualify as a BIOCB?* | * *The general rule is that a SI … continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof. § 9-315(a)(1).* * No! A BIOCB is “a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods and in the ordinary course ***from a person, other than a pawnbroker, in the business of selling goods of that kind***.” **§ 1-201(b)(9)**. Here, Arnie isn’t in the business of selling ovens, so Gabriela’s is not a BIOCB and can’t take advantage of the BIOCB doctrine. * Gabriela’s could have searched the UCC records to discover whether there were possible security interests in the equipment. It then could (i) buy subject to the SI (for a discounted price reflecting the existence of the lien) or (ii) arrange for some or all of the purchase price to go to the SP which would, in exchange, terminate its SI in the particular oven being purchased. |
| * How would we approach the problem w/o § 9-325? | * First Bank’s argument: It has priority under § 9-322(a)(1) b/c it was the first to file or to perfect w/ respect to the oven. * Staten Island’s argument: § 9-324(a) gives it priority, since it acquired a PMSI in collateral other than inventory and (presumably) filed its FS within 20 days of Gabriela’s obtaining possession. So, if Staten Island had satisfied § 9-324(a), it would have priority; if not, First Bank would have priority. This solution is unsatisfactory b/c the two SP’s are dealing with different debtors! |
| * *The resolution…* | * A SI created by the debtor [Gabriela’s] is subordinate to a SI in the same collateral created by another person [Arnie’s] if: * (1) the debtor acquired the collateral subject to the SI created by the other person [Arnie’s]; FB’s SI survived the sale from Arnie’s to Gabriela’s. * (2) the SI created by the other party was perfected when the debtor acquired the collateral; & FB had perfected by filing before Arnie’s sold to Gabriela’s. * (3) there’s no period thereafter when the SI is unperfected. **§ 9-325(a).** * There has been no lapse in FB’s perfection**. *See* § 9-325, Cmt 3, ex. 1.** |

* **Derivative Title Doctrine** *Nemo dat quod no habet.*
  + A purchaser of goods acquires all title which his transferor had or had power to transfer. **§ 2-401(1)**

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| **Problem 24.6 Continuity Principle: BIOCB Exception** | |
| * *Sale from Arnie’s to Heatum’s* | * *The general rule is that a SI … continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof. § 9-315(a)(1).* * *Does Heatum’s qualify as a BIOCB?* * No! A BIOCB is “a person that buys goods in good faith, w/o knowledge that the sale violates the rights of another person in the goods and in the ordinary course ***from a person, other than a pawnbroker, in the business of selling goods of that kind***.” **§ 1-201(b)(9)**. * Here, Arnie isn’t in the business of selling ovens, so Heatum’s isn’t a BIOCB and cannot take advantage of the BIOCB doctrine. Therefore, Heatum’s takes subject to the SI. |
| * *Sale from Heatum’s to Gabriela’s* * **Likely to be on class exam. Bar examiners love to test this !!!** | * *The general rule is that a SI … continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof. § 9-315(a)(1).* * *Does Gabriela’s qualify as a BIOCB?* * Yes. Heatum’s is a person … in the business of selling goods of that kind,” so Gabriela’s is a BIOCB. * *Does Gabriela’s take free of the SI?* * No! A BIOCB takes free of a SI ***created by the buyer’s seller***. **§ 9-320(a)**  Here, this SI was created by *Arnie’s*—not by *Heatum’s*—so the BIOCB doctrine doesn’t permit Gabriela’s to take free of the SI that was created by her seller’s predecessor. *(even though Gabriela’s (buyer) is a BIOCB)* |
|  | * *What is the rationale for this limitation?* * Part of the justification for allowing a BIOCB to take free of a SI is that the SP loses the inventory collateral but gains a right to its proceeds. Here, the sale to Gabriela’s creates no proceeds for the SP. * *What remedy is available to Gabriela’s?* * She may sue her seller for breach of the warranty of title. There is in a K for sale a warranty by the seller that the title conveyed shall be good, and its transfer rightful; and the goods shall be delivered free from any SI or other lien or encumbrance of which the buyer at the time of contracting has no knowledge. **§ 2-313(1).** |
| * *Sale from Heatum’s to Arnie’s. Heatum’s is in the business of selling industrial cooking equipment. Arnies qualifies as a BIOCB. Will Arnie’s take free of First Bank’s SI?* | * *The general rule is that a SI … continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof. § 9-315(a)(1).* But Arnie’s qualifies as a BIOCB. So, under § 9-320(a), Arnie’s “takes free of a SI created by the buyer’s seller, even if the SI is perfected and the buyer knows of its existence.” * This is garden-variety BIOCB transaction – the sale of inventory by a dealer – so there’s no surprise that Arnie’s takes the oven free of First Bank’s SI. |
| * **Derivative Title Doctrine** * *Sale from Arnie’s to Gabriela’s. Will Gabriela’s take free of First Bank’s SI?* | * *The general rule is that a SI … continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof. § 9-315(a)(1).* Gabriela’s has two problems under Art. 9: First, she’s not a BIOCB b/c Arnie’s isn’t in the business of selling ovens. Second, § 9-320(a) permits her to take free only of a SI created by her seller, and Arnie didn’t create First Bank’s SI. * Art. 2 provides the protection Gabriela’s needs. Under the Derivative Title Doctrine, a purchaser of goods acquires all title which his transferor had or had power to transfer. **§ 2-401(1).** Arnie’s acquired the oven free of First Bank’s SI under BIOCB doctrine. As purchaser, Gabriela’s acquires from her transferor (Arnie’s) whatever title Arnie’s had in the oven, *viz.* the oven unencumbered by First Bank’s SI. Therefore, First Bank has no claim to the oven in Gabriela’s hands. Gabriela’s acquires all the rights to the oven that Arnie’s had, and Arnie took it free of First Bank’s SI. |

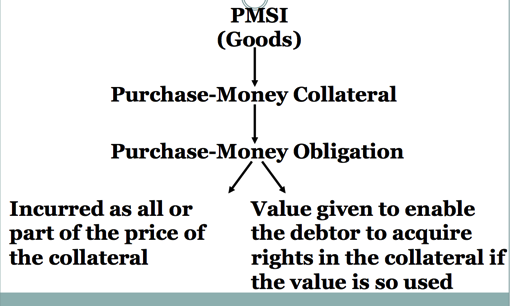
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| ***In re Western Iowa Limestone* Continuity Principle:Garage Sale Exception** | |
| * *What principle does this case add to an understanding of the BIOCB doctrine?* | * BIOC definition: “… Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Art. 2 may be a buyer in ordinary course of business….” **§ 1-201(b)(9).** * The Dealers left the ag lime with the seller pending their sales to the Dealers’ customers. Dealers didn’t need to find a place to store until later sale. Seller provided trucking services when the later sale occurred. But “possession” can include “constructive possession.” Here, title passed at the time of sale, and the seller served merely as a bailee holding the ag lime for the Dealers. |
| * *Does the SI survive the sale?* | * *The general rule is that a SI … continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof. § 9-315(a)(1).* The “Garage Sale” exception states that “a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys: * (1) w/o knowledge of the SI * (2) for value * (3) primarily for the buyer’s personal, family, or household purposes **&** * (4) before the filing of a FS covering the collateral.” **§ 9-320(b).** |

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| **Problem 24.7 Continuity Principle: Garage Sale Exception** | |
| * *(a)* |  |
| * *(b) Would the result be different if Music Emporium had filed a FS when it sold the piano to Davies?* | * Yes! To take free, the buyer must buy the consumer good “before the filing of a FS covering the goods.” § 9-320(b)(4). Therefore, the “garage sale” exception won’t apply, and Eric will take the piano subject to the SI. * N.B. The piano is an expensive consumer good. Although Music Emporium’s security interest is automatically perfected w/o filing, by filing a FS it can protect itself against the risk that the piano will be sold to another consumer. Thus, it could “repossess” the piano from Eric. |
| * *(c)* *If Music Emporium hasn’t filed a FS but Eric buys the piano for use in his business giving piano lessons, what result?* | * Eric will take the piano subject to Music Emporium’s SI. § 9-320(b) requires both that the buyer acquires the goods from a seller who primarily uses the goods for personal, family, or household use and primarily for his own personal, family, or household use. * This dual req’t explains the “garage sale” nickname: the good must be consumer goods in both the seller’s hands and the buyer’s hands. |

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| **Problem 24.8** | |
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Automatic Perfection: The PMSI in Consumer Goods

THE CONCEPT OF THE PURCHASE-MONEY SECURITY INTEREST (PMSI)

* + **Importance of the PMSI**
  + Automatic perfection
  + Priority rules
* Chapter 7: focuses on the definition of a PMSI  **§ 9-103** contains the statutory definition
* Chapter 14: focuses on automatic perfection for certain PMSI’s
  + **Are PMSI’s limited to certain kinds of collateral?** Only “goods” and “software” can be the subject of a PMSI. **§ 9-103(a)(1)**
  + **What is required to have a PMSI in goods?**
  + If goods, they must be purchase-money collateral  **§ 9-103(b)(1)**
  + To be “purchase-money collateral,” they must secure a “purchase-money obligation.”  **§ 9-103(a)(1)**
  + A “purchase-money obligation” must meet either of two alternative tests  **§9-103(a)(2)**
    - **Seller’s PMSI**: the obligor has incurred the obligation as part of the purchase price of the goods.
    - **Lender’s PMSI**: the credit is extended to enable the debtor to acquire rights in or use of the collateral and it is so used.
* 
* **General Rule**
  + A PMSI in CONSUMER GOODS is perfected when it attaches
  + No filing or other step is req’d to perfect a PMSI in consumer goods
    - Other than goods, such as automobiles, that are subject to a statute or treaty
* **Rationale for automatic perfection of PMSI in consumer goods**
  + Cost outweighs the benefit
  + Avoids clogging the system w/ many records
  + Few people would ever check the UCC records for a FS as to consumer goods
    - * Secured lenders unlikely to check

Used consumer goods have little value, so few lenders will ever lend against them

* + - * Prospective buyers are unlikely to check

Most buyers of the used consumer goods other consumers & they won’t not know to check the UCC records

* + Requiring filing would burden the system but will achieve little value in giving notice
* **Elements of Automatic Perfection in PMSI**
  + PMSI
  + Consumer Goods
* **How does it affect priority?**
  + Filing is necessary to prevent a buyer of consumer goods from taking free of a SI under “garage sale” exception
  + A fixture filing is req’d for priority over conflicting interests in fixtures
* **Federal Trade Commission Credit Practices Rule**
  + Unfair credit practices
    - * Unfair for a lender or retail installment seller directly or indirectly to take or receive from a consumer an obligation that:

Constitutes or contains a non-possessory SI in household goods other than a PMSI.

Summary of Chattel Paper Purchaser Priority Rules (§ 9-330)

* Situation 1:
* The Purchaser of Chattel Paper (*i.e*., either a buyer of the chattel paper or a lender w/ a SIin it) versus a prior SP who claims the chattel paper “merely as proceeds” (§ 9-330(a)). Who has priority?
  + A. The Rule: The purchaser of chattel paper has priority if:
  + (1) Prior SP claims interest in chattel paper merely as proceeds of inventory.
  + (2) Purchaser is in good faith.
  + (3) Purchase is in the ordinary course of the purchaser’s business.
  + (4) Purchaser gives new value.
  + (5) Purchaser takes possession or obtains control.
  + (6) No legend on the chattel paper indicating that it is assigned to another assignee.
* B. Important Qualifications:
  + (1) **Merely as proceeds:** the original lender has not loaned against the chattel paper. See PEB Commentary No. 8.
  + (2) Good faith is defined at § 9-102(a)(43).
  + (3) “New Value” is defined at § 9-102(a)(57). See also Cmt 3 and subsection (e).
  + (4) As to possession, see Cmt 4.
* Situation 2:
* The Purchaser of Chattel Paper (*i.e.*, either a buyer of the chattel paper or a lender w/ a SI in it) versus a prior SP who claims the chattel paper other than merely as proceeds. (§ 9-330(b).) Who has priority?
  + A. The Rule: The purchaser has priority if:
    - (1) He gives new value
    - (2) He takes possession or obtains control
    - (3) He’s in good faith
    - (4) He’s in the ordinary course of the purchaser’s business
    - (5) He’s w/o knowledge that the purchase violates the rights of the SP
  + B. Important add’l qualification:
    - (1) As to the “w/o knowledge” req’t, it’s not enough to defeat this element that the purchaser merely knows of the prior SI’s *existence*.
  + Perfection by Control

General Rule

* A SI in investment property, deposit accounts, or e- chattel paper 🡪 ***May*** be perfected by control
* A SI in a deposit account 🡪 May be perfected ***only*** by control (except as otherwise provided for proceeds)
* All other property 🡪 ***May*** be perfected by filing (but perfection by control is preferred for priority purposes)

Control of Deposit Account

* A SP has control of a deposit account if:
  + **Being There:** SP is the bank w/ which the deposit account is maintained
  + **Control Agreement**
    - Debtor, SP, & bank have agreed in an authenticated record that the bank will comply w/ instructions originated by the

SP directing disposition of the funds in the deposit account w/o further consent by the debtor **or**

* + **Customer**
    - * A person who has a bank account or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank
      * SP becomes the bank’s customer w/ respect to the deposit account.
      * SP not req’d to be the exclusive customer of the account.

Control of Investment Property

* **Obtaining Control:** Purchaser has necessary whatever steps, given the manner in which the securities are held, to place itself in a position where it can have the securities sold, w/o further action by the owner.
* A SP having control of all security entitlements or commodity Ks carried in a securities account or commodity account has control over the securities account or commodity account
  + To get control over a security account 🡪 Must get control of all security entitlements.
  + You can do this by either:
    - * Having all of the entitlements transferred to an acct in the firm held by the SP **or**
      * Entered into a control agreement among the debtor, Securities intermediary, & SP covering all of the entitlements now or thereafter credited to the debtor’s acct.
  + A purchaser has *control* of a certificated security in **bearer form** if the certificated security is delivered to the purchaser.
    - * Delivery occurs when SP has possession of the certificate or a 3P takes possession of the certificate on the SP’s behalf and acknowledges it holds the certificate for the 3P
  + A purchaser has *control* of a certificated security in **registered form** if the certificated security is delivered to the purchaser, **&**
    - * Certificate is indorsed to the purchaser **or**
      * The certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.
      * When it is perfected by control, as here, it has priority over the certificated security that is perfected by delivery only
  + A purchaser has “control” of an **uncertificated security** if:
    - * Uncertificated security is delivered to the purchaser (bank holding mutual fund, etc) **or**
      * Issuer agreed to comply w/ instructions originated by the purchaser w/o further consent by the registered owner.
  + A purchaser has “control” of a security entitlement if:
    - * Purchaser becomes the entitlement holder **or**
        + EX: B loans A $ **|**  in return A transfers stock (entitlement) to B’s security acct
      * The securities intermediary agreed to comply w/ entitlement orders originated by the purchaser w/o further consent by the entitlement holder **or**
      * Another person has control of the security entitlement on behalf of the purchaser **or**   
        having previously acquired control of the security entitlement 🡪 acknowledges it has control on behalf of the purchaser.
  + If an interest in a security entitlement is granted by the entitlement holder to their own securities intermediary 🡪 securities intermediary has control
    - * Ex: Margin Agreement – stockholder is permitted to borrow against the value of existing investments in account in order to make new investments and in effect the broker takes a SI in his account.
  + A purchaser who has satisfied the req’ts for control of uncertificated securities or a securities entitlement has control even if the registered owner or the entitlement holder retains the right to make substitutions, to originate instructions or entitlement orders to the issuer or securities intermediary, or otherwise to deal w/ the uncertificated security or security entitlement.

An issuer or a securities intermediary may not enter into a “no consent needed” agreement w/o the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not req’d to enter it even though the registered owner or entitlement holder so directs.  An issuer or securities intermediary that has entered into such an agreement is not req’d to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder.

Not sure where this goes

What are the rights of the bankruptcy trustee?

* + **Lien creditor:** a trustee in bankruptcy from the date of the filing of the petition….  **§ 9-102(a)(52)(C)**
  + A SI … is subordinate to the rights of… (2) except as otherwise provided in subsection (e),a person that becomes a lien creditor before the earlier of the time: (A) the SI … is perfected….” **§ 9-317(a)**
  + The trustee shall have, as of the commencement of the case, and w/o regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by – (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and w/ respect to such credit, a judicial lien on all property on which a creditor on a simple K could have obtained such a judicial lien, whether or not such a creditor exists **Bankruptcy Code § 544(a)(1)**

**Rationale for he purchase-money priority**

* + **Facilitating alternative sources of financing**
    - * A first filing financer could obtain a blanket lien on all the debtor’s assets, rendering them unavailable for other lenders.
      * Purchase-money priority allows the debtor to borrow from another lender to acquire new assets.
  + **Equities favor the purchase-money financer**
    - * The purchase-money financer provides the fresh infusion of capital that adds to the debtor’s assets.
      * According priority to it also causes no harm to the first filing financer.

**Rationale for 20-day grace period**

* + Facilitates the credit sale
  + Permits seller to finance the sale, retain a SI, and provide immediate delivery to the buyer.
    - Seller is able to make the sale only b/c it’s willing to sell on credit terms
    - If it’s selling on credit 🡪 it’s reasonable to permit it to retain a PMSI to secure the extension of a credit.
      * It will be auto-perfected only if the collateral is consumer goods; otherwise must file a FS to perfect.
        + But it’s mostly infeasible to file a FS *before* the buyer takes possession of the goods.
      * Buyer often will be unwilling to delay taking delivery to permit the seller to file a FS, so the sale could be lost.

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| **Brodie Hotel Supply** | |
| * *U.S.*   + *SA – 11/2. It covers equipment, AAPC.*   + *FS – 11/4. It covers equipment.* * *Brodie*   + *SA – 11/12. It covers the restaurant equipment.*   + *FS – 11/23. It covers equipment.*      * *Do both US & Brodie have perfected SIs in the restaurant equipment?* | * *Under the general rule who has priority?* * US b/c first to file on 11/4 * *Does Brodie have a PMSI in the equipment?* * Yes: the SI in the equipment secures Lyon’s obligation to pay the financed purchase price. § 9-102(a)(2) * *Which has priority to the equipment?* * **§ 9-322(a)(1):** U.S. is the first to file on 11/4 * **§ 9-324(a):** Brodie has PMSI in non-inventory |
| * *What’s Brodie’s problem?* | * For priority, Brodie must perfect its PMSI before the debtor obtains possession of the collateral or w/in 20 days thereafter. * It appears Brodie doesn’t meet the qualifications for the PMSI priority b/c he hasn’t filed the FS on time. Lyon got possession on June 1 when he took over the restaurant. Brodie was supposed to file w/in 20 days on 6/1, however he didn’t file its FS until 11/23—much more than 20 days after 6/ 1. * The 20-day period runs from the time Lyon entered into the agreement w/ Brody. Therefore, U.S. would have priority under the first-to-file-or-perfect rule § 9-322(a)(1) |
| * *How does the Ct (and revised Art. 9) resolve this problem?* | * The 20-day grace period begins to run from time the **debtor** obtains possession of the **collateral**. **Debtor** is a person having an interest in the collateral. **§ 9-102(a)(28).** * **Collateral** is property subject to a SI. § 9-102(a)(12). * Therefore, the 20-day period commences when the property becomes subject to Brodie’s SI. * On 11/12, Lyon commits to buy the equipment and enters into the SA. Not until then does he become a “debtor” and the forklift become “collateral.” 11/23 is w/in 20 days of 11/12, so Brodie has satisfied the req’ts for the PMSI priority in non-inventory. Cf. § 9-324; Cmt 3, last ¶. |

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| **Problem 19.2** | |
|  | * *(a) Trustee’s argument?* * Lydia got possession on 3/11. Chip did not file FS until 4/2, outside 20 days of 3/11. Chip therefore cannot use § 9-317(e). * *(b) Chip’s argument* * Lydia didn’t get possession until 3/15 when the system was complete. The FS filed 4/2 is w/in the 20-day grace period. *Under* § 9-317(e) he has priority over an intervening lien creditor, including the trustee in bankruptcy. * *(c) Which argument should prevail?*   Sometimes a debtor buys goods and takes possession of them in stages, and then assembly and testing are completed (by the seller or debtor-buyer) at the debtor’s location. Under those circumstances, the buyer ‘takes possession’ … when, after an inspection of the portion of the goods in the debtor’s possession, ***it would be apparent to a potential lender to the debtor that the debtor has acquired an interest in the goods taken as a whole***. § 9-324, Cmt 3, ¶ 2.  *Is that fact-intensive test met here on March 11?*   * A potential lender would see a lot of apparently valuable computer equipment. * *But why is it packaged and stored in a closet?* * *Would a potential lender notice that one crucial component was missing?* |
| * *How can Opaline obtain priority over Bank?* | * **§ 9-324(b) - Priority of PMSI in Inventory** * Requirements * PMSI in inventory * Perfected when debtor acquires possession of inventory * Gives notice to prior financer w/in 5 years before debtor obtains possession of inventory. * Notice must indicate that it’s taking a PMSI in inventory & must describe it. |

**Differences between §§ 9-324(a) and (b)**

* + **20-day grace period for perfection**
    - For non-inventory 🡪 PMSI must be perfected before debtor obtains possession of the collateral or w/in 20 days thereafter.
    - For inventory 🡪 PMSI must be perfected when debtor obtains possession of the collateral; there’s no grace period.
  + **Notice Requirement** 
    - **Re: Priority**
      * For inventory 🡪 PMSI holder must notify a prior inventory financer that it’s acquiring a SI in inventory & describe it
      * For non-inventory 🡪 No notice req’t to achieve priority
    - **Purpose**
      * A fraudulent debtor may apply to SP for advances even if it’s already given a PMSI in the inventory to another party § 9-324, Cmt 4
      * Concern is that the prior inventory financer will extend add’l credit on the strength of inventory in which it doesn’t have priority.
        + Part of the rationale for the PMSI priority is that it doesn’t harm the first-filed SP.
        + But the inventory financer typically will “make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received.”
        + An inventory financer who’s unaware of a competing SI having priority might be induced to make new advances, mistakenly believing it has priority in the new inventory. PMSI financer’s notice is designed to prevent this risk.

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| **GMAC Notice (p. 105)** | |
|  | This is to notify you that GM Acceptance Corp holds or expects to acquire PMSIs in inventory collateral which will from time to time hereafter be delivered to Spartan Motors Ltd. 0f Poughkeepsie, New York, and in the proceeds thereof.   * Such inventory collateral consists, or will consist, of the types of collateral described in a FS, a true copy of which is annexed hereto and made a part hereof. |

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| ***Leading Edge Pork*** | |
| * *On what basis does Heritage Bank claim an interest in the pigs sold by Lone Hollow to the debtor?* | * It has a perfected, non-PMSI in the debtor’s livestock, present and after-acquired. * When the debtor acquired an interest in the pigs by purchase from Lone Hollow, its SI attached to them. |
| * *On what basis does Lone Hollow claim an interest in those pigs?* | * It has a perfected PMSI in the pigs it sold to the debtor. * If no special priority rule applies, which has priority? * Heritage would have priority under the first to file or to perfect rule. |
| * *What’s wrong w/ Lone Hollow’s claim that its PMSI has priority over Heritage Bank’s SI?* | * There are questions concerning whether the notices given by Lone Hollow to Heritage comply w/ § 9-324(d) – the livestock version of the PMSI inventory priority – w/ respect to the sales made on June 10 and June 12. * As to the first sale, the question is whether the contents of Lone Hollow’s notice conformed to the statute. * As to the second sale, the question is whether it met the timing requirements for § 9-324. |
| * 1st notice  What does § 9-324 require the notice to say? | * “… the notification states that the person sending the notification has or expect to acquire a PMSI in [(b) inventory] [(d) livestock] of the debtor and describes the [(b) inventory] [(d) livestock] .” * *What did Lone Hollow’s notice say?* * Email message: “Scott – Wayne Peugh gave me your contact information w/ regard to Purchase PMSI for pigs delivered from Lone Hollow.” * *What’s wrong w/ the notice?* * Doesn’t identify the debtor (name of employee insufficient). * Doesn’t state that Lone Hollow has or expects to acquire a PMSI in the pigs (the reference to a PMSI is insufficient). * *Cf.* June 12 letter, p. 233 |
| * 2md - *What is the problem w/ the second notice?* | * § 9-324(d) requires the notice to be received w/in six months *before* the debtor receives the livestock. * **N.B. For inventory, the time is w/in five years before the debtor receives the inventory.** * **Delivery of the pigs:** The summary judgment record is unclear when the pigs sold on June 10 and June 12 were delivered to the debtor. * **Receipt of the notice:** It also is unclear when the letter, mailed on June 12, was received by Heritage Bank, in general, or the debtor’s loan officer, in particular. * Why must the notice be received before delivery of the collateral to the debtor? |
| * Ststaus of the parties | * Do Otto and Emoticon have perfected SIs? * Both do. * Absent any special priority rule, which would have priority? * Otto is first to file a FS. § 9-322(a)(1). * Do either Otto or Emoticon have a PMSI? * **Emoticon**: § 9-103(a)(2) – “all or a part of the purchase price” * **Otto**: § 9-103(a)(2) – “to enable the debtor to acquire rights in the collateral if the value is in fact so used” |
| * How do we resolve the priority between 2 conflicting perfected PMSIs? | * **§ 9-324(g):** “If more than one SI qualifies for priority in the same collateral under [§ 9-324(a)] : * (1) a SI securing an obligation incurred as all or a part of the price of the collateral has priority over a SI securing an obligation incurred for value given to enable the debtor to acquire rights in or use of the collateral….” * **The Seller’s PMSI has priority over the Lender’s PMSI.** |
| * *Why prefer the seller’s PMSI over the lender’s PMSI?* | * § 9-324, Cmt. 13: in real estate, equities favor the vendor over the lender, because vendor never would have parted w/ the real estate unless it could satisfy debt out of the property. * How persuasive is that explanation? * Can’t the same thing be said for the lender? * Alternative? Equal priority; share pro rata. |
| * *Suppose both Otto and Emoticon had held lender PMSIs?* | * § 9-324(g)(2): between two lender PMSI holders, the first to file rule applies. * Here, Otto would have priority. * What justifies *that* rule? * Comment provides no explanation. * Where do the equities lie? * No reason to prefer one over the other. |

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| **Problem 19.4** | |
|  | * Undee the first to file rule, auto would have priority…but see 9-324(g): “If <1 SI qualifies for….(see slide) |
| * *Why prefer the sellers PMSI over the lenders PMSI?* | * ~~In real estate 🡪 favor vendor over lender § 9-324(g)~~ * Prof would treat the equally and pro-rate if he had his way, but the code doesn’t do that |
|  | But see 9-324(g)(2) b/w 2 lender PMSI holders, the first to file applies |

* + Goods Covered by Certificate of Title
    - **Certificate of Title:** A § provides for the SI in question to be indicated on the certificate as a condition or result of the SI’s obtaining priority over the rights of a lien creditor w/ respect to the collateral.
* **Law Governing Perfection and Priority of SIS in Goods Covered by a Certificate of Title**
  + Goods become covered by a certificate of title when a valid **application** for the certificates of title and the applicable **fee** are delivered to the appropriate authority
  + Goods cease to be covered by a certificate of title at the earlier of:
    - * The time the certificate of title ceases to be effective under the law of the issuing jsd **or**
      * The time the goods become covered by subsequently by a certificate of title issued by another jsd
  + Local law of the jsd under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a SI in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

Perfection of Certificates of Title

* + The filing of a FS is not necessary or effective to perfect a SI in prop subject to:
    - * A §, regulation, or treaty whose req’ts for a SI's obtaining priority over the rights of a lien creditor
      * A certificate of title § covering automobiles, which provides for a SI to be indicated on the certificate as a condition or result of perfection.

A person may perfect a SI in a vehicle that’s the subject of a first or subsequent sale 🡪 only by recording the SI on the certificate of title

* Compliance w/ req’ts of a §, regulation, or treaty for obtaining priority over the rights of a lien creditor 🡪 is equivalent to filing a FS
* A SI in prop subject to a §, regulation, or treaty 🡪 May be perfected only by compliance w/ those req’ts. A SI so perfected remains perfected notw/standing a change in the use or transfer of possession of the collateral.
* Duration and renewal of perfection of a SI perfected by compliance w/ the reqt’s prescribed by a §, regulation, or treaty are governed by the §, regulation, or treaty.
* Any period in which collateral subject to a § is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind. Doesn’t apply to a SI in that collateral created by that person.
* A SP can’t rely on automatic perfection where it has a PMSI in a vehicle or any other good covered by a certificate of title §, even if it qualifies as a consumer good
* A SI in goods covered by a certificate of title which is perfected by any method under the law of another jsd when the goods become covered by a certificate of title from this State remains perfected until the SI would have become unperfected under the law of the other jsd had the goods not become so covered.
  + - So if another jsd would allow you to perfect an car by possession then when you move to this state the vehicle will remain perfected until it would have become unperfected under the law of the other jsd.

Priority:  
Intro & Basic Rules of Priority

* *Recall:*
* ***Attachment Occurs When: § 9-203(b)***
  + *1) Value has been given*
  + *2) Debtor has rights in the collateral*
  + *3) One of the following:*
    - *Security Agreement*
      * *1. Authenticated by debtor*
      * *2. Describing the collateral*
    - *Collateral is not a certificated security and is in the possession of the SP per the SA*
    - *Collateral is a certificated security in registered form and the security certificate has been delivered to the SP* ***or****the collateral is deposit accounts, electronic chattel*

General Rules

* A SA is effective according to its terms b/w the parties against purchasers of the collateral, and against creditors, except as otherwise provided in the UCC
* A SI is subordinate to the rights of a person that becomes a lien creditor before the earlier of the time the SI is perfected

Interests That Take Priority Over or Take Free of a SI

* **A SI is subordinate to the rights of:**
  + **1. A Person entitled to priority § 9-322** 
    - * **Formal language of the statute:** Conflicting perfected SIs…rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the SI…is first perfected*,* if there’s no period thereafter when there is neither filing nor perfection. § 9-322(a)(1)
      * **Factors to determine priority among conflicting SI in the same collateral:**
        + First to file or perfect, whichever is earlier (if there’s no period of time when there is neither filing or perfection)
        + If a person is perfected by possession, but then loses possession 🡪 New priority date when they get possession back
        + Perfected interest has priority over unperfected interest
        + If both are unperfected 🡪 First to attach hai0 s priority
  + **2. A person that becomes a lien creditor before the SI is perfected**
    - **Lien Creditor**
      * + A creditor that acquired a lien on the property involved by attachment, levy, or the like

Once the sheriff seizes (levies) the collateral they become a lien creditor

* + - * + An assignee for benefit of creditors from the time of assignment
        + A trustee in BR from the date of the filing of the petition **or**
        + A receiver in equity from the time of appt
* **Rationale**
  + To have priority is to have superior rights in the collateral
  + Both fairness and efficiency dictate that rival claimants to the debtor’s property will be able to learn of a competing claim having priority before taking their own interest
  + Priority goes to the party who has taken proper steps to make their interest known
* **Who takes priority? !!!**
  + Perfected prevails over unperfected
  + 2 unperfected SIs 🡪 First to attach
  + 2 perfected SIs 🡪 First to file FS or to perfect the SI

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| **Problem 18.5  Perfected SP vs. Perfected SP** | |
| * *(a) Is Fuller’s SI perfected?* | * Yes. On July 1 his SI in the watch both attaches and perfects |
| * *Characterize it* | * Perfected SI in the watch |
| * *Is Owen’s SI perfected* | * Yes, he has collateral in the watch & ? & more formally b/c authenticated SA |
| * *Characterize it* | * Perfected SI in the watch |
| * *Who has priority?* | * The earliest to file the FS |
| * *(b)* | * Although Fuller was still the first to perfect (by possession), there was a period following that initial perfection during which there is neither filing nor perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the SI…is first perfected*,* ***if there’s no period thereafter when there is neither filing nor perfection****.* 9-322(a)(1) |

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| **Problem 18.6 Perfected SP vs. Perfected SP Future Advances** | |
| * *What’s Commerce Banks argument as to why it should have priority?* | * It has priority, so $350K: Commerce * (see slide) |
| * *Who wins?* | * Conflicting perfected SIs…rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the SI…is first perfected*,* if there’s no period thereafter when there is neither filing nor perfection. § 9-322(a)(1) |
| * *(c)* |  |
| * *(d)* | * Take-out loan   + Termination statement   + Assignment * Subordination Agreement |
| * *Variation* | * It’s still Commerce b/c Commerce Bank was the first to file. |

Priority Issues:  
Special Priority for the PMSI

PMSI Priority in Goods Other than Inventory

* A perfected PMSI in goods other than inventory or livestock has priority over a conflicting SI in the same goods, and
* a perfected SI in its identifiable proceeds also has priority, if the PMSI is perfected when the debtor receives possession of the collateral, or w/in 20 days thereafter.
  + - **When does debtor receive possession of the collateral?** Buyer “takes possession” when, after an inspection of the portion of the goods in debtor’s possession, it *would be apparent to a potential lender, that debtor has acquired an interest in the goods* 
      * + Sometimes a debtor buys goods and takes possession in stages, and then assembly and testing are completed at debtor’s location

PMSI Priority in Inventory

* Perfected PMSI in inventory has priority over a conflicting SI in the same inventory if:
  + - PMSI in inventory
    - Perfected when debtor acquires possession of inventory
    - Gives notice to prior financer w/in 5 years before debtor obtains possession
    - Notice must indicate that it is taking a PMSI in inventory and must describe the inventory
* Notice req’ts only apply if the holder of the conflicting SI had filed a FS covering the same types of inventory:
  + - If PMSI is perfected by filing 🡪 Before the date of filing **or**
    - If PMSI is temporarily perfected while making goods available to debtor (for final sale) 🡪 before the 20-day period begins

Conflicting PMSI

* If < 1 PMSI qualifies for priority in the same collateral 🡪
  + A SI securing an obligation incurred as all or part of the price of the collateral has priority over a SI securing an obligation incurred for value given to enable the debtor to acquire rights in or use of collateral
    - * Seller’s PMSI has priority over Lender’s PMSI
      * If both parties held a Lender PMSI 🡪 *see the First-in-Time rule*

Differences b/w General Purchase Money Priority and Inventory Purchase Money Priority

* + **20-day grace period for perfection**
    - * Non-Inventory 🡪 w/in 20 days
      * Inventory 🡪 no grace period
  + **Notice Req’t**
    - * Non-Inventory 🡪 no notice req’t
      * Inventory 🡪 must notify a prior inventory financer that it is acquiring a SI in inventory and describe the inventory

**/\* START SEND NOTES**

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| **Problem 19.1** | |
| * *(a) What are the rights of the bankruptcy trustee* | * *Recall: a lien creditor is defined to include(c) a trustee in bankruptcy….* * If a person files a FS w/ respect to a PMSI before or w/in 20 days after the debtor receives delivery of the collateral, the SI takes priority over the rights of a … lien creditor which arise b/w the time the SI attaches and the time of filing. § 9-317(e) * Chip’s has a PMSI. It files a FS w/in 20 days after delivery of the computer equipment (3/22 is w/in 20 days of 3/11). So, Chip’s has priority over a lien creditor, including Lydia’s bankruptcy trustee, whose interest arises in the gap. * Bankr. Code § 544(a)(1) gives trustee only those rights a hypothetical lien creditor would have under state law, and a lien creditor would be subordinate to Chip’s. |
| * *(b)* | * Attachment of Bank’s SI in new equipment   + Authenticated SA describing collateral   + Equipment both owned and after-acquired   + § 9-204(a) allows after-acquired property clause   + Value given: Bank extended the line of credit   + Debtor has rights in collateral: Lydia gets rights in the computer equipment under the sales agreement   + SI *attaches* when debtor acquires rights in the after-acquired collateral. * Perfection of Bank’s SI in new equipment   + SI is perfected if it has attached and all of the applicable req’ts for perfection…have been satisfied. A SI is perfected when it attaches if the applicable req’ts are satisfied before the SI attaches. § 9-308(a).   + SI also *becomes perfected* when debtor acquires rights in the after-acquired collateral.   + Here, we have 2 SPs, both of which are perfected |
| * *(c) Does Chips qualify for priority?* | * **Under the “first-to-file-or-perfect” rule - § 9-322(a)(1)** * *See* § 9-322(f)(1) – subject to exceptions in Part 3. * A perfected PMSI in goods other than inventory or livestock has priority over a conflicting SI in the same goods, … if the PMSI is perfected when the debtor receives possession of the collateral or w/in 20 days. § 9-324(a) * Chip has a perfected PMSI. The collateral is goods other than inventory or livestock. Its perfected b/c he filed the FS on 3/22– w/in 20 days of 3/11 when Lydia receives possession of the computer equipment. So, Chip has priority over Bank w/ respect to that computer equipment. |

Priority Issues:  
Priority in Investment Property & Deposit Accounts

Priority of SI in Investment Property

* + A SI held by a SP having control of investment property 🡪 has priority over a SI held by a SP that doesn’t have control.
  + Conflicting SI held by SP, each of which has control 🡪 Rank according to priority in time of taking control
  + A SI held by a securities intermediary in a security entitlement or a securities account maintained w/ the securities intermediary 🡪 has priority over a conflicting SI held by another SP
  + A purchaser of uncertificated security has control if:
    - The uncertificated security is delivered to the purchaser **or**
    - The issuer agreed to comply w/ instructions originated by the purchaser w/o further consent by the registered owner

Priority of SI in Deposit Account

* **Priorities in Deposit Accounts § 9-327**
  + A SP *having control* has priority over one w/o control **§ 9-327(1)**
    - *“A SI held by a SP having control of the deposit account has priority over a conflicting SI held by a SP that doesn’t have control”*
  + Among those having control, priority ranks according to the time of obtaining control **§ 9-327(2)**
    - **Except:** A SI held by the bank where the account is maintained has priority over all others
      * **Except:** A non-bank having control by becoming a customer w/ respect to the account has priority over the bank where the account is maintained.

Priority of Certificated Security

* **3 methods of obtaining control of Certificated Security**
  + **Being There**: If deposit account maintained w/ SP 🡪 SP has control
  + **Control** **Agreement**: 3-party agreement among debtor, SP, and depositary bank under which depositary bank agrees to follow SP’s instructions w/o further consent of debtor
  + **Customer:** SP becomes depositary bank’s “customer” w/ respect to the deposit account

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| **Problem 20.1** | |
| * *Can the trustee avoid the Venture SIs?* | * ***Perfection****: Is filing a permissible method for perfecting a SI w/ respect to investment property?* * Yes: A SI in chattel paper, negotiable documents, instruments, or investment property may perfected by filing. § 9-312(a). * ***Priority****: What is the priority rule governing perfected SIs and the bankruptcy trustee?* * Bankruptcy trustee has the rights of a lien creditor. Bankr. Code § 544(a)(1); UCC § 9-102(a)(52).   + SI is enforceable against creditors. § 9-201.   + Only an unperfected SI is subordinate to a lien creditor. § 9-317(a)(2). * **Therefore, the trustee won’t be able to avoid the SIs.** |

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| **Problem 20.2** | |
| * *What is the status of the two parties?* | * **Venture**: Has perfected first by filing. § 9-312(a). * **Adventurous**: Has perfected second by delivery. § § 9-313(a), 8-301(a)(1). |
| * *Who has priority?* | * A SI in a certificated security in registered form which is perfected by taking delivery under Section 9-313(a) and not by control under § 9-314 has priority over a conflicting SI perfected by a method other than control. § 9-328(5). * Adventurous, perfected by delivery, has priority over Venture, perfected only by filing. |

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| **Problem 20.3** | |
| * What kind of investment property are the mutual fund shares? | * **Uncertificated security** means a security that is not represented by a certificate. § 8-102(a)(18). |
| * How would one take control of an uncertificated security? | * A purchaser has control of an uncertificated security if: * the uncertificated security is delivered to the purchaser **or** * issuer agreed it will comply w/ instructions originated by the purchaser w/o further consent by the registered owner. § 8-106(c) |
| * Will Venture or Midtown have priority to the shares? | * A SI held by a SP having control of investment property … has priority over a SI held by a SP that doesn’t have control of the investment property. § 9-328(1). |

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| **Problem 20.4** | |
| * *(a)* How does one obtain control over a securities account? | * A SP having control of all security entitlements … carried in a securities account … has control over the securities account….” § 9-106(c). * A purchaser has ‘control’ of a security entitlement if: * (1) the purchaser becomes the entitlement holder; * (2) the securities intermediary agreed it will comply w/ entitlement orders originated by the purchaser w/o further consent by the entitlement holder. § 8-106(d)(2). |
| * *Will Venture or Downtown have priority?* | * A SI held by a SP having control of investment property … has priority over a SI held by a SP that doesn’t have control of the investment property. § 9-328(1). |
| * *(b) What are the priorities among Venture, Downtown, and Hale & Hardy?* | * A SI held by a securities intermediary in a security entitlement or a securities account maintained w/ the securities intermediary has priority over a conflicting SI held by another SP. § 9-328(3). * Hale & Hardy has priority over both Downtown and Venture. * A SI held by a SP having control of investment property … has priority over a SI held by a SP that doesn’t have control of the investment property. § 9-328(1). Here, Downtown has priority over Venture. |

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| **Problem 20.5** | |
| * *(b)* How should Venture perfect its SI in the savings account? | * Except as otherwise provided in § 9-315(c) or (d) for proceeds, a SI in a deposit account may be perfected only by control under § 9-314. § 9-312(b)(1). * **The SPs having control is *the exclusive* method by which to perfect a SI in a deposit account.** * So, Venture better take control of the savings account. W/o control, it will be vulnerable to all rival claimants – judgment lien creditor, bankruptcy trustee, a competing SP. |
| * *How does one take control of a deposit account?* | * **§ 9-104 sets out 3 methods for obtaining control.** * Being There: If the deposit account is maintained w/ SP, then SP has control. (a)(1) * Control Agreement: A 3-party agreement among debtor, SP, and depositary bank under which depositary bank agrees to follow SP’s instructions w/o further consent of the debtor. (a)(2) * Customer: SP becomes the depositary bank’s “customer” w/ respect to the deposit account. (a)(3) * § 4-104(a)(5) – “customer” * § 9-104, Cmt 3 – SP need not be exclusive customer |
| * *How Should Venture Take Control?* | * By becoming a “customer” w/ respect to the account. § 9-104(a)(3). * By *becoming a customer*, it assures having priority over Buchanan Bank & Trust should it ever obtain a SI in the account. § 9-327(4). * By *taking control*, it assures having priority over any other secured creditor that fails to take control. § 9-327(1). * By *taking control first*, it assures having priority over any other secured creditor that obtains control. § 9-327(2). |

PRIORITY ISSUES:  
Fixtures

**Fixtures** are   
goods that have become so related to a particular real property   
that an interest in them arises under real property law.

* A SI doesn’t exist under this article in ordinary building materials incorporated into an improvement on land **§ 9-334(a)**

General Rule: Priority of SIs in Fixtures

* + An encumbrancer prevails over a fixture financer **§ 9-334(c)**
  + “In cases not governed by (d)-(h), SI in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of related real property other than the debtor.”

Exceptions to the General Rule

* A perfected SI in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:
  + (1) The fixtures financer has priority if: **First-to-file Exception for fixtures § 9-334(e)(1)**
    - Debtor is owner or possessor of the real estate **&**
    - SP made ***a fixture filing*** *before the interest* in real property (encumbrancer or owner) is of record **&**
    - SP would also have priority over any predecessor in interest of the real property interest holder.
  + (3) the conflicting interest is a lien on the real property obtained by legal or equitable proceedings *after the SI was perfected by any method permitted by this article.*…” **§ 9-334(e)(3)**
* **Fixtures PMSI**
  + A perfected PMSI in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property **AND**:
    - the SI is a PMSI
    - the owner or encumbrancers interest arises *before* the goods become fixtures **&**
    - the SI is perfected by a fixture filing *before* the goods become fixtures or  
      w/in *20 days* thereafter.
* **Concept of a Fixture § 9-334, Cmt 3: Categories of Goods**
  + Goods that remain entirely personal property and are not any part of real property
  + Ordinary building materials that have become completely integrated into the real property and retain no characteristics of personal property
  + Goods that have become a part of real property for some purposes but which retain some features of personal property for financing purposes.
    - **Fixtures**: Goods that have become so related to particular real property that an interest arises under real property law. § 9-102(a)(41).
    - Art 9 defers to local real estate law to determine whether a good becomes a fixture.

3 Tests

* **Annexation Test How securely the goods have been fixed to the real property.**
  + ***Annexation***: Has the chattel been physically annexed to the real property or to an appurtenance?
  + Sometimes the test asks how securely or how permanently the goods have been affixed to the realty.
  + If they could be removed by loosening a few bolts w/ a hand tool 🡪 Less likely to be characterized as fixtures
  + If it takes considerable labor to remove them, & if the result would be a large gaping hold in the real property, even if their removal would not necessarily jeopardize the structural integrity of the real property 🡪 Likely to be a fixture
* **Institutional or Functional Test – How closely the distinct uses to which the goods are to be put parallels the uses to which the real estate is to be put**
* Is the chattel put to the same use as the real property to which it is attached?
* Sometimes the test asks whether the personal property essential to carrying out the purposes of the real property?
  + The installation of electrical generator in a building meant to house such generator switches 🡪 more likely to be a fixture than a set of shelves on the walls for the purpose of holding all the manuals that came w/ the machinery.
* **Traditional Test – Intent of the party bringing the goods upon the land and affixing them to it.**
  + **Did the party making the annexation intend to annex it permanently to the real property?**
  + Usually the most important factor
  + Sometimes the test asks about the intentions of other parties as well
  + Does it appear this party “intended to make a permanent accession to the freehold?
    - If yes 🡪 More likely a fixture at the time of its initial introduction to the property.

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| **Problem 21.1** | |
| * How does the *Adkins* case relate to this problem? * *Recall:* A SI doesn’t exist under this article in ordinary building materials incorporated into an improvement on land. § 9-334(a). | * *Adkins* held that windows were “ordinary building materials” falling w/in this exception, so that a SI in the windows is cut off once the windows become incorporated into the residence. * *Is this problem distinguishable?* * Probably. *Ryan* held that a bathtub was not ordinary building material, because it incorporated a number of luxury features and was coordinated w/ walls, coiling, and other fixtures. * Similarly, these are not *ordinary* windows. Instead, they are works of art. * *Query:* Is *any* bathtub “building materials”? |
| * *Assuming not excluded under § 9-334(a), will the windows qualify as fixtures?* | * Probably. * (1) Annexation: Relatively firmly affixed. * (2) Intention: Homeowner intended the art windows to remain permanently affixed. * (3) Function: Houses need windows. (But do they need art glass windows?) |
| * *What is the general priority rule governing SIs in fixtures?* | * In cases not governed by (d)-(h), SI in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of related real property other than the debtor.” **§ 9-334(c)**. Therefore, unless there’s an exception, the fixtures financer (*i.e.,* the personal property financer) loses to a real estate interest. |
| * *Is there any applicable exception in (d)–(h)?* | * A perfected SI in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if: * (3) the conflicting interest is a lien on the real property obtained by legal or equitable proceedings *after the SI was perfected by any method permitted by this article.*…” **§ 9-334(e)(3)** |
| * *What is the rationale for this result?* | * **Judgment creditors generally aren’t reliance creditors who search real-property records**. Accordingly, a perfected fixture SI takes priority over a subsequent judgment lien or other lien obtained by legal or equitable proceedings, even if no evidence of the SI appears in the relevant real-property records. (e)(3) This protects a perfected fixture SI from avoidance by a trustee in bankruptcy, regardless of the method of perfection. § 9-334, Cmt 9 |

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| **Problem 21.2** | |
| * *(a)* What is the general priority rule governing SIs in fixtures? | * In cases not governed by (d)-(h), SI in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of related real property other than the debtor.” **§ 9-334(c)**. * *Is there an applicable exception?* * **§ 9-334(e)(1): First-to-file Exception for fixtures** * The fixtures financer has priority if: * The debtor is either the owner or in possession of the real estate; * The SP has made ***a fixture filing*** *before the interest in real property* (encumbrancer or owner) is of record **&** * The SP would also have priority over any predecessor in interest of the real property interest holder. * To take advantage of this first-to-file rule for fixtures, DFS must file *a fixture filing*. Here, DFS apparently has relied on automatic perfection of its PMSI and didn’t file anything. So, the first-to-file exception doesn’t apply. |
| * *(b)* What is the general priority rule governing SIs in fixtures? | * In cases not governed by subsections (d) through (h), SI in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of related real property other than the debtor.” **§ 9-334(c)**. |
| * Is there an exception? | * **Again, the § 9-334(e)(1) first-to-file rule for fixtures won’t be applicable.** * The fixtures financer has priority if: * The debtor is either the owner or in possession of the real estate; * The SP has made ***a fixture filing*** *before the interest in real property* (encumbrancer or owner) is of record; and * The SP would also have priority over any predecessor in interest of the real property interest holder. * **Again, DFS has failed to file *a fixture filing*. So, the first-to-file exception doesn’t apply.** |
| * *(c)* Suppose DFS had filed a FS w/ the NY SOS. | * **Now DFS will have filed a FS, and it will have filed before either Lazyboy’s or Nutmeg Bank’s interest in the real estate arose. But DFS has made only an ordinary UCC-1 filing, *not a fixture filing*. So, the first-to-file exception doesn’t apply.** * “Fixture Filing” - § 9-102(a)(40) * § 9-502(a) – Normal reqt’s for FS * § 9-502(b) – Additional reqt’s for FS |

* **Fixture Filing - Content**
  + Indicate it covers fixtures
  + Indicate that it will be filed in real estate records
  + Provide a description of real property that would be sufficient if it were a real estate mortgage
  + If debtor doesn’t have an interest of record in the real property, provide debtor’s name
  + File in office where mortgage would be filed **§ 9-501(a)(1)(B)**
  + Mortgage filed of record can be effective as a fixture filing **§ 9-502(c)**

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| **Problem** | |
| * *21.3 What should DFS have done?* | * *Which state’s law applies?* * **General rule**: The law of the debtor’s location. § 9-301(1). * **Exception for fixtures**: * While goods are located w/in a state, the local law of that jsd governs: the perfection of a SI in goods by filing a fixture filing. § 9-301(3)(A). * The cottage (and its windows) are located in CT, so CT law governs how to perfect. The CT version of Art. 9 will direct filing in the office where a mortgage on the real estate would be recorded. § 9-501(a)(1)(B). **Had DFS filed a fixture filing in the CT county real estate records, it would have had priority over both the buyer and the later real estate financer.** § 9-334(e)(1). |

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| **Problem 21.4** | |
| * *(a)* The general priority rule for SIs in fixtures? | * In cases not governed by (d)-(h), SI in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of related real property other than the debtor. **§ 9-334(c)**. |
| * Will the first-to-file rule help Middleborough? | * **§ 9-334(e)(1):** The fixtures financer has priority if: * The debtor is either the owner or in possession of the real estate. Here, Springfield is the owner *and* is in possession of the real estate. * The SP has made ***a fixture filing*** *before the interest in real property* (encumbrancer or owner) is of record; **and** * If Middleborough filed a fixture filing, it was before Beta’s mortgage filing. * The SP would also have priority over any predecessor in interest of the real property interest holder. * Not applicable; there is no predecessor in interest w/ respect to Beta. |
|  | * Before the Beta transaction, Alpha has priority over Middleborough under § 9-334(c). * When Beta pays off Alpha and becomes the first and only real estate encumbrancer: * **If Middleborough has filed only a standard UCC-1**, Beta also will have priority under § 9-334(c). Middleborough will have filed its FS before Beta’s mortgage is recorded, but § 9-334(e)(1) requires it to have first filed a *fixture filing*. * **If Middleborough has filed a fixture filing**, then it satisfies all the requirements for § 9-334(e) and so will have priority. * N.B. Beta would be aware that it’s taking subject to the SI in fixtures, because having searched the *real estate records* it could have seen the fixture filing when it performed the title search on the property. |
| * *(b)* | * Under the general rule, Beta has priority. * If Middleborough has filed a standard UCC-1: * Beta will have priority, because Middleborough still cannot satisfy § 9-334(e)(1)(A). It did not file a fixture filing before Beta’s mortgage was recorded. * If Middleborough has filed a fixture filing: Beta still will have priority. If Beta took over Alpha’s mortgage, then (e)(1)(B) isn’t met. Alpha would be Beta’s predecessor in title, and Middleborough doesn’t have priority over Alpha. * **Rationale**: This apparent limitation is just an expression of the usual rule—a person must be entitled to transfer what he has. Thus, if the fixture SI is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage, even though the assignment is a later recorded instrument. § 9-334, Cmt 6. |

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| **Problem 21.5** | |
| * What is the general priority rule governing SIs in fixtures? | * In cases not governed by (d) through (h), SI in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of related real property other than the debtor. **§ 9-334(c)**. * *Is there an applicable exception?* * **§ 9-334(d) – Fixtures PMSI**: … a perfected PMSI in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property **AND**:   + the SI is a PMSI   + the owner or encumbrancers interest arises *before* the goods become fixtures **&**   + the SI is perfected by a fixture filing *before* the goods become fixtures or w/in *20 days* thereafter. |
| * Does PPP meet these req’ts? | * *Does debtor have an interest of record in or is it in possession of the real property?* * Debtor’s interest is recorded; it also is in possession. * *Is the SI a PMSI?* * It secures payment of part of the purchase price. * *Did the interest of the encumbrancer arise before the goods became fixtures?* * Mortgage arose in 1992; pump became a fixture on 9/06/12. * *Is the SI perfected by a fixture filing before the goods become fixtures or w/in 20 days thereafter?* * Fixture filing made 2 days after installation of the new pump. * *Rationale for the PMSI priority for fixtures?* * § 9-334, Cmt 7 |
| * *Variation 1* | * *Suppose Delta Bank holds a construction mortgage. Will PPP still have priority?* * No! § 9-334(d) refers to (h), which creates an exception to the PMSI exception. If the real estate encumbrancer is *a construction lender w/ a construction mortgage*, and it is filed before the fixture financer perfects, then the construction mortgage has priority. * *What’s req’d for Delta to have a construction mortgage?* * …to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, *if a recorded mortgage so indicates.* § 9-334(h);*See* Cmt 11 |
| * *Variation 2* | * *What effect will these facts have on PPP’s priority?* * **General rule**: As encumbrancer, Delta has priority, unless some exception applies. * **PMSI rule**: PPP still has a PMSI, but it filed a UCC-1 in the SOS’s office and so failed to make a fixture filing. § 9-334(d). * “**Readily removable” collateral rule**: Under § 9-334(e)(2), the fixture financer can have priority if, *inter alia*, * before the goods become fixtures * the SI is perfected by any method permitted by Art. 9. * PPP filed before the pump was installed. * Filing a FS is a method permitted for perfecting a SI in goods. |
| * *Can PPP meet the other req’ts of (e)(2)?* | * § 9-334(e)(2) requires the pump to be “readily removable” **&** one of the following: * **(A) Factory or office machines** * Maybe. It is possible to characterize the water pump as a “factory machine.” * **(C) Replacements of domestic appliances that are consumer goods** * Not consumer goods. * **(B) Equipment that is not primarily used or leased for use in the operation of the real property** * Scope of this category is ambiguous. |

**9-334(e)(2)(B)**

* + **Alternative 1: The Narrow Interpretation**
    - Can’t be equipment that is part of the building systems, like a furnace or A/C unit.
    - The water pump might well qualify, if it’s readily removable. It is used in the business operated in the building, but it is not used to operate the building.
  + **Alternative 2: The Broad Interpretation**
    - Can’t be equipment used in the business operating on the real estate.
    - Water pump won’t qualify even if it is readily removable. The business operated in the building is bottling water, and the pump is used to draw water to be treated and bottled.
  + **Which reading of § is better?**
    - This rationale supports the narrower reading:
      * This rule is made necessary by the confusion in the law as to whether certain machinery, equipment, and appliances become fixtures. It protects a SP who, *perhaps in the mistaken belief that the readily removable goods will be not become fixtures*, makes a UCC filing…rather than a fixture filing. **§ 9-334, Cmt 8, ¶ 1**
    - One might be misled by readily removable equipment used equipment used in the business, but one is not likely to be misled about the fixtures status of building operating systems, like an A/C or heating unit.

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| *In the Matter of Bennett* | |
| * *Why did GreenPoint Credit lose under old Article 9?* | * The bank’s mortgage on real estate, covering fixtures, was recorded first. * The manufactured home qualified as a fixture. * GreenPoint perfected its SI in the manufactured home by noting it on the certificate of title. * General rule: encumbrancer prevails over fixture financer. § 9-334(c). * PMSI rule: requires perfecting w/in 20 days by filing a fixture filing. GreenPoint did not. * There was no equivalent to § 9-334(e)(4). * Therefore, the bank has priority under § 9-334(c). |
| * The Ct points out that under Revised Art. 9, GreenPoint would have priority. Why? | * A perfected SI in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if: (4) the SI is: * (A) created in a manufactured home in a manufactured home transaction & * (B) perfected pursuant to a § described in § 9-311(a)(2). **§ 9-334(e)(4).** * *See* § 9-334, Cmt 10. |

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| **Problem 21.6** | |
| * *(a)* | * Subject to the other provisions of this part, if a SP holding a SI in fixtures has priority over all owners and encumbrancers of the real property, the SP, after default, may remove the collateral from the real property. **§ 9-604(c)** * A SP that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. SP need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them **§ 9-604(d)** |
| * *(b)* | * PPP will argue it’s entitled to some of what the trustee receives upon disposition of the plant, since some of that value is attributable to the pump – *as to which it had priority*. * ***~~Tustian v Schriever~~*** * ~~Holds that prior Art. 9 provided only 1 remedy for the party holding a SI in a fixture upon default,~~ *~~viz.~~* ~~it could repossess the fixture.~~ * ~~Accordingly, it was~~ *~~not~~* ~~entitled to share in the proceeds from the sale of the real estate if the real estate was sold while the fixture in which it held an interest was still affixed to the land.~~ * ~~The Ct follows~~ *~~Maplewood~~*~~, a much-criticized decision.~~ |
| * How does Revised Art 9 handle the issue? | * If a SA covers goods that are or become fixtures, a SP may proceed: under this part **or** in accordance w/ the rights w/ respect to real property, in which case the other provisions of this part do not apply.” **§ 9-604(b)** * Subsection (b) … serves to overrule cases holding that a SP’s only remedy after default is the removal of the fixtures from the real property.  *See, e.g. Maplewood Bank & Trust v. Sears, 625 A.2d 537 (N.J. Super. Ct. App. Div. 1993).* |

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| **Problem 16.1** | |
| * *(a)* | * a) Perfect by filing a financing statement? * “A SI in chattel paper, negotiable documents, instruments, or investment property may perfected by filing.” § 9-312(a). * This is not perfection “by control.” We will see that a SI perfected by control will have priority over one perfected by filing. *See* Comment 4, § 9-312. |
| * *(b)* Perfect by merely taking possession | * “…A SP may perfect a SI in certificated securities by taking delivery of the certificated securities under § 8-301.” § 9-313(a). * “Delivery of a certificated security to a purchaser occurs when: (1) the purchaser acquires possession of the security certificate….” § 8-301(a)(1). |
| * *(c)* | * (c) Perfection by control * § 9-314(a) allows perfection by control. * § 9-106 defines “control,” referring to § 8-106. * A purchaser has ‘control’ of a certificated security in registered form if the certificated security is delivered to the purchaser, and: * (1) the certificate is indorsed to the purchaser or in blank by an effective indorsement; or * (2) the certificate in registered form is registered in the name of the SP. § 8-106(b). * “Delivery of a certificated security to a purchaser occurs when: * the purchaser acquires possession of the security certificate” or * when a 3P takes possession on its behalf or acknowledges that it holds the certificate for the SP. § 8-301(a). * Thus, a standard case of “control” requires both the SP’s taking possession and either the certificate being indorsed to the SP or the certificate being registered in the SP’s name. |

Concept of control of investment property

* “Obtaining ‘control’ means that the purchaser has taken whatever steps are necessary, given the manner in which the securities are held, to place itself in a position where it can have the securities sold, w/o further action by the owner.” Comment 1, § 8-106.
* Why should the debtor be willing to surrender such control?
  + *Cf.* SP taking possession of tangible collateral like goods. The SP is in essentially the same position.
  + *N.B.* Just because the SP is in the position to sell the securities w/o further action by the owner doesn’t mean it has the *right* to do so. The SP will have that right only upon the debtor’s default and only in accordance w/ the rules set out in Part 6 of Article 9.
  + If the debtor pays off the debt, the SP will be obliged to relinquish control.

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| **Problem 16.2** | |
| * *(a)* | * Bank opens brokerage account; shares transferred. This is one method by which a SP gains control over a security entitlement. * “A purchaser has ‘control’ of a security entitlement if: (1) the purchaser becomes the entitlement holder….” **§ 8-106(d)(1)**. * Notice how this technique accords w/ the general principle of how control is obtained by putting the SP in a position to sell the collateral w/o further action by the debtor. As the owner of the account to which the shares have been credited, the bank can unilaterally transfer the collateral. |
| * *(b) Agreement b/w debtor and SP* | * This alone won’t constitute “control.” Instead, what is required is a three-party “control agreement.” * “A purchaser has ‘control’ of a security entitlement if: … (2) the securities intermediary has agreed that it will comply w/ entitlement orders originated by the purchaser w/o further consent by the entitlement holder….” **§ 8-106(d)(2).** * A securities intermediary may not enter into an agreement of the kind described in (d)(2) w/o consent of the entitlement holder….” **§ 8-106(g).** * Once again, notice how this technique comports w/ the general concept of control articulated in Cmt 1. The lender will obtain a “control agreement” – a 3-party agreement among the debtor, broker, and SP – under which the broker will agree to follow the SP’s instructions concerning disposition of the entitlement held in the account w/o the debtor’s having any further say in the matter. * Many brokers have standard form agreements, and often they won’t negotiate different terms, especially in relatively small or uncomplicated transactions. |

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| **Problem 16.3** | |
| * *What must Shakes & Rattles do to perfect its SI?* | * “If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder’s own securities intermediary, the securities intermediary has control.” §8-106(e). * “(e) provides that if an interest in a security entitlement is granted by an entitlement holder to the securities intermediary through which the security entitlement is maintained, the securities intermediary has control. A common transaction covered by this provision is a margin loan from a broker to its customer.” **§ 8-106, Cmt 6.** The brokerage firm need do nothing more to perfect its SI, since it obtains control automatically upon attachment |

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| **Problem 16.4(a)** | |
| * *(a) How should SP perfect its SI in the security account?* | * “A SP having control *of all security entitlements … carried in a securities account* … has control over the securities account….” **§ 9-106(c)**. Venture Loans must get control over all of the entitlements credited to Cashmore’s account. Thus, it must either:   + Have all of the entitlements in Cashmore’s account transferred into an account that Venture Loan holds w/ the broker **(§ 8-106(d)(1))**, **or**   + Enter into a control agreement amount Cashmore, Shakes & Rattles, and itself covering all of the entitlements now or thereafter credited to Cashmore’s account w/ the broker. **§ 8-106(d)(2).** |
| * *(b) Will the debtor’s having the right to execute orders on his account prejudice the SP’s control?* | * A purchaser who has satisfied the reqt’s of (d) has control, even if … the entitlement holder … retains the right to make substitutions for the … security entitlement, to originate instructions or entitlement orders to the … securities intermediary, or otherwise to deal w/ the … security entitlement.” **§ 8-106(f).** |
| * *How will Venture’s SI be protected?* | * Control agreement must impose limits on what debtor can do. * Trades limited to certain kinds of stocks (*e.g.*, ones deemed safe) * Prohibit cash distributions to the debtor (or limit them to cases where the value of stock remaining is above specified amount) * Notification to SP of any trades executed by the debtor |

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| **Problem 16.5** | |
| * *Is there any reason to question whether Large Lenders has a SI in the CBI checking account?* | * The SA describes the collateral as “accounts.” The FS identifies the collateral as “accounts.” But the checking account is a “deposit account,” not an “account.” *Account* means a right to payment of a monetary obligation…(i) for property that has been or is to be sold…(ii) for services rendered or to be rendered. **§ 9-102(a)(7).** *Deposit account* means a demand, time, savings, passbook, or similar account maintained w/ a bank. **§ 9-102(a)(29).** * *Assume the SA and FS read, “all deposit accounts, now held or hereafter acquired.”* |
| * *(a) Can Large Lenders perfect its SI in the checking account by filing a FS?* | * A SI in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing. **§ 9-312(a).** So, perfection by filing is ***not*** allowed: * Except as otherwise provided in § 9-315(c) or (d) for proceeds: (1) a SI in a deposit account may be perfected only by control under § 9-314. **§ 9-312(b)(1).** * The SP’s having control is *the exclusive* method by which to perfect a SI in a deposit account. |
| * *(b)* *Problem 16.5(b) How does one take control of a deposit account?* | * § 9-314(b) directs to § 9-104. It sets out 3 methods for obtaining control. * “Being There”: If the deposit account is maintained w/ SP, then SP has control. (a)(1) * Control Agreement: A 3-party agreement among debtor, SP, and depositary bank under which depositary bank agrees to follow SP’s instructions w/o further consent of the debtor. (a)(2) * Customer: SP becomes the depositary bank’s “customer” w/ respect to the deposit account. (a)(3) * § 4-104(a)(5) – “customer” * § 9-104, Comment 3 – SP need not be exclusive customer * Can Large Lenders allow Knifty Knits to use the account? * Yes. § 9-104(b) |

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| **Problem 33.2** | |
| * *(a) Broker obligated to follow bank’s instruction?* | * Yes. This is just what the control agreement obligates the broker to do. * As we’ve seen, the concept of “control” just means that the SP is in a position to dispose of the collateral w/o the further consent of the debtor. |
| * *(b) Any basis for the debtor to challenge?* | * The sale is commercially reasonable under § 9-627(b)(1), b/c it was made “in the usual manner on [a] recognized market.” There was no need to give notice of the sale to the debtor, also b/c the sale took place on a recognized market. § 9-611(d). |

How do you perfect a fixture?

* Filing a valid initial FS
  + - This won’t give protection against others who can legitimately claim an interest in the same property through their interest, either as owner of or as one holding a mortgage on, the real estate that fixture is affixed and which it become a part.
* Fixture Filing
  + - The filing of a FS, covering goods that are or are to become fixtures
    - This secures you against the owner of real property the fixture is attached to.

Reqt’s for a valid Fixture filing

* **Normal Reqt’s for a FS:** a FS is sufficient only if it:
  + Names debtor
  + Names SP or a representative of the SP **&**
  + Indicates the collateral covered by the FS
* **Additional Req’ts for a fixture filing:** to be sufficient, a financing which is filed as a fixture filing and covers goods that are or are to become fixtures, must also:
  + Indicate it covers this type of collateral
  + Indicate it’s to be filed in the real property records
  + Provide description of real property to which collateral is related; and
  + If debtor doesn’t have an interest of record in the real property 🡪 Provide name of the owner
* **Governing Law**
  + Fixtures are governed by the law of the place where the fixture is located
  + So a fixture filing should be filed in the JSD the fixture is located in
* **Filing Office**: Office in which to file a FS to perfect the SI in goods that are (or are to become) fixtures 🡪 Is the office designated for the filing or recording of a record of a mortgage
  + A mortgage filed of record 🡪 Can be a fixture filing

Priority of SI in Fixtures

* **General Rule**: A SI in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor
  + **Encumbrance:** A right, other than an ownership interest, in real property. Includes mortgages & other liens on real property
  + **Mortgage:** A consensual interest in real property, including fixtures, which secures payment or performance of an obligation
    - * No SI for Fixtures in ordinary building materials incorporated onto an improvement on land.
  + **Fixtures PMSI Priority:** A perfected SI in fixtures has priority over a conflicting interest of an encumbrancer or owner of real property if the debtor has an interest of record in or is in possession of the real property and:
    - * SI is a PMSI
      * Interest of the encumbrancer/owner arises before the goods become fixtures **&**
      * SI is perfected by a fixture filing before the goods become fixtures or w/in 20 days
  + **Other Exceptions** A perfected SI in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:
    - * **First to File Rule for Fixtures**
        + Debtor has an interest of record in the real property or is in possession of the real property and the SI:

Is perfected by a fixture filing before the interest of the encumbrancer or owner is of record **&**

Has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner

* + **Readily Removable Collateral Rule**
    - * Before the goods become fixtures
      * The SI is perfected by any method permitted by this article &
      * The fixtures are readily removable

Factory or office machines

Replacements of domestic appliances that are consumer goods

Equipment that is not primarily used or leased for use in the operation of the real property **or**

This option is ambiguous, 2 alternatives:

*Narrow Interpretation*

Can’t be equipment that’s part of the building systems, e.g., furnace or A/C

Must be readily movable, used in business operated in the building, but not used to operate building itself

*Broad Interpretation*

Can’t be equipment used in the business operating on real estate

If readily movable and equipment is being used in the business operations

* + - * **Judgment Creditor**: The conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the SI was perfected by any method permitted by this article **or**
      * **Construction Mortgage** has priority over PMSI in fixtures

If the real estate encumbrancer is a construction lender w/ a construction mortgage, and it is filed before the fixture financer perfects 🡪 Construction mortgage has priority

Construction mortgage must secure obligation incurred for construction or improvement & must say construction mortgage on the document

Remedy on default

* If a SP holding a SI in fixtures has priority over all owners and encumbrancer of the real prop 🡪 SP, after default, may remove the collateral from the real prop.
* A SP that removes collateral shall promptly reimburse any encumbrancer or owner of the real prop, other than the debtor, for the cost of repair of any physical injury caused by the removal.
* SP need not reimburse the encumbrancer or owner for any diminution in value of the real prop caused by the absence of the goods removed or by any necessity of replacing them.
* SP may also proceed in accordance w/ the rights w/ respect to real prop.
  + - e.g., SP may be entitled to share in the proceeds from the sale of the real estate if the real estate was sold while the fixture in which it has an interest is still affixed to the land.

PRIORITY ISSUES:  
Special Issues in Bankruptcy

Strong Arm Clause

* BR trustee has the power to avoid any interest that could have been avoided by a lien creditor.
  + - Lien creditor has priority over unperfected SIs at the time of filing
    - So a perfected SI has priority over a lien creditor

Preferential Transfers

Elements to avoid preferential transfers

* **Transfer of property of the debtor**
  + A transfer is not made until the debtor has acquired rights in the property transferred
  + Granting a SI is considered a transfer of property
* **To or for the benefit of a creditor**
* **For or on account of an antecedent debt owed by debtor before transfer was made**
  + Debt pre-existed the transfer
    - * Made while the debtor was insolvent
  + Presumed to be insolvent on and during the 90 days prior to the date of petition
    - * Made w/in the preference period
  + Usual period: on or w/in 90 days of the filing of the bankruptcy petition (1 year for transfers to an insider)
  + **Insider** – includes relatives of an individual debtor; partners of a partnership; officers, directors, or other persons ‘in control’ of a corp
* Enabled the creditor to receive more than it would receive if the debtor’s assets were liquidated as of the date of petition
  + **w/ transfer** 🡪 Amount Debt – payment – amount of collateral = secured claim
  + **w/o transfer 🡪** Amount Debt – amount of collateral = secured claim
  + If there’s an amount left unsecured 🡪 Unsecure amount x .10 = X 🡪 X + secured claim
  + If the secured claim is more w/ the transfer 🡪 this element is met
  + When an unsecured creditor is converted to a secured creditor 🡪 He can receive more
  + Payments on an under-secured debt allow creditors to receive more
* ***Exceptions***: Trustee may not avoid a transfer –
  + **Contemporaneous Exchange:** to the extent that such a transfer was—
    - * Intended by the debtor and the creditor to be a contemporaneous exchange for new value given to the debtor **&**
      * In fact substantially contemporaneous exchange;
      * There’s no reason to discourage this transaction. The creditor is not engaged in a ‘grab’ of assets, and the equality of distribution principle is not affected
  + **Ordinary Course of Business:** to the extent that such transfer:
    - * Was in payment of a debt incurred by debtor in ordinary course of business **AND**
        + Is it a common financing arrangement?
      * Made in the ordinary course of business **or** e.g., Does debtor usually pay a few days early/late, etc.
      * Made according to ordinary business terms i.e., Customs and terms of the industry
  + **PMSI or Enabling Loan:** that creates a SI in property acquired by the debtor—
    - To the extent such SI secures new value that was—
      * + Given at or after the signing of a SA that contains a description of such property as collateral
        + Given by or on behalf of the SP under that agreement
        + Given to enable the debtor to acquire such property **&**

Uused by the debtor to acquire such property

That is perfected on or before 30 days after the debtor receives possession of such property

* + **Automatic Stay**
    - * Any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustees right and powers are subject to such perfection or to the extent that such act is accomplished w/in time limits.
      * Trustee’s powers limited by generally applicable law permitting perfection to be effective against a party acquiring rights in the property before the date of perfection.
      * § 362(a) Filing of petition stays most credito-collection action, including acts to perfect a SI
      * § 362(b) Creates an exception that covers this PMSI priority, *see p289, text*
  + **Floating Lien:** creates a perfected SI in inventory
    - * Compare the deficiency 90 days before filing of BR w/ the deficiency on BR day

Only to the extent that the net effect of all the transfers reduces the SP’s deficiency will there be a preference

* + - * EX: A owes B 400k. B has a SI in all of A’s inventory now owned and hereafter acquired (which means there will constantly be new inventory—it’s a floating lien). A files for BR, on the day of filing the inventory is worth 250k. You must compare that to 90 days prior when the inventory was worth 300k.

The deficiency on day of BR filing is 150k (400-250)

The deficiency 90 days prior is 100k (400-300)

b/c the situation has worsened the trustee cannot avoid the transfers

* + - * EX: What if instead 90 days prior the inventory was worth 100k?

The deficiency on day of BR filing is 150k

The deficiency 90 days prior is 300k

b/c the deficiency has been reduced the trustee can avoid these transfers to the extent of 150k.

90th day – BR day = 300 – 150 = 150k

Pro Rata Distribution

* + Remaining assets / Remaining Debts X Debt = Distribution
    - * EX: $12k asset / $20k debt = 60%, 60% x $10k debt = $6k per creditor
  + Not following pro rata distribution allows a creditor to get more than they would have through the bankruptcy proceeding

Does the Interest Survive the Disposition?

* **General Rule**
  + A SA is effective to its terms between the parties, against purchasers of the collateral, and against creditors
  + A SI continues in collateral regardless of sale, lease, license, exchange, or other disposition.
* **Exceptions** 
  + **Authorization of SP**
    - * SI continues ***unless*** the SP authorizes the disposition free of the SI
  + **Buyer of Unperfected Collateral**
    - * An unperfected SI is subordinate to a non-ordinary course of business buyer who:

Gives value

Takes delivery of the collateral

w/o knowledge of the SI **AND** knowledge ≠ notice

Before it is perfected

* + - * Where the SP’s SI is *unperfected*, even if the buyer had been concerned about the existence of a possible SI and had performed a search, they would have found nothing to provide notice of the interest. Lack of notice results regardless of the reason for unperfection
  + **Buyer in Ordinary Course of Business**
    - * A buyer in ordinary course of business takes free of a SI ***created by the buyer’s seller***, even if the SI is perfected and the buyer knows of its existence.

**BIOCB**: a person that buys goods in good faith, w/o knowledge that the sale violates the rights of another person in the goods and in the ordinary course from a person other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports w/ the usual or customary practices in the kind of business in which the seller is engaged or w/ the seller’s own usual or customary practices.

A BIOCB doesn’t include a person that acquires goods in a transfer in bulk **OR** as security for or in total or partial satisfaction of a money debt

EX: A owes B for an antecedent debt. B decides to take a TV out of A’s showroom in satisfaction of that debt 🡪 not BIOCB

* + - * Buyer takes free whether or not it knows the SI exists
      * Remember that it **must** be the buyer’s seller! BAR EXAMINERS LOVE THIS **!!!**

If A sells to B/ then B sells to C / then C sells to D 🡪 D can’t take free of the SI even if they are a BIOCB b/c the SI wasn’t created by the buyer’s seller (C); B created it. Sale creates no proceeds for the SP.

What remedy is available to D?

D may sue seller for breach of the warranty of title

There is a warranty by the seller that:

The title conveyed shall be good, and its transfer rightful **&**

The goods shall be delivered free from any SI or other lien or encumbrance of which the buyer at the time has no knowledge.

* + **Buyer of Consumer Goods: “Garage Sale”**
    - * A buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a SI, even if perfected, if the buyer buys:

W/o knowledge of the SI

For value

Primarily for the buyer’s personal, family, or household purposes **&**

Before the filing of a FS statement covering the goods

Can’t be auto-perfection or possession.Must be FS!

If the buyer isn’t going to use goods as consumer goods 🡪 this exception doesn’t apply.

Double Debtor Problem

* When 2 different SP’s are claiming superior title through 2 different debtors
* Which SP has priority?
  + A SI created by the debtor (2nd to become debtor w/ regards to the collateral) is subordinate to a SI in the same collateral created by another person (1st to become debtor) if:
    - * + Debtor acquired the collateral subject to the SI created by the other person
        + SI created by the other party was perfected when debtor acquired collateral; and
        + There’s no period thereafter when the SI is unperfected
  + EX: Bank C gives A a loan secured by all equipment which was continually perfected. A later sells an oven (equipment) to G. In order to buy the oven G gets a loan from bank D (granting them a PMSI in the oven). Which bank has priority? Bank C who has a SI through debtor A, or, bank D who has a SI through debtor G?
    - * + SI created by the first debtor (A) will have priority if:

Debtor (2nd debtor – G) acquired the collateral subject to the SI created by other person (A)

Here, G acquired subject to the SI b/c not BIOCB, etc.

SI created by the other party was perfected when debtor acquired the collateral

Here, it was perfected before debtor acquired it

There is no period thereafter when the SI is unperfected

True. Bank C kept the interest continually perfected

* + - * + This means Bank C has priority over Bank D

What Are Proceeds?

* **General Rule:** a SI attaches to any identifiable proceeds of collateral
  + If the collateral is disposed of by the debtor in such a way that the transferee takes free of the SI 🡪 SP didn’t obtain in its place a SI in the proceeds presumably generated by that disposition
  + If the transferee takes the original collateral subject to the SP 🡪 SI, then the SP will continue to have an interest in the original collateral and in addition will have a newly created interest in the proceeds
  + “Proceeds of proceeds are proceeds”
* **Proceeds**:
  + Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral  **§9-102(a)(64)(A)**
    - * EX: bank loans dealership $ and gets SI in inventory. When dealership sells a car, anything received in return is Proceeds (ie: note, cash, trade-in)
  + **Whatever is collected on, *or distributed on account of*, collateral;**
    - * Promissory note 🡪 Proceeds from the sale of goods, including any cash proceeds collected on that note
      * If SP has stocks as collateral 🡪 Dividends debtor receives on account of those stocks are “distributed on account of” the collateral
  + To the extent of the value of collateral and to the extent payable to the debtor or the SP, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral
    - * Whatever SP has an interest in the collateral also has an interest in insurance proceeds from the collateral. (make sure the SI in the collateral hasn’t been cut off by BIOCB, Garage sale, etc.)
  + Can be cash proceeds or noncash proceeds.
    - * Cash proceeds
        + $, checks, deposit accounts, *and the like* (the functional equivalent of $, check, or deposit accounts, e.g., some money-market accounts that are securities or part of securities entitlement)
        + **Doesn’t include:** Notes or trade-ins
      * Noncash proceeds: other than cash proceeds

Attachment, Perfection, and Priority in Proceeds

Attachment

* + A SI automatically attaches to any identifiable proceeds of collateral
  + **How to determine which proceeds are identifiable?**
    - * Don’t mingle personal funds w/ proceeds. Inventory financers require a borrower to establish a proceeds account solely for proceeds from the sale of inventory.
      * Proceeds that are commingled w/ other property are identifiable proceeds:
        + If proceeds are goods
        + If proceeds are not goods, to the extent that the SP identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this article w/ respect to commingled property of the type involved.

**TX**: **Lowest Intermediate Balance** method of tracing

Assume debtor spends his own $ first

Then, he encroaches on proceeds

If deposits later made (personal funds) 🡪 it doesn’t replenish the proceeds. It only replenishes the personal funds – if deposit of proceeds then that is proceeds

Perfection

* **General Rule:** A SI in proceeds is auto-perfected if the SI in the original collateral was perfected.
* **Continuation of Perfection:** A perfected SI in proceeds becomes unperfected on the 21st day after the SI attaches to the proceeds, unless:
  + **(1) Same Office Rule**  **§ 9-315(d)(1)**
    - * A filed FS covers the original collateral **&**
      * SI in proceeds may be perfected by filing in same office where FS has been filed **&**
      * Proceeds aren’t acquired w/ cash proceeds
  + **(2) Cash Proceeds Rule:** the proceeds are identifiable cash proceeds **OR § 9-315(d)(2)**
  + **(3) Alternative Perfection Rule:** When SI attaches to the proceeds w/in 20 days **§ 9-315(d)(3)**
    - *“The SI in proceeds is perfected, other than by general rule of auto-temporary perfection, when SI attaches to the proceeds w/in 20 days.”*
    - If a filed FS covers the original collateral 🡪 a SI in proceeds which remains perfected becomes unperfected at the later of:
      * + When the effectiveness of the filed FS lapses or is terminated **or**
        + 21st day after SI attaches to the proceeds

Priorities

* **Priorities Among Conflicting Sis on Same Collateral**
  + Time of perfection: proceeds and supporting obligations
    - * The time of filing or perfection as to a SI in collateral is also the time of filing or perfection as to a SI in proceeds
      * The time of filing or perfection as to a SI in collateral supported by a supporting obligation is also the time of filing or perfection as to a SI in the supporting obligation
  + Priority of PMSI
    - * A perfected PMSI in goods other than inventory has priority over a conflicting SI in the same goods. A perfected SI in its identifiable proceeds also has priority, if the PMSI is perfected when the debtor receives possession of the collateral or w/in 20 days thereafter
* **Transfer of Money; Transfer of Funds from Deposit Account**
  + A transferee of $ takes it free of a SI unless the transferee acts in collusion w/ the debtor in violating SP’s rights
  + A transferee of funds from a deposit account takes the funds free of a SI in the deposit account unless the transferee acts in collusion w/ the debtor in violating SP’s rights
  + **Rationale:** Promotes the free transferability of money and its equivalent

Chattel Paper and Accounts Financing

Priority of Purchaser of Chattel Paper or Instrument

* + **SI Claimed Merely as Proceeds – Type A Inventory Financing**
    - * A purchaser of chattel paper has priority over a SI in the chattel paper which is ***claimed merely as proceeds of inventory*** subject to a SI if:

In good faith and

In the ordinary course of the purchaser’s business

The purchaser gives new value and

**New Value**

* + $
  + Money’s worth in property, services, or new credit **or**
  + Release by a transferee of an interest in property previously transferred to the transferee
  + **Doesn’t include** an obligation substituted for another obligation
    - * **Purchaser** includes an outright buyer and one acquiring SI

Takes possession of chattel paper or obtains control **&**

Chattel paper doesn’t indicate that it’s been assigned to an identified assignee other than purchaser

**Rationale:** It’s common practice to put a legend on the chattel paper stating if it’s been assigned

Not legend 🡪 Assume it hasn’t been assigned

Just b/c the papers are produced fraudulently 🡪 doesn’t mean they won’t be chattel paper.

* + **Other Sis – Type B Inventory Financing**
    - An account debtor (buyer of the collateral) on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives notice, authenticated by the assignor/ assignee, that the amount due or to become due has been assigned and that payment will be made to the assignee.
    - After receipt of notice 🡪 account debtor may discharge its obligation by paying the assignee and can’t discharge the obligation by paying the assignor.
      * + **Account debtor**: A person obligated on an account, chattel paper, or general intangible. Doesn’t include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

So can pay assignor until they receive notice the accounts been assigned

After they receive notice 🡪 they must pay the assignee.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| * **???** | | | | | |
| **Type** | **Control** | **Possession** | **Filing** | **Federal Law** | **Method of Perfection** |
| **Inventory** |  | X | X |  |  |
| **Equipment** |  | X | X |  |  |
| **Consumer Goods** |  | X | X |  | [PMSI] X COT |
| **Farm Products** |  | X | X |  |  |
| **Fixtures** |  | X | X |  |  |
| **Documents** |  | X | X |  |  |
| **Instruments** |  | X | X (new law) |  |  |
| **Tangible Chattel Paper** |  | X | X |  |  |
| **Electronic Chattel Paper** | X |  | X |  |  |
| **Accounts** |  |  | X |  |  |
| **General Intangibles** |  |  | X |  |  |
| **Deposit Accounts** | X (only way) |  |  |  |  |
| **Commercial Tort Claims** |  |  | X |  |  |
| **Letter-of-Credit** | X (only way) |  |  |  |  |
| **Investment Property (C)** | X | X (delivery) | X |  |  |
| **Investment Property** | X |  | X |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
| **SET UP CHART** | | | |
| **Items** | **Type of Collateral** | **Statute** | **Method of Perfection** |
| Installment Ks | Accounts Instrument Chattel Paper | §9-309(2) | Filing, for CP and I, you’d prefer to have Possession under §9-330 |
| Office Equipment | Inventory Equipment PMSI | §9-309 | Filing by FS (more practical)  Possession  PMSI 🡪 No Auto-Perfection b/c not a consumer good in the hands of the buyer |
| Promissory note | Instrument Tangible Chattel Paper Accounts | §9-109(a)(3)  §309(4)  §9-312  §9-313  §9-309(4)\* | Filing (may be better)  Possession  Automatic perfection when dealing w/ promissory notes |
| Credit card receivables | Accounts | §9-309(2)  §9-102(2)(vii)  §9-310(2) | Filing a FS |
| TV sets and stereos | Consumer Goods (depends on debtor’s use) Equipment (maybe) | §9-309 PMSI | Filing (may be better than automatic perfection under §9-320(b))   Possession (not practical)  If it’s a consumer good 🡪 Automatic |
| Delivery truck | Equipment | §9-310(b)(3)  §9-311 for vehicle -COT | Filing a COT  Possession (not so sure it’ll work b/c you need a 1st lien on COT, therefore, you might as well file a COT) |
| GM’s stock | Instrument Investment Property --  Certificated Security or  Uncertificated Security |  | Control (trumps filing & everything else under §9-328)  Filing |
| Software (held under a license) | General Intangible | §9-312  §9-314  §9-310(8) | Filing only |
| 10 non-transferable, non-negotiable CD for 10K each issued to SF & redeemable 90 days from date of issue. U will lend to SF, Inc. | Deposit accounts  Perhaps also an instrument (*but b/c they’re marked non-transferable and non-negotiable, they wouldn’t be)* |  | Control (only way) |
| Supplies of machine replacement parts stored by SF for use in repairing its machines | Equipment; could be inventory |  | Filing (more practicable)  Possession |
| Cash which SF originally places in its register but ultimately deposits in its account at Bank of Boston | While in the register 🡪 It’s money  When it’s in the bank 🡪 It’s a deposit account (better choice) |  | Possession (when it’s $)  Filing, for DA, it must be control |
| SF’s Patent infringement claim against Trigger Happy Company | Commercial tort claim |  | Filing (only way) |
| SF’s Child-proof trigger patent | General intangibles |  | Filing (only way)  for patent 🡪not req’d to comply w/ federal law; can use UCC. *In re Cybernetic Services: 252 F3rd. 1039, 9th Cir. 2001* |
| G’s new cars | Inventory |  | Possession  Filing a FS (more practicable than filing w/ DMV) |
| Used cars G receives on trade-in | Inventory |  | Possession  If it’s in the dealer’s hand 🡪 File a FS (more practicable)  If it’s in the consumer’s hands 🡪 File COT |
| G’s rights to payment for body shop and repair services | Chattel paper (unlikely)  Accounts (better choice if you don’t want to commit malpractice) |  | Possession (better choice)  Filing (for accounts only) |
| G’s tow truck | Equipment |  | Possession (don’t think so)  Filing w/ DMV (better choice) |
| G’s fleet of leased taxi cabs | Inventory |  | Possession (might work since it’s just inventory)  Filing a FS (better choice) |
| The large computer system & network G uses in its various business locations | Equipment |  | Possession (unlikely)  Filing (better choice) |
| Software developed by G & used in maintaining inventory control | General intangible (if it’s an article 9 software)  Equipment (unlikely) |  | Filing (only) |

EXAM Tips

* **Room:** 513 **Contact Info:**
* **Exam Format:** MC + Essay
* **Do:**
* **Don’t:**
* **Activities:**

How Worley Grades

* + If you don’t define the issue 🡪 You won’t get any points for the application !!!
  + Issue 1 pt
  + Rule 1 pt per element e.g., 3 elements, A, B, C
  + Analysis/Application 1 pt per each aspect of each element e.g. if a(2) B(1) C(3) 🡪 max 5 pts
  + Conclusion 1 pt

Dear Secured Transactions Students,

The assignment for November 3 is as follows:

Finish Problems 18.5 and 18.6.

Assignments 17, 18, and 19 (through Problem 21.3 only).  We will cover all the Problems in Assignment 19, but we will cover the remaining problems the following week.

. We will finish discussing the bankruptcy materials.

2.  Assignment ## 21 & 22.  We will not cover Assignment ## 23 $ 24; although I would like for you to have exposure to the concepts covered in those last two assignments, they are not tested on the bar exam and are, in that respect, expendable.

Written Exercise #3 is due.

Have a great weekend!

-JJW