

**Supplement to
Problems and Materials on Secured Transactions**

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Chapter One

Page 16:

For additional questions commonly asked in aid of execution, *See Byron Originals, Inc. v. Iron Bay Model Co.*, 2006 WL 1004827 (N.D. W. Va. 2006).

Page 24:

The median homestead exemption is now \$50,000.

Chapter Two

Page 48:

At the end of the page, add the following.

In addition, state laws outside Article 9 may prohibit the creation of a security interest in particular situations. For example Kansas prohibits the creation of more than one security interest in a motor vehicle weighing 26,000 pounds or less. Kan. Stat. § 8-135(6). Any attempt to create a second security interest in such a vehicle is void. North Carolina prohibits a creditor from taking a security interest to secure certain extensions of credit if the interest rate exceeds 1.25% per month. N.C. Gen. Stat. § 24-11(c). *See also In re Worley*, 2008 WL 2433195 (Bankr. D.N.C. 2008) (concluding that a creditor's efforts to take a security interest in violation of this statute constitutes an unfair and deceptive trade practice, entitling the debtor to recovery of attorney's fees incurred in seeking to avoid the lien). Consumer protection statutes such as these tend to be highly idiosyncratic and lawyers must be on a constant lookout for them.

Page 62:

IN RE SABOL
337 B.R. 195 (Bankr. C.D. Ill. 2006)

Perkins, Chief Judge.

This adversary proceeding is before the Court, after trial, on the complaint by Charles E. Covey, as Trustee of the Chapter 7 estate ("Trustee"), to determine the validity of a security interest held by Morton Community Bank ("Bank") in several items of sound equipment owned by Michael S. Sabol, one of the Debtors ("Debtor"). * * * The main issue is whether the Composite Document Rule can rescue the Bank from the absence of a security agreement.

The following facts are not in dispute. On May 25, 2002, the Debtor, doing business in the recording industry as Sound Farm Productions, completed an application for a Small Business Administration (SBA) guaranteed loan to expand

his business, requesting approval of a loan from the Bank, as Lender, in the principal amount of \$58,000. The Bank's application for the SBA guarantee, comprised of a separate page completed and signed by its loan officers dated June 3, 2002, contains a section entitled "Loan Terms," which includes a subsection for collateral, requesting information as to description, market value and existing liens. Among the assets listed on the application were assets the Debtor presently owned and pledged to BankPlus, in addition to two items he intended to acquire using a portion of the proceeds of the loan.

On July 5, 2002, the Debtor executed an SBA form promissory note in the principal amount of \$58,000 payable to the Bank. In addition to the note, the Debtor signed another document, in letter format, which provided:

In consideration for Morton Community Bank granting a loan to Michael S. Sabol DBA Sound Farm Productions, the undersigned does hereby authorize Morton Community Bank to execute, file and record all financing statements, amendments, termination statements and all other statements authorized by Article 9 of the Illinois Uniform Commercial Code, as to any security interest in the loan or refinancing presently sought by the undersigned, as well as all loans, refinancing or workouts hereafter granted by Morton Community Bank to Michael S. Sabol DBA Sound Farm Productions.

On July 18, 2002, the Bank filed a standard form Uniform Commercial Code (UCC) financing statement, covering inventory, accounts receivable and equipment. The financing statement was not signed by the Debtor. No separate document entitled "Security Agreement" was signed by the Debtor.

Although he initially dealt with loan officer Will Thomas, the Debtor testified that when he went to the Bank to sign the loan documents, a different loan officer handled the closing. He did not recall any discussion about a security agreement or a security interest. The Debtor testified that he signed the documents in order to comply with the Bank's requirements to obtain the loan. The proceeds of the loan were used for operating capital and to purchase additional equipment. The Debtor spent less than \$20,000 for equipment, which he began to purchase shortly after he received the loan.

The Debtor and his wife, Rhonda K. Sabol, filed a joint petition for bankruptcy under Chapter 7 on February 14, 2005. They listed Morton Community Bank as a secured creditor, holding a security interest in "tools" valued at \$12,410, with a total claim of \$35,792.91. * * * Contending that the Bank's purported security interest

never attached to the equipment, the Trustee filed a report of possible assets, disclosing that he intended to administer the sound equipment as assets of the bankruptcy estate and brought this adversary complaint to determine the validity of the Bank's lien.

At the trial, the Debtor testified concerning the loan transaction. The only other witness was Josh Graber, a representative of the Bank. Although Graber was employed by the Bank at the time the loan was made, he was not involved in the making of the loan to the Debtor. He testified that no security agreement was prepared for the loan in question, although the Bank typically used one for secured loans.

The Trustee contends that the Bank does not have a valid purchase money security interest under Article 9 of the UCC, because there is no separate document captioned "Security Agreement" or any language in any other document explicitly granting a security interest. The Bank, relying on the "Composite Document Rule," contends that the loan application, the promissory note, the authorization and the financing statement, taken together, establish an agreement to create a security agreement.

ANALYSIS

* * * Under Illinois law, which governs the issue of whether the parties have entered into a valid security agreement, a nonpossessory security interest does not attach and is not enforceable unless the debtor has authenticated a security agreement that contains a description of the collateral, value has been given, and the debtor has rights in the collateral. [§ 9-203(b)(3)(A)]. A "security agreement" is defined as "an agreement that creates or provides for a security interest." [§ 9-102(a)(73)]. A "security interest" is an interest in personal property or fixtures which secures payment or performance of an obligation. [§ 1-201(37)]. The requirement of a written security agreement is said to serve two purposes: the first being evidentiary in that it eliminates disputes as to what items are secured and the second in the nature of a statute of frauds, by precluding the enforcement of claims based only on an oral representation. *In re Outboard Marine Corp.*, 300 B.R. 308 (Bankr. N.D. Ill. 2003). No particular words of grant or "magic words" are required to be included in a security agreement to create a security interest. Notwithstanding the lenity of the Composite Document Rule, there must be some language reflecting the debtor's intent to grant a security interest. Accordingly, a financing statement which does not contain any grant language by the debtor creating a security interest

in the described collateral, but merely identifies the collateral, cannot substitute for a security agreement.

Notwithstanding the statutory requirement of a signed or authenticated security agreement that describes the collateral, some courts have adopted a liberal view of what suffices to meet that requirement. Under the “Composite Document Rule,” two or more documents in combination may qualify as a security agreement. * * *

The pre-UCC era of chattel mortgages, and the technical and sometimes complex requirements associated therewith, fostered common law exceptions in the name of equity and pragmatism. Beginning in 1962, however, the UCC ushered in a new, simplified regime for documenting and perfecting secured transactions. Because the UCC reduces to an absolute minimum the formal requirements for the creation of a security interest, the need for those equitable exceptions no longer exists. In the interests of certainty and maintaining some identifiable standard, it is important to enforce the minimal formal requirements set forth in Article 9 of the UCC. Thus, an argument can be made that strict rather than liberal interpretation of the UCC documentation requirements is more consistent with the overall purpose of the UCC to create certainty and reliability in commercial transactions. Other courts have applied the Composite Document Rule narrowly.

The Bank relies upon the Debtor’s testimony that he understood that by signing the loan documents that he was granting the Bank a security interest in the equipment that he was going to purchase, as reflected in his treatment of the Bank as a secured creditor in his bankruptcy schedules. The Bank also relies on the itemization of collateral on the loan application, the provision in the note regarding the Bank’s rights in “collateral” and its rights upon default, the debtor’s authorization and the description of the collateral in the financing statement. The Bank’s reliance on the listing of collateral under the description of loan terms on its application for the SBA guarantee reveals nothing about the Debtor’s intent to grant a security interest. The application consists of two separate portions: one completed by the Debtor and one completed by the Bank. The listing of the collateral appears on the Bank’s portion of the document. That page was completed by officers of the Bank and is dated one week after the Debtor’s signature on his application for the loan.

The Bank points to the provisions of the note which describe, generically, the Bank’s rights in collateral and upon default. The note defines “Collateral” as “any property taken as security for payment of this Note.” Upon default, the note authorizes the Bank to “take possession of any Collateral” and to “sell, lease, or otherwise dispose of any Collateral.” The note also provides that the Bank may:

“[b]id on or buy the Collateral at its sale;” “preserve or dispose of the Collateral;” “[c]ompromise, release, renew, extend or substitute any of the Collateral;” and “[t]ake any action necessary to protect the Collateral.” The note does not identify the collateral. In fact, the note itself contemplates a separate security agreement. Under the heading of general provisions, the note provides that “Borrower must sign all documents necessary at any time to comply with the Loan Documents and to enable Lender to acquire, perfect, or maintain Lender’s liens on Collateral.”

The Debtor’s authorization for the Bank to file a financing statement is equally inefficacious. It authorizes that filing “as to any security interest in the loan . . . presently sought by the [Debtor].” *In re Numeric Corp.*, 485 F.2d 1328 (1st Cir. 1973), relied on by the Bank, is distinguishable. In *Numeric*, although the parties had not signed a formal security agreement, the board of directors of the debtor authorized the preparation of a UCC financing statement to cover the creditor’s security interest in certain equipment described in a bill of sale. Finding that the directors’ resolution established “an agreement in fact” by the parties to create a security interest, the court held that the resolution, taken with the financing statement’s itemization of the collateral, constituted a security agreement.

The Bank also relies on its UCC-1 financing statement. The financing statement, as permitted by the Revised UCC, was not signed by the Debtor. The financing statement was not filed by the Bank until July 18, 2001, almost two weeks after the loan was closed. No one from the Bank testified that the financing statement was presented to the Debtor at the time that he signed the document authorizing its filing. The Debtor’s testimony that a security interest was not discussed contradicts any suggestion that the financing statement was presented to the Debtor at or prior to the loan closing. This Court will not presume that a financing statement, not shown to be contemporaneous, has any part to play in the Composite Document Rule.

In re Data Entry Service Corp., 81 B.R. 467 (Bankr. N.D. Ill. 1988), a case involving an SBA loan, relied on by the Bank, is factually distinguishable. In that case, in addition to the note, the debtor signed a Loan Agreement which listed as collateral, first liens on machinery, equipment, furniture and fixtures, inventory, accounts and general intangibles. Directly above the debtor’s signature, at the end of the document, the Agreement provided that the debtor agreed to the conditions imposed. In addition, two financing statements describing the collateral were filed with the Secretary of State, each signed by the debtor. The court determined that the Loan Agreement, by itself or in conjunction with the signed financing statements, was sufficient to create a security interest in favor of the SBA.

A similar result was reached in *In re Maddox*, 92 B.R. 707 (Bankr. W.D. Tex. 1988), another SBA-guaranteed loan case. As in *Data Entry*, the debtor had signed a loan agreement which identified collateral under “Terms of the Loan” as a “first lien on all equipment, inventory and accounts receivable.” The court’s decision in *In re Tracy’s Flowers and Gifts, Inc.*, 264 B.R. 1 (Bankr. W.D. Ark. 2001), highlights the weakness of the Bank’s position. Recognizing that a “bare bones” financing statement, standing alone, cannot double as a “security agreement,” the court held that the following additional language included in the creditor’s UCC-1, qualified as a security agreement:

This note is secured by all accounts, inventory and equipment now owned or hereafter acquired by [the debtor] The loan secured by this lien was made under [a SBA] nationwide program....

264 B.R. at 2.

Whether considered alone or in combination, this Court finds that there is not sufficient evidence of the Debtor’s intent to create a security interest in the documents relied on by the Bank. No language conveying a security interest to the Bank is found in any of the documents. There is no evidence that the Debtor read or reviewed, much less agreed to, the “loan terms” contained in the Bank’s application to the SBA. The financing statement, containing the only description of collateral, is not signed by the Debtor and, in all likelihood, was never seen by him. What is left? Only boilerplate references in the note to the Bank’s rights in “any collateral” and in the authorization to “any security interest.”

Had the Bank’s application for SBA guarantee, which listed the collateral, been signed by the Debtor, the minimal requirements of § 9-203 may well have been satisfied. But without a description of the collateral in a signed or authenticated document or in a separate document incorporated by reference into a signed or authenticated document, no security interest can be recognized. This Court is of the view that the Composite Document Rule is most appropriately used, if at all, to allow the debtor’s intent to grant a security interest to be demonstrated by reference to the various loan documents where the debtor has signed or authenticated a document containing a description of the collateral that does not contain words of grant. The Rule should not be applied, however, to bypass the necessity of a signed or authenticated writing that describes the collateral, as that is the clearly stated minimum requirement of § 9-203.

Even though the Bank may have intended that there was to be a security interest, the Court does not view the result reached as unduly harsh. The primary

purpose of Article 9 of the UCC was to create uniformity and certainty in commercial transactions. The steps required to be taken by secured parties to establish and protect their interests, having been reduced to a minimum, are simple and clearly laid out. It is not unreasonable to require that they be complied with.

The Trustee objected to the Bank's proof of claim filed as secured in the amount of \$36,967.34 on the basis that the Bank had no valid security interest. Having now obtained that determination, the objection should be allowed, the Bank should be denied any secured claim, but should be allowed an unsecured claim in the amount stated in its claim.

Note

In contrast to the facts of *Sabol*, the debtor in *In re Weir-Penn, Inc.*, 344 B.R. 791 (Bankr. N.D.W. Va. 2006), signed a financing statement describing the collateral as equipment, inventory, and accounts, and also signed a promissory note which provided that "[t]his Loan is secured by . . . the following previously executed, security instruments or agreements: UCC Financing Statement on all business assets bearing file # 048209 recorded 11/16/1997 with the WV Secretary of State." The court ruled that the combination of these two writings was sufficient to demonstrate an intent to secure the debt and to satisfy the requirements of § 9-203(b)(3).

Page 72:

Before the last paragraph, insert the following problem:

Problem 2-4½

Last year, Deterrent, the owner of a burglar alarm monitoring company, sold the business to Buyer for \$2 million. Buyer paid only \$200,000 in cash and gave Deterrent a promissory note for the \$1.8 million balance. To secure the note, Buyer executed a security agreement that described the collateral as "all monitoring contracts and equipment, all accessions, parts accessories and additions thereto and replacements thereof, and all

proceeds of the foregoing.” Does the collateral include monitoring contracts that Buyer enters into with customers of the business after Buyer executed the security agreement? See *In re Emergency Monitoring Technologies, Inc.* 366 B.R. 476 (Bankr. W.D. Pa. 2007).

Page 87, footnote 34:

Courts continue to split on the efficacy of dragnet clauses in consumer transactions. Compare *In re Shemwell*, 378 B.R. 166 (Bankr. W.D. Ky. 2007) (dragnet clause in open-ended line of credit granted to consumer is enforceable, and thus collateral secures all obligations of the consumer to the creditor); *In re Nagata*, 2006 WL 2131318 (Bankr. D. Haw. 2006) (credit card agreement, which provided for debt to be secured by all collateral provided for other loans made to the debtors, was secured by cars which debtor later refinanced, even though debtors had paid off the car loans); *In re Franklin*, 343 B.R. 815 (Bankr. N.D.W. Va. 2006) (enforcing a future advances clause in a consumer loan transaction without discussing the purpose of the future advance or how related it may be to the original loans), with *Wooding v. Cinfed Employees Federal Credit Union*, 872 N.E.2d 959 (Ohio Ct. App. 2007) (although auto loan agreement provided that car would secure all obligations the borrower owed to the lender, nothing specifically indicated that the car would secure the borrower’s credit card account obligations and thus there was “no meeting of the minds with respect to the cross-collateralization of the automobile”); *In re Yelverton*, 2007 WL 841393 (Bankr. M.D. Ala. 2007) (neither first loan agreement, which included a clause indicating that collateral securing other loans also secures this one, nor second loan agreement, which included a clause purporting to make the collateral secure all other debts of the borrowers, was adequate to make the collateral granted in the second agreement secure the debt created in the first). See also *In re Keeton*, 2008 WL 686938 (Bankr. M.D. Ala. 2008) (dragnet clause in security agreement with joint debtors did not clearly encompass obligations later incurred by only one of them, and thus the collateral did not secure those individual obligations).

Page 89, footnote 36:

Banc of America Strategic Solutions, Inc. v. Cooker Restaurant Corp., 2006 WL 2535734 (Ohio Ct. App. 2006), *appeal denied*, 861 N.E.2d 144 (Ohio 2007) (liquor license is not property under Ohio law and thus no security interest may attach to it).

Page 106, footnote 50:

See In re Haley & Steele, Inc., 2005 WL 3489869 (Mass. Super. Ct. 2005) (delivery of consumer goods to merchant buyer that is excluded from the definition of “consignment” by § 9-102(a)(20)(C) should not be regarded as a sale or return under Article 2, and therefore subject to all the merchant’s creditors – which would be worse than treating the transaction as a consignment and subjecting the goods to the merchant’s secured creditors – and is instead simply a bailment).

Page 107:

Add the following new footnote after the second sentence of the last paragraph:

If, however, the sale aspect of a “sale or return” transaction provided that the seller either retained title or retained a security interest, then Article 9 would apply to the seller’s retained interest.

Page 109:

Add the following sentence and footnote at the end of the penultimate paragraph:

Finally, some transactions that seem very similar to secured transactions, such as pawning arrangements, are typically statutorily excluded from Article 9’s coverage. When that is not the case, however, Article 9 may well apply.⁵⁴

⁵⁴ *See In re Schwalb*, 347 B.R. 726 (Bankr. D. Nev. 2006).

Chapter Three

Page 128:

At the end of the page, add the following citations:

Idaho Code § 28-45-107; Kan. Stat. § 16a-5-109; Mo. Stat. § 408.552; R.I. Gen. Laws § 6-51-3(a) (providing similarly with respect to automobile loans).

Page 132:

Add the following clause and footnote to the end sentence currently ending with footnote 5.

or when the collateral is a motor vehicle.⁶

⁶ See, e.g., 625 Ill. Comp. Stat. 5/3-114(f-7) (providing a right to cure if the owner has paid 30% of the total payments for the car); *Walczak v. Onyx Acceptance Corp.*, 850 N.E.2d 357 (Ill. Ct. App.), *appeal denied*, 861 N.E.2d 665 (Ill. 2006) (affirming class certification in action against secured party for disposing of collateral without first providing notification of the right to cure).

Page 132, n. 5:

Add Rhode Island to the list of states that have enacted UCCC § 5.111. See R.I. Gen. Laws § 6-51-3(b).

Page 145, Problem 3-7:

See *Turner v. Firststar Bank, N.A.*, 845 N.E.2d 816 (Ill. Ct. App. 2006).

Page 145:

Revise the last paragraph to read as follows:

In addition to complying with § 9-609 by avoiding a breach of the peace, the secured party must be careful to comply whatever nonuniform amendments to Article 9 that the applicable state may have chosen to enact. For example, Rhode Island requires a secured party repossessing a motor vehicle without the debtor's knowledge to notify the local police department within one hour after the repossession. R.I. Gen. Laws § 6A-9-609(b)(2). Connecticut requires 15 days advance notification of any electronic self-help, prohibits electronic self-help entirely if the secured party has reason to know it will result in grave harm to the public interest, and provides for nonwaivable consequential damages for its wrongful use. Conn. Gen. Stat. § 42a-9-609(d). Similarly, the secured party must comply with any law outside Article 9 that the relevant state may choose to make applicable to the repossession of collateral. Again, Massachusetts provides an interesting example:

Page 148:

As in the areas of default, cure, and repossession, nonuniform amendments to Article 9 – or state laws outside Article 9 entirely – may impose restrictions on how a disposition is to be conducted. For example, North Dakota deleted the phrase “if the collateral is other than consumer goods” from its version of § 9-611(c)(3), with the result that all the persons listed in subsection (c)(3) are entitled to notification of a disposition even if the collateral consists of consumer goods. N.D. Cent. Code. § 41-09-108(3)(c). Ohio Rev. Code § 1317.16 provides that a secured party whose interest was created through a retail installment sale must use a public sale to dispose of the collateral. *See Daimler/Chrysler Truck Financial v. Kimball*, 2007 WL 4358476 (Ohio Ct. App. 2007).

Page 151:

Some states have nonuniform rules on notification. For example, Georgia requires the seller/secured party in a retail installment contract, within ten days after a repossession, to give the buyer/debtor written notice – sent by registered or certified mail or by statutory overnight delivery – of its intent to seek a deficiency. Failure to do so bars the creditor from obtaining a deficiency judgment. Ga. Code Ann. § 10-1-10; *Parham v. Peterson, Goldman & Villani*, 2009 WL 597203 (Ga. Ct. App. 2009).

Page 152, Problem 3-10(C):

See *Jones v. Flowers*, 547 U.S. 220 (2006).

Page 159, Problem 3-12(D):

See *Compass Bank v. Kone*, 134 P.3d 500 (Colo. Ct. App. 2006).

Page 165, Problem 3-17(A)(1):

Cf. *Eddy v. Glen Devore Personal Trust*, 131 Wash. App. 1015 (2006).

Page 177:

In the second paragraph, add to the citations following the third sentence:

Proactive Technologies, Inc. v. Denver Place Associates Ltd. Partnership, 141 P.3d 959 (Colo. Ct. App. 2006) (ruling under former Article 9 that consequential damages in the form of lost profits are not available for conducting a commercially unreasonable disposition).

Chapter Four

Page 215:

Add the following at the end of the penultimate paragraph:

Since then, the *Erwin* court has repudiated its own analysis and indicated that the *Erwin* decision “should be accorded the proverbial ‘decent burial.’” *In re Berry*, 2006 WL 2795507 (Bankr. D. Kan.), *opinion supplemented*, 2006 WL 3499682 (2006) (a financing statement listing the debtor’s first name as “Mike,” instead of “Michael,” will be inadequate if the filing is not uncovered in a search using the full name). *See also In re Borden*, 353 B.R. 886 (Bankr. D. Neb. 2006) (filing against “Michael R. Borden” that identified him as “Mike Borden” was seriously misleading because the filing apparently was not disclosed in a search using the longer first name, which the court identified as the debtor’s “legal name” and, therefore, his “correct name” under § 9-506(c)).

Page 222:

Before the last paragraph, add the following:

Several states have recently enacted non-uniform amendments to deal with the uncertainty attendant to the correct name of an individual. Texas and Virginia both made the name on the debtor’s driver’s license a safe harbor. Thus, while filing against one or more other variations of the debtor’s name may be effective, filing against the name as indicated on the debtor’s license will suffice. 2009 Va. Acts — (S 1100); 2007 Tex. Sess. Law Ch. 565. Tennessee did something similar, but created multiple alternative safe harbors: (i) a state-issued driver’s license or identification card; (ii) birth certificate; (iii) passport; (iv) social security card; or (v) military identification card. 2008 Tenn. Pub. Ch. No. 648. Nebraska has taken a different approach. It amended its version of § 9-506(c) to provide that an error in the debtor’s name is not seriously misleading if a search under the debtor’s correct *last* name reveals the filing. 2008 Neb. Laws

Leg. Bill. 851. More recently, however, it delayed the effective date of this new rule to give the Code's sponsoring organizations more time to craft a uniform solution to the problems surrounding uncertainty about an individual debtor's name. 2008 Neb. Laws Leg. Bill 308A.

Each of these approaches makes it much easier for the filer, but potentially more difficult for the searcher. If you were a state legislator in one of the remaining 46 states, would you support any of these approaches? Consider what a prospective secured lender to Wendy Johnson would have to do in each of these three states both to perfect its own security interest and to ascertain if there were any existing security interests.

Page 223, footnote 6:

Maxus Leasing Group, Inc. v. Kobelco America, Inc., 2007 WL 655779 (N.D.N.Y. 2007) (secured party was perfected despite omission of digit in serial number used in financing statement's description of the collateral; error was minor and did not render filing seriously misleading); *Stroud National Bank v. Owens*, 134 P.3d 870 (Okla. Ct. Civ. App. 2006) (omission of first digit of vehicle identification number in description of bobcat and error in its model year did not render the description seriously misleading).

Page 231:

Add the following footnote at the end of the second sentence of the first paragraph after Problem 4-5:

As with almost everything else in Article 9, lawyers have to be on the lookout for non-uniform filing rules. For example, Georgia requires local filing for security interests in "growing crops," Ga. Code Ann. § 11-9-501(a)(1)(A), and Arkansas requires local filing for "equipment used in farming operations, or farm products, or accounts arising from the sale of farm products," Ark. Code Ann. § 4-9-501(2).

Pages 237-38:

Apparently, federal law also preempts Article 9's filing system with respect to railroad cars, locomotives, and other rolling stock. For such security interests property, filing with the Surface Transportation Board is required to perfect. *See* 49 U.S.C. § 11301; *In re California Western Railroad, Inc.*, 303 B.R. 201 (Bankr. N.D. Cal. 2003).

Page 238, footnote 18:

Add the following citation and text at the end:

In re Tower Tech, Inc., 67 Fed. Appx. 521 (10th Cir. 2003) (filing with Patent Office is ineffective). Recording the secured party's interest with the Patent Office may, however, be necessary to have priority over subsequent purchasers. *See* 35 U.S.C. § 261. That said, recording the assignment federally may impair the ability of the debtor to bring an infringement action. Such an action must be brought by all joint owners to avoid the possibility of subjecting the defendant to duplicative actions. *See McKesson Automation, Inc. v. Swisslog Italia S.P.A.*, 2008 WL 4820506 (D. Del. 2008) (staying infringement action until the plaintiff – who had apparently paid off a secured loan but recorded no reassignment back – could clear up title).

Page 238:

In late 2005, the National Conference of Commissioners on Uniform State Law issued the Uniform Certificate of Title Act (UCOTA) to replace the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act (UMVCTA). Because the new edition of some statutory supplements for commercial law courses may include UCOTA and omit UMVCTA, below is a table that provides a reference to UCOTA for each citation in the book to UMVCTA.

| Page | UMVCTA Provision | UCOTA Provision |
|---------------|------------------|-----------------|
| 390 | § 1 | § 2 |
| 390 | § 2 | § 5 |
| 480 | § 7 | § 2(a)(5) |
| 480 | § 14(a) | § 16 |
| 480 | § 14(e) | § 16 |
| 238, 305, 480 | § 20(b) | §§ 25(f), 26(b) |
| 238 | § 21 | §§ 25, 26(b) |
| 238 | § 25 | § 26(a) |

Be advised, however, that some of the changes are significant. Thus, the UCOTA provisions referenced above may yield a different answer to problems governed by state law based on the UMVCTA.

Page 239, footnote 19:

Revise the footnote to read as follows:

See In re Anderson, 351 B.R. 752 (Bankr. D. Kan. 2006) (presentation of appropriate documents with the requisite fee to the Kansas Department of Revenue is not adequate to perfect a non-purchase-money security interest in a motor vehicle; perfection requires actual notation of the secured party's interest on the certificate); *In re Darrington*, 251 B.R. 808 (Bankr. E.D. Va. 1999) (ruling the secured party unperfected due to the DMV's failure to issue a certificate of title with a notation of the secured party's lien). *Cf.* § 9-303(b); Uniform Motor Vehicle Certificate of Title and Anti-Theft Act § 20(b) (a security interest is perfected by the delivery to the relevant Department of the existing certificate of title, if any, the application for a certificate containing the name and address of the lienholder, and the applicable fee); *In re Baker*, 345 B.R. 261 (D. Colo. 2006) (a lien on a motor vehicle in Colorado is perfected when the county clerk enters a lien notice in the state's electronic Central Registry but then

relates back in time to when the secured party delivered the appropriate documentation to the county clerk).

A similar issue arises when the secured party assigns its security interest. In general, the assignee need not do anything for the security interest to remain perfected. See § 9-311(c). However, if the certificate of title statute requires that the assignee be noted on the certificate, that rule will control. See *In re Clark Contracting Services, Inc.*, 2008 WL 5459818 (Bankr. W.D. Tex. 2008). See also § 9-311 comment 4.

Page 240, Problem 4-8:

Add the following new question to the end of the problem:

- C. Daytona borrowed \$9,000 from City Bank to take a vacation. In return, Daytona granted City Bank a security interest in Daytona's station wagon. City Bank had Daytona endorse the back of the certificate of title for the car and took possession of the certificate. Is City Bank's security interest perfected? See *In re Global Environmental Services Group, LLC*, 2006 WL 980582 (Bankr. D. Haw. 2006)

Page 245, end of carryover paragraph at top of page:

Nothing requires a depositary bank to enter into a control agreement and obtaining the assent of most banks has proven to be much more difficult than the drafters of revised Article 9 anticipated. Depositary banks want to ensure that their own rights are protected and that they will incur no liability to the secured party for their own errors or delays in complying with the secured party's instructions. Perhaps most important, they want to ensure that the control agreement does not interfere with their normal processes for posting credits and debits to a deposit account. To deal with this problem, the Joint Task Force on Deposit Account Control Agreements of ABA Section on Business Law has produced a model deposit account control agreement, and commentary thereto, for use in commercial transactions involving a security interest in a deposit account. See Joint Task Force on Deposit Account Control Agreements, *Initial Report of the Joint Task Force on Deposit Account Control Agreements*, 61 BUS. LAW. 745 (2006) (also available at www.abanet.org/dch/committee.cfm?com=CL710060). This model is the product of much negotiation and is intended to be generally acceptable to both the lending community (specifically, their legal counsel) and the operational departments of depositary institutions.

Page 247, end of last illustration:

Add the following footnote at the end of the paragraph.

²² Compare *In re Winchester*, 2007 WL 420391 (Bankr. N.D. Iowa 2007) (bank's security interest in piano dolly was not a PMSI because debtor had purchased the dolly two weeks before the bank made the secured loan), with *First National Bank in Munday v. Lubbock Feeders, L.P.*, 183 S.W.3d 875 (Tex. Ct. App. 2006) (to qualify as a PMSI, loan must be "closely allied" with debtor's purchase of the collateral but need not precede that purchase; advances made as much as 18 days after debtor's purchase were closely allied because they could be traced to the purchase (in some unspecified manner)); *In re Murray*, 352 B.R. 340 (Bankr. M.D. Ga. 2006) (debt incurred for documentary fee, certificate of title fee, and extended service contract, in connection with motor vehicle purchase, was all for the "price" of the vehicle, and thus creditor had a PMSI).

Page 253, second full paragraph:

Add the following footnote after the citation to § 9-109(d)(8):

As a result, Article 9 does not govern how to either obtain or perfect a consensual lien on an insurance policy. Such matters are left to the common law. *See, e.g., In re JII Liquidating, Inc.*, 344 B.R. 875 (Bankr. N.D. Ill. 2006) (Article 9 does not apply to a security interest in unearned insurance premiums, and thus the insured's premium financier did not need to file a UCC financing statement to perfect its security interest; it needed merely to obtain the right to cancel the policies).

Page 279, last full paragraph:

Add the following at the end:

Other states are more lenient. *See, e.g., In re Jackson*, 358 B.R. 412 (Bankr. D. Kan. 2007) (PMSI in mobile home remained perfected by filing notice of security interest despite several refinancings, even though non-PMSIs must be noted on the certificate of title to be perfected).

Page 285, second full paragraph:

Revise the paragraph to read as follows:

These same rules apply when a corporate entity reincorporates in a new state. Imagine, for example, that a Washington corporation wishes to reincorporate in Delaware for tax or licensing purposes. If the corporation had granted a security interest in some of its personal property, you might be tempted to analyze this as a relocation of the debtor, possibly with a change in name as well. In reality, however, the Washington and Delaware corporations are separate entities, and this is properly viewed not as a relocation of the debtor but as a transfer of the collateral to a transferee located in a different state. *See* § 9-316 comment 2, example 4. The same would apply if a partnership decided to incorporate in another state; that

too would involve a transfer of the collateral to a new entity. The same principle applies to changes in entity form within a single state: they are generally regarded as a change in debtor (*i.e.*, a transfer of the collateral to a new debtor), rather than as a change in name. However, it is important to check state law on this point. For example, Delaware law provides that, upon doing so, the new entity “shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the corporation.” 8 Del. Code Ann. § 266(h).

Page 287, Problem 4-34:

Revise the Problem to read as follows:

Problem 4-34

- A. Look back at Problem 4-10 and your answer to it. Now that we have learned more about acquiring and maintaining perfection, what additional things should Firstbank do when conducting its search for existing security interests to make sure it has uncovered all security interests that could still be perfected?
- B. Demolition Specialists, Inc., a Washington corporation, has come to Bank for a \$700,000 loan to buy a large demolition crane from Raze Enterprises, a Nebraska business. What UCC searches does Bank need to conduct and why to be certain it will have the only perfected lien on the crane?

Chapter Five

Page 302:

Add the following to the end of the full paragraph:

On the importance of pre-filing, see *In re Millivision, Inc.*, 474 F.3d 4 (1st Cir. 2007) (bankruptcy trustee, who is deemed to have a judicial lien on all of the debtor's assets, could avoid a security interest of lenders who loaned \$500,000 to the debtor one day before the debtor's creditors filed an involuntary petition against it because the lenders did not pre-file their financing statement).

Page 305, Problem 5-4(B):

See also *In re O'Neill*, 344 B.R. 142 (Bankr. D. Colo. 2006).

Page 311, Problem 5-10(C):

See *In re Bordon*, 2007 WL 703153 (8th Cir. BAP 2007).

Page 318:

Add the following text and problem immediately following Problem .

A secured party's priority date for the first-to-file-or-perfect rule is the date when it first either files a financing statement with respect to the relevant collateral or perfects, provided there is no period thereafter when it lacks both perfection and an effective filing against the relevant collateral. If a secured party's perfection lapses at a time when it has no effective filing, then its original priority date will no longer apply and a new date will be created if and when it re-files or re-perfects. Consider the following example:

Lender A perfects a security interest in Debtor's equipment by filing a financing statement on June 1, 2003. Lender B perfects a security interest in the same equipment by filing a financing statement on July 1, 2004. Lender A files a new financing statement on August 1, 2008. Lender B files a continuation statement on May 1, 2009. Lender B has maintained perfection continuously because its continuation statement was filed in a timely manner. *See* § 9-515(c), (d). However, Lender A's security interest became unperfected on June 1, 2008, five years after its initial filing. Because of that, Lender A's priority dates from 2008, not 2003. As a result, Lender B, whose security interest was initially subordinate to Lender A's, now has priority.

Now try your hand at the following problem, which also requires that you consider lapses in perfection.

Problem 5-13½

Dan owns and operates a fleet of commercial shrimping boats in Louisiana. In 2006, Dan obtained a \$200,000 loan from First Bank and granted First Bank in return a security interest in all of Dan's existing and after-acquired inventory and equipment to secure the debt. First Bank perfected its security interest by filing in the appropriate Louisiana office a financing statement that properly described both Dan and the collateral (assume no certificate of title statute applies). In 2007, Dan decided to borrow more money to finance further expansions. First Bank was willing to lend the funds Dan wanted, but only at an interest rate that Dan thought was unfairly high. So, Dan approached Second Bank, which agreed to make the loan. Second Bank then filed its own, authorized financing statement that properly described Dan and identified the collateral as "all assets." Two days later, Second Bank loaned Dan \$300,000 and Dan authenticated a security agreement granting Second Bank a security interest in all of Dan's existing and after-acquired inventory and equipment to secure the loan.

On February 1, 2008, Dan moved to Florida. Pursuant to a requirement in both security agreements Dan notified both banks in advance of the planned move. Second Bank filed a new and effective financing statement

identifying the collateral as “all assets” against Dan in the appropriate office in Florida on March 15 (assume no certificate of title statute applies in Florida either).

- A. What are the relative rights of the banks in all the relevant collateral if First Bank filed a new financing statement against Dan in the appropriate office in Florida on July 15, 2008?
- B. What are the relative rights of the banks in all the relevant collateral if First Bank filed a new financing statement against Dan in the appropriate office in Florida on April 15, 2008?

Page 327:

Problem 5-19½

Technically, § 9-324(a) applies to a PMSI in consumer goods and gives it priority over a conflicting security interest in the same goods. However, it is rarely needed in that context. Why is that? *See* §§ 9-204(b), 9-309(1).

Page 335, Problem 5-26:

Add the following sentence at the end of the first paragraph:

The deposit account agreement between Dynamo and Second Bank gives Second Bank a security interest in all deposits to secure all debts Dynamo owes or comes to owe to Second Bank.

Page 337, Problem 5-27:

Add the following sentence at the end of the first paragraph:

The deposit account agreement between Dynamo and Second Bank gives Second Bank a security interest in all deposits to secure all debts Dynamo owes or comes to owe to Second Bank.

Page 370, Problem 5-45:

Revise the problem to read as follows:

Problem 5-45

On August 1, Factor purchased from Donnybrook Corp. all of its accounts receivable generated between July 1 and July 30 from sales of inventory. Factor paid approximately 70% of the face value of the accounts but did not file a financing statement. On August 15, Donnybrook borrowed \$10,000 from State Bank and signed a security agreement granting a security interest in all of Donnybrook's accounts then existing or after acquired to secure all obligations then owed and thereafter owed to State Bank. That same day State Bank filed in the appropriate office a financing statement identifying itself as the secured party, "Donnybrook Corp." as the debtor, and the collateral as "accounts."

- A. Between Factor and State Bank, who has priority in the accounts receivable generated between July 1 and July 30 from sales of Donnybrook's inventory? *See* §§ 9-109(d)(4)–(7), 9-322(a).
- B. How, if at all, would the analysis change if the collateral were promissory notes and State Bank's security agreement and financing statement described the collateral as "instruments"? *See* §§ 9-309(4), 9-318.

Chapter Six

Page 389, Problem 6-1(B):

Cf. Yeadon Fabric Domes, Inc. v. Maine Sports Complex, LLC, 901 A.2d 200 (Me. 2006).

Page 436:

At the end of the last line, add:

In re O'Neill, 344 B.R. 142 (Bankr. D. Colo. 2006) (because perfection of a security interest in a motor vehicle through compliance with the state's certificate of title statute is the equivalent to perfection by filing, perfection attained after the debtor filed for bankruptcy but within 20 days of attachment related back to the time of attachment under § 9-317(e) and therefore was protected from avoidance by § 546(b) of the Bankruptcy Code).

Appendices

Page 466: Insert the following excerpt from Wash. Rev. Code § 6.15.020:

§ 6.15.020. Pension money exempt—Exceptions—Transfer of spouse's interest in individual retirement account

* * * (3) The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever. This subsection shall not apply to child support collection actions issued under chapter 26.18, 26.23, or 74.20A RCW if otherwise permitted by federal law. This subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in such plan to the extent expressly provided for in a qualified domestic relations order that meets the requirements for such orders under the plan, or, in the case of benefits payable under a plan described in sections 403(b) or 408 of the internal revenue code of 1986, as amended, or section 409 of such code as in effect before January 1, 1984, to the extent provided in any order issued by a court of competent jurisdiction that provides for maintenance or support. This subsection shall not prohibit actions against an employee benefit plan, or fund for valid obligations incurred by the plan or fund for the benefit of the plan or fund.

(4) For the purposes of this section, the term “employee benefit plan” means any plan or arrangement that is described in RCW 49.64.020, including any Keogh plan, whether funded by a trust or by an annuity contract, and in sections 401(a) or 403(a) of the internal revenue code of 1986, as amended; or that is a tax-sheltered annuity described in section 403(b) of such code or an individual retirement account described in section 408 of such code; or a Roth individual retirement account described in section 408A of such code; or a medical savings account described in section 220 of such code; or an education individual retirement account described in section 530 of such code; or a retirement bond described in section 409 of such code as in effect before January 1, 1984. The term “employee benefit plan” also means any rights accruing on account of money paid currently or in advance for purchase of tuition units under the advanced college tuition payment program in chapter 28B.95 RCW. The term “employee benefit plan” shall not include any

employee benefit plan that is established or maintained for its employees by the government of the United States, by the state of Washington under chapter 2.10, 2.12, 41.26, 41.32, 41.34, 41.35, 41.40 or 43.43 RCW or RCW 41.50.770, or by any agency or instrumentality of the government of the United States.

Page 473, after second sentence of second paragraph:

But see In re Verus Investment Management, LLC, 344 B.R. 536 (Bankr. N.D. Ohio 2006) (CD is a deposit account, not an instrument).