

Security Interests and Liens Priorities

A Lexis Practice Advisor® Practice Note by Ira L. Herman, Blank Rome LLP



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This practice note discusses the requirements for the attachment and perfection of consensual security interests in personal property under Article 9 of the Uniform Commercial Code (UCC). A security interest is said to attach to collateral when it becomes a right that is enforceable against the debtor's property. Perfection places third parties, including the debtor's other creditors, on notice of the existence of a security interest.

There are four basic methods for perfecting a security interest under the UCC. First, and most common, is the filing of a properly completed financing statement with the appropriate UCC filing office. Some collateral requires a filing with a governmental agency designated for the filing of such perfection devices (e.g., the patent office, the FAA in Tulsa, OK). Second, the collateral may be held in the possession of the secured party. Third, perfection by obtaining control over the collateral. Fourth, in a few cases, the attachment of the security interest automatically perfects the security interest.

This practice note also covers issues concerning the relative rights of creditors holding competing interests in a particular res. There are a number of general rules:

- A creditor with a valid and perfected security interest has recourse to its collateral.
 - If two or more creditors are properly perfected, then the priorities among such competing secured creditors is spelled out in the UCC, but the general rule is that the first to perfect has priority, whether the competing security interests and liens are consensual or nonconsensual. The general rule does not apply in instances where the UCC specifies that perfection by possession trumps an earlier filing; there are other exceptions to the first in time rule.
 - Although an unperfected security interest may be enforceable against the debtor, a properly perfected security interest will have priority over such unperfected interest.
 - Under the Bankruptcy Code, a trustee or debtor in possession has the rights of a perfected lien creditor and an unperfected security interest may be avoided, so that the underlying claim is treated as a general unsecured claim in bankruptcy.
- Stated in the reverse, a perfected security interest prevails over a judgment creditor and over a bankruptcy trustee or debtor in possession.
- This practice note addresses the attachment and perfection of contractual security interests, the priority of liens, and related issues as follows:
- Extent of Secured Claim – Valuation of Collateral
 - Secured Claim Status – Validity, Priority, and Extent of Security Interests and Liens
 - Security Agreements
 - Perfection by Filing
 - Perfection by Possession
 - Perfection by Control
 - Lien Priorities
 - Bankruptcy Risks
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For related content and resources, see [Security Interests Resource Kit](#), [Perfection Methods in Various Types of Collateral Chart](#), and [Non-Uniform UCC Provisions Chart](#).

Extent of Secured Claim – Valuation of Collateral

To ensure that a secured lender receives sufficient adequate protection, it is important to determine the value of the lender's secured claim early on in the bankruptcy case. Essentially, a lender's secured claim is equal to the sum of the value of its collateral as of the petition date (plus any property that the secured lender holds that is subject to setoff).

In determining the value of a secured lender's collateral, courts have employed varying methods of valuation depending on the facts of the case, including using fair market value, liquidation value, and going concern value. For more information, see [Valuation](#).

Secured Claim Status – Validity, Priority, and Extent of Security Interests and Liens

The law of secured transactions in the United States covers the creation and enforcement of a security interest. Usually, a secured transaction happens when a person or business borrows money for the purpose of acquiring property, including real estate, vehicles, or business equipment. A security interest exists when a borrower enters into a contract that allows the lender or secured party to take collateral that the borrower owns in the event that the borrower cannot pay back the loan. The term security interest is often used interchangeably with the term lien in the United States.

A security interest promotes economic security because it provides the lender with the promise of repayment: if the borrower defaults on the loan, the lender should be able to recoup the loan amount by taking the agreed-upon asset used as collateral and selling it. A security interest can be particularly valuable in bankruptcy because secured creditors will be able to collect their debts before creditors without a security interest.

The first step in the perfection of a lien is to cause attachment of the collateral to occur, which will thereafter allow the creditor to perfect the security interest, which is the ultimate goal in properly securing the collateral. Thus, as a first step, attachment of the collateral must occur. If

the security interest has attached to the collateral, it is enforceable against the debtor; if it has not attached, it is not enforceable at all. Thereafter, if perfection is achieved, it will ensure that the lien of the secured party is enforceable against most third parties that acquire a lien in the collateral subsequent to the secured party.

An Article 9 security interest attaches when all of the following events have occurred:

- **Value has been given.** Value in the context of Article 9 of the UCC is broader than the contractual concept of consideration. Value includes giving a security interest in total or partial satisfaction of a preexisting debt as well as binding commitments to extend credit.
- **The debtor has rights in the collateral.** For purposes of Article 9 of the UCC, the debtor need not own the collateral. It is sufficient if the debtor has some limited rights to the collateral. Of course, the security interest would then attach only to the limited rights that the debtor has or has the power to transfer. See Section 9-203 of the Uniform Commercial Code, comment 6. Additionally, a debtor, for purposes of this section of Article 9, may not necessarily be the primary obligor on the underlying loan. It is the party with rights in the collateral granting the security interest. Thus, the primary obligor could be a corporation and the collateral securing the loan could belong to the president of the corporation or its sole shareholder. The president or sole shareholder in such a case would then be the debtor who would have rights in the collateral.
- **A security agreement has been entered into which:**
 - Is authenticated by the debtor
 - Describes the collateral –and–
 - Describes the land if the collateral includes timber to be cut

Security Agreements

No particular form is required for a security agreement. The security agreement can be contained in the promissory note, the deed of trust, or a loan agreement. It must, however, include language granting a security interest. While no magic language is required, a present grant of a security interest should be evident from the words of the document. For instance, a UCC-1 financing statement has all of the information required to be in a security agreement. It is authenticated by the debtor, it describes the collateral, and it may describe the land. Indeed, by the very act of authenticating a financing statement, one could argue that it is implicit that the debtor intended to grant a security

interest in the described collateral to the secured party. Nonetheless, this alone is not sufficient unless it contains specific granting language of some kind.

It should be noted that a security agreement is not required for attachment if collateral is in the possession of the secured party “pursuant to the debtor’s security agreement,” or the collateral is deposit accounts, electronic chattel paper, investment property, or letter of credit rights over which the secured party has control.

Description of Collateral

The security agreement must contain a description of the collateral being secured, although such description need not be exact and detailed (i.e., serial numbers), but it must reasonably identify the collateral that is subject to the security interest. On the other hand, a super-generic description such as “all assets” or “all personal property” is not sufficient for a security agreement. (That would, however, be a sufficient description for a financing statement under revised Article 9 of the UCC.) It is sufficient if the security agreement lists the collateral by category, such as all equipment, inventory, and accounts.

Proceeds

In Article 9 parlance, proceeds means, among other things, any property acquired upon the sale, lease, exchange, or other disposition of collateral that is subject to a security interest; anything collected or distributed on account of the collateral; and insurance proceeds upon the loss or destruction of the collateral up to the value of the collateral. There is no need to put a statement in the security agreement providing for a security interest in the proceeds of collateral. The attachment of a security interest in collateral automatically gives a secured party rights to the identifiable proceeds.

After-Acquired Property

After-acquired property is property in which the debtor had no rights at the time of the loan transaction but in which it subsequently acquires rights. In order for a security interest to attach to that type of collateral, there must be an affirmative statement in the security agreement creating or providing for a security interest in after-acquired property. It is sufficient to insert the phrase “now owned or hereafter acquired” in the security agreement’s description of collateral. Such a statement is not required in the financing statement for perfection of a security interest in after-acquired property.

Future Advances

If appropriate, a security interest in collateral may also secure future obligations owed by the debtor to the secured party.

Those future obligations or advances do not need to be made pursuant to a commitment made or even be seriously contemplated at the time at which the security agreement is entered into. All that is required is a statement in the security agreement whereby the debtor grants the security interest to secure future advances. As a practical matter, it should be evident that when representing debtors, it is important to focus on the language in the security agreement. The language could be so broad that the agreement grants the security interest to secure any and every other obligation of any kind ever owed by the debtor to the secured party. This is a clause that bears close examination to ensure that it accords with the intent of the parties at the time at which the contract is entered into.

Review of the Requirements of a Security Agreement

Requirements for a security agreement include that it:

- Be a written (or electronic) record
- Be signed or authenticated by the debtor
- Contain a sufficient description of the collateral
- Be less than a specific serial number approach but be more than merely all assets
- A description by category is sufficient (e.g., all equipment, accounts, and general tangibles)

Other requirements include that:

- Value has been given
- The debtor has rights in the collateral
- There is no need to include proceeds, which is automatically included
- The after-acquired property clause be included
- The future advances clause be included, if appropriate

Perfection by Filing

A security interest in many types of collateral may be perfected by filing a properly completed financing statement in the appropriate UCC filing offices. Except for security interests arising out of certain sales of accounts or payment intangibles, the filing of a properly completed financing statement is the only method of perfecting a security interest in accounts or commercial tort claim intangibles. This is because these types of collateral have no physical presence that enables perfection by possession. The filing of a financing statement is an alternative method of perfecting a security interest in goods, negotiable documents, instruments, chattel paper, and investment property. For information on the methods of perfection for various types of collateral under Article 9 of the UCC, see [Perfection](#)

[Methods in Various Types of Collateral Chart](#). For a summary of nonuniform UCC provisions adopted by different states, see [Non-Uniform UCC Provisions Chart](#).

A financing statement under revised Article 9 of the UCC must set forth:

- The debtor's name
- The debtor's mailing address
- Whether the debtor is an individual or an organization
- If the debtor is an organization, the type of organization (i.e., corporation, partnership, limited liability company, etc.); the jurisdiction of organization; and an organizational number
- The name of the secured party or the secured party's representative
- The mailing address of the secured party or its representative –and–
- A description of the collateral covered by the financing statement

The two principal ingredients that cause the greatest trouble are (1) the debtor's name and (2) the description of collateral. Uniform forms for financing statements, continuation statements, termination statements, and the like are contained in Article 9 of the UCC itself. Any document meeting these requirements may be filed as a financing statement.

A financing statement may be filed without the debtor's signature on the financing statement if the debtor authorizes the filing. By entering into a security agreement, a debtor automatically authorizes the filing of a financing statement covering the collateral described in the security agreement.

A collateral description in a financing statement is sufficient if it "indicates the collateral covered by the financing statement." A financing statement indicates the collateral when it has a description of the collateral or if it indicates that it covers all assets or personal property of the debtor. "Supergeneric" collateral descriptions for financing statements are allowed under revised Article 9 of the UCC. Where the security agreement creates a lien in all of the assets of the debtor, the supergeneric collateral description would be as follows: "All assets." A slightly expanded supergeneric, all-asset description is as follows:

All personal property of debtor, wherever located, and now owned or hereafter acquired, including accounts, chattel paper, deposit accounts, documents, equipment, general intangibles, instruments, inventory, investment property, letter-of-credit rights and commercial tort claims, and the proceeds and products of the foregoing.

The debtor's correct name is crucial to the validity of the financing statement because records are indexed on that basis. The name of the debtor should appear on this form exactly as it appears on the security agreement, and if the debtor is a registered organization, exactly as the debtor's name appears in the public records of the organization. If the debtor is an individual, the financing statement must indicate the debtor's last name. A trade name is not a sufficient name for a debtor. For a trust, the rules are somewhat confusing. It is necessary to examine the trust documents and determine whether separate filings are required under the names of the individual trustee(s), and either the individual settlor(s) or the name of the trust itself, if it has one. Any name used for the debtor other than the correct name renders the financing statement insufficient and seriously misleading, unless the name used is so similar to the debtor's correct name that a search under the debtor's correct name, using the filing office's standard search logic, would disclose the filing with the incorrect name.

As a practical matter, consider taking the following steps:

- Getting the name of the registered organization from its certificate of formation, its certified articles of incorporation, its certified articles of organization, or its certificate of limited partnership, in each instance issued by the secretary of state of the jurisdiction of its formation
- Requiring any natural person who is a borrower to produce a passport, social security card, birth certificate, federal income tax return, or photocopy of his or her driver's license
- Getting copies of formation documents from unregistered entities (the partnership agreement, etc.)
- Getting a copy of the trust agreement and all amendments if the borrower is a trust to obtain the correct names of the trust, the trustee(s), and the settlor(s) and listing all three as debtors

According to Section 9-516(b)(5)(A) of the Uniform Commercial Code, the mailing address of the debtor must be included. Although the standard UCC-1 form previously had a space for both the debtor's Social Security number (for an individual) and federal employer identification number (for an organization), many states have eliminated this space out of concerns for debtors' privacy. See, e.g., Cal. Comm. Code § 9521 (allowing UCC-1 forms without a blank for Social Security number). But see, e.g., Idaho Comm. Code § 28-9-502(e)(3) (requiring "the debtor's social security number or other unique number, combination of numbers and letters, or other identifier selected by the secretary of state using a selection system or method approved by the secretary of agriculture, or in the case of a debtor doing business other than as an individual, the debtor's internal revenue

service taxpayer identification number or other approved unique identifier” for a financing statement covering farm products). It is therefore important to check both the filing and the privacy requirements for the state in which the UCC-1 will be filed. If the debtor is an organization, the type of organization must be specified (i.e., corporation, general partnership, limited liability company), along with the jurisdiction of the organization. See Section 9-516(b)(5)(C) of the Uniform Commercial Code (a filing against a debtor that is an organization is ineffective when it is rejected for failure to indicate the type of organization and the jurisdiction). Additionally, the form must contain the name and mailing address of the secured party. See Section 9-516(b)(4) of the Uniform Commercial Code (a filing does not occur when the filing office refuses to accept the filing because of failure to include the name and mailing address of the secured party of record).

The basic approach in the current version of Article 9 is that perfection centers on the debtor’s location rather than on where the collateral is or may be located. Furthermore, Article 9 presently defines the location of the debtor in ways that, for many entities including corporations, change prior law by focusing on the place of incorporation or registration rather than on the location of the chief executive office.

A registered organization is one that is organized under the laws of a state or the United States. Examples include corporations, limited liability companies, and limited partnerships. For registered organizations that are organized under the law of the state, the filing location of the debtor is the state of organization (regardless of whether the debtor’s actual business location or headquarters is in that state). Thus, for example, a Delaware limited liability company doing business in Nevada and having all of its assets in Nevada, the place of filing is the Delaware Secretary of State.

For an organization that is not registered, the filing location is in the jurisdiction of the place of business, or, if there is more than one place of business, the jurisdiction of its chief executive office. Examples of organizations that are not registered include a general partnership and an unincorporated association. A source of confusion occurs when the debtor is a trust. Specifically, it is not clear whether a trust is viewed as an unregistered organization or as one or more individuals who are acting in their capacities as trustees or settlors of the trust. As a practical matter, until the law with respect to trusts is settled, it is best to file in all possible locations—for individuals, their jurisdiction of residence and for the trust, the jurisdiction of the trust’s place of business or chief executive office, if it has one. It is most important that the filing occur at least in the jurisdiction where the trustee is located if, under applicable law, the trustee has legal title

to the collateral. For individuals, the filing location is the state of the individual’s principal residence, with respect to both business and personal assets of the individual. Thus, if an individual lives in Montana but does business as a sole proprietorship in New Mexico, under Article 9 the place of filing would be the Montana Secretary of State.

If the debtor changes its location, the security interest must be perfected in the new jurisdiction within four months of the change. Similarly, if the debtor changes its name, a financing statement amendment must be filed within four months of the change. Moreover, if the collateral is transferred subject to the lender’s existing security interest to a different entity and the new debtor is located in a different jurisdiction from the transferor, a financing statement must be filed within one year of the transfer in the new debtor’s jurisdiction.

Perfection by Possession

A secured party may perfect a security interest by having possession, either itself or through a third party, of the collateral. Possessory security interests are the oldest form of security interests in personal property. As commerce has expanded, however, possessory security interests are increasingly less common. This tendency has been accelerated by the advent of electronic handling systems for various forms of semi-intangibles. Article 9 does not define such possession. It appears, however, that it means that the secured party or its agent has taken physical control of collateral that is a tangible asset.

Certain types of collateral must be perfected through possession:

- **Money.** The only way that a secured party may perfect its security interest in money is by possession.
- **Instruments.** A lender may perfect a security interest in an instrument either by filing or possession. Priority as between a secured party having possession and the secured party having a filing goes to the secured party having possession. A security interest arising out of a sale of a promissory note (i.e., an instrument) is perfected automatically, without additional action, when it attaches. See Section 9-304(4) of the Uniform Commercial Code.
- **Letters of credit.** Possession of a letter of credit does not perfect a security interest in proceeds of the letter of credit.
- **Certificated securities.** A secured party perfects its interest in certificated securities by possession, without any necessary endorsement.
- **Chattel paper.** Article 9 limits perfection by possession to tangible chattel paper. In *re Commercial Money Ctr., Inc.*,

392 B.R. 814, 825 n.22 (B.A.P. 9th Cir. 2008); *In re Inofin, Inc.*, 455 B.R. 19, 37 (Bankr. D. Mass. 2011). Electronic chattel paper may not be perfected by possession and instead may be perfected by control or filing. See *In re K-RAM, Inc.*, 451 B.R. 154, 173 (Bankr. D.N.M. 2011) (“Perfection by possession applies only to tangible negotiable documents, goods, instruments, money or tangible chattel paper . . . Perfection by control applies only to investment property, deposit accounts, letter-of-credit rights, electronic chattel paper and electronic documents.”).

- **Other collateral.** A secured party can perfect by taking possession of collateral, including goods and negotiable documents. If collateral is in the possession of a third party, perfection will depend upon the third party’s ability to authenticate a record evidencing perfection (i.e., signing a writing or otherwise authenticating an electronic record) acknowledging that the third party possesses the collateral for the benefit of the lender.

Perfection by Control

Control works to perfect an interest in collateral held by a third party by agreement for the benefit of the lender. Article 9 of the UCC permits perfection of a security interest by control for investment property, deposit accounts, electronic chattel paper, and letters of credit.

- **Deposit accounts.** The only way to perfect a security interest in a deposit account is by obtaining control of the deposit account—the filing of a financing statement does not work for a deposit account. A secured party has control of a deposit account if it is the depository bank or if the deposit account in the depository bank is in the secured party’s name. Additionally, a secured party has control if the depository bank agrees with the secured party that the depository bank will comply with the instructions from the secured party concerning the account, without allowing for consent by the account holder.
- **Investment property.** Investment property is a catch-all term that includes certificated securities, uncertificated securities, security entitlements, and securities accounts. If the collateral does not qualify as investment property, it is probably a general intangible.

Lien Priorities

Among secured creditors, the “first in time” to perfect generally has priority. The UCC employs a “pure race” system such that actual knowledge of an unperfected security interest by a competing lender is not relevant to the inquiry. The most important exception to the first in time rule is the priority provided by the UCC to a party secured by a purchase money security interest (PMSI). Generally, a PMSI

is a security interest taken or retained by a seller of the collateral to secure all or a part of its purchase price, or “for value given, to enable the debtor to acquire rights or use the collateral if the value is in fact so used.” The key is to find a direct nexus between the loan proceeds and the collateral. Comment 3 to UCC § 9-103 states:

The concept of “purchase-money security interest” requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase money security interest if the debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.

Intangible collateral is non-goods collateral and is personal property that cannot be touched. Under Article 9 of the UCC, the only intangible collateral that can be subject to a PMSI is software purchased for the principal purpose of use in goods that are themselves taken under a PMSI. In other words, the PMSI is permitted in software in an integrated transaction with the acquisition of the related hardware.

For goods other than inventory or livestock that are farm products, Article 9 gives a perfected PMSI priority over a conflicting security interest in the goods and the identifiable cash proceeds if the PMSI is perfected within 20 days after the debtor receives possession.

The PMSI has priority if:

- It is perfected when the debtor receives possession of the inventory.
- The holder of the PMSI sends an authenticated notice to the holder of the conflicting security interest.
- The competing secured party receives the notice within five years (six months in the case of livestock constituting farm products) before the debtor receives possession.
- The notice states that the PMSI holder expects to acquire a PMSI in inventory and describes the inventory. The purchase money priority in inventory attaches to the proceeds of that inventory only to a very limited extent. A prior filer on accounts, for example, will have priority on accounts arising from the sale of inventory unless the creditors agree otherwise.

Contractual and Structural Subordination

The priority rules of Article 9 of the UCC can be modified contractually (i.e., by a subordination agreement). Intercreditor agreements are crafted to establish priorities as a matter of contract rather than following the Article 9 priority scheme. Intercreditor agreements typically address issues including:

- The right of a senior lender to block payments by the debtor to a subordinated lender after a default under the senior lender's loan documents
- A standstill period during which a junior lender may not exercise remedies
- Bankruptcy rights such as with regard to debtor-in-possession financing, cash collateral use, objections to the disposition of the shared collateral, voting rights with regard to a plan of reorganization, etc.

Secured Party vs. Bank Setoff Rights

A depository bank's common-law right of setoff has priority over a security interest held by another secured lender, including one who claims the deposit accounts as cash proceeds of an asset-based loan. The depository bank will lose its senior status only if a competing secured creditor takes control of the deposit account in question or if the depository bank has agreed to a contractual subordination of its setoff right.

Bankruptcy Risks

A valid, perfected security interest generally will be enforced by the bankruptcy courts. However, the lender with collateral faces various risks that could defeat the lender's senior status, including the automatic stay, subordination, recharacterization, surcharges, avoidance (preferences and fraudulent transfers), and failure to properly perfect (strong-arm powers of the trustee under Section 544 of the Bankruptcy Code).

Adherence to the technical requirements for perfection is essential. Secured creditors risk avoidance of a security interest that they may think is perfected when they file the financing statement in the wrong jurisdiction. See *In re Davis*, 274 B.R. 825, 828 (Bankr. W.D. Ark. 2002) (a financing statement for farm equipment had to be filed in the county of the debtor's residence). For example, in *Kunkel v. Ries* (*In re Morken*), 199 B.R. 940 (Bankr. D. Minn. 1996), the collateral, which was livestock, was expected to be in transit through several states. The secured creditor relied on UCC § 9-103(d)(1), which allows a security interest to remain perfected for four months after collateral is moved from the state where the financing statement is filed. The bankruptcy court held, however, that because the secured creditor knew at the point that the financing statement would be filed that the collateral would be moved to a state other than the one in which it was perfected, the secured creditor was not entitled to rely on the four-month rule. *Kunkel*, 199 B.R. at 962.

Additionally, in the case of *Fleet National Bank v. Whippany Venture I, LLC* (*In re IT Group, Inc.*), 307 B.R. 762 (D. Del. 2004), the creditor similarly failed to perfect a security interest in the proceeds from a contract to sell a real property when it filed a financing statement in New Jersey, which was where the property was located. Because the creditor's interest was in a general intangible; however, the creditor was required to file in the state where the debtor's chief executive office was located, which happened to be Colorado. *Fleet National Bank*, 307 B.R. at 766. Since the creditor had not filed a financing statement in Colorado, the security interest was unperfected and avoidable under the trustee's strong-arm powers. *Fleet National Bank*, 307 B.R. at 767.

A security interest is likewise unperfected if the creditor has followed the procedure for perfecting an interest in the wrong type of collateral. For example, a creditor of a car dealership who perfects an interest in vehicles that are inventory must file a financing statement and cannot perfect through the usual process of indicating the interest on the certificate of title. See *In re Babaeian Transp. Co.*, 206 B.R. 536, 546 (Bankr. C.D. Cal. 1997) (a secured creditor who failed to file a UCC-1 financing statement had not perfected its security interest in vehicles that were held as inventory). Similarly, a security interest is also unperfected when it is filed under the name of the wrong debtor or when the secured creditor fails to correctly indicate the names of multiple debtors. See *Official Committee of Unsecured Creditors v. Regions Bank* (*In re Camtech Precision Manufacturing, Inc.*), 443 B.R. 190, 198-99 (Bankr. S.D. Fla. 2011) (a security interest against assets of additional debtors was unperfected where the creditor listed their names only on a nonstandard attachment to the financing statement and neither the names of the additional debtors nor the attachment were referenced on the financing statement). Moreover, a security interest may even be unperfected as a result of a clerk's error in, for example, failing to properly note the name of the secured creditor on a certificate of title. See, e.g., *In re Reaster*, 242 B.R. 423, 426 (Bankr. S.D. Ohio 1999) (a secured interest in a mobile home was not perfected where the clerk failed to identify the name of the correct lienholder on the certificate of title, and the error was not minor).

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