AMERICAN BANKRUPTCY INSTITUTE

Rocky Mountain Bankruptcy Conference

Secured Transactions 201

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CONCURRENT SESSION

2026

Secured Transactions 201

Advanced Article 9 Considerations of:

Attachment
Perfection
Priority
Enforcement

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Review Question –

How can a lender ensure first priority repayment from secured collateral?

9-322. Priorities Among Conflicting Security Interests In and Agricultural Liens on Same Collateral

(a) Except as otherwise provided in this section, priority among conflicting security interests and agricultural lies in the same collateral is determined according to the following rule:

(1) Conflicting perfected security interests and agricultural liens 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 security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

9-315. Secured Party's Rights on Disposition of Collateral and in Proceeds.

(a) Except as otherwise provided in this article . . . :

(1) a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and

(2) a security interest attaches to any identifiable proceeds of collateral.

9-320. Buyer of Goods

(a) Except as otherwise provided in subsection (e), a buyer in ordinary course of business . . . takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

9-324. Priority of Purchase-Money Security Interests.

(a) Except as otherwise provided in subsection (g), a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods[.]

UCC FINANCING STATEMENT

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Lender Co.
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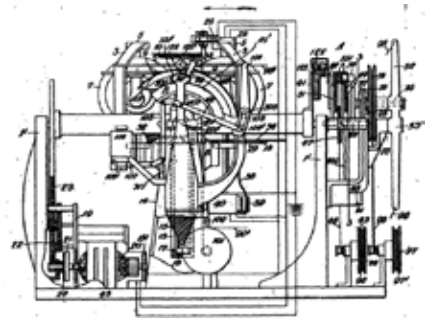
All debtor's personal property; now owned or hereafter acquired.

Is this all right?

9-307. Location of Debtor.

(e) A registered organization that is organized under the law of a State is located in that State.

Is this all right?



Is this all right?

March 1: Creditor files financing statement

May 1 : Debtor orders two airplanes (worth $300K) from Manufacturer

May 15: Airplanes arrive at Debtor's showroom

May 20: Manufacturer files financing statement

Is this all right?

9-324. Priority of Purchase-Money Security Interests.

(a) . . .

(b) . . . [A] perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory . . ., if:

(1) the purchase-money security interest is perfected when the debtor receives possession of the inventory;

(2) the purchase-money secured party sends a signed notification to the holder of the conflicting security interest;

(3) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(4) the notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

Is this all right?

9-515. Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement.

(a) . . . [A] filed financing statement is effective for a period of five years after the date of filing.

Is this all right?

9-311. Perfection of Security Interests in Property Subject to Certain Statutes, Regulations, and Treaties.

(a) . . . [T]he filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt Section 9-310(a);

(2) [List such statutes, including non-UCC central filing statutes.] . . .

(d) During any period in which collateral subject to a statute specified in (a)(2) 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, this section does not apply to a security interest in that collateral created by that person.

9-102. Definitions and Index of Definitions.

(11) "Chattel paper" means:

(A) a right to payment of a monetary obligation secured by specific goods, if the right to payment and security agreement are evidenced by a record; or

(B) A right to payment of a monetary obligation owed by a lessee under a lease agreement . . .

Is this all right?

9-330. Priority of Purchaser of Chattel Paper or Instrument.

(a) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value, takes possession of each authoritative tangible copy of the record evidencing the chattel paper, and obtains control under Section 9-105 of each authoritative electronic copy of the record evidencing the chattel paper; and

(2) the authoritative copies of the record evidencing the chattel paper do not indicate that the chattel paper has been assigned to an identified assignee other than the purchaser.

Is this all right?

Is this all right?

Is this all right?

9-609. Secured Party's Right to Take Possession After Default.

(a) After default, a secured party:

(1) may take possession of the collateral; and

(2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 9-610.

(b) A secured party may proceed under subsection (a):

(1) pursuant to judicial process; or

(2) Without judicial process, if it proceeds without breach of the peace.

Is this all right?

Is this all right?

Is this all right?

Is this all right?

1-203. Lease Distinguished from Security Interest.

(a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

(1) the original term of the lease is equal to or greater than the remaining economic life of the goods;

(2) the lessee is bound to renew the lease for the remaining economic lie of the goods or is bound to be come the owner of the goods;

(3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or

(4) the lessee has an option to become the owner of the goods for now additional consideration or for nominal additional consideration upon compliance with the lease agreement.

Security interest: Debtor still "owns" the A/R

- Requires repossessing creditor to remit any surplus.

True sale: Creditor "owns" the A/R

- Permits purchaser to retain any surplus beyond the purchase price.

Restaurant requests an additional $100,000 from MCA. In exchange, Restaurant will give MCA daily ACH debits until MCA has received $150,000.

MCA files a financing statement covering Restaurant's accounts.

Restaurant makes $50,000 in ACH debits to MCA before filing for bankruptcy.

At the time of the bankruptcy, Restaurant has $20,000 in accounts.

Who gets the $20,000 in accounts? Was this a sale or a loan?

Questions?

Comments?

Thank you for your participation!

Secured Transactions in Bankruptcy 201: Advanced Article 9 Considerations of Attachment, Perfection, Priority and Enforcement, and Avoidance in Bankruptcy

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I. Scope of Uniform Commercial Code ("UCC") Article 9

UCC Article 9 is the most broadly adopted uniform law within the United States, although with some state modifications as codified. Article 9 is not limited to personal property security interests for loans or financed transactions, although those contractual arrangements are an important part of its scope. Article 9 also applies to transactions in agricultural liens created under other laws, sales of accounts, notes chattel paper and payment intangibles (all as defined "types" of personal property), consignments, leases, and security interests arising under other articles of the UCC.

Article 9 applies to transactions involving a "security interest" as defined by UCC § 1-201(b)(35). Contractual form language does not prevail if the substance of the transaction is retention of security for a debt, however referenced. In pertinent part, UCC § 1-201(b)(35) provides:

> (35) " Security interest " means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-505 , the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 2-401 is limited in effect to a reservation of a "security interest."

Historically, crafty document drafters used language to achieve results to avoid application of laws in relation to personal property security interests. Adoption of the UCC collapsed various prior laws into Article 9 of the UCC to favor substance over form. Hence, Article 9 of the UCC addresses the issues of liens in personal property, however created: a retained ownership interest, a lease, a consignment, as well as sales of types of intangible personal property. The general scope of UCC Article 9 is set forth in UCC § 9-109, which provides in pertinent part, as follows:

> § 9-109. SCOPE.
> (a) [General scope of article.] Except as otherwise provided in subsections (c) and (d), this article applies to:
> (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;
> (2) an agricultural lien;
> (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes;
> (4) a consignment;
> (5) a security interest arising under Section 2-401, 2-505, 2-711(3), or 2A-508(5), as provided in Section 9-110; and
> (6) a security interest arising under Section 4-210 or 5-118.

> (b) [Security interest in secured obligation.] The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

Some of these subsections deserve further discussion.

a. Agricultural liens under other laws

Every state has enacted statutory liens on agricultural products. Many of those liens arise by operation of law without debtor consent. UCC § 9-109(a)(2) states that an agricultural lien is within the scope of Article 9. The term "agricultural lien" is defined in UCC § 9-102(b)(5). Although the creation of agricultural liens under other laws remains effective, the perfection and enforcement of those agricultural liens is pursuant to UCC Article 9. Accordingly, attachment of an agricultural lien occurs pursuant to other statutory law but the perfection and enforcement of those agricultural liens are governed by UCC Article 9.

b. Sales

Again, crafty document drafters were able to draft documents that on their face stated a "sale" of accounts (or chattel paper, payment intangibles, or promissory notes), however those "sales" included recourse obligations, non-fair value purchase terms, seller retention of servicing, seller's right to excess collections, rights to post-sale modification of pricing terms, security interests in both assets sold and other seller assets, guaranties, and call options for repurchase. Because of the crafty draftsmanship, sales of accounts, chattel paper, payment intangibles, and promissory notes are included within the scope of UCC Article 9. Thus, buyers must perfect the purchase of those assets by filing a financing statement. Nevertheless, the issue of whether a true sale or a disguised financing transaction exists is left for determination by the courts. The basic underlying concept of whether or not a true sale exists is decided by whether the benefits and burdens of ownership of the transferred assets are transferred to the buyer as opposed to retained by the seller. This has resulted in lenders in large transactions requiring legal opinions as to whether a transaction constitutes a "true sale".

Although sale transactions are within the scope of Article 9, neither the UCC nor Article 9 defines or establishes rules for distinguishing between transactions constituting outright sales and those that create security interests. See UCC § 9-109, cmt. 5 (Am. Law Inst. & Nat'l Conf. of Comm'rs on Unif. State Laws 2022); and Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 14, June 10, 1994. There is authority for the proposition that the party seeking to recharacterize a transaction intended to be a sale as a loan must present clear and convincing evidence therefore. *In re Candy Lane Corp.,* 38 B.R. 571, 577 (Bankr. S.D.N.Y. 1984) (citing *Cross v. A.G.V. Assocs., Inc.*, 340 F.2d 42, 44 (2d Cir. 1964), cert. denied, 381 U.S. 913 (1965)); *A.B. Lewis Co. v. Nat'l Inv. Corp.*, 421 S.W.2d 723, 729 (Tex. Civ. App. 1967); see also *Fox v. Peck Iron & Metal Co.*, 25 B.R. 674, 688 (Bankr. S.D. Cal. 1982). But see *In re Hurricane Elkhorn Coal Corp. II*, 19 B.R. 609, 618 (Bankr. W.D. Ky. 1982), modified on other grounds, 32 B.R. 737 (W.D. Ky. 1983) (stating there is a "presumption

of includability in the estate, leaving it to the property claimant, even the possessory claimant, to rebut the presumption").

The rise of merchant cash advance ("MCA") lenders has highlighted the need for greater understanding of true sales of accounts and the impact of after-acquired collateral clauses. MCA cases have resulted in cases establishing factors to determine whether a true sale exists or a disguised financing. The courts have developed a holistic, multi-factor framework for analyzing transactions in this context relying principally on the following factors which inform both the intent of the parties and the economic substance of the transaction: (1) the language of the agreement and conduct of the parties; (2) whether the buyer has a right of recourse against the seller; (3) whether the seller continues to service accounts and commingles receipts with its operating funds; (4) whether there was an independent investigation by the buyer of the account debtor(s); (5) whether the seller has a right to excess collections; (6) whether the seller retains an option to repurchase accounts; (7) whether the buyer can unilaterally alter the pricing terms; and (8) whether the seller has an absolute power to alter or compromise the terms of the underlying asset. See*, CapCall, LLC v. Foster (In re Shoot the Moon)*, 635 B.R. 797, 813 (Bankr. D. Mont. 2021) (citing Robert D. Aicher & William J. Fellerhoff, *Characterization of a Transfer of Receivables as a Sale or a Secured Loan Upon Bankruptcy of the Transferor*, 65 AM. BANKR. L.J. 181, 186-94 (1991)); *Dryden Advisory Grp., LLC v. Beneficial Mut. Sav. Bank (In re Dryden Advisory Grp., LLC)*, 534 B.R. 612, 620 (Bankr. M.D. Pa. 2015); *In re R&J Pizza Corp.*, Case No.: 14-43966-CEC, 2014 Bankr. LEXIS 5461, at *7-8 (Bankr. E.D.N.Y. Oct. 14, 2014). A guiding principle behind these factors is the allocation of risk and whether the seller truly passed the risk of loss to the buyer. See *Shoot the Moon*, 635 B.R. at 813-14 ("A sale typically occurs when the risk of loss from the purchased assets passes to the buyer — a gamble usually reflected in the purchase price. Conversely, in a disguised loan, the parties may employ various methods to allocate risk — the putative seller typically remains exposed to the underlying receivables and may grant the putative buyer recourse to sources of recovery beyond the receivables.")

c. Consignments

In 1998, the drafts of Article 9 (adopted 2001 and referred to as Revised Article 9) take a different approach to consignments than prior versions. The UCC Permanent Editorial Board has acknowledged that "some reported cases and articles suggest that, despite the clarification, the law of consignments remains puzzling to some of the lawyers and judges who have grappled with it." See, Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 20, Jan. 24, 2019. UCC § 9-109(a)(4) states that consignments are within the scope of Article 9. And UCC § 9-201(b)(35) states that "Security interest" includes any interest of a consignor. However, when dealing with statutes, definitions are important to read and understand. The term "consignment" is defined in UCC § 9-102(a)(20) ("Consignee" and "Consignor" are also defined in subsections (19) and (21)). Only those consignments that satisfy the definitional standards are included. That definition encompasses bailments of goods to merchants to facilitate sales that does not create a "security interest". See, Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 20, Jan. 24, 2019. Thus, they are true consignments and require compliance with the perfection rules.

It must be noted that there may be some true consignments that do not fulfill all of the elements of UCC § 9-102(a)(20) and are not subject to Article 9. Perhaps not required to be stated, but for clarity, any document that purports to be a consignment but retains an ownership interest as security for an obligation is not a "consignment" and is properly characterized as a secured transaction within the UCC definition of security interest.

Consignments within UCC § 9-102(a)(20) apply other rules including UCC §§ 9-319, 9-505 and 9-601, and are also distinguishable from an Article 2 "sale or return" in UCC § 2-326. Failure of the consignor to comply with Article 9 rules subjects the consignor's interest to avoidance under § 544(a)(3). E.g. *IPC (USA), Inc. v. Ellis (In re Pettit Oil Co.)*, 2019 U.S. App. LEXIS 7085 (9th Cir. March 11, 2019), *aff'g* 575 B.R. 905 (Bankr. 9th Cir. 2017), *aff'g* 2016 Bankr. LEXIS 3895* (Bankr. W.D. Wash. 2016).

d. Leases for Security

Another area in which the form of draftsmanship has attempted to avoid the application of the law of security interests are documents purporting to be leases of personal property. Leases of equipment and other goods are ubiquitous in commerce. Article 9 does not apply to "true leases" (see UCC Article 2A) but does apply to "disguised leases", "disguised conditional sales", or leases for security. The final sentence of the definition of security interest in UCC § 1-201(b)(35), states: "Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to Section 1-203." Prior to the 1998 revisions to Article 9, many courts struggled with whether the lease agreements constituted a "true lease" or was a disguised security interest. Unlike in the sale of accounts context in which the drafters provided no guidance, the pre-existing case law on leases assisted drafters with UCC § 1-203 which sets forth some clear guidelines although "determined by the facts of each case". The factors of UCC § 1-203 generally focus attention on indicia of ownership, what happens at the end of the lease term and allocation of risk as to residual value of the goods.

Proper characterization of a lease by a Bankruptcy Court is important to determine applicable law. If a lease is a disguised financing, then compliance with Article 9 is required. If a lease is a true lease, then compliance with Bankruptcy Code § 365 is required.

e. Real Estate Related or Second Tier Transactions

The scope of Article 9 is solely as to personal property and does not apply to security interests in real estate. However, under prior Article 9 there was confusion as to whether a real estate related transaction or "second tier transaction", such as notes secured by real property, was within the scope of Article 9. Revised Article 9 specifically addressed that common issue in UCC § 9-109(b), which states:

> [Security interest in secured obligation.] The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

Accordingly, a note secured by mortgage is not within the scope of Article 9. However, a security interest in that same note (secured by mortgage) is within the scope of Article 9. Any attempt to perfect a security interest in that note by recording in real property records is

ineffective. See, UCC § 9-109, cmt. 7 (Am. Law Inst. & Nat'l Conf. of Comm'rs on Unif. State Laws 2022); and Report of the Permanent Editorial Board for the Uniform Commercial Code, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes, November 14, 2011.

Revised Article 9 also codifies the common law principle that collateral for a note follows a transfer (either a sale or security interest) of a note. UCC § 9-203(g) explicitly provides that "[t]he attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien." Courts have not understood this principle nor properly applied Article 9.

II. Perfection and Filing Issues under UCC Article 9

A financing party that desires personal property collateral must satisfy the three elements of attachment of UCC § 9-203(b), and to have priority as to third parties must perfect as required by UCC § 9-308(a). The secured party has the burden of proving that it has properly perfected its security interest. *See In re Tuscany Energy, LLC*, 581 B.R. 681 (Bankr. S.D. Fla. 2018). The correct method of perfection depends on the "type" of collateral ("types" are those defined by the UCC). Attachment requires that the secured party provide value, the debtor have rights in the collateral, and, generally, the debtor authenticate a security agreement.

The possible methods of perfection under Article 9 are: (1) automatic, for those situations enumerated in UCC § 9-309(1) to (13); (2) possession, for negotiable documents, goods, instruments, money, tangible chattel paper, and certificated securities, UCC § 9-313 (note that possession is the exclusive method of perfection for tangible money, UCC § 9-312(b)(3)); (3) control, for investment property, deposit accounts, letter of credit rights, electronic chattel paper, controllable electronic records, controllable accounts, and controllable payment intangibles, UCC § 9-314(a) (note that control is the exclusive method of perfection for deposit accounts as original collateral and for letter of credit rights, UCC § 9-312(b)); (4) compliance with other statutes, both federal and state, UCC § 9-311, and (5) filing a UCC-1 financing statement, the general rule, for all types of collateral except money and deposit accounts as original collateral, UCC § 9-310(a).

Filing of a basic one-page UCC-1 financing statement serves as public notice that a secured party may have a security interest. The UCC-1 is not meant to be a summary of the underlying financing transaction or the security agreement; rather, it need only list the names of the debtor and secured party and "indicate" the collateral that it covers. UCC § 9-502(a). When a debtor authorizes it, UCC 9-502(d) permits a financing statement to be filed before a security interest attaches, and if it does so, then perfection occurs instantly when the security interest attaches. *Rebel Auction Company, Inc. v. Citizens Bank*, 343 Ga. App. 81, 805 S.E.2d 913 (2017).

Although filing a UCC-1 financing statement is the most common method of perfection, there are important exceptions where specialized rules apply. UCC § 9-311(a) provides that the filing of a financing statement is not necessary, and ineffective, to perfect a security interest in property subject to (1) a statute, regulation, or treaty of the United States whose requirements for

a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt Article 9's filing provisions, or (2) a state certificate of title statute covering the property.

The exceptions to the general rule of filing a financing statement create significant traps for the unwary, particularly in the context of motor vehicles, deposit accounts, cryptocurrency, planes, trains, and vessels. Common issues that arise in perfecting security interests in each of these categories of collateral are discussed below.

a. Vehicles

Motor vehicles are among the most commonly encountered forms of collateral, yet perfecting a security interest in a motor vehicle is one of the most frequent sources of error for secured parties. UCC § 9-311(a)(2) provides that the filing of a financing statement is neither necessary nor effective to perfect a security interest in goods subject to a state certificate of title statute. Instead, perfection must be accomplished by having the security interest noted on the certificate of title issued by the applicable state department of motor vehicles. UCC § 9-311(b). Accordingly, a creditor that files a UCC-1 financing statement covering a motor vehicle in a state where there is a certificate of title statute, but fails to note its lien on the certificate of title, does not have a perfected security interest. *See, e.g.*, *McCarthy v. BMW Bank of North America*, 509 F.3d 528 (D.C. Cir. 2007).

A recurring issue in the motor vehicle context is whether a particular type of vehicle constitutes a "motor vehicle" subject to a certificate of title statute. In *In re Rainer*, 246 B.R. 11 (Bankr. W.D.N.Y. 2000), the court held that a personal watercraft was not a "motor vehicle required to be registered" within the meaning of the New York UCC. Because the personal watercraft was not subject to the certificate of title exception, the creditor's purchase-money security interest in the consumer goods was automatically perfected under UCC § 9-309(1), and the Chapter 7 trustee could not avoid the creditor's interest. By contrast, in that same case, the court concluded that a four-wheeled, off-the-road all-terrain vehicle (ATV) was a "motor vehicle" under the New York UCC. The creditor's failure to note its lien on the ATV's certificate of title left the purchase-money security interest unperfected and subject to avoidance by the trustee. *See also In re Renaud*, 308 B.R. 347 (B.A.P. 8th Cir. 2004) (where bank had not properly perfected its lien on debtors' ATV by notation on its certificate of title, trustee could avoid the lien under its strong-arm powers); *In re Psalto*, 225 B.R. 753 (Bankr. D. Idaho 1998) (snowmobile was a motor vehicle for which notation on a certificate of title was the exclusive method of perfection, and a creditor's financing statement filed with the Secretary of State was insufficient).

The timing of perfection is also critical in the motor vehicle context, particularly with respect to avoidance as a preferential transfer under Bankruptcy Code § 547. In some jurisdictions, for example, a security interest in a motor vehicle is not perfected until it is entered on the certificate of title, not when the application for the certificate is submitted. *See, e.g.*, *McCarthy*, 509 F.3d at 528 (applying District of Columbia law). Similarly, in *In re Glandon*, 338 B.R. 103 (Bankr. D. Colo. 2006), the court held under Colorado law that a lender's purchase-money security interest in a motor vehicle was not perfected upon presentation of the paperwork to the county clerk, but only when the lien information was transmitted to Colorado's

Central Registry. Because that transmission occurred within the 90-day preference period, and because the security interest was not perfected within the applicable grace period, the transfer was avoidable as a preference. Practitioners must therefore be attentive not only to completing the correct paperwork, but also to ensuring that the state's internal processing is completed sufficiently in advance of any potential bankruptcy filing. *See also In re Vazquez Vazquez*, 549 B.R. 304 (Bankr. D. P.R. 2016) (perfection of security interest within 90 days prior to filing was avoidable as a preference); *In re Shreves*, 272 B.R. 614 (Bankr. N.D. W. Va. 2001) (equitable subrogation did not relieve lender of statutory duty to record motor vehicle lien on certificate of title).

b. Deposit Accounts

Deposit accounts present unique perfection challenges because filing a UCC-1 financing statement is not effective to perfect a security interest in a deposit account as original collateral. UCC § 9-312(b)(1) provides that, except in the case of proceeds, "a security interest in a deposit account may be perfected only by control under Section 9-314." Thus, control is the exclusive method of perfection for deposit accounts. A secured party that files only a UCC-1 financing statement covering a deposit account, even one that broadly covers "all assets," does not have a perfected security interest in the deposit account. *See, e.g.*, *In re Van Der Laan*, 556 B.R. 366 (Bankr. N.D. Ill. 2016).

Control over a deposit account is obtained in three ways under UCC § 9-104(a): (1) when the secured party is the bank with which the deposit account is maintained; (2) when the debtor, the secured party, and the bank have entered into a written agreement (commonly known as a deposit account control agreement, or "DACA") providing that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent of the debtor; or (3) when the secured party becomes the bank's customer with respect to the deposit account. The DACA is the most common method by which non-bank secured parties obtain control, and serves both as the means of satisfying the perfection requirement and, pursuant to UCC § 9-203(b)(3)(D), the authenticated control agreement can satisfy the attachment requirement in lieu of a separate authenticated security agreement.

Several common issues arise with deposit account perfection. First, the priority rules for deposit accounts under UCC § 9-327 are distinctive: a secured party with control has priority over one without control; among multiple secured parties with control, priority generally ranks in order of time of obtaining control; but the depository bank always has priority over other secured parties that obtained control through a DACA, regardless of timing. UCC § 9-327(3). A secured party can overcome the bank's priority only by becoming the bank's customer with respect to the deposit account. UCC § 9-327(4). Second, practitioners must be attentive to the distinction between deposit accounts and instruments. If a certificate of deposit is evidenced by a negotiable certificate, it is classified as an instrument under the UCC and not as a deposit account, meaning perfection can be achieved by possession or filing rather than control. *See* UCC § 9-104, cmt. 3. But if the certificate of deposit is uncertificated or the certificate is nonnegotiable, it generally remains a deposit account, and perfection requires control. *See In re Perez*, 440 B.R. 634 (Bankr. D. N.J. 2010). Third, the secured party must maintain control to remain perfected. If the secured party loses control, for example, if the DACA is terminated, the security interest becomes unperfected. *See, e.g.*, *In re Cruz Rivera*, 600 B.R. 132 (B.A.P. 1st Cir. 2019).

c. Cryptocurrency

The perfection of security interests in cryptocurrency has presented significant challenges due to the unique nature of digital assets and the absence, until recently, of a uniform statutory framework. Prior to the 2022 amendments to the UCC, cryptocurrency was generally classified as a "general intangible," which is the catch-all category for personal property not otherwise classified under Article 9. *See* UCC § 9-102(a)(42). As a general intangible, the only available method of perfection was the filing of a UCC-1 financing statement. Perfection by possession is unavailable because cryptocurrency is intangible, and perfection by control was not available for general intangibles under the pre-amendment statute.

Filing a UCC-1, however, presented practical problems because a secured party that perfected by filing had no reliable means of preventing the borrower from transferring the cryptocurrency to a pseudonymous purchaser on the blockchain, effectively rendering the security interest unenforceable as a practical matter even though it remained legally valid. *See* Ronald J. Mann, *Reliable Perfection of Security Interests in Crypto-Currency*, 21 SMU Sci. & Tech. L. Rev. 159 (2018).

Some practitioners attempted to address these limitations by treating cryptocurrency as a "financial asset" under Article 8 of the UCC, utilizing the indirect holding system. This approach required the custodian or third-party entity holding the cryptocurrency to (1) consent to the classification of the cryptocurrency as investment property, and (2) be a "securities intermediary" that would comply with "entitlement orders" giving control to the secured party. *See* UCC § 8-503(a). While effective, this method had practical limitations, including its "opt-in" requirement and the reluctance of custodians to face the potential application of other Article 8 provisions. As a result, some lenders perfected using both approaches simultaneously by filing a UCC-1 financing statement under Article 9 and taking control of a securities account under Article 8.

The 2022 amendments to the UCC introduced a new Article 12 governing "controllable electronic records" ("CERs"), a category that encompasses cryptocurrency and other blockchain-based assets. A CER is a record of information in electronic form that may be subject to "control" as defined in UCC § 12-105. Control requires that a party demonstrate: (1) the power to avail itself of substantially all of the benefit of the CER; (2) the exclusive power to prevent others from availing themselves of substantially all the benefit; and (3) the exclusive power to transfer control to another person. UCC § 12-105(a). Importantly, a power can be "exclusive" for CER purposes even if the power is shared with another entity through a multi-signature wallet or if the protocol built into the system requires an automatic change. UCC § 12-102(b).

Under amended Article 9, a security interest in a CER, including cryptocurrency, may be perfected either by filing a UCC-1 financing statement or by obtaining control. UCC § 9-312A. However, a security interest perfected by control has priority over a security interest perfected by filing. UCC § 9-326A. This priority rule creates a strong incentive for secured parties to obtain control rather than relying solely on a filed financing statement. As states adopt the 2022 amendments, practitioners should be vigilant about transition rules, as a party that was senior by virtue of a prior filed financing statement may find its priority subordinated to a later-in-time

party that obtains control under Article 12. *See generally* Adam Back, *Uniformity Is Coming to Crypto-Backed Transactions*, 41-DEC Am. Bankr. Inst. J. 16 (2022).

Reliance on control as the primary method of perfection for cryptocurrency presents its own challenges. Control of cryptocurrency is invariably established by dominion over the private key, which is the cryptographic code necessary to transfer the asset on the blockchain. A debtor could give its private key to multiple parties simultaneously, and each party might believe that it alone has control, with no reliable public means to verify who holds the keys or who obtained them first. Furthermore, many holders of cryptocurrency are reluctant to disclose their private keys, and a secured creditor in possession of the keys could potentially move the cryptocurrency to its own wallet. If a secured creditor moves cryptocurrency post-petition, the creditor may be subject to sanctions for violation of the automatic stay. *See* 11 U.S.C. § 362(k).

Because of these practical difficulties, commentators have proposed the creation of a centralized national filing system for cryptocurrency that would serve as an additional or alternative method of perfection, offering enhanced transparency, uniformity, and predictability. *See* Jessica G. McKinlay, *Securing the Rights of Cryptocreditors*, 99 Am. Bankr. L.J. 115 (2025). Until such a system is adopted, however, practitioners must navigate the intersection of Article 9, Article 12, and state-specific enactments to ensure that security interests in cryptocurrency are properly perfected.

d. Aircraft

Perfection of security interests in aircraft is governed by federal law, which preempts the UCC's filing provisions. Accordingly, a creditor that files only a UCC-1 financing statement covering an aircraft, without complying with the applicable federal filing regime, does not have a perfected security interest.

Under the Federal Aviation Act, the Federal Aviation Administration ("FAA") maintains a national registry for the ownership of and interests in United States registered aircraft, with each aircraft identified by a specific "N-number." Security interests in aircraft are perfected through the filing of a security agreement with the FAA at its registry in Oklahoma City. The security agreement must identify the collateral by manufacturer, model designation, serial number, and (for airframes) N-number, and must be signed in ink by the debtor by a corporate officer or other managerial position and notarized. Unlike UCC-1 financing statements, a lien filed with the FAA does not lapse after a certain period, and there are no required continuation filings to maintain such lien. A security interest filed with the FAA may be released by a simple document signed by the secured party referencing the applicable recording information.

Since 2006, security interests in United States aircraft have also been subject to registration with the International Registry created pursuant to the Convention on International Interests in Mobile Equipment (the "Cape Town Convention") and the related Protocol specific to aircraft (the "Aircraft Protocol"). The Cape Town Convention and Aircraft Protocol apply to "international interests" in "aircraft objects," which include airframes certified to transport at least eight persons including crew or goods in excess of 2,750 kilograms, helicopter engines having at least 1,750 pounds of thrust, and helicopters certified to transport at least five persons or goods in excess of 450 kilograms. Once registered, an international interest has priority over

any interest registered thereafter, as well as interests that are not registered. Filings with the International Registry take the place of FAA filings in the case of most aircraft assets, although it remains common practice for secured parties to file in both registries to ensure maximum protection.

Although the federal filing regime preempts state law concerning the means of perfection, the creation of a security interest and its priority in relation to other creditors remains determined pursuant to applicable state law, which is generally the UCC. Moreover, there is typically related collateral in aircraft financings, such as equipment not constituting part of the aircraft, insurance and other proceeds, maintenance records, and any lease rights, that cannot be perfected through an FAA filing. Financing statements must be filed to perfect the secured party's security interest in that collateral. It is standard practice to include a description of the aircraft in the UCC-1 to more fully identify the related collateral, even though the UCC filing does not itself perfect the lien on the aircraft.

e. Trains

Railroad rolling stock, which includes railroad cars, locomotives, and other rolling stock and accessories used in railway operations, presents several different perfection issues from aircraft or vessels. Unlike aircraft and vessels, there is no title registration system for rolling stock. As a result, railcars do not have a specific jurisdiction designating a single place to file liens or an officially assigned identification number to be filed against. Instead, each unit is identified by a reporting mark under the Uniform Machine Language Equipment Register, administered by the American Association of Railroads, in a letter and number format (e.g., ABCX 1234).

The Surface Transportation Board ("STB") is the designated federal agency for filing security interests against railroad rolling stock. 49 U.S.C. § 11301(a). That statute provides that instruments evidencing a security interest in rolling stock "intended for a use related to interstate commerce shall be filed with the [STB] in order to perfect the security interest." Once filed, the document is "notice to, and enforceable against, all persons," and no additional filing under state law is required. *Id.* Interests perfected under this section are "deemed perfected in all jurisdictions." *Id.*, § 11301(e). A security agreement submitted to the STB must be in writing, signed by the owner and the secured party, and notarized. The STB assigns each primary document a specific recordation number, and related secondary documents (such as assignments, amendments, and releases) are filed under that number with a letter designation.

Once filed with the STB, a security agreement does not need updated filings to remain effective; there is no continuation requirement analogous to UCC § 9-515. However, a change of reporting mark requires updated filings, and lien documents typically include a covenant requiring these filings as a precondition to any reporting mark change. There is no specific requirement under the regulations for terminating an STB filing; the secured party simply files a termination document referencing the original primary document and the equipment covered under it.

As with aircraft and vessels, the federal law requiring filing with the STB preempts state law only as to the means of perfection. The creation of a security interest and its priority in

relation to other creditors is determined pursuant to applicable state law, which is generally the UCC. In most rolling stock financings there is related collateral beyond the railcars themselves, including proceeds, insurance and condemnation payments, books and records, and any lease and related credit support, that cannot be perfected through filing with the STB. Financing statements must therefore be filed to perfect the secured party's security interest in that collateral. It is standard practice to include a description of the railcars in the UCC-1 to more fully identify the related collateral, even though the UCC filing does not perfect the lien on the railcars themselves.

It is also standard practice for financiers of rolling stock to file their security interests in Canada with the Office of the Registrar General, care of Corporations Canada, to protect their interests in the event the equipment is located in that jurisdiction. Similar to the STB, filing with the Registrar General perfects the lien in all places in Canada. Additionally, a protocol to the Cape Town Convention, known as the Luxembourg Rail Protocol, has been created specifically relating to rolling stock. This protocol went into effect on March 8, 2024, and the International Rail Registry, based in Luxembourg, became operational on that same date. As of August 2025, the protocol has been ratified only by Luxembourg, Gabon, Sweden, Spain, Paraguay, and South Africa; the United States has not yet ratified it.

f. Boats

Perfection of security interests in vessels is complicated by the intersection of federal and state law, and the correct method depends on whether the vessel is "documented" or "undocumented." A documented vessel is one for which a certificate of documentation has been issued by the National Vessel Documentation Center ("NVDC") under Chapter 121, Title 46 of the United States Code. For documented vessels, perfection is accomplished through the filing of a mortgage document with the NVDC, at which time it becomes "valid against any person." 46 U.S.C. § 31321(a)(2). If the mortgage meets additional criteria, most notably, the encumbrance of the entire vessel, it is considered a "preferred mortgage," entitling the secured party to special rights and procedures, including in rem foreclosure in the event of default. 46 U.S.C. § 31322. The NVDC will only accept filings related to documented vessels; it is not possible to file a mortgage and therefore to perfect a security interest in an undocumented vessel through this method.

For undocumented vessels, which are generally smaller recreational and commercial watercraft, the methods of perfection are based on state law and vary from state to state. There are two general methods under state law: (1) filing a UCC financing statement, and (2) making an indication on a state-issued certificate of title. As to the first method, the general UCC rule of perfection through filing applies in the twelve states where no other method is "otherwise provided" for undocumented vessels. UCC § 9-310(a). As to the second method, a total of thirty-eight states have adopted a certificate of title statute for vessels, and in those states, perfection of a security interest in a titled vessel is accomplished through an indication on the state-issued certificate. UCC §§ 9-310(b)(3), 9-311(a)(2). In such states, the filing of a UCC financing statement will fail to perfect a security interest in a vessel subject to the certificate of title statute. It is therefore critical for practitioners to determine, on a state-by-state basis, whether the vessel in question is subject to a certificate of title statute, as filing in the wrong system renders the security interest unperfected and vulnerable to avoidance.

In the bankruptcy context, courts have addressed whether certain watercraft are "consumer goods" for purposes of the automatic perfection rule in UCC § 9-309(1), which provides that a purchase-money security interest in consumer goods is perfected upon attachment without the need for filing. In *In re Lockovich*, 940 F.2d 916 (3d Cir. 1991), the Third Circuit held that a twenty-two-foot motor boat was a consumer good under Pennsylvania law and that the creditor therefore had a valid perfected purchase-money security interest without filing. As noted above, in *In re Rainer*, 246 B.R. 11 (Bankr. W.D.N.Y. 2000), a personal watercraft was held not to be a "motor vehicle required to be registered" and therefore the PMSI was automatically perfected. These cases highlight the importance of correct classification: if the vessel is a consumer good not subject to a certificate of title statute, the purchase-money security interest may be automatically perfected; if it is subject to such a statute, the secured party must comply with the applicable notation requirements or risk having its interest avoided by a bankruptcy trustee.

III. Security Interests in Intellectual Property

Understanding how and when UCC Article 9 applies to intellectual property—and Article 9's co-existence with intellectual property laws—can be a difficult exercise. These materials do not attempt to cover all issues that arise with respect to the perfection of security interests in intellectual property. Instead, the following is intended to provide a basic introduction of key issues at play.

a. Laws Protecting Intellectual Property

Generally speaking, intellectual property ("IP") includes assets that are protected by patent, copyright, trademark, trade secret, and similar laws. IP is largely protected by: (i) the Patent Act, 35 U.S.C. §§ 1-390; (ii) the Copyright Act, 17 U.S.C. §§ 101-1511; (iii) the Trademark (or "Lanham") Act, 15 U.S.C. §§ 1051-1127; and (iv) state trademark and trade secret laws.[1] Article 9 provides for perfection under other federal or state laws if required by those statutes or regulations. UCC § 9-311. Because the Patent Act, the Copyright Act, and the Trademark Act provide for certain filings to be made in federal offices regarding patents, copyrights, and trademarks, it can be difficult to understand when such filings either supplement or preempt Article 9 filings with respect to security interests in IP.

b. Perfection of Security Interests in IP: UCC Article 9 vs. Federal Statutes

IP generally falls within Article 9's collateral category of "general intangibles."[2] *See* Comment 5d to UCC § 9-102. And, the perfection of a security interest in general intangibles is generally accomplished by filing a UCC financing statement ("UCC-1"). *See* UCC § 9-310(a). However, many courts addressing perfection issues in IP

[1] There is no federal office for filing an interest in trade secrets. As a result, security interests in trade secrets are generally governed by UCC Article 9. Please note, however, that a trade secret may eventually become protected by a patent, at which time the Patent Act may apply. *See* 1C Secured Transactions Under the UCC § 25.01 (2026)

[2] One exception exists for certain "computer program[s] embedded in goods," which are defined as "goods" under § 9-102(a)(44). Otherwise, software generally is included in the category of "general intangibles." § 9-102(a)(42).

(typically in the context of bankruptcy) have found that filing a UCC-1 may not perfect a party's security interest in certain types of IP.

Copyrights

In 1990, on an appeal from a bankruptcy court decision in the case of *In re Peregrine Entertainment, Ltd.*,[3] the United States District Court for the Central District of California concluded that security interests in copyrights—and associated receivables (such as royalties earned from licensing copyrighted works)—must be perfected by recording in the U.S. Copyright Office rather than under Article 9 of the UCC.[4]

The *Peregrine* court found, among other things, that the broad definition of a "transfer" in the Copyright Act resulted in federal law preempting state law methods of perfecting security interests in copyrights. Specifically, the court reasoned that because: (i) the Copyright Act provides that a "transfer" pertaining to a copyright may be recorded in the U.S. Copyright Office; (ii) the Copyright Act defines "transfer" to include the "mortgage" or "hypothecation" of a copyright; and (iii) "the terms 'mortgage' and 'hypothecation' include a pledge of property as security or collateral for a debt," an agreement granting a security interest in a copyright may be recorded in the Copyright Office and therefore the Copyright Act preempts Article 9.[5] 116 B.R. at 198-99.

In 2002, the Ninth Circuit Court of Appeals adopted *Peregrine's* rationale as to registered copyrights but held that a security interest in an *unregistered* copyright is properly perfected under Article 9. *See In re World Auxiliary Power Co.*, 303 F.3d 1120 (9th Cir. 2002). Many other courts have followed *Peregrine's* holding with respect to registered copyrights in the context of bankruptcy.

Patents & Trademarks

In contrast to perfecting a security interest in copyrights, numerous bankruptcy courts have ruled that the proper method to perfect a security interest in patents and trademarks is to file a UCC-1 under Article 9. *See* 1C Secured Transactions Under

[3] 116 B.R. 194 (C.D. Cal. 1990) (Judge Alex Kozinski of the Ninth Circuit Court of Appeals sitting by designation).
[4] *Peregrine*'s holding regarding copyright receivables/royalties was later overruled by the Ninth Circuit Court of Appeals in the case of *Broadcast Music, Inc. v. Hirsch*, 104 F.3d 1163 (9th Cir. 1997).
[5] This is a simplified summary of one part of the *Peregrine* court's analysis regarding preemption issues, and readers are encouraged to review the court's opinion in its entirety.

the UCC § 25.04[1] n.4[6] & 5[7] (2026). One key rationale is that, unlike the Copyright Act, the Patent Act and Trademark Act do not use the words "transfer," "mortgage," or "hypothecation," but instead use the term "assignment," which term traditionally refers to the conveyance of title as opposed to the pledging of collateral. *See, generally, id*. § 25.04[4]. Therefore, these courts have held that the Patent and Trademark Acts do not preempt UCC Article 9 with respect to a secured party's perfection of a security interest in patents and trademarks, and thus the proper method to perfect a security interest in patents and trademarks is under Article 9.

Please note, however, that filing a UCC-1 financing statement may not protect a secured creditor as against certain buyers of patents or trademarks, or as against a later creditor who takes title to a patent or trademark in the form of a security document. To protect against those instances, the filing of a notice of security interest with the U.S. Patent and Trademark Office may be necessary.

Given the foregoing complexities involving the perfection of security interests in IP, it is not uncommon for secured parties to file notices of their security interests in IP under both state (UCC Article 9) and federal (Copyright Act, Patent Act, and Trademark Act) laws.

IV. Enforcement: Repossession Without Judicial Process

One of the great advantages of a security interest is the opportunity to engage in self-help repossession to satisfy the underlying debt. The law permits the holder of a security interest not only to proceed against the collateral pursuant to judicial process, which is a right afforded to all litigants, but also to proceed "without judicial process," if it does so "without breach of the peace."

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[6] Citing Phoenix Sys. & Components, Inc. v. First State Bank (*In re* Phoenix Sys. & Components, Inc.), 2007 Bankr. LEXIS 603 (Bankr. D. Neb. Feb. 23, 2007); Braunstein v. Gateway Mgmt. Servs. (*In re* Coldwave Sys., LLC), 368 B.R. 91, 97 (Bankr. D. Mass. 2007); Gasser Chair Co. v. Infanti Chair Mfg. Corp., 2006 U.S. Dist. LEXIS 7423 (E.D.N.Y. Feb. 8, 2006); Moldo v. Matsco, Inc. (*In re* Cybernetic Servs.), 252 F.3d 1039 (9th Cir. 2001); *In re* Tower Tech, Inc., 67 Fed. Appx. 521 (10th Cir. 2003); In re Pasteurized Eggs Corp., 296 B.R. 283 (Bankr. D.N.H. 2003); *In re* Transportation Design & Tech. Inc., 48 B.R. 635, 40 U.C.C. Rep. Serv. 1393 (Bankr. S.D. Cal. 1985); and City Bank & Trust Co. v. Otto Fabric Inc., 83 B.R. 780, 5 U.C.C. Rep. Serv. 2d 1459 (D. Kan. 1988) with respect to patents.

[7] Citing *In re* Roman Cleanser, 43 B.R. 940, 39 U.C.C. Rep. Serv. 1770 (Bankr. E.D. Mich. 1984), *aff'd on other grounds*, 802 F.2d 207 (6th Cir. 1986) (security interest perfected by Article 9 filing); *In re* TR-3 Indus., 41 B.R. 128, 41 B.R. 128, 39 U.C.C. Rep. Serv. 279 (Bankr. C.D. Cal. 1984) (same); Joy Grp. Oy v. SupremeBrands L.L.C., 2016 U.S. Dist. LEXIS 64746 (D. Minn. May 16, 2016) (UCC filing perfected interest in later acquired trademark); *In re* Together Dev. Corp., 227 B.R. 439 (Bankr. D. Mass. 1998) (filing with U.S. Patent and Trademark Office did not perfect interest in registered trademark); Joseph v. Valencia, Inc. (*In re* 199Z, Inc.), 137 B.R. 778 (Bankr. C.D. Cal. 1992) (federal law did not preempt Article 9 filing); Gasser Chair Co. v. Infanti Chair Mfg. Corp., 2006 U.S. Dist. LEXIS 7423 (E.D.N.Y. Feb. 8, 2006) (UCC filing required to perfect security interest in patent); *In re* Chattanooga Choo Choo Co., 98 B.R. 792, 8 U.C.C. Rep. Serv. 2d 795 (Bankr. E.D. Tenn. 1989) (Article 9 rather than federal statutes controls); *In re* C.C. & Co. Inc., 86 B.R. 485, 6 U.C.C. Rep. Serv. 2d 915 (Bankr. E.D. Va. 1988) (creditor who perfected under Article 9 acquired all rights in trade name and good will at public disposition); and Raffel Sys., LLC v. Man Wah Holdings Ltd., Inc., 2020 U.S. Dist. LEXIS 104321, at *9 (E.D. Wis. June 15, 2020) ("Courts that have addressed this issue have consistently found that the Patent Act does not address perfection of security interests—it addresses assignments of title.") with respect to trademarks.

The legal concept of "breach of the peace" is not further explained in the UCC. Rather, it is left for courts to interpret and apply the phrase. Courts across the country have not settled on one understanding of "breach of the peace," and there are some extreme variations in interpretation. What follows is a summation of applicable caselaw on the topic as established in Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming (the "Rocky Mountain" states), plus a bonus opinion from the Tenth Circuit arising out of the state of Oklahoma.

Arizona

Wiley v. On Point Recovery and Transport LLC, 757 F.Supp.3d 943 (D. Ariz 2024)

Relevant Facts: When Repossession Agent came to collect the car, Debtor told Agent through the door that she had already scheduled a payment with Creditor, rendering repossession unnecessary. Agent insisted he could not leave the property without Debtor's car and threatened to involve the police. Debtor was afraid to leave her home because the Agent was lurking outside, and so missed her doctor's appointment. Debtor contacted Creditor, who instructed Agent to cease repossession efforts. Debtor then sued Agent for breach of the peace in violation of Arizona state law.

Question of Law: Does Debtor's complaint for breach of the peace fail to state a claim on which relief can be granted?

Ruling: There was no breach of the peace because Agent's alleged actions did not implicate any aggravating factors such as violence, threats of violence or property damage, and did not indicate a potential for violence or further escalation.

Money Quote: "Arizona courts have indicated that relevant factors include whether the creditor used force or violence; whether the creditor entered the debtor's premises; whether the debtor protested the repossession; whether the creditor damaged the debtor's property during the course of repossession; and whether law enforcement officers were present."

Rand v. Porsche Financial Services, 216 Ariz. 424 (Ariz. App. 2007)

Relevant Facts: Debtor leased a luxury car from Lessor. Under the terms of the lease, Lessor could enter the Debtor's premises to repossess the car. Debtor defaulted and Lessor hired Agent to repossess the car. Debtor physically resisted the repossession and Police were called. Police forced Debtor to permit the repossession.

Question of Law: Is self-help repossession wrongful as a matter of law when a law enforcement officer is involved?

Ruling: The mere presence of a police officer at the scene of a repossession is not enough to convert the private conduct to state action and will not necessarily amount to a breach of the peace. Summary judgment was improperly granted because a question of fact exists as to the conduct of the Police present at the repossession. (Overturning *Walker v. Walthall*, 121 Ariz. 121 (Ariz. App. 1978)).

Money Quote: "[A]lthough we employed broad language in finding state action from the presence of an officer, the facts in *Walker* involved more than mere presence. . . . [Because Police] 'permitted' the repossession company to take control of [Debtor's] vehicle, its action arguably provided the requisite level of active state participation."

Pete v. U.S. Bank, N.A., 2009 WL 532611 (Ariz.App. March 3, 2009)

Relevant Facts: Debtor granted a purchase money security interest in a mobile home. After Debtor defaulted, Creditor repossessed the home, without obtaining Debtor's written consent or a court order. Debtor sued Creditor for wrongful repossession and obtained a default judgement.

Question of Law: Should Creditor be permitted to set aside entry of default and vacate the default judgment because the complaint failed to allege any wrongful act?

Ruling: Debtor's complaint states that Creditor acted contrary to Navajo Nation law and was therefore sufficient to support the default judgment.

Money Quote: "Under Navajo Nation law, cited in [Debtor's] complaint, failure to obtain either a court order or written consent before repossessing property constitutes a breach of the peace."

Colorado

Alonzo v. Marquesan Cross LLC, 2022 WL 22925161 (Colo. App. July 28, 2022)

Relevant Facts: Repossession Agent came to retrieve Debtor's car at her home at about 8:30p.m. Neighbor testified that Agent banged on and kicked the front door, yelled obscenities, went through a gate into the backyard, shined flashlights through the windows, attempted to open the garage, and overturned flowerpots, ostensibly looking for keys. Thinking Agent was attempting to break into Debtor's house, Neighbor called the police. Debtor testified that she was inside the house with her daughter and young granddaughter. She heard loud banging and kicking on her front door and saw the doorknob moving, like someone was trying to open the door. She initially believed that strangers were trying to break into her home, but later realized that Agent intended to repossess her vehicle. Agent testified that he knocked loudly on the door and then went into the backyard to take pictures of the car inside the garage, but did not engage in the other activities Neighbor and Debtor described. Police arrived, at which point Neighbor engaged in a verbal altercation with Agent. However, the police left the scene within five minutes without issuing any citations or warnings. Shortly thereafter, Agent also left.

Question of Law: Was a directed verdict in favor of Agent on Debtor's claim under the Colorado Fair Debt Collection Practices Act warranted?

Ruling: A reasonable jury could have found that Agent breached the peace during the incident at Debtor's home, because breach of the peace includes trespassing or using violent means, and a jury could credit Debtor and Neighbor's recitation of the events.

Money Quote: "For purposes of [section 9-609], breach of the peace includes, but is not limited to, breaking, opening, or moving any lock, gate, or other barrier to enter enclosed real property without the contemporaneous permission of the debtor or using or threatening to use violent means. Whether a breach of the peace occurred is generally a fact question for the jury."[8]

Nevada

Droge v. AAAA Two Start Towing, Inc., 468 P.3d 862 (Nev. App. 2020)

Relevant Facts: Debtor defaulted on his car loan while incarcerated. He'd left the car at his parents' house, where they stored it in their fenced backyard. Repossession Agent came to get the car, but did not attempt to repossess so long as it was parked in the fenced backyard. Several months later, Agent saw the car parked in front of the home on the driveway. Agent was hooking the car to the tow truck when Debtor's parents confronted Agent. Debtor's father then drove the car back into the fenced backyard, narrowly avoiding injuring Agent (who was still trying to hook up the car). Agent called Police. Police arrested Debtor's father for battery with a deadly weapon, and he was charged with that crime, but ultimately acquitted at trial.

Question of Law: Did Agent forfeit the privilege to trespass on Debtor's parents' property by breaching the peace?

Ruling: Mere trespass, standing alone, is not a breach of the peace, but self-help repossessions must be conducted at a reasonable time and in a reasonable manner. In this case, there are sufficient contested facts to permit a jury to conclude that Agent was in breach of the peace, such that the grant of summary judgment in Agent's favor should be overturned.

Money Quote: "Because we agree that breach of the peace is a relatively elastic legal concept, we track the majority approach and decline to adopt an express definition for the term. Instead, we provide workable guidelines to assist courts in determining when a breach of the peace occurs."

Mkhitaryan v. U.S. Bancorp, 2012 WL 6204840 (D. Nev. Dec. 12, 2012)

Relevant Facts: After Debtor's default on his car payment, Agents came to repossess his car at about 10:30 am. Debtor claims that one Agent chased Debtor's father around the garage with a baseball bat, screamed obscenities, and had Police hand-cuff Debtor and force him to turn over the vehicle. Agents deny ever touching the baseball bat, which they claim was a foam toy kept in the trunk of Agent's car, or screaming obscenities. Both Debtor and Agent called for Police.

Question of Law: Is summary judgment for Debtor appropriate because Agents' behavior constituted a breach of the peace?

[8] Internal citations omitted.

Ruling: The facts are too messy and disputed to determine that Agents breached the peace, because a mere objection is insufficient and the mere presence of law enforcement is insufficient.

Money Quote: "These major factual discrepancies are for a jury to determine, not a court at the summary judgment stage. . . . It is for a jury to determine, after hearing the facts, whether the police actions blessed the repossession such that [Debtor] was deprived of due process or whether individual police officers offered a personal opinion and, in the moment, [Debtor] agreed."

New Mexico

Duke v. Garcia, 2014 WL 1318646 (D.N.M Feb. 28, 2014)

Relevant Facts: Repossession Agent drove tow truck to Debtor's home to repossess car after Debtor failed to make payments. Debtor confronted Agent and one pushed the other (it is disputed who pushed whom). Both parties called Police. Police arrived and coordinated Agent's repossession of the vehicle.

Question of Law: Did Agents unlawfully trespass on Debtor's land because of a breach of the peace?

Ruling: All that is required for a breach of the peace is oral protest of the repossession, and a reasonable jury would have to conclude Debtor resisted the repossession.

Money Quote: "Pushing is physical violence, and actual violence means a breach of the peace has occurred, regardless of who initiated it."

Waisner v. Jones, 107 N.M. 260 (N.M. 1988)

Relevant Facts: Debtor defaulted on car payments and Creditor hired Agent to repossess her truck. Agent went to Debtor's work on an Air Force base. In accordance with base policy, Agent was accompanied by military Police. Police told Debtor "we have to take the truck." Debtor was intimidated and handed over the keys.

Question of Law: Is self-help repossession wrongful as a matter of law when a law enforcement officer is involved?

Ruling: Jurors were not properly instructed on the wrongfulness of self-help repossession when law enforcement officers are introduced and the jury verdict in favor of Creditor must be reversed.

Money Quote: "If a law enforcement official accompanies a repossessor and confronts the defaulting party during a self-help repossession, the mere presence of the official, without more, is sufficient to chill the legitimate exercise of the defaulting party's rights."

Utah

Cottam v. Heppner, 777 P.2d 468 (Utah 1989)

Relevant Facts: Debtor was a cattle rancher and gave two security interests in his herd. The senior lien was held by Farmer, who sold Debtor the cattle, and the junior lien held by Bank. After Debtor sold some of the cattle out of trust in violation of the security agreements, the Farmer and Bank agreed with Debtor that the loan would be rewritten and the cattle gathered and sold. Pursuant to an agreement between Debtor and Farmer, the cattle were gathered into Farmer's corrals. When Debtor again violated the negotiated agreement, Bank called the loan, repossessed the cattle with Farmer's permission, and sold the cattle at auction.

Question of Law: Did Bank breach the peace by trespassing into Farmer's corrals, which had been rented to Debtors for purposes of holding the cattle?

Ruling: The actions of the bank did not even constitute a bare trespass, so the jury's determination granting Bank's deficiency judgment was appropriate.

Money Quote: "Courts have struggled in determining when a creditor's trespass onto a debtor's property rises to the level of a breach of the peace. The two primary factors considered in making this determination are the potential for immediate violence and the nature of the premises intruded upon."

Wyoming

Salisbury Livestock Co. v. Colorado Cent. Credit Union, 793 P.2d 740 (Wyo. 1990)

Relevant Facts: Repossession crew drove to debtor's home to repossess three cars. They found the first standing in front of the house with the key in the ignition. They scouted the area around the house for the other two vehicles, but did not see them. On their way back to the main road, they noticed a private drive, which they turned down and traveled for about 50 yards, at which point they could see other vehicles parked in the yard. They identified the remaining two vehicles, hooked them up and towed them away. It was light outside and they could hear people stirring in a nearby building, but they did not attempt to obtain permission to enter the property or to take the vehicles. The only property damage was the inadvertent breaking of a single two-by-four that was lying on the ground near the repossessed vehicles.

Question of Law: Did the repossession crew's entrance on the private drive constitute trespass, and therefore a breach of the peace?

Ruling: There was clearly trespass, but it is a question of fact whether that trespass was privileged. It would be so if there was no confrontation and the timing and manner of the repossession was reasonable. But a reasonable jury could find that the entry was unreasonable. Directed verdict in favor of the creditor is overturned.

Money Quote: "[W]e do not agree . . . that a trespass without more is a breach of the peace. A trespass breaches the peace only if certain types of premises are invaded, or immediate violence is likely. . . Confrontation or violence is nonecessary to finding a breach of the peace. The possibility of immediate violence is sufficient."

10th Circuit (Oklahoma)

Marcus v. McCollum, 394 F.3d 813 (10th Cir. 2004)[9]

Relevant Facts: Creditor repossessed Debtor's husband's car by towing it while it was parked in Debtor's driveway. Debtor noticed the tow truck and ran outside, arguing loudly with Creditor that it had the wrong vehicle. A nearby Police Officer observed the altercation and drove over. Police told Debtor not to interfere with the repossession, because if the situation escalated, "someone" would be going to jail. Debtor allowed the car to be towed away. Debtor later brought a 1983 action against Police.

Question of Law: Are Police protected by qualified immunity, or did Police violate a clearly established Constitutional right?

Ruling: In Oklahoma, the general standard is that repossessors breach the peace if they meet resistance from the debtor, even if that resistance is not "strong." It stands to reason that police should not weigh in on the side of the repossessor and assist an illegal repossession. Summary judgment in favor of Police is reversed.

Money Quote: "[O]fficers are not state actors during a private repossession if they act only to keep the peace, but they cross the line if they affirmatively intervene to aid the repossessor."

[9] The reasoning in this case regarding to the claim of qualified immunity was subsequently informed by Pearson v. Callahan, 555 U.S. 223 (2009) (in resolving government officials' qualified immunity claims, courts need not first determine whether facts alleged or shown by plaintiff make out the violation of constitutional right, instead courts may first address whether the right was clearly established at the time of the alleged misconduct).

Faculty

Prof. Brook E. Gotberg is a professor of law at Brigham Young University J. Reuben Clark Law School in Provo, Utah, where she teaches bankruptcy, contracts, secured transactions and other commercial law subjects. She joined the university in 2020 and has since been named the 2022 recipient of the Francis R. Kirkham Professorship, which honors exceptional achievements in scholarship, teaching or citizenship. Prof. Gotberg's scholarship focuses primarily on debtor and creditor relations, both in and out of bankruptcy. She recently presented on bankruptcy venue reform, avoidance actions, and the relationship between small businesses, the SBRA and COVID-19. Prior to joining the BYU faculty, she was an associate professor at the University of Missouri School of Law. Prof. Gotberg's experience with commercial law stems from her time with Sullivan & Cromwell in Los Angeles, where she represented both debtors and creditors in a variety of cases from large antitrust suits to minor contract disputes. She also clerked for Hon. Milan D. Smith, Jr. on the Ninth Circuit Court of Appeals, and for Hon. Thomas B. Donovan in the U.S. Bankruptcy Court for the Central District of California. Prof. Gotberg has been published in the *ABI Law Review* and is a 2019 ABI "40 Under 40" honoree. She received her B.A. *magna cum laude* in political science from Brigham Young University and her J.D. *cum laude* from Harvard Law School.

James R. Irving is a partner at Dentons US and member of the Restructuring, Insolvency and Bankruptcy practice group in Louisville, Ky., where he focuses on bankruptcy and restructuring matters, purchasing distressed businesses and their assets, as well as commercial litigation. He has experience representing debtors, creditors' committees, foreign representatives in chapter 15 bankruptcy cases, liquidating trustees, and parties acquiring assets in distressed situations. Mr. Irving is an ABI director and is a member of ABI's inaugural 2017 class of "40 Under 40." He also was named one of Louisville Business First's Forty Under 40 in 2019 and was selected for the National Conference of Bankruptcy Judges Next Generation Program in 2018. In addition, Mr. Irving received the Chicago Bar Association's Exceptional Young Lawyer Award in 2013. His experience with matters of juvenile justice through his *pro bono* work has led to opportunities to teach CLE courses and edit publications on the subject for the American Bar Association. Mr. Irving received his B.A. in 2005 in history and political science from Williams College and his J.D. in 2008 from Vanderbilt University Law School.

Hon. Michael F. Thomson is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, appointed on Nov. 1, 2025. Previously, he had worked in private practice for more than 25 years and focused on navigating complex bankruptcy and receivership proceedings, out-of-court restructurings and related litigation. Judge Thomson was a chapter 7 and subchapter V trustee in the District of Utah, served as a chapter 11 trustee, and represented creditors, distressed companies, chapter 7 and 11 trustees, and court-appointed receivers in virtually all aspects of the workout, restructuring and liquidation process, including litigation and appeals. He is a Fellow with the American College of Bankruptcy and has been recognized in *The Best Lawyers in America* (Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and Litigation – Bankruptcy), *Super Lawyers* magazine, *Mountain States Super Lawyers* (Bankruptcy & Creditor/Debtor Rights) and *Utah Business* magazine's "Legal Elite" (Bankruptcy/Workout). He also was rated AV-Preeminent by Martindale-Hubbell. Judge Thomson received his J.D. from the University of Utah College of Law, where he was an articles editor of the *Utah Law Review* and a William H. Leary Scholar.

Steven T. Waterman is a partner with Dorsey & Whitney LLP in Salt Lake City and the former co-chair of the firm's Bankruptcy and Financial Restructuring practice group. His practice consists of assisting financial institutions with commercial loans and special assets, and his work spans both real and personal property collateral. Mr. Waterman has foreclosed on planes, trains and automobiles, as well as cattle, crematoriums, country clubs and turkeys. He regularly litigates cases involving the Uniform Commercial Code and foreclosure, including the presentation of expert valuation evidence. In addition, he helps protect the interests of banks in chapter 11 bankruptcy reorganizations, and receivership and insolvency proceedings. Mr. Waterman has litigated cases in federal, tribal and state trial and appellate courts for financial institutions, trustees, receivers, franchisors and creditor committees. His experience includes out-of-court workouts in numerous industries and agriculture, including cooperatives. Mr. Waterman was an adjunct professor teaching secured transactions at the J. Reuben Clark Law School at Brigham Young University from 2012-20, and he served as co-chair of the Admissions Committee of the Utah State Bar from 1996-2020. A frequent lecturer, he has been honored in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights and is AV-rated by Martindale-Hubbell. He is admitted to the Utah and Wyoming Bars, and before the U.S. Supreme Court, the U.S. Courts of Appeals for the Eighth and Tenth Circuits, the Courts of the Shoshone and Arapahoe Tribes, and the U.S. District Courts for the District of Utah, District of Colorado, District of Wyoming, Northern and Central Districts of Illinois and District of Nebraska. Mr. Waterman received his B.S. in business management-finance from Brigham Young University and his J.D. from the University of Utah, where he was a William H. Leary scholar.