

UCC ARTICLE 9- RECENT CASE LAW DEVELOPMENTS

Presented By:

David S. Willenzik

Jones Walker Waechter Poitevent Carrere & Denegre, LLP

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Licensing

Waite v. Cage, 2011 WL 2118803 (S.D. Tex. 2011). Court held that purchaser/assignee could not acquire interest in chattel paper because assignee was not properly licensed under applicable Texas law to hold chattel paper contracts.

Lopes v. Fafama Auto Sales, 2011 WL 6258818 (Mass. App. Ct. 2011). Court held that unlicensed dealer had authority to originate chattel paper contracts notwithstanding fact that dealer failed to obtain the necessary state license. Court held that failure of dealer to obtain license subjected dealer to enforcement penalties and did not preclude dealer from selling vehicles to the public on financed chattel paper basis.

Insurance

Huntington National Bank v. U.S., 2010 WL 1416971 (N.D. Ohio 2010). Court held that security interest in rights under a life insurance policy was outside the scope of Article 9. (UCC § 9-109(d)(8)) The court looked at non-UCC law and the terms of the assignment of the policy to determine whether the secured party had a lien on the policy proceeds ahead of federal tax lien.

DSW Comment: Different result in Louisiana. Louisiana UCC Article 9 contains non-uniform La UCC §9-107.1 subjecting rights under insurance policies to Louisiana Article 9 security interests. Unclear whether La UCC 9-107.1 is limited to security interests in life insurance policies on lives of Louisiana residents.

In re QA3 Financial Corp., 2011 WL 1297840 (Bankr. D. Neb. 2011). Court concluded that secured party's right to unearned property insurance premiums under a defaulted insurance premium financing contract was outside the scope of UCC Article 9. The court nevertheless applied non-UCC law to hold that the secured party was entitled to collect unearned insurance premiums from the insurer ahead of other competing creditors as the result of assignment language included in the underlying agreements between the parties.

DSW Comment: While an insurance premium financier's collateral assignment rights to recover unearned insurance premiums are clearly beyond the scope of UCC Article 9, insurance premium finance contracts in and of themselves are treated as payment intangible under the Code. Examples: (1) Insurance premium finance company sells/assigns contracts to a bank. Sale/assignment subject to UCC Article 9. (2) Insurance premium finance company grants a UCC security interest in premium finance contract portfolio (payment intangibles under the UCC) to secure bank loan.

Additionally Note: Insurance premium finance contracts are payment intangibles rather than chattel paper. Reason: chattel paper limited to financing contracts arising out of sales of goods or rendition of services. Insurance is not a "good" under the Code.

In re Johnson, 439 B.R. 416 (Bankr. E.D. Mich. 2010). Court held that employer paid disability benefits under an employer's long term disability plan were collateral subject to a UCC Article 9 security interest. Court held that disability benefits were accounts or general intangibles under the Code and not insurance.

DSW Comments: Obviously, disability insurance benefits are insurance excluded from coverage under the Code.

¹ The listed cases and certain discussion were derived from materials prepared by Steven O. Weise of Proskauer Rose, Los Angeles, Teresa W. Harmon of Sidley Austin, Chicago, and Lynn A. Soukup of Pillsbury Winthrop Shaw Pitman, Washington, DC, and presented at the ABA Business Law Section Spring Meeting in Las Vegas (April, 2012).

Farm Products

In re Grogan, 476 B.R. 270 (Bankr. D. Oregon 2012). Court held that growing Christmas trees were “farm products” for UCC purposes subject to a UCC Article 9 security interest.

Consumer Fixtures

In re Dalebout, 454 B.R. 158 (Bankr. D. Kan. 2011). Court held replacement windows did not become UCC fixtures when installed in a home.

DSW Comment. The Louisiana UCC definition of “fixtures” specifically excludes goods and building materials attached to residential structures. See La UCC §9-102(a)(41). No such thing as consumer fixtures in Louisiana.

Non-Negotiable Certificated CD’s

In re Perez, 440 B.R. 634 (Bankr. N.D. NJ 2011). Court held that security interest in non-negotiable, certificated CD with third-party bank was a deposit account for UCC purposes, and could only be secured under a 3-party control agreement.

DSW Comment: I question whether a negotiable, certificated CD is a deposit account under the Code, or is it an “instrument” that may be perfected by possession/pledge.

Hotel Room Revenues

In re Ocean Place Development, LLC, 447 B.R. 726 (Bankr. D.N.J. 2011). Court held that rights to hotel room revenues were “accounts” for UCC purposes and not real estate rentals exempt from coverage under UCC Article 9.

DSW Comment: Arguably different result in Louisiana. See *In re T-H New Orleans*, 10 F.3d 1009 (5th Cir. 1993). Best practice when taking a security interest in hotel revenues is to take a UCC security interest in “accounts” and a collateral assignment of rents under La. R.S. 9:4401.

Equipment Leases

In re Ky USA Energy, Inc., 449 B.R. 745 (Bankr. W.D. Ky. 2011). Court held that motor vehicle lease that included an option purchase the vehicle at the end of the lease term for \$1 was a lease intended as security subject to UCC Article 9.

DSW Comment: Correct result. See UCC §1-201(b)(35). See also UCC §1-203.

Aniebue v. Jaguar Credit Corp., 708 S.E.2d 4 (Ga. Ct. App. 2011). Court held that four-year lease of a new vehicle with an option to purchase at the end of the lease term for \$19,684, was a true lease. Therefore, Article 9 requirement of notification before disposition by the lessor did not apply.

DSW Comment: Correct result. Lease was a true lease for UCC Article 9 and Article 2A purposes. If lease was made in Louisiana subject to the Louisiana Lease of Movable Act (La. R.S. 9:3301, et seq.), lessor would not be required to comply with UCC Article 9’s notice before disposition requirements.

In re Warne, 2011 WL 1303425 (Bankr. D. Kan. 2011). Court held that a 61-month non-cancellable lease, which contained an option to purchase at the end of the lease term for \$31,100, was a “true lease” notwithstanding that the lessee had provided a \$31,100 security deposit equal to the purchase option price. The court held that purchase option price was a reasonable estimate at the time of entering into the lease of the equipment’s value at the end of the lease term.

VFS Leasing Co. v. J & L Trucking, Inc., 2011 WL 3439525 (N.D. Ohio 2011). Court held that a six-year lease under which the lessee had the option to purchase the trucks at the end of the lease term for 8.84% of the original acquisition price, was a “true lease” holding that the option price was not nominal.

In re Turner, 2011 WL 2490600 (W.D. Mo. 2011). Court held that a lease of automobile was a true lease because the lessee could terminate the lease at any time without penalty.

In re Kentuckiana Medical Center LLC, 455 B.R. 694 (Bankr. S.D. Ind. 2011). The Court held that a non-cancellable equipment lease was a “lease intended as security” for UCC purposes when the lessee had the option at the end of the lease term (i) to purchase the leased equipment for \$238,000, or (ii) to lease the equipment for one month for \$238,000 and then become the owner of the equipment for no additional consideration, or (iii) to return the leased equipment to the lessor, paying the costs of shipping and guarantying that the lessor will realize at least 10% of its original acquisition cost upon sale.

In re Del-Maur Farms, Inc., 2011 WL 2847709 (Bankr. D. Neb. 2011). Court held that a non-cancellable lease was a “lease intended as security” for UCC purposes when the lessee had the option to purchase the leased equipment at the end of the lease term for 10% of the equipment’s initial acquisition cost, and if the lessee did not elect to purchase the equipment, the lessee was obligated to renew the lease for an additional one year term for a rent that exceeded the option price.

J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65 (Iowa 2011). Court recognized validity of “hell or high water” clause included in equipment lease resulting in lessee’s being precluded from asserting defenses to payment under the lease as against the lessor based on claims that the lessee had against the equipment supplier/manufacturer.

DSW Comment: Hell or high water clauses generally are enforceable in Louisiana.

Conditional Sales

In re Aleris International, Inc., 2011 Bankr. LEXIS 346 (Bankr. D. Del. 2011). Court held that seller’s attempt to retain title to sold goods resulted in a completed sale under UCC § 2-401, with ownership passing to buyer at time of delivery, and with the seller retaining a security interest/lien in the purchased goods. The court further held that the seller’s security interest/lien was not properly perfected because the seller had not filed a financing statement.

DSW Comment: Same result in Louisiana, although Louisiana has not enacted UCC Article 2 on Sales.

Also note: Seller would not have been required to file perfect if goods were consumer goods subject to automatic perfection under UCC Article 9.

Farm Credit of Northwest Florida, ACA v. Easom Peanut Co., 718 S.E.2d 590 (Ga. Ct. App. 2011). Court held that sale of peanut crop to broker was a completed sale with retention of security interest despite agreement between the parties that peanut farmer would retain ownership of peanuts until peanuts were delivered to broker and warehouse receipt issued.

Assignment for Purposes of Collection; Validity of Anti-Assignment Clause

Filer, Inc. v. Staples, Inc., 766 F. Supp. 2d 314 (D. Mass. 2011). While UCC Article 9 generally applies to true sales/assignments of rights under accounts, payment intangibles, chattel paper and instruments, Article 9 does not apply to transfers/assignments for purpose of collection. *See* UCC §9-109(d)(5). The court held that assignment of accounts for collection was not subject to UCC Article 9, and therefore the anti-assignment override rule of UCC § 9-406(d) did not invalidate the contractual restriction against assignment contained in the underlying contract between the assignor and the account debtor.

DSW Comment: Correct result under the circumstances. However, anti-assignment override of UCC §9-406(d) would apply if accounts had been sold to third-party purchaser rather than assigned for collection.

Sales of Receivables/Factoring

In re Qualia Clinical Serv., Inc., 441 B.R. 325 (B.A.P. 8th Cir. 2011). Court held that receivables purchase arrangement was disguised financing and not a true sale because recourse rested with the seller. The court further concluded that the purchaser's security interest was voidable as a preference because it filed a corrective financing statement in the proper jurisdiction of organization within the preference period.

DSW Comment: Louisiana UCC Article 9 contains non-uniform La UCC §9-109(e), which provides that sales of receivables with recourse to the seller nevertheless result in true sales under Louisiana law with title to and full ownership of the receivables vesting in the buyer. *See also* the Louisiana Exchange Sales of Receivables Act, La. R.S. 9: 3731.1, et seq. enacted under Act 958 of 2010.

Palmdale Hills Property, LLC v. Lehman Commercial Paper, Inc. (In re Palmdale Hills Property, LLC), 457 B.R. 29 (B.A.P. 9th Cir. 2011) Court held that loan repurchases documented under master repurchase agreement are true sales and not secured transactions based on the unambiguous intent of the parties as stated in the master repurchase agreement. The court cited decisions in *American Home*, 388 B.R. 69 (Bankr. D. Del. 2008) and *Granite Partners*, 17 F.Supp.2d 275 (S.D.N.Y. 1998) in support of its conclusion. The court relied on statements in the master repurchase agreement that the parties intended for the transaction not be construed as loans, and on use of the terms "Buyer" and "Seller" throughout the underlying agreements.

DSW Comment: Several UCC commentators have noted that the court's reliance on the stated intent of the parties is inconsistent with the true sale/property of the estate analysis typically applied for other types of transactions in which the analysis typically focuses on the economic terms and relative risk allocation of the parties at interest.

This type of risk assumption analysis may not, however, be applicable in Louisiana. Non-uniform La UCC §9-109(e) provides that "in the absence of fraud or intentional misrepresentation, the parties characterization of a sale of [receivables] shall be conclusive that the transaction is a true sale and is not a secured transaction and that title has passed to the party characterized as the purchaser, regardless of whether the purchaser has recourse against the seller..."

Receivables Exchange v. Suncoast Technology, 2012 WL 1019623 (E.D. La. 2012). Claim for fraud and divergence of funds (conversion) in connection with factoring transaction can be asserted directly against corporate principals under Louisiana law. Corporate principals participating in fraudulent scheme have no right to hide behind the corporate shield.

BrooksGreenblatt LLC v. C. Martin & Co., 2012 WL 911882 (M.D. La. 2012). UCC §9-406 double payment liability case. Seller sold receivables to factor. Seller and factor sent UCC §9-406 notice to account debtor directing that AD pay factor rather than seller. AD nevertheless paid seller and seller diverted funds. AD subsequently settled with factor and then filed suit against seller based on legal subrogation of factor's rights against seller. Court held that AD had right to seek reimbursement from seller based on La. Civ. Code art. 1827, comment (d).

Tort Claims

Modtech Holdings, Inc. v. Monteleone & McCrory LLP, 2011 WL 1429631 (C.D. Cal. 2011). Court held that law firm had a perfected security interest in client litigation proceeds without the necessity of filing a UCC financing statement, recognizing the security interest to be in the form of an attorney's lien under applicable California law notwithstanding the fact that secured indebtedness owed to the law firm was unrelated to the particular law suit giving rise to the recovery.

DSW Comment: Arguably different result in Louisiana. The Louisiana attorney lien statute (La. R.S. 9:5001) gives an attorney a statutory lien or privilege on judgments obtained by them, which lien arguably is limited to litigation proceeds arising out of the case or controversy giving rise to the unpaid attorney's fee indebtedness. *See also* La. Civ. Code arts. 3295, et seq. If a Louisiana attorney or law firm wishes to take of UCC security interest in the proceeds of an unrelated case, the attorney must file a UCC-1 financing statement under the Louisiana UCC rules that apply to security interests in rights under commercial and consumer tort claims.

In re American Cartage, Inc., 656 F.3d 82 (1st Cir. 2011). A security agreement's after-acquired property clause cannot encompass commercial tort claims that arose after the security agreement was entered into. While the right to a tort recovery can be proceeds of other collateral, a commercial tort claim itself, and hence standing to pursue a commercial tort claim, cannot be "proceeds" of other collateral.

Beane v. Beane, 2011 WL 223167 (D. N.H. 2011). Court held that claims of a corporation against a former employee/owner were commercial tort claims. Therefore, generic references in the security agreement to "accounts and other rights to payment" and "payment intangibles" were insufficient to create a security interest in commercial tort claim.

Necessity of Security Agreement

Palmatier v. Wells Fargo Financial National Bank, 2010 WL 2516577 (N.D. N.Y. 2010), 72 U.C.C. Rep. Serv. 2d 236. Court held that purchase order was sufficient to constitute a UCC security agreement when (i) purchase order was signed by the buyer, and (ii) included a description of the furniture being purchased, and (iii) the purchase order referenced buyer's agreement to grant seller a purchase money security interest in the purchased goods.

In re Giaimo, 2010 Bankr. LEXIS 4726 (B.A.P. 6th Cir. 2010). Court held that application for vehicle certificate of title, coupled with certificate of title that listed the secured party as lienholder, was sufficient under Ohio UCC § 9-203 for the attachment to take place. No formal security agreement.

Laborers Pension Trust Fund-Detroit v. Interior Exterior Specialists Co., 2011 WL 5211481 (E.D. Mich. 2011). Court held that a written agreement pursuant to which litigant transferred funds during appeal to a special account held by the judgment creditor, and which provided a source for payment of the judgment if the appeal was unsuccessful, was a security agreement despite the fact that the agreement did not expressly include the words "security interest."

In re Global Aircraft Solutions, Inc., 2011 WL 3300241 (9th Cir. BAP 2011). Court held that garageman's possession of aircraft navigation unit pursuant to oral security agreement was sufficient for security interest to attach.

Lopes v. Fafama Auto Sales, 2011 WL 6258818 (Mass. Ct. App. 2011). Court held that combination of two documents signed by a car buyer – a bill of sale stating that the car dealer had a right to repossess the car for nonpayment and certificate of title application listing the dealer as a lien holder – constituted an authenticated security agreement for UCC Article 9 purposes.

Rights in Collateral

ATC Healthcare Services, Inc. v. New Century Financial, Inc., 2011 WL 2739540 (Tex. Ct. App. 2011). Court held that secured party's perfected security interest in existing and after-acquired accounts attached to accounts generated after the debtor became a franchisee and operated under the name of franchisor.

In re Ward, 2011 WL 2680295 (Bankr. N.D. Ga. 2011). Court held that credit union with a security interest in customer's account could enforce that security interest by setoff against account funds that included exempt social security benefits. Court held that setoff is not a judicial or other legal process and thereby would not violate prohibition of 42 U.S.C. § 407(a).

DSW Comment: I question whether this is the correct result?

Lebedowicz v. Meserole Factory LLC, 2011 WL 6380290 (N.Y. Sup.Ct. 2011). Court held that security agreement signed by members of an LLC on behalf of the LLC, and not in their individual capacities, did not grant a security interest in the members' LLC ownership interests.

DSW Comment: Creditor dumb mistake.

In re WL Homes, LLC, 452 B.R. 138 (Bankr. D. Del. 2011). Court held that debtor had sufficient rights in a deposit account of a wholly owned subsidiary to grant a security interest in subsidiary deposit account. The parent/debtor funded and had full access to deposit account, and controlled access to the funds by requiring approval of the parent's controller. The court further found that the subsidiary implicitly consented to the use the deposit account as collateral for the parent/debtor's loan because the person who signed the security agreement on behalf of the debtor was also the president of the subsidiary.

Jorday, Inc. v. Burggraff, 212 WL 1813436, 77 UCC Rep. Serv. 2d 645 (Minn. Ct. Appl. 2012). Bank made secured loan to trustees of revocable trust secured by assets purportedly owned by trust-controlled corporation and limited liability company. Court held that trustee did not own the collateral, and therefore had no rights in the collateral sufficient to grant security interest in favor of bank to secure trustee's loan.

Zaremba Group LLC v. FDIC, 2011 WL 721308 (E.D. Mich. 2011). Husband purported to act on behalf of limited liability debtor separately owned by wife in granting UCC security interest in LLC assets to secure bank loan. Court held that husband had no authority (actual, apparent or implied) to act on behalf of LLC debtor, and consequently invalidated the security interest.

DSW Comment: Really dumb mistake.

Restrictions on Transfer

In re Dunlap, 458 B.R. 301 (Bankr. E.D. Va. 2011). Court held that a retire military officer's purported assignment of future military pension benefits did not result in the creation of a valid security interest or complete transfer of ownership of future fundings as a result of federal prohibitory statute.

In re Garrison, 2011 WL 5593025 (Bankr. W.D. Ark. 2011). Court held that statement on the reverse side of stock certificate for shares in a closely-held corporation stating that the shares "may not be offered, sold, transferred, pledged or hypothecated in the absence of an effective registration statement for the shares under the [Securities Act of 1933] and under any applicable state securities laws," was ineffective to prevent the shareholders from granting a UCC security interest in the shares.

MeeCorp Capital Markets, LLC v. PSC of Two Harbors, LLC, 2011WL 1119191 (D. Minn. 2011). Court held that UCC security interest did not attach LLC ownership interests because LLC agreements required unanimous consent of all members in order to grant of security interest.

In re TerreStar Networks, Inc., 457 B.R. 254 (Bankr. S.D. N.Y. 2011). Court held that federal law prohibits a security interest from attaching to an FCC license. Nevertheless, a security interest can attach to the "economic value" of the license.

Concorde Equity II, LLC v. Bretz, 2011 WL 5056295 (Cal. Ct. App. 2011). Court held that while state law prohibited the granting of a security interest in a liquor license, the secured party's security interest could attach to the proceeds of liquor license sold by a court appointed receiver.

Texas Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628 (Tex. 2010). Court held that Article 9 rules negating statutory anti-assignment provisions supersede the assignment prohibitions found in the Texas Lottery Act.

Cross-Collateralization

In re Alaska Fur Gallery, Inc., 457 B.R. 764 (Bankr. D. Alaska 2011). Court held that cross-collateralization clause included in secured party's security agreement unambiguously secured both future related *and unrelated* loans, further holding that borrower's UCC collateral additionally secured borrower's subsequent real estate loan.

In re Renshaw, 447 B.R. 453 (Bankr. W.D. Pa. 2011). Court held that prior requirement of Pennsylvania UCC that cross-collateralized future loans must be related to the primary loan, was not carried over under the 2001 amendments to the Code. The court further ruled that the 2001 UCC amendments were retroactive in effect as applicable to both then outstanding and subsequent transactions. *See* Comment 5 to §9-204.

Sufficiency of Collateral Description

Pearson v. Wachovia Bank, 2011 WL 9505 (S.D. Fla. 2011). Court held that security agreement, which described the collateral as “[a]ll of the investment property . . . held in or credited to” three designated securities accounts was sufficient to create a security interest when bank later issued one monthly statement for all three accounts using a different, single account number. The Court found that the three pledged accounts were not consolidated into a single new account.

In re O & G Leasing, 456 B.R. 652 (Bankr. S.D. Miss. 2011). Court held that description of collateral as “Performance Drilling Rig # 3” and four other numbered rigs was sufficient to create a security interest in the collateral even though exhibit providing a more complete description was not attached when security agreement was signed. Court held not a fatal error pointing out that more detailed exhibit was later attached.

In re HT Pueblo Properties, LLC, 2011 WL 5041767 (Bankr. D. Colo. 2011). Security agreement described the collateral to include “[a]ll accounts, general intangibles. . . [and] rents . . . arising out of a sale, lease, consignment or other disposition of any of the . . . Collateral.” Court held that collateral description did not cover hotel room revenues because there was no disposition of the property.

DSW Comment: Good practice when taking a security interest in hotel room revenues to include in UCC security interest in accounts and separate collateral assignment of rents under La. R.S. 9:4401.

In re Moore, 2011 WL 2457343 (Bankr. N.D. Miss. 2011). Court held that description of collateral as “[a]ll crops, and farm products whether any of the foregoing is owned now or acquired later; whether any of the foregoing is now existing or hereafter raised or grown,” was sufficient to encumber future year's harvest.

In re Southeastern Materials, Inc., 452 B.R. 170 (Bankr. M.D. N.C. 2011). Court held that description of collateral as “all of the Debtor's . . . equipment, wherever located,” but which also stated that “the address where the Debtor keeps and maintains the equipment is . . . Columbus County,” created a factual issue as to whether the parties intended to encumber equipment located in multiple counties.

DSW Comment: Best practice not to include location of collateral in security agreement or financing statement.

In re D & L Equipment Inc., 457 B.R. 616 (E.D. Mich. 2011). A financing statement that described collateral as “[e]quipment and inventory financed by The CIT Group” was effective to perfect equipment and inventory financed by Wells Fargo Equipment Finance after Wells acquired the secured loan and filed UCC-3 amendment changing the name of the secured party. Court held that the two filings collectively provided notice to third persons of the possibility that Wells Fargo had assumed CIT's role in the financing arrangement.

DSW Comment: Best practice would have been to also amend collateral description deleting reference to CIT.

Ford Motor Credit v. Hicks, 2012 WL 1906419, 77 UCC Rep. Serv. 2d 714 (S.D. W.Va. 2012). Discrepancy in model year of vehicle in UCC security agreement and in vehicle certificate of title. Court held not to be a fatal error.

First Premier Capital v. Brant, 465 B.R. 801 (N.D. Ill. 2011). UCC security agreement mistakenly stated that debtor (motor vehicle lessee) was granting a UCC security interest in *lessor's* interest in collateral. Court held not a fatal error, pointing out that parties could later revise security agreement language to correct mutual mistake.

DSW Comment: Dumb error.

Interest in Cooperative Apartment Unit

In re McCoy, 2011 WL 3501851 (Bankr. E.D. N.Y. 2011). Court held that cooperative association had a security interest in the debtor's shares in the debtor's cooperative apartment as a result of provisions in association's bylaws. Court further held that security interest was automatically perfected under New York's non-uniform version of UCC § 9-308 without the necessity that association file UCC financing statement.

See also: **Lombard v. Union Square Inn Apartments Corp.**, 94 A.D.3d 717, 942 N.Y.S. 2d 116 (NY S.Ct. 2012).

Aircraft Perfection

In re McConnell, 455 B.R. 824 (Bankr. M.D. Ga. 2011). Court held that proper method to perfect a UCC security interest in civil aircraft is to file a copy of security agreement with FAA in Oklahoma City. Filing UCC-1 financing statement in state UCC records is not sufficient to perfect aircraft security interest.

DSW Comment: Dual filings required for aircraft collateral. 1. Filing with FAA for airframe and certain engines. 2. Filing in UCC records for avionics, charter rights, and other UCC collateral.

Travel Express Aviation Maintenance, Inc. v. Bridgeview Bank Group, 942 N.E.2d 694 (Ill. Ct. App. 2011). Court held that not necessary to file UCC-3 continuation statement with FAA in order to continue the effectiveness of UCC security interest in aircraft beyond 5-years. Five-year UCC continuation rules do not apply to aircraft filings.

Perfection in Vessels

Home Savings & Loan Co. of Youngstown, Ohio v. Super Boats & Yachts, LLC, 2011 WL 2447641 (S.D. Fla. 2011). Secured party attempted to perfect UCC security interest in vessel by having lien noted on vessel certificate of title. Court held that vessel was documented and therefore could only be secured by a preferred ship mortgage filed with US Coast Guard.

Perfection in Motor Vehicle Inventory

In re Moye, 437 Fed. Appx. 338 (5th Cir. 2011) Court held that secured party's purchase-money security interest in motor vehicles held as inventory for sale, was not perfected by possession of unmarked certificates of title. Secured party required to file perfect by filing a financing statement in UCC records. *See* UCC § 9-311(d).

DSW Comment: Non-uniform La UCC §9-311(d) requires filing of a UCC financing statement in the UCC records with respect to motor vehicle inventory held for "sale or *lease*". Not sufficient hold/possess or to be listed as lienholder on motor vehicle certificate of titles without filing in UCC records.

In re Reality Auto Group Corp., 2011 WL 336798 (Bankr. D. P.R. 2011). Court held that security interest in a car dealer's inventory of used cars – for which certificates of title already exist – must be perfected by notation of the lien on the certificates of title, and not by filing a financing statement.

DSW Comment: Decision incorrect under revised §9-311(d). Security interest in use car inventory held for sale- for which certificates of title have been issued- can only be perfected by filing UCC-1 financing statement in UCC records. Filing with state department of motor vehicles and having lien noted on certificate of title is not sufficient.

Again, non-uniform La UCC §9-311(d) makes UCC filing rule applicable to motor vehicle inventory held *for sale or lease*, whereas multistate UCC §9-311(d) is limited to motor vehicle inventor held *for sale* only.

Perfection in Titled Motor Vehicles and Manufactured Homes

CT & T EV Sales v. 2AM Group LLC, 2012 WL 1576761, 77 UCC Rep. Serv. 2d 584 (D. S.C. 2012). Secured party erroneously filed UCC financing statement in UCC records with respect to title motor vehicle held for use rather than for sale. Court held security interest to be unperfected commenting that secured party was required to file with state DMV and have lien noted on vehicle certificates of title.

In re Barbee, 2011 WL 6141648 (6th Cir. 2011). Court held that secured party did not have perfected UCC security interest on manufactured home simply as a result of taking mortgage on the property on which the mobile home was affixed. Secured party required to file with Department of Motor Vehicle and have lien noted on manufactured home's certificate of title.

DSW Comment: Rule in Louisiana is that secured party must file with La DPS in order to file perfect on manufactured home that has not been immobilized pursuant to La. R.S. 9:1149.4.

In re Moore, 2011 WL 1100072 (Bankr. D. Kan. 2011). Court held that security interest in a debtor's manufactured home that was permanently affixed to the real estate was not perfected by a recorded mortgage because the certificate of title for the home had not been eliminated pursuant to the Kansas Manufactured Housing Act. Therefore, notation of the security interest on the certificate of title remained the only way to perfect.

In re Starks, 2011 Bankr. LEXIS 268 (Bankr. E.D. Ky. 2011). Court held that mobile homes were personal property and not fixtures or interests in real estate under the Kentucky UCC.

DSW Comment: Manufactured homes are deemed to be "movables" in Louisiana to the extent that they have not been immobilized under La. R.S 9:1149.4.

Manufactured homes are not deemed to be "fixtures" under the Louisiana UCC. *See* definition of "fixture" under La UCC §9-102(a)(41). Manufactured homes are either "equipment" or "consumer goods" under the Louisiana UCC depending on their intended use.

In re Brooks, 452 B.R. 809 (Bankr. D. Kan. 2011). Court held that secured party had a security interest in a debtor's mobile home by obtaining a mortgage on real estate and the related fixtures.

DSW Comment: Same result in Louisiana provided that debtor immobilizes the manufactured home pursuant to La. R.S. 9:1149.4, thereby converting manufactured home into immovable property (i.e., a building) for Louisiana law purposes. A mortgage on underlying real estate will automatically attach to buildings (including immobilized manufactured homes) locate on mortgaged property. *See* La. Civ. Code arts. 465 and 3292.

In re Medcorp, 472 B.R. 444 (Bankr. N.D. Ohio 2012). Court held that secured party's filing of UCC financing statement in public UCC records not sufficient to perfect UCC security interest in titled motor vehicles used in the course of the debtor's ambulance service business.

Assignments of Motor Vehicle Security Interests

In re McMullen, 441 B.R. 144 (Bankr. D. Kan. 2011). Court held that it was not necessary to amend existing UCC motor vehicle filing to have assignee of originating seller/creditor named as substitute lienholder on vehicle certificate of title.

See also **In re Fryseth**, 2011 WL 4344162 (Bankr. W.D. Wis. 2011), and **Parks v. Mid-Atlantic Finance**, 343 S.W.3d 792 (Tenn. Ct. App. 2011).

DSW Comment: It remains an open question whether assignee of motor vehicle security interest in Louisiana must apply to the La DPS to have its name listed as substitute secured party on vehicle certificates of title.

Termination of Motor Vehicle Security Interest upon Payment in Full

Pollitt v. DRS Towing, LLC, 2011 WL 1466378 (D. N.J. 2011). Court held that UCC §9-513, obligating secured party to timely release UCC filings on consumer goods collateral, does not apply to security interests in titled motor vehicles that are used primarily for consumer (i.e., personal, family or household) purposes.

Name of Debtor on Filed Financing Statement

Trane Co. v. CGI Mechanical, Inc., 2010 WL 2998516 (D. S.C. 2010). Court held that notice of federal tax lien listing the taxpayer by its former name was sufficient to give an IRS tax lien priority over subsequent judgment lien.

DSW Comment: IRS not held to same standards as other UCC secured parties when including debtor's correct legal name in IRS tax lien filings.

In re Harvey Goldman & Co., 455 B.R. 621 (Bankr. E.D. Mich. 2011). Court held that financing statement that identified the corporate debtor by its registered assumed business name, "Worldwide Equipment Co.," rather than the name on its articles of incorporation, "Harvey Goldman & Company," was not effective to perfect a security interest.

DSW Comment: Never file financing statement under debtor's assumed business/trade name.

In re PTM Technologies, Inc., 452 B.R. 165 (Bankr. M.D. N.C. 2011). Secured party mistakenly misspelled debtor's name as "Tecnologies" instead of "Technologies," omitting the "h". A search of the UCC records under the misspelled name "Tecnologies" did not reveal filings under correct name "Technologies". Court held that filing in misspelled name was seriously misleading and therefore ineffective.

DSW Comment: Another dumb mistake. Always verify spelling of debtor's correct legal name as appearing in records of Secretary of State.

Note: There would not have been a problem if search of UCC records under misspelled name had revealed prior filings under correct legal name. Depends on sophistication and sensitivity of state search logic system to pick up similar names.

In re Borges, 2011 WL 4101096 (Bankr. D. N.M. 2011). Debtor granted UCC security interest in collateral in favor of named secured party and its affiliate companies. Filed financing statement list only named secured party without mentioning that affiliates were also secured. Court held failure to name additional secured parties on financing statement was fatal error.

DSW Comment: Apparently different fact situation as compared to typical syndicated loan with multiple secured lenders under single credit facility and with lead lender acting as agent for other lenders. In that

case, only lead lender need be listed as secured party on filed financing statement without disclosing its agency capacity. Here, multiple loans by multiple affiliated secured parties.

SEC v. Kaleta, 2011 WL 6016827 (S.D. Tex. 2011). Secured party filed UCC financing statement on behalf of itself and other secured creditors without indicating that filing was in a representative capacity and without naming additional secured creditors. Court held that only named secured party's security interest was perfected.

DSW Comment: I question whether court's decision is correct in light of UCC §9-503(d), which provides "[f]ailure to indicate the representative capacity of the secured party or representative of a secured party does not affect the sufficiency of a financing statement."

Official Comm. of Unsecured Creditors v. Regions Bank (In re Carntech Precision Manufacturing, Inc.), 443 B.R. 190 (Bankr. S.D. Fla. 2011). Bank filed UCC financing statement listing only single debtor with blank pages attached to filed UCC-1 listing additional debtor names. Court held that filing was not sufficient to file perfect a security interest in additional debtor collateral.

DSW Comment: Dumb.

Miller v. State Bank of Arthur (In re Miller), 2012 Bankr. LEXIS 70 (Bankr. C.D. Ill. 2012). Court held that UCC financing statement filed against "Bennie A. Miller" was not effective to perfect a UCC security interest even though Bennie A. Miller was the name on the debtor's driver's license, social security card, house deed, tax returns, credit cards and bill of sale. Mr. Miller's legal name was "Ben Miller", the name listed on his Indiana birth certificate, and there was no evidence that Miller had legally changed his name. The court held that the bank's filing was seriously misleading and therefore invalid because a search of the UCC records under the name "Ben Miller" did not reveal the financing statement in the name "Bennie A. Miller".

Reversed, In re Miller, C.D. Ill. 8/17/2012, applying the 2010 revisions to UCC Article 9 (not yet effective) providing a safe harbor for filings in the name listed on the debtor's state-issued driver's license.

Improperly Indexed Financing Statement

In re Twin City Hospital, 2011 Bankr. LEXIS 1501 (Bkrcty. N.D. Oh. 2011). Court held that properly filed financing statement that was improperly indexed by the filing office, and therefore undiscoverable by subsequent searchers, nevertheless was effective to perfect the secured party's security interest. *See* UCC §9-517.

Filing in the Wrong Location

In re Qualia Clinical Service, Inc., 441 B.R. 325 (8th Cir. BAP), *aff'd*, 652 F.3d 933 (8th Cir. 2011). Secured party mistakenly filed UCC financing statement in Nebraska where debtor had its principal place of business. Debtor was a Nevada corporation and secured party should have filed in Nevada. Secured party later recognized error and refilled in Nevada, but did so within 30-days of debtor filing bankruptcy. Court held second filing in Nevada to be voidable preference and held original filing in Nebraska to be ineffective.

Failure to Timely File Continuation Statement

In re Miller Bros. Lumber, 56 Bankr. Ct. Dec. (CRR) 128, 2012 WL 1601316, && UCC Rep. Serv. 2d 525 (Bank. M.D. N.C. 2012). Secured party failed to timely file UCC continuation statement within 5-years of original filing, claiming automatic stay in debtor's pending bankruptcy prohibited secured party from doing so. Court held in favor of debtor and debtor's unsecured creditors pointing out that 2001 amendments to UCC Article 9 provide otherwise. *See* Comment 4 to UCC §9-516.

Signature Credit Partners v. Casaic Offset & Silkscreen, 2012 WL 1999496 (W.D. La 2012). Secured party attempted through subcontractor to continue filed UCC financing statement within the 5-year effective period. Caddo Parish Clerk erroneously refused to accept the continuation statement asserting that the filing had already

been continued, which was incorrect (clerk error). The secured party later attempted to refile the continuation, but outside of 5-year window. Court held that secured party's filing had lapsed despite clerk error.

DSW Comment: Seems like an unfair result.

Unauthorized Terminations

Inc. v. Toobro, 932 N.Y.S.2d 759, 2011 NY Slip Op. 511564 (S.Ct. NY. 2011). Debtor terminated filed financing statement without secured party's authorization. Court held that termination filing ineffective.

Official Committee of Unsecured Creditors v. City National Bank, 2011 WL 1832963 (N.D. Cal. 2011). UCC filings were erroneously terminated by title company without secured party's consent. Court held that terminations were unauthorized and thereby without effect.

Priority vs Lien Creditors

Nabers v. Morgan, 2011 WL 359069 (S.D. Miss. 2011). Court held that Mississippi state tax lien is inferior to prior perfected UCC security interest in accounts. Court applied first to file or perfect rule.

Scion, Inc. v. Martinez, 2011 WL 744912 (Mich. Ct. App. 2011). Court held that lien creditor (garnisher) had priority over subsequently file perfected UCC security interest.

National City Bank v. Texas Capital Bank, 2011 WL 5926661 (Tex. Ct. App. 2011). Court held that secured party with prior perfected UCC security interest has priority over the rights of subsequent lien creditor (garnisher).

Priority over Statutory Lienholders

In re South Louisiana Ethanol LLC, 2011 WL 148053 (Bankr. E.D. La. 2011). Court held that perfected UCC security interest in equipment has priority over the rights of an unpaid seller with a statutory vendor's lien.

Buyer in the Ordinary Course

In re Black Diamond Mining Co., 2011 WL 6202905 (Bankr. E.D. Ky. 2011). Court held that buyer of goods in the ordinary course of seller's business takes free of prior perfected UCC security interest in seller's inventory.

Madison Capital Co., LLC v. S & S Salvage, LLC, 765 F. Supp. 2d 923 (W.D. Ky. 2011). Mining company sold scrap metal to scrap dealer who then resold to buyer. Mining company not in the business of selling scrap metal, which (as a proceeds of secured equipment) was subject to a prior perfected UCC security interest in favor of mining company's secured lender who had not consented to Mining Company's disposition. Court held that the buyer did not qualify as a "buyer in the ordinary course" in so far as buyer purchased scrap metal free of mining company creditor's prior perfected lien. Court held that the initial sale of the scrap metal from the mining company to dealer was not in the ordinary course of the mining company's business since the mining company was not in the business of selling scrap metal. Therefore, dealer purchased on a "subject to" basis. Court further held that, while the second sale of the scrap metal by the dealer to the buyer was in the ordinary course of the dealer's business, the second sale did not have the effect of releasing the mining company creditor's original perfected lien. The buyer in the ordinary course rule of UCC §9-322(a) is limited to a buyer purchasing free and clear of a security interest created "*by the buyer's seller.*"

DSW Comment: Good law school exam question.

Cornerstone Bank and Trust v. Consolidated Grain and Barge Co., 956 N.E.2d 944 (Ill. Ct. App. 2011). Grain buyer purchased farm products from seller, partially offsetting purchase price amount against unpaid amount owed by seller to buyer. While such an offset ordinarily would not result in the buyer qualifying as a "buyer in the

ordinary course” under UCC Article 9, the court held that Article 9 was preempted by the federal Food Security Act, which recognizes offset sales as sales in the ordinary course allowing the buyer to purchase on a free and clear basis.

DSW Comment: Be mindful of special PACA rules when dealing with crops and other perishable food commodities.

Priority of Competing Security Interests

Platte Valley Bank v. Tetra Fin. Group, LLC, 2011 U.S. Dist. LEXIS 9278 (D. Neb. 2011). Court held that secured party with control perfected UCC security interest in deposit account had priority over competing creditor asserting claim against sale proceeds deposited into account with third-part bank.

DSW Comment: Decision correct.

Merrill Lynch Business Financial Services, Inc. v. Kupperman, 2011WL 3328492 (3d Cir. 2011). Debtor reorganized into new corporation (NEWCO). Secured creditor of original debtor claimed UCC security interest in debtor’s assets transferred to NEWCO as well as in NEWCO subsequently acquired assets. Court held in favor of secured party holding that NEWCO was a continuation of original debtor.

DSW Comment: The 2010 amendments to UCC Article 9 deal with continuation of UCC security interest in new debtor assets.

Domus, Inc. v. Davis-Giovinazzo Construction Co., 2011 WL 3666485 (E.D. Pa. 2011). Court applied the “first to file or perfect” rule. SP1 filed against debtor’s accounts before SP2 filed. Court held in favor of SP1.

In re Siskey Hauling Co., Inc., 456 B.R. 597 (Bankr. N.D. Ga. 2011). Debtor had secured loans in favor of SP1, SP2, and SP3, all with file perfected UCC security interest in debtor’s collateral. SP1 filed first, SP2 filed second, and SP3 filed third. SP3 advanced additional funds to debtor to pay off SP1’s loan. SP3 then claimed leapfrog priority over SP2. Court held in favor of SP2, holding that SP3’s additional advance to debtor was used to pay off SP1, and not to purchase SP1’s outstanding loan. SP3 was entitled to leap ahead of SP2 only by purchasing SP1’s loan and lien position.

DSW Comment: When desiring to leap-frog over superior ranking creditor, best practice is to purchase senior secured party’s loan and lien position.

Proceeds

In re Wright Group, 443 B.R. 795 (Bankr. N.D. 2011). Court held that miniature golf course proceeds were not proceeds of UCC secured equipment (gold clubs, balls, etc.), but instead were revenues derived from use of the golf course facility as a whole (i.e., equivalent to hotel room rentals).

In re EEE Auto Sales, Inc., 2011 WL 2078544 (Bankr. E.D. Va. 2011). Court held that amounts that auto dealer collected from buyers of autos for sales taxes and registration fees were not “proceeds” of the dealer’s inventory. Court held that secured party had no security interest in such trust funds.

DSW Comment: Correct decision.

Action Capital Corp. v. Eclipse Bank, Inc., 2011 WL 4502080 (Ky. Ct. App. 2011). Priority contest between SP1 with file perfected security interest in debtor’s accounts, and SP2 with file perfected UCC security interest in debtor’s inventory. SP2 claimed continuing security interest in accounts as proceeds of secured inventory. Court held in favor of SP1.

DSW Comment: Would it make a difference if SP2 filed ahead of SP1 (SP2 was the first to file)? Apparently not. See Comment 9 to UCC §9-324.

Comerica Bank v. Jones, 2011 WL 4407422 (E.D. Mich. 2011). Secured party had blanket UCC security interest in all of debtor's assets including investment property. Debtor subsequently sold interest in debtor's subsidiary to third party. Court held that sale proceeds were "proceeds" of investment property collateral.

In re Young, 2011 WL 3799245 (Bankr. D.N.M. 2011). Court held that LLC distributions to members were not "proceeds" of secured LLC membership interests. Court erroneously relied on **In re Hastie** decision, 2 F.3d 1042 (10th Cir. 1993), which was legislatively over-ruled under the 2001 amendments to UCC Article 9. *See* UCC §9-102(a)(64)(B).

Wrongful Repossession

Reed v. Les Schwab Tire Centers, Inc., 2011 WL 692904 (Wash. Ct. App. 2011). Court held that secured party did not convert debtor's tire wheels by removing tires and wheels from vehicle following debtor's default, and then returning wheels to debtor. Court held that secured party's actions were justified.

Johnson v. Universal Acceptance Corp., 2011 WL 3625077 (D. Minn. 2011). Court held that debtor had no cause of action for wrongful seizure against police officer who did not actually participate or assist in seizure of vehicle.

Ford Motor Credit Co. v. Ryan, 939 N.E.2d 891, 72 U.C.C. Rep. Serv. 2d 977 (Ohio Ct. App. 2010). Court held that tow truck operator committed breach of the peace when seizing defaulted vehicle from debtor's home. Operator threw debtor's wife to the ground.

Notice of Foreclosure Sale

States Resources Corp. v. Gregory, 339 S.W.3d 591 (Mo. Ct. App. 2011). Court found that secured party's notice of intended disposition of collateral was insufficient, denying the secured party the right to collect the resulting deficiency.

Stern-Obstfeld v. Bank of America, 915 N.Y.S.2d 456 (N.Y. Cty. Ct. 2011). Court held that bank seizing cooperative apartment unit must comply with additional non-uniform notice requirements of NY law before selling coop at public or private sale.

Aguayo v. U.S. Bank, 653 F.3d 912 (9th Cir. 2011). Secured party attempted to argue that, as a national bank, it was not required to comply with state consumer protection laws requiring creditor to provide certain detailed information to a defaulting consumer before seizing personal automobiles. The court held that the National Bank Act does not preempt state law in that respect.

Barclays Bank PLC v. Poynter, 2011 WL 3794890 (D. Mass. 2011). Court held UCC Article 9 default remedies and notice requirement apply to non-judicial seizures and sale of documented vessel subject to preferred ship mortgage. Federal maritime law and Preferred Ship Mortgage Act do not supersede or preempt Article 9 requirements.

In Re Marmc Transportation, 469 B.R. 84, 76 UCC Rep. Serv.2d 862 (D. WY. 2012). Court held that secured party's notice of private sale of aircraft was insufficient under UCC Article 9. Court denied secured party deficiency rights.

Zwicker v. Emigrant Mortgage Co., 91 A.D. 3d 443, 936 N.Y.S. 2d 158, 76 UCC Rep. Serv. 2d 452 (S.Ct. N.Y. 2012). Court held that secured party complied with UCC notice of foreclosure sale of collateral requirement by sending notice to debtor via certified mail, return receipt requested, and by advertising in local newspaper over three consecutive weeks. Court further found that sale price of collateral at foreclosure sale was commercially reasonable.

Public vs Private Sale of Collateral

Scott v. Nuvel Financial Services LLC, 789 F. Supp. 2d 637 (D. Md. 2011). Court held that public sale of collateral was proper under UCC Article 9 when sale was repeatedly advertised in local newspaper, and members of the general public were invited to attend and were present at auction, notwithstanding that non-dealer participants were required to provide a \$1000 refundable cash deposit in order to bid on foreclosed vehicles.

DSW Comments: The Code favors private sales of collateral. See Comment 7 to UCC §9-610. A true public sale (at which the secured party may bid on and purchase the collateral) is difficult to achieve in many, many circumstances. A public sale requires that (i) the sale be advertised to the general public, (ii) the sale be conducted on a live auction basis, and (iii) members of the public be present at the auction and actively participate in the auction process. Generally, dealer sales, sealed bid sales, and sales of goods that are not appealing to the public will not qualify as a public sale for UCC article 9 purposes.

Commercial Reasonableness

People's United Equipment Finance Corp. v. Hartmann, 2011 WL 3476610 (5th Cir. 2011). Court held that purported public sale of equipment was commercially reasonable despite the fact that the secured party was the sole bidder. Key factor in this case was that equipment sold to secured party for its fair market value as of the sale date.

Fifth Third Bank v. Miller, 2011 U.S. Dist. LEXIS 3618 (E.D. Ky. 2011). Secured party has the burden of proving that collateral was sold in a commercially reasonable manner.

KeyBank v. Bingo, 2011 WL 1559829 (W.D. Wash. 2011). Court held that secured bank had no fiduciary duty or liability to debtor to protect value of debtor's secured investment property when financial markets cratered in 2008.

UBS Bank USA v. Wolstein Business Enterprises, 2011 WL 129868 (D. Utah 2011). Court held that sale of stock over the New York Stock Exchange was commercially reasonable despite fact that stock was sold a depressed market with the stock later rebounding.

Center Capital Corp. v. PRA Aviation, LLC, 2011 WL 442107 (E.D. Pa. 2011). Court found that private sale of aircraft met the standards of commercial reasonableness required under the Code.

DSW Comment: Because of the limited marketability of jet aircraft to the general public, it is virtually impossible to conduct public foreclosure sale of aircraft collateral.

Exchange Bank of Missouri v. Gerit, 2012 WL 1850974, 77 UCC Rep. Serv. 2d 638 (Mo. Ct. App. W.D. 2012). Court held that bank has burden of proving that private sale of collateral was commercially reasonable. Debtor asserted that bank sold collateral at too low a price. Court held in favor of debtor, limiting bank's recovery of deficiency.

Strict Foreclosure

In re Brooke Corp., 2012 WL 3066706 (Bankr. D. Kan. 2012). Bankruptcy trustee retains right to later challenge debtor's transfer of ownership of collateral to secured party as a preference and fraudulent conveyance when debtor's transfer was made via strict foreclosure under UCC §9-620.