

Personal Property Secured Transactions

By Stephen L. Sepinuck*

I. THE SCOPE OF ARTICLE 9

Article 9 of the Uniform Commercial Code (“U.C.C.”) applies to any transaction, regardless of the transaction’s form, in which personal property secures an obligation.¹ Many transactions that are not structured as a secured loan—a lease of goods,² a conditional sale,³ a sale with an option or obligation to repurchase or resell⁴—might nevertheless be a secured transaction. If the economics of the deal are such that the transaction is really a loan, then the transaction will be a secured transaction and will be governed by Article 9 (absent the application of some exception). Several consequences can flow from this recharacterization of the transaction. If the secured party fails to recognize that Article 9 applies, and because of that fails properly to perfect its security interest, the secured party might end up losing priority in the collateral. More fundamentally, the recharacterization affects which party is the true owner of the property, and therefore whether the property becomes part of the bankruptcy estate that arises when one of them petitions for bankruptcy relief.

In *In re Hawaii Island Air, Inc.*,⁵ four months before it filed for bankruptcy protection, an airline purported to sell, to the entity from which the airline had leased five aircraft, spare parts for those aircraft that the debtor owned. Later,

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1. See U.C.C. § 9-109(a)(1) (2013).

2. See U.C.C. § 1-203 (2011) (providing some rules on whether a transaction structured as a lease of goods is really a sale with a retained security interest).

3. See *id.* §§ 1-201(b)(35), 2-401(1) (retention of title by a seller of goods is limited in effect to the retention of a security interest).

4. See, e.g., *Stillwater Nat’l Bank & Trust Co. v. CIT Grp./Equip. Fin., Inc.*, 383 F.3d 1148 (10th Cir. 2004) (concluding that an obligation to repurchase equipment purportedly sold made the transaction really a security arrangement); *Holland v. Sullivan*, No. M2016-00538-COA-R3-CV, 2017 WL 3917142 (Tenn. Ct. App. Sept. 9, 2017) (holding that a sale of an automobile with an option to repurchase, with the putative seller retaining possession and the buyer receiving the certificate of title, was really a loan and a secured transaction); *cf. Dillree v. Devoe*, 724 P.2d 171 (Mont. 1986) (holding that a sale with an option to repurchase was not a disguised loan largely because evidence supported the trial court’s conclusion that the value of the goods was not disproportionate to the option price).

5. No. 17-01078, 2019 WL 2041705 (Bankr. D. Haw. May 7, 2019).

the parties jointly agreed to and did sell the spare parts to a third party. In the airline's bankruptcy, a dispute arose about whether the lessor or the airline was entitled to proceeds of that later sale. Several facts suggested that the purported sale to the lessor was really a secured loan: (i) the airline retained possession of the spare parts; (ii) the transaction occurred only because the airline needed an immediate cash infusion; (iii) the lessor had no need for the spare parts, would not have bought them if the airline had not needed cash, had no interest in them other than liquidating them as rapidly as possible, and apparently was not in the business of dealing in such items; (iv) neither party seemed concerned about whether the parts were worth the purchase price; and (v) the lessor apparently did not expect or demand payment contemporaneously with the sale.⁶ However, other facts suggested that the transaction was a true sale: (i) the airline also had no use for the parts and apparently never intended to regain full control of them and (ii) the lessor had no contractual guarantee of repayment.⁷ The court, therefore, declined to decide the nature of the transaction on summary judgment.⁸

Article 9 also applies to some transactions that are not loans, either in structure or economic substance. These include sales of accounts, chattel paper, payment intangibles, or promissory notes.⁹ However, there are some exceptions. Article 9 does not apply to a sale of accounts that is part of a sale of the business out of which the accounts arose.¹⁰ Nor does it apply to a sale of accounts for the purpose of collection only.¹¹ But reliance on those exceptions is unwise, as one case from last year demonstrated.

In *SE Property Holdings, LLC v. Unified Recovery Group, LLC*,¹² the court ruled that a debtor's sale of accounts was not excluded from the scope of Article 9 as a part of sale of the business out of which they arose because less than all of the debtor's business was sold.¹³ The court then ruled that the transaction was not excluded as a sale for the purposes of collection only because the buyer plainly received all of the debtor's rights in the accounts.¹⁴ Because the buyer failed to perfect its interest, the debtor retained the power to grant a security interest in the accounts to a secured party, and because that secured party did perfect, it had priority over the buyer.¹⁵

Because Article 9 generally applies to both loans secured by accounts and to sales of accounts, whether a transaction involving accounts is a secured loan or a sale has no impact on the applicability of Article 9. However, the distinction

6. *Id.* at *5.

7. *Id.*

8. *Id.*

9. See U.C.C. § 9-109(a)(3) (2013); see also *id.* § 9-102(a)(73)(D) (defining "secured party" to include a buyer of receivables); *id.* § 9-102(a)(28)(B) (defining "debtor" to include a seller of receivables).

10. See *id.* § 9-109(d)(4).

11. See *id.* § 9-109(d)(5).

12. 410 F. Supp. 3d 775 (E.D. La. 2019).

13. *Id.* at 782.

14. *Id.* at 783.

15. *Id.* at 783–84.

between a secured loan and a sale can matter for other purposes. Perhaps chief among these is whether the transaction is subject to restrictions on usury.

Several cases last year dealt with a type of financing arrangement that appears to be proliferating: a purported sale of an interest in future receivables. Typically, these transactions involve a payment of a “purchase price” in return for a specified percentage of the seller’s future accounts receivable until the putative buyer receives a specified total return. The agreements also typically provide for the putative seller to pay the buyer—by automatic debit to its deposit account—a specified amount each day or each workday. The agreements might also contain a “reconciliation provision,” pursuant to which the amount of the daily payment can be adjusted to more closely match the amount equal to the specified percentage times the amount of receivables actually collected. In many of these transactions, the putative buyer’s rate of return is so high that the transaction would be usurious if it were deemed to be a loan, rather than a sale. Consequently, courts are frequently called upon to decide whether the transaction is a loan or a sale.

The courts that ruled on the issue last year split on how to characterize these transactions. Several concluded that the transaction at issue was a sale.¹⁶ Others concluded that the transaction was a loan.¹⁷ In so doing,

16. See, e.g., *In re GMI Grp., Inc.*, No. 19-52577-PMB, 2019 WL 3774117 (Bankr. N.D. Ga. Aug. 9, 2019) (ruling that a transaction structured as a sale of 5 percent of future receivables for \$150,000 until \$210,000 was paid—through daily debits of \$1,400—was a sale, not a usurious loan, under New York law); *Power Up Lending Grp., Ltd. v. Cardinal Energy Grp., Inc.*, No. 2:16-cv-1545, 2019 WL 1473090 (E.D.N.Y. Apr. 3, 2019) (ruling that a transaction in which a business sold for \$128,000 18 percent of its future accounts receivable, to be collected by way of daily, automatic withdrawals from the business’s bank account until a total of \$172,800 was collected, was a true sale and hence not subject to state usury law); *In re Ortega’s Mexican Rest., LLC*, 597 B.R. 442 (Bankr. D. Conn. 2019) (ruling that a transaction in which a restaurant sold for \$20,000 19 percent of its future accounts receivable, to be collected by way of daily, automatic withdrawals from the restaurant’s bank account until a total of \$27,600 was collected, was a true sale and hence not subject to state usury law); *In re Cornerstone Tower Servs., Inc.*, No. BK16-40787, 2019 WL 127359 (Bankr. D. Neb. Jan. 3, 2019) (ruling that a transaction structured as a sale of a specified percentage of all future receivables for \$75,000 “until” \$105,000 was paid was a true sale because the transaction documents described it as such, there was no obligation to repurchase accounts, the buyer acquired the right to enter into compromises with the account debtors, and the buyer could take no more than a specified amount each day); *In re Steele*, No. 17-03844-5-JNC, 2019 WL 3756368 (Bankr. E.D.N.C. Aug. 8, 2019) (ruling that a transaction structured as a sale of 12 percent of future receivables was a sale, not a loan because the terms of the agreement were clear).

17. See, e.g., *In re Polk*, No. 18-30913-JPS, 2019 WL 7342458 (Bankr. M.D. Ga. Dec. 19, 2019) (concluding that two transactions structured as a sale of future receivables were really loans secured by receivables because, even though there was a reconciliation provision and the agreement had an indefinite term, the agreement made bankruptcy an event of default, putting liability on the putative seller, and thus provided for guaranteed payment); *Funding Metrics, LLC v. NRO Boston, LLC*, 2019 N.Y. Misc. LEXIS 4878 (Sup. Ct. Aug. 28, 2019) (ruling that a transaction structured as a sale of \$286,000 of future receivables for \$200,000, to be repaid in daily increments of \$2,600 for twenty-two weeks was a loan bearing interest at an annualized rate of 102 percent, as was a similar transaction between the parties, because the documents shifted all risk of nonpayment of the receivables to the seller, which remained absolutely liable for the Purchased Amount); *In re GMI Grp., Inc.*, 606 B.R. 467 (Bankr. N.D. Ga. 2019) (holding a transaction structured as a sale of 17 percent of future receivables for \$75,000 until \$111,750 was paid—through daily debits of \$1,117—was a usurious loan under New York law, not a sale, because agreements included a personal guaranty and confession of judgment, each triggered on default, and default was defined to include the failure

many courts based their decisions on nuances of fact that are of questionable relevance.¹⁸

Despite its broad scope, Article 9 does not govern all security interests in personal property. It does not apply to a security interest in a tort claim (other than a commercial tort claim),¹⁹ to a security interest in a deposit account in a consumer transaction,²⁰ or to a security interest in or claim under an insurance policy (other than a health-care insurance receivable).²¹ For each of these exclusions, however, there is an exception: “Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds.”²² Last year a court misunderstood this exception.

In *In re Anderson*,²³ a bank had a mortgage on a corporation’s real property. The mortgage was later amended to cover “[a]ll payments, proceeds, settlements of other compensation heretofore or hereafter made, including . . . the right to receive the same from any and all insurance policies covering the Land or the Improvements.”²⁴ A casualty occurred that resulted in an insurance claim. When the claim was settled and the corporation received payment, the president of the corporation, who had personally guaranteed the debt to the bank, facilitated a transfer of the funds to his wife, who was a creditor of the corporation. In the president’s later bankruptcy, the bankruptcy court declared his debt to the bank non-dischargeable under section 523(a)(6) of the Bankruptcy Code,²⁵ due to willful and malicious injury: specifically the president’s interference with the bank’s security interest in the funds. On appeal, the district court affirmed. In so doing, it concluded that section 9-109(d)(8) did not apply because the bank claimed the settlement funds not as original collateral, but as proceeds.²⁶ In so doing, the court wrote that, by defining the collateral to include “insurance proceeds paid,” the agreement “squarely placed” that bank’s interest within section 9-109(d)(8)’s exception for “proceeds and priorities in proceeds.”²⁷ The court also relied on a case involving insurance proceeds on a vehicle that was collateral for a loan.²⁸

to maintain on deposit at least twice the amount of the daily payment obligation); *Funding Metrics, LLC v. D & V Hospitality, Inc.*, 91 N.Y.S.3d 678 (Sup. Ct. 2019) (ruling that a transaction structured as a sale of \$29,200 of future receivables for \$20,000, to be repaid in daily increments of \$265.45, was a usurious loan because the putative buyer had no risk of nonpayment due to the fact that, when unforeseen circumstances prevented the putative seller from making the required payments, the buyer had the right to—and did—seek and obtained a judgment by confession).

18. See John F. Hilson & Stephen L. Sepinuck; A “Sale” of Future Receivables: Criminal Usury in Another Form, *TRANSACTIONAL LAW.*, Aug. 2019, at 1; John F. Hilson & Stephen L. Sepinuck, A “Sale” of Future Receivables: Disguising a Secured Loan as a Purchase of Hope, *TRANSACTIONAL LAW.*, Apr. 2019, at 14.

19. See U.C.C. § 9-109(d)(12) (2013).

20. See *id.* § 9-109(d)(13).

21. See *id.* § 9-109(d)(8).

22. *Id.* § 9-109(d)(8), (12), (13).

23. 599 B.R. 504 (D. Md. 2019). An appeal was filed with the U.S. Court of Appeals for the Fourth Circuit on July 24, 2019.

24. *Id.* at 509.

25. 11 U.S.C. § 523(a)(6) (2018).

26. 599 B.R. at 516–17.

27. *Id.* at 517.

28. *Id.* (citing *In re Holtslander*, 507 B.R. 779 (Bankr. N.D.N.Y. 2014)).

The court's analysis was flawed. It seems to have misunderstood the exception for proceeds, thinking it refers to proceeds of the insurance policy, rather than to proceeds of other Article 9 collateral. Real property law, not Article 9, governed the mortgage. While real property law *might* provide that a mortgagee has an interest in insurance proceeds resulting from damage to the mortgaged property, Article 9 has nothing to say about the issue because it governs neither the mortgage nor any security interest in either the insurance policy or the claim under the policy.²⁹

II. ATTACHMENT OF A SECURITY INTEREST

In general, there are three requirements for a security interest to attach to collateral: (i) the debtor must authenticate a security agreement that describes the collateral; (ii) value must be given; and (iii) the debtor must have rights in the collateral or the power to transfer rights in the collateral.³⁰ There were interesting cases on the first and third of these requirements last year.

A. AN AUTHENTICATED SECURITY AGREEMENT THAT DESCRIBES THE COLLATERAL

The requirement of an authenticated security agreement is fairly easy to satisfy. The agreement must create or provide for a security interest. That is, the agreement must include language indicating that the debtor has given a secured party an interest in personal property to secure payment or performance of an obligation (or in connection with a sale covered by Article 9),³¹ and it must describe the collateral.³² There were interesting cases last year on each of these requirements.

In *Stamey Cattle Co. v. Wright*,³³ a credit seller of cattle provided the buyer with invoices that stated that “[t]itle will transfer when full payment is received.” The court ruled that while this language can be sufficient to provide for a security interest,³⁴ there was a problem with the invoices. The buyer authenticated some of the invoices only after the buyer had already resold the cattle. As a result, the debtor no longer had rights in the collateral when the debtor authenticated the invoices.³⁵ With respect to the other cattle, there was a material dispute

29. For this reason, the court's reliance on the *Holstlander* decision was improper. In *Holstlander*, the original collateral was a vehicle, and Article 9 governed the security interest in that vehicle. As a result, Article 9 also applied to the security interest in the insurance claim for damage to the vehicle.

30. See U.C.C. § 9-203(b) (2013).

31. See *id.* § 9-102(a)(74).

32. See *id.* § 9-203(b).

33. No. 5:17-cv-147, 2019 WL 722597 (S.D. Ga. Feb. 19, 2019).

34. See *id.* at *14 (citing U.C.C. § 2-401, which provides that retention of title by the seller of goods shipped to the buyer is limited in effect to a reservation of a security interest).

35. *Id.* at *15. Although the court's conclusion is supported by the text of section 9-203, it is not clear why the debtor's authentication is required when a security interest is claimed through a retention of title by a seller. In most transactions involving a consensual security interest, the debtor is transferring property rights (the security interest) in the collateral. Hence, the requirement that the debtor authenticate the security operates as a statute of frauds and provides written documentation

of fact about whether the debtor or the debtor's authorized agent authenticated the invoices, and this dispute precluded summary judgment.³⁶

In *In re Barsir*,³⁷ a term in the agreement between a medical care provider and a patient stated that the provider may "petition the appropriate circuit court for an order directing the [patient] to pay the [provider] from the funds determined by [a] medical assistance program to be available."³⁸ The court ruled that this language did not create a security interest in the patient's retirement account because the language required the issuance of a court order and no such order was entered.³⁹

In *Autumn Health Care v. Peoples Bank*,⁴⁰ an individual authenticated a security agreement granting a bank a security interest in a certificate of deposit ("CD") to secure a home mortgage loan made to others. Eight years later, the homeowners defaulted and the bank notified the debtor that it would effect setoff against the CD. The debtor brought suit and sought to admit into evidence a memorandum indicating that the CD would serve as collateral for only five years. The trial court excluded the evidence and the court of appeals affirmed. Because the memorandum predated and contradicted the security agreement, which expressly stated that the bank had no duty to release the security interest "until the secured debts are paid in full," the parol evidence rule barred admission of the memorandum.⁴¹

The requirement that the security agreement provide a description of the collateral is fairly easy to satisfy. The description need not be specific or list every individual item; it must merely "reasonably identify" the collateral.⁴² In other words, the security agreement must "make [it] possible" to identify the collateral.⁴³ For most types of property, a description by a type defined in the U.C.C. is sufficient.⁴⁴ Nevertheless, this requirement was the focus of several decisions last year.

In *1st Source Bank v. Minnie Moore Resources, Inc.*,⁴⁵ the court ruled that a bank's security agreement sufficiently described the equipment that the debtor had purchased with financing from the bank even though the agreement did not identify the items by their model year and even though there was an error in the serial number of one item. Because the agreement indicated the model

that the property rights were in fact transferred. When a credit seller of goods retains title as a security device, however, the flow of property rights is only from the seller to the buyer/debtor. It is not clear what purpose is served by requiring the debtor's authentication of a writing documenting the limited transfer of rights by the seller. To draw an analogy, a deed transferring a fee simple must be signed by the grantor but need not be signed by the grantee. The same is true when a lesser interest—a life estate, fee determinable, or easement—is transferred.

36. *Id.*

37. 608 B.R. 457 (D. Md. 2019).

38. *Id.* at 461.

39. *Id.* at 463.

40. No. 19-CA-19, 2019 WL 5704779 (Ohio Ct. App. Oct. 30, 2019).

41. *Id.* at *6–7.

42. See U.C.C. § 9-108(a) (2013).

43. *Id.* cmt. 2.

44. *Id.* § 9-108(b)(3).

45. No. 3:18-CV-089 JD, 2019 WL 2161679 (N.D. Ind. May 17, 2019).

of each item and the debtor did not claim to own more than one of that model, the court concluded that the description was sufficient.⁴⁶

In contrast, in *In re Aluminum Extrusions, Inc.*,⁴⁷ the court declined to decide on a motion for summary judgment whether a security agreement covering the debtor's "inventory" attached to steel dies and aluminum racks. The debtor used the dies to mold aluminum into finished products for sale and used the racks to store molded products waiting to be painted or shipped, but the evidence was conflicting about the useful life of the dies and the racks. The court noted that the U.C.C. defines "inventory" to include "materials used or consumed in a business,"⁴⁸ but then properly noted that this phrase covers only property with a relatively short period of use in the debtor's business.⁴⁹ In short, goods used in business are "equipment" if they are fixed assets with a relatively long period of use, but are "inventory" if they are "used up" or consumed in a short period of time.⁵⁰ Given the facts were still at issue, the court did not determine whether the dies and racks inventory covered by the security agreement were inventory or equipment.⁵¹

Two other cases were even worse for the secured party. In *Cheniere Energy, Inc. v. Parallax Enterprises LLC*,⁵² a promissory note described the collateral to consist of all existing and after-acquired deposit accounts, investment property, instruments, documents, chattel paper, goods, contract rights, letter-of-credit rights, and "[a]ll other tangible and intangible property and assets of" the debtor.⁵³ The court ruled that the description did not adequately describe "general intangibles" and, therefore, did not include the debtor's only asset: its interest in a wholly owned limited liability company. "Intangible property," the court concluded, is a super-generic term that encompasses things other than general intangibles, and hence pursuant to U.C.C. section 9-108(c) is not an adequate description of collateral.⁵⁴

In *In re Bates Drug Stores, Inc.*,⁵⁵ a security agreement described the collateral as "[a]ll accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a . . . disposition of any of the property described in this Collateral section." The court concluded that the description covered general intangibles only if they arose from the disposition of the described Collateral: that is, from inventory, accounts, and equipment.⁵⁶ The court then

46. *Id.* at *4.

47. No. 17-12693-JDW, 2019 WL 5677572 (Bankr. N.D. Miss. Oct. 31, 2019).

48. *Id.* at *2 (quoting U.C.C. § 9-102(a)(48)(D)).

49. *Id.* at *3 (citing *Morgan Cnty. Feeders, Inc. v. McCormick*, 836 P.2d 1051, 1053 (Colo. Ct. App. 1992)).

50. *Id.* (quoting U.C.C. § 9-102 cmt. 4a).

51. *Id.*

52. 585 S.W.3d 70 (Tex. App. 2019).

53. *Id.* at 78.

54. *Id.* at 79–80.

55. No. 35926-3-III, 2019 WL 2763356 (Wash. Ct. App. July 2, 2019).

56. *Id.* at *3. The court similarly concluded that the grant of a security interest in "[a]ll records and data relating to any of the property described in this Collateral section" was limited to records and data that relate to inventory, accounts, and equipment. *Id.*

remanded the case to determine what collateral fell within this somewhat narrow description.⁵⁷ The case is a good reminder to secured parties and their counsel that sometimes fewer words are better.

Although a description of collateral only by a type defined in the Uniform Commercial Code is sufficient for most types of collateral, it is insufficient to describe a commercial tort claim.⁵⁸ Hence a security agreement must describe such a claim with greater specificity than simply by type. Unfortunately, courts continue to misapply this rule.

In *Mantle v. North Star Energy & Construction LLC*,⁵⁹ a bank had a security interest in the debtor's general intangibles. When the debtor settled a commercial tort claim, the bank's assignee claimed that the security interest attached to the debtor's rights under the settlement agreement because those rights were a general intangible. The court disagreed. Relying on a 2016 ruling by the U.S. Court of Appeals for the Eighth Circuit,⁶⁰ the court ruled that the heightened requirements for describing commercial tort claims somehow prevent a security agreement that describes the collateral to include after-acquired general intangibles from encumbering the proceeds of a commercial tort claim.⁶¹ The decision is wrong.⁶²

B. RIGHTS IN THE COLLATERAL

A debtor cannot grant a security interest in property in which the debtor does not have rights in or at least the power to convey rights. This rather obvious requirement caused a problem for one lender last year.

In *Foundation One Banking Corp. v. Svoboda*,⁶³ a struggling auto dealer purported to grant a security interest in two trucks to a lender. The dealer provided the lender with a manufacturer's certificate of origin for the older truck and a certificate of title for the newer truck. After default, the lender brought a replevin action and a corporation, Lehr, Inc., intervened. Although the certificate of origin showed an original transfer from a dealership to Lehr, and a later transfer for another dealership to the debtor, there was a gap in the chain of title: the certificate showed no transfer from Lehr to the second dealership.⁶⁴ The certificate of title was issued after Lehr had purchased and obtained its own certificate of title

57. *Id.*

58. *Id.* § 9-108(e)(1).

59. 441 P.3d 841 (Wyo. 2019).

60. *Id.* at 848-49 (relying on *Bayer CropScience, LLC v. Stearns Bank*, 837 F.3d 911, 916 (8th Cir. 2016)).

61. *Id.*; see also *In re Alliance Ins. Grp. of Akadelphia, Inc.*, No. 6:18-bk-71472, 2019 WL 1992622, at *2-4 (Bankr. W.D. Ark. Feb 12, 2019) (ruling that banks' security interests in twenty-one promissory notes did not encumber any commercial tort claims relating to the notes because, even if the tort claims were proceeds of collateral, the claims were not specifically described in the security agreements).

62. See, e.g., Steven O. Weise & Stephen L. Sepinuck, *Annual Survey of Commercial Law: Personal Property Secured Transactions*, 72 *BUS. LAW.* 1143, 1145-46 (2017).

63. 931 N.W.2d 431 (Neb. 2019).

64. *Id.* at 434.

for that truck.⁶⁵ A jury returned a verdict for the corporation.⁶⁶ On appeal, the state supreme court affirmed the judgment for the corporation.⁶⁷

When a debtor's rights to transfer property are restricted by contract or law, the debtor might nevertheless be permitted to grant a security interest in that property. That is because Article 9 contains several rules that override many contractual and legal restrictions on assignment.⁶⁸ Unfortunately, these rules are rather complex. Last year's survey detailed how the bankruptcy court in *In re Woodbridge Group of Cos., LLC*,⁶⁹ misapplied these rules.⁷⁰ Specifically, the court incorrectly ruled that section 9-408 does not apply to a sale of promissory notes that contain a restriction on transfer.⁷¹ Unfortunately, on appeal, the district court affirmed, adopting hook, line, and sinker the bankruptcy court's faulty conclusion "that section 9-408 applies only to transactions involving the grant or transfer of a security interest in a promissory note, not an outright sale of a promissory note."⁷²

Although Article 9's anti-assignment rules override many contractual and legal restrictions on assignment, it is doubtful that they override the express terms of a judicial order. In *In re National Football League Players' Concussion Injury Litigation*,⁷³ individuals purported to assign their right to payment under a class-action settlement agreement with the NFL. Without discussing Article 9, the appellate court affirmed a lower court ruling that the assignments were void because the court-approved settlement agreement expressly prohibited assignment and stated that any attempted assignment was void.⁷⁴

C. OTHER ATTACHMENT ISSUES

A security interest may secure future advances: that is, a loan made or indebtedness incurred after the debtor authenticates the security agreement.⁷⁵ Whether a security interest does so is a matter of contract interpretation; the official comments expressly reject any requirement that the later indebtedness be in any way related to the original secured obligation.⁷⁶ However, when the later obligation is

65. *Id.* at 435.

66. *Id.* at 433.

67. *Id.* at 439.

68. See U.C.C. §§ 9-406(d)–(f), 9-407, 9-408, 9-409 (2013).

69. 590 B.R. 99 (Bankr. D. Del. 2018).

70. See Stephen L. Sepinuck, *Annual Survey of Commercial Law: Personal Property Secured Transactions*, 74 *BUS. LAW.* 1291, 1297–98 (2019); see also Carl S. Bjerre & Stephen L. Sepinuck, *Spotlight*, *COM. L. NEWSL.* 12, 12–14 (Feb. 2019).

71. *In re Woodbridge Grp. of Cos., LLC*, 590 B.R. at 109.

72. See *In re Woodbridge Grp. of Cos.*, 606 B.R. 201, 210 (D. Del. 2019). For a stinging criticism of the decision, see Bruce A. Markell, *The Road to Perdition: 180 Equipment, Woodbridge and Liddle Pave the Way*, *BANKR. L. LETTER*, Nov. 2019, at 1, 6–10.

73. 923 F.3d 96 (2d Cir. 2019).

74. *Id.* at 109–10.

75. See U.C.C. § 9-204(c) (2013).

76. See *id.* cmt. 5. Courts have uniformly followed this rule in commercial transactions. See, e.g., *Pride Hyundai, Inc. v. Chrysler Fin. Co.*, 369 F.3d 603 (1st Cir. 2004). For the most part, they have done the same in consumer cases. See, e.g., *In re Zaochney*, No. A11-00603-DMD, 2011 WL 6148727 (Bankr. D. Alaska Dec. 12, 2011); *In re Renshaw*, 447 B.R. 453 (Bankr. W.D. Pa. 2011); *In re Hobart*,

incurred years after the original secured obligation was paid off, courts are sometimes resistant to enforcing a future advances clause in a security agreement entered into years before.⁷⁷

In *Scott v. PNC Bank*,⁷⁸ the U.S. Court of Appeals for the Third Circuit dealt with this problem in a case outside the scope of Article 9 of the Uniform Commercial Code. The court ruled that the district court below had erred in concluding that the assignment of a life insurance policy “as collateral security for any and all liabilities . . . that may hereafter arise in the ordinary course of business between . . . the undersigned and the Assignee” survived the repayment of the original loan, persisted for another thirteen years, during which the assignee was acquired by another entity, and then applied to the acquiring entity’s new and unrelated loan to the debtor.⁷⁹ The court concluded that discovery was necessary to ascertain whether the new loan was “in the ordinary course of business” established by the original parties.⁸⁰

A security agreement may provide for the security interest to encumber after-acquired collateral: that is, collateral acquired after the debtor authenticates the security agreement.⁸¹ However, an after-acquired property clause in a security agreement is ineffective to reach an after-acquired commercial tort claim.⁸² In *DB NPI Century City, LLC v. Legendary Investors Group No. 1, LLC*,⁸³ the court misapplied this rule. The commercial security agreement in that case described the collateral to include “now owned or hereafter acquired . . . general intangibles.”⁸⁴ When the debtor later settled a commercial tort claim, the secured party claimed that its security interest attached to the debtor’s rights under the settlement

452 B.R. 789 (Bankr. D. Idaho 2011); *In re Brannan*, No. 10-62399-13, 2011 WL 2076378 (Bankr. D. Mont. May 26, 2011); *Educators Credit Union v. Guyton*, 805 N.W.2d 736 (Wis. Ct. App. 2011); *In re Massey*, No. 09-81220-TRC, 2010 WL 99266 (Bankr. E.D. Okla. Jan. 6, 2010). *But cf. In re Dumlao*, No. NV-10-1505-JuHKw, 2011 WL 4501402 (9th Cir. BAP Aug. 5, 2011) (language in a consumer’s car loan agreement with a credit union providing that the vehicle secured “any other amounts or loans, including any credit card loan, you owe us for any reason now or in the future” was effective under section 9-204 to cover the consumer’s credit card obligation, but the case was remanded to determine if the clause violated the duty of good faith or was unconscionable given the adhesive nature of the agreement and the small font used); *In re Keeton*, No. 07-11204-DHW, 2008 WL 686938 (Bankr. M.D. Ala. Mar. 10, 2008) (a dragnet clause in a security agreement for a car loan to joint debtors did not clearly encompass obligations later incurred by only one of them, and thus the collateral did not secure one debtor’s individual credit card obligations); *Wooding v. Cinfed Employees Fed. Credit Union*, 872 N.E.2d 959, 961 (Ohio Ct. App. 2007) (although an auto loan agreement provided that a car would secure all obligations the borrower owed to the lender, nothing specifically indicated that the car would secure the borrower’s credit card account obligations and thus there was “no meeting of the minds with respect to the cross-collateralization of the automobile”).

77. *Jipping v. First Nat’l Bank Alaska*, 735 F. App’x 436 (9th Cir. 2018). For somewhat different views of this case, compare E.H. Geiger & Stephen L. Sepinuck, *Zombi Documents*, 9 *TRANSACTIONAL LAW.*, Feb. 2019, at 1, with Scott Berman, *Zombi Documents: A Dissenting View*, *TRANSACTIONAL LAW.*, Apr. 2019, at 13.

78. 785 F. App’x 916 (3d Cir. 2019).

79. *Id.* at 920.

80. *Id.*

81. See U.C.C. § 9-204(a) (2013).

82. See *id.* § 9-204(b)(2).

83. No. B271089, 2019 WL 2082039 (Cal. Ct. App. May 13, 2019).

84. *Id.* at *13.

agreement. The trial court ruled otherwise and the appellate court affirmed, concluding that because a security interest cannot attach under an after-acquired property clause to a commercial tort claim, it cannot attach to the rights under a settlement agreement relating to such a claim.⁸⁵ The decision is wrong and lacks support in the text of Article 9.

A security interest automatically attaches to identifiable proceeds of the collateral.⁸⁶ Unfortunately for secured parties, sometimes it is difficult to identify proceeds. Two cases last year involved a similar problem in that regard.

In *Wheeling & Lake Erie Railway Co. v. Keach*,⁸⁷ a railway that was a connecting carrier under a uniform bill of lading had both contract and tort claims against a shipper in connection with a catastrophic derailment. The claims totaled at least \$2.5 billion. The security interest of the railway's secured lender, which included after-acquired accounts and payment intangibles, attached to the contract claim and the proceeds thereof.⁸⁸ However, the secured lender was unable to demonstrate what portion, if any, of a \$110 million global settlement of claims against the shipper were its collateral.⁸⁹

Similarly, in *In re Aerogroup Int'l, Inc.*,⁹⁰ the court ruled that a secured party with a senior security interest in the debtor's intellectual property was not entitled to any portion of the proceeds of a settlement agreement that the debtor entered into with a buyer after the buyer breached an asset purchase agreement, even though the agreement included a transfer of rights in trademarks. Another creditor had priority in the debtor's claims against the buyer and nothing in the settlement agreement allocated a portion of it to the alleged diminution in value of the intellectual property. As a result, even if some portion of the settlement were for loss to the value of the intellectual property, that portion was not *identifiable* proceeds of the intellectual property.⁹¹

III. PERFECTION OF A SECURITY INTEREST

A. METHOD OF PERFECTION

In general, perfection of a security interest is necessary, but not always sufficient, for the secured party to have priority over the rights of lien creditors, other secured parties, and buyers, lessees, and licensees of the collateral.⁹² The method or methods by which a secured party can perfect a security interest depend on the type of collateral and the nature of the transaction. The dominant method of perfection is by filing a financing statement, but other methods include taking possession or control of the collateral, complying with a certificate-of-title

85. *Id.* at *14–15.

86. See U.C.C. §§ 9-203(f), 9-315(a)(2) (2013).

87. 606 B.R. 1 (D. Me. 2019). An appeal was filed to the U.S. Court of Appeals for the First Circuit on September 7, 2019.

88. See *id.* at 5–12.

89. *Id.* at 12–14.

90. No. 17-11962 (KJC), 2019 WL 2120735 (Bankr. D. Del. May 13, 2019).

91. *Id.* at *6.

92. See U.C.C. §§ 9-317, 9-322(a) (2013).

statute, and complying with any preemptive federal law.⁹³ Among the first steps in determining how to perfect are: (i) to identify and classify the collateral; (ii) to ascertain whether Article 9 applies to a security interest in that collateral; and (iii) to determine which state's law governs.

B. GOVERNING LAW

In general, the law of the jurisdiction where the debtor is located governs perfection of a security interest.⁹⁴ There are, however, several exceptions, including for security interests in deposit accounts,⁹⁵ investment property,⁹⁶ goods covered by a certificate-of-title statute,⁹⁷ and security interests perfected by possession.⁹⁸ There is also an exception for agricultural liens, which are created by statute rather than by agreement.⁹⁹ For such liens, the law of the jurisdiction where the farm products are located governs perfection.¹⁰⁰ Courts did a good job last year resolving issues with respect to the law governing security interests and agricultural liens.

In *In re Trinity Investment Group, LLC*,¹⁰¹ a seller sold several restaurants located in Ohio to the debtor and retained a security interest in the equipment and accounts. The seller filed a financing statement in Ohio, but did not file in Indiana, where the debtor was organized and had its chief executive office. The court correctly ruled that the debtor was located in Indiana, that Indiana law governed perfection, and that the security interest was therefore not perfected by the financing statement filed in Ohio.¹⁰² Unfortunately, the court's reasoning was a bit flawed. The court noted that a registered organization, such as a limited liability company, is located in the state in which it is registered,¹⁰³ but nevertheless went on to base its decision on the fact that an organization with multiple places of business is located at its chief executive office and the debtor's chief executive office was in Indiana.¹⁰⁴ But the rule about an organization with multiple places of business is not applicable to registered organizations;¹⁰⁵ the fact that the debtor was an Indiana limited liability company alone determined that the debtor was located in Indiana for the purposes of Article 9.

93. *See id.* §§ 9-310–9-314.

94. *See id.* § 9-301(1).

95. *See id.* § 9-304.

96. *See id.* § 9-305.

97. *See id.* § 9-303.

98. *See id.* § 9-301(2).

99. *See id.* § 9-102(a)(5) (defining "agricultural lien").

100. *See id.* § 9-302.

101. No. 18-10627, 2019 WL 2004760 (Bankr. N.D. Ind. Feb. 11, 2019).

102. *Id.* at *2.

103. *Id.* (citing the Indiana and Ohio versions of U.C.C. § 9-307(e)).

104. *Id.*

105. *See* U.C.C. § 9-307(b)(3) (2013). The subsection begins "[e]xcept as otherwise provided in this section," and subsection (e) specifies that a registered organization that is organized under the law of a state is located in that state.

In *In re First River Energy, LLC*,¹⁰⁶ the court ruled that the law of the jurisdiction where the debtor is located—Delaware—governed the perfection and priority of security interests in the debtor’s inventory of fuel, not the law of Texas, which grants oil producers in that state an automatically perfected purchase-money security interest in the oil they sell on credit.¹⁰⁷ Because the Texas producers did not file a financing statement in Delaware, their security interests in the inventory and its proceeds were unperfected and subordinate to the rights of a secured party that did perfect its security interest.¹⁰⁸ In contrast, Oklahoma law grants its oil producers a statutory lien—not a security interest—in the oil they produce and the proceeds thereof.¹⁰⁹ The court ruled that Article 9’s perfection rules do not apply to statutory liens, and hence Oklahoma law governed the perfection and priority of the Oklahoma statutory lien in favor of oil producers.¹¹⁰

In *Fishback Nursery, Inc. v. PNC Bank*,¹¹¹ the U.S. Court of Appeals for the Fifth Circuit affirmed a lower court ruling that, because the law of the jurisdiction where farm products are located governs the perfection and priority of an agricultural lien on the farm products, the law of Michigan, Tennessee, and Oregon governed, respectively, the priority of the agricultural liens on the goods shipped to those states, even though the debtor’s contracts with the agricultural lienholders purported to select only Oregon law.¹¹² The priority issue among the lienholders was, according to the court, not a contractual dispute to which the contractual choice-of-law did or could apply.¹¹³

C. ADEQUACY OF FINANCING STATEMENT

To be sufficient to perfect a security interest, a filed financing statement must provide the name of the debtor, provide the name of the secured party or a representative of the secured party, and indicate the collateral.¹¹⁴

Of these three requirements for an effective financing statement, the name of the debtor is the most important. That is because financing statements are indexed

106. No. 18-50085-CAG, 2019 WL 1103294 (Bankr. W.D. Tex. Mar. 7, 2019). The court later certified the matter for direct appeal to the circuit court. No. 18-50085-CAG, 2019 WL 1782628 (Bankr. W.D. Tex. Apr. 22, 2019).

107. See TEX. BUS. & COM. CODE § 9.343 (2019).

108. 2019 WL 1103294, at *18–21. See also *In re SemCrude, L.P.*, 864 F.3d 280 (3d Cir. 2017) (the security interests of the debtor’s oil suppliers were unperfected because: (i) even though the U.C.C. of the suppliers’ states—Texas and Kansas—contained non-uniform language purporting to provide the suppliers with an automatically perfected security interest, the law of the jurisdiction where the debtor was located governs; (ii) that law did not provide for automatic perfection; and (iii) the suppliers did not file a financing statement in the state where the debtor is located).

109. See OKLA. STAT. tit. 52, § 549.3(A) (2019). This statutory lien was created in response to the decisions in the *SemCrude* case. See 2019 WL 1103294, at *15 (discussing *Gaskins v. Texon, LP*, 321 P.3d 985, 990–91 (Okla. Civ. App. 2013)).

110. 2019 WL 1103294, at *16. Because the Oklahoma oil producers had not yet proven that they were entitled to this statutory lien, the court denied summary judgment. *Id.*

111. 920 F.3d 932 (5th Cir. 2019).

112. *Id.* at 937–39.

113. *Id.* The court then noted that the result would be the same if the court applied federal choice-of-law rules to determine which state’s law applied in bankruptcy. *Id.* at 939.

114. See U.C.C. § 9-502(a) (2013).

by—and searches are conducted using—the debtor’s name.¹¹⁵ A filed financing statement that lists an incorrect name for the debtor is not effective to perfect unless the financing statement would be disclosed in response to a search under the debtor’s correct name, using the filing office’s standard search logic.¹¹⁶ For the purposes of these rules, the correct name of a registered organization is the name stated to be the organization’s name on the public organic record most recently filed with the state in which it is registered.¹¹⁷ The correct name of an individual is, in most cases, the name provided on the debtor’s driver’s license if the license is unexpired and issued by the state in which the individual is located.¹¹⁸ There were several cases last year in which secured parties experienced difficulty complying with these rules.

In *Bailey v. Rose*,¹¹⁹ a filed financing statement listed the individual debtor’s first name in the box for a last name and listed the debtor’s last name in the box for a middle name. Because the financing statement would not be disclosed in response to a search against the debtor’s correct name, the court concluded that the financing statement was seriously misleading and ineffective until it was later amended.¹²⁰ Similarly, in *In re Preston*,¹²¹ a financing statement filed against a debtor whose driver’s license displayed his name as “D Dennis” Preston (without a period but with a space) was deemed ineffective because the financing statement listed in the field for the debtor’s first personal name “D.Dennis” (with a period and no space) and a search under the debtor’s driver’s license name failed to disclose the financing statement.¹²²

If the debtor’s name changes after a proper financing statement is filed, the financing statement remains effective to perfect a security interest in collateral acquired by the debtor before or within four months after the name change.¹²³ However, the financing statement will not be effective to perfect a security interest in collateral acquired more than four months after the name change if the name change has caused the financing statement to become seriously misleading.¹²⁴

In *In re Wastetech, LLC*,¹²⁵ the debtor’s name changed before, rather than after, the financing statement was filed. Specifically, a factor filed a financing statement identifying the debtor as “NTC Waste Group, LLC,” approximately four months after the debtor had changed its name to “Wastetech, LLC.” A search under the debtor’s correct name at the time the financing statement was filed would not

115. See *id.* §§ 9-519(c)(1), 9-523(c)(1)(A).

116. See *id.* § 9-506(a)–(c).

117. See *id.* § 9-503(a)(1).

118. See *id.* § 9-503(a)(4) (Alternative A). The vast majority of states have enacted Alternative A to section 9-503.

119. No. H044788, 2019 WL 2710209 (Cal. Ct. App. June 28, 2019).

120. *Id.* at *5.

121. No. 18-41253, 2019 WL 7604710 (Bankr. D. Kan. Dec. 19, 2019).

122. *Id.* at *6.

123. See U.C.C. § 9-507(c)(1) (2013).

124. See *id.* § 9-507(c)(2).

125. 605 B.R. 264 (Bankr. N.D. Ga. 2019).

have disclosed the financing statement. The court ruled that the financing statement was ineffective to perfect the security interest.¹²⁶ It did not matter that the factor was unaware of the name change or had begun its relationship with the debtor prior to the change in name.¹²⁷

In *Northside Elevator, Inc. v. Ossmann*,¹²⁸ the court ruled that a filed financing statement identifying the debtor as “Jeffrey A. Ossmann,” the name on the debtor’s driver’s license at the time the financing statement was filed, remained effective to perfect a security interest in collateral acquired more than four months after the debtor was issued a new driver’s license under the name “Jeffrey Alan Ossmann” because, even though a search under the new name would not disclose the filing, a search using the debtor’s middle initial—which the filing office’s regulations describe as “the logical equivalent” of the debtor’s middle name—would disclose the filing.¹²⁹ The court’s ruling is incorrect. The statutory reference to a filing office’s “standard search logic” deals with the results of a search against the debtor’s correct name, not with what alternative names a searcher must or should search against.

The indication of collateral need not be specific; it merely must reasonably identify the collateral or, put another way, provide enough information so that the identity of the collateral is objectively determinable.¹³⁰ For this purpose, an indication of the collateral by a type defined in Article 9 is in most cases sufficient.¹³¹ There were two conflicting decisions about this requirement last year.

In January, the U.S. Court of Appeals for the First Circuit ruled in a dispute arising out of the Puerto Rico bankruptcy that filed financing statements indicating the collateral as “[t]he pledged property described in the Security Agreement attached as Exhibit A hereto,” and which attached the security agreement, were ineffective to perfect because the attached security agreement did not define the pledged property even by type of collateral, and instead referenced a bond resolution that defined the term but which was not attached.¹³² It did not matter, in the court’s view, that the bond resolution was publicly available, because nothing filed with the U.C.C. records indicated where to find it.¹³³

Less than eight months later, the U.S. Court of Appeals for the Seventh Circuit ruled that a filed financing statement identifying the collateral as “[a]ll Collateral described in First Amended and Restated Security Agreement dated March 9, 2015 between Debtor and Secured Party” was sufficient to perfect even though

126. *Id.* at 271.

127. *Id.* at 272–73. The court also ruled that it did not matter that the financing statement was allegedly filed less than four months after the name change because section 9-507(c)(1) gives efficacy to a filed financing statement with respect to a debtor whose name has changed only if the financing statement was filed against the debtor’s then correct name and the name change occurred afterwards. *Id.* at 273.

128. No. 2018AP1596, 2019 WL 2291631 (Wis. Ct. App. May 30, 2019).

129. *Id.* at *4.

130. See U.C.C. § 9-108(a), (b)(6) (2013).

131. See *id.* §§ 9-108(b)(3), (e), 9-504.

132. *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 914 F.3d 694, 709–12 (1st Cir. 2019). A petition for a writ of certiorari was filed on May 3, 2019.

133. *Id.* at 710–11.

the security agreement was not also filed because the collateral was “objectively determinable” under section 9-108(b)(6).¹³⁴ Amazingly, the court did not even mention the First Circuit’s contrary ruling. Although most, if not all, commentators agree that the Seventh Circuit’s decision is incorrect,¹³⁵ the issue should not matter much to the operation of the filing system. No careful creditor should file a financing statement that indicates the collateral solely by a reference to an unfiled document, and no diligent searcher should ignore such a financing statement that it discovers.¹³⁶ Of course, in bankruptcy, where perfection is policed without regard to whether anyone was misled, the issue might arise.

IV. ENFORCEMENT OF A SECURITY INTEREST

A. DEFAULT

Article 9 gives secured parties various rights upon default, including the rights to repossess, collect, and dispose of the collateral.¹³⁷ However, Article 9 does not define default, instead leaving that to the parties’ agreement and other law.

In *Hussein v. UBS Bank USA*,¹³⁸ the court held that because the loan documents expressly gave the bank the right to accelerate the debt and liquidate the collateral—shares of stock in a corporation—whenever the bank deemed “itself or its security interest in the Collateral insecure,” the debtor had no cause of action against the bank for accelerating the debt and liquidating the collateral after the collateral had declined in value. It did not matter that the debtor had substantial assets because the language of the agreement dealt with whether the security interest had become insecure, not the insecurity of the loans.¹³⁹

The other law that can affect whether the debtor is in default includes the law relating to waiver and estoppel.¹⁴⁰ In *Hendrickson v. Fifth Third Bank*,¹⁴¹ the court ruled that the debtor stated a cause of action against both her lender and the repossession agent that repossessed her vehicle by alleging that the lender had accepted late payments for several months and then, following another late payment, ordered that her vehicles be repossessed without providing advance notification of its intent to strictly enforce the terms of the loan agreement.¹⁴²

134. 938 F.3d 866 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 1125 (2020).

135. See, e.g., Bruce A. Markell, *supra* note 72, at 2–6 (describing the decision as “an interpretive disaster”). *But cf.* Muhammad S. Alkhidhr & Stephen L. Sepinuck, *Circuits Disagree About Financing Statement that Indicate Collateral Solely by Reference to Unfiled Documents*, 9 *TRANSACTIONAL LAW.*, Dec. 2019, at 1, 1 (stating that the decision is “questionable” but has some textual support).

136. See Alkhidhr & Sepinuck, *supra* note 135, at 2.

137. See U.C.C. §§ 9-601(a), 9-607(a), 609(a)(1), 9-610(a) (2013).

138. 446 P.3d 96 (Utah Ct. App. 2019).

139. *Id.* at 107.

140. See U.C.C. § 1-103(b) (2011).

141. No. 18-cv-0086 (WMW/TNL), 2019 WL 652417 (D. Minn. Feb. 15, 2019).

142. *Id.* at *2–4 (relying on *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232, 237 (Minn. 1980)) (holding that, if a creditor repeatedly accepts late payments, the creditor is estopped from exercising default remedies, such as repossessing the collateral, before the creditor gives the debtor written notice of the creditor’s intent to strictly enforce the terms of the loan agreement). However, the court ruled that another debtor in substantially the same position but whose personal liability on the

B. REPOSSESSION

Article 9 permits a secured party to repossess collateral without judicial process provided it can do so without causing a breach of the peace.¹⁴³ This duty not to breach the peace is non-delegable; a secured party violates the rule even if an independent contractor causes a breach of the peace.¹⁴⁴ Moreover, a breach of the peace can occur even if there is no violence.¹⁴⁵ Consequently, a secured party and its agents must normally withdraw from a confrontation with the debtor or with third parties.

In *Goodwin v. His Choice Towing & Recovery, LLC*,¹⁴⁶ the court denied the defendants' motion for summary judgment, ruling that a reasonable jury could conclude that a breach of the peace occurred when a repossession agent towed the debtor's car away despite the oral protest of the debtor's husband. Even though the towing began when the husband was in the house, the situation could have devolved into a more dangerous situation when the husband came out cussing, waiving a piece of paper, and yelling he was going to call the police.¹⁴⁷

In contrast, in *Westbrook v. NASA Federal Credit Union*,¹⁴⁸ the court ruled that even though the debtor's widow and her son got into a "heated conversation" with the repossession agent, because the agent was "very professional," did not curse or threaten, and merely made sarcastic comments to the son, who engaged in threatening behavior, the agent's conduct did not amount to a breach of the peace.¹⁴⁹

The use of a uniformed police officer to assist in a repossession is not permitted.¹⁵⁰ That is because it is a false display of authority: the secured party has a *contractual* right to possession but the debtor has a *legal* right to make the creditor go to court to enforce it. There were two noteworthy cases last year dealing with police involvement in a repossession.

In *Hyman v. Devlin*,¹⁵¹ the court upheld a jury verdict against a police officer for violating a debtor's civil rights. The officer had arrived at the scene of an automobile repossession and threatened to arrest the debtor if she did not exit the vehicle.¹⁵² In *Russell v. Santander Consumer USA, Inc.*,¹⁵³ however, the court declined

loan had been discharged in bankruptcy had no such claim because the lender had no duty to send notification to her. *Id.* at *4–5.

143. See U.C.C. § 9-609(a)(1), (b)(1) (2013).

144. *Id.* § 9-609 cmt. 3. Some states have rules outside of Article 9 to the contrary. See, e.g., CAL. BUS. & PROF. CODE § 7507.13(b) (Deering 2007).

145. See, e.g., *Callaway v. Whittenton*, 892 So. 2d 852 (Ala. 2003).

146. No. 1:17-cv-753, 2019 WL 1212119 (N.D. Ga. Jan. 14, 2019) (magistrate recommendation); No. 1:17-cv-753, 2019 WL 7944075 (N.D. Ga. Dec. 13, 2019) (adopting magistrate recommendation).

147. 2019 WL 1212119, at *11. The repossession in the case was apparently wrongful for another reason: the debtor had brought the loan current two days before her car was repossessed, and thus the debtor was not in default. *Id.* at *7–8.

148. No. 3:17-cv-00534-AKK, 2019 WL 1056356 (N.D. Ala. Mar. 6, 2019).

149. *Id.* at *5.

150. See U.C.C. § 9-609 cmt. 3 (2013).

151. No. 3:17-89, 2019 WL 2271113 (W.D. Pa. May 28, 2019). An appeal was filed to the U.S. Court of Appeals for the Third Circuit on July 3, 2019.

152. *Id.* at *11–13. The court upheld an award of \$5,000 in compensatory and \$190,000 in attorney's fees but reduced the jury's award of \$500,000 in punitive damages to \$30,000. *Id.* at *23.

153. No. 19-CV-119, 2019 WL 4572882 (E.D. Wis. Sept. 20, 2019).

to issue a summary judgment on a couple's claim that a repossession company and its agent breached the peace during a repossession of the couple's car while the husband was in custody in the back of a police car because it was unclear whether the police were present to investigate the agent's allegation that the husband had threatened him with a gun or to assist in the repossession.¹⁵⁴ Moreover, the fact that the creditor had obtained a judgment of replevin did not make the events a judicial repossession, to which the breach-of-the-peace standard does not apply, because the creditor had not obtained a writ of execution to have the sheriff repossess the car.¹⁵⁵

C. NOTIFICATION OF DISPOSITION

After default, a secured party may dispose of the collateral.¹⁵⁶ Before most dispositions, the secured party must send notification of the disposition to the debtor and any secondary obligor.¹⁵⁷ Such a notification is sufficient if, among other things, it indicates the method of the intended disposition, states the time and place of a public disposition or the time after which any other disposition is to be made, and states that the debtor is entitled to an accounting of the unpaid indebtedness and the charge, if any, for providing the accounting.¹⁵⁸ In a consumer-goods transaction, the notification must include all that information and some additional information, including a description of any liability for a deficiency of the person to whom the notification is sent.¹⁵⁹ Several secured parties faced challenges last year to the content of the disposition notifications they provided.

In *Autovest, LLC v. Weatherly*,¹⁶⁰ a notification of disposition in connection with a consumer-goods transaction stated that the collateral would be sold at a public sale sometime after August 13, 2015. The court ruled that this was insufficient because a notification of a public sale must state the time and place of the sale.¹⁶¹ In *Manshadi v. Bleggi*,¹⁶² a notification of disposition stating that the collateral would be sold privately sometime after August 3, 2014, was not sufficient because the collateral was sold earlier, on July 23, 2014.¹⁶³

154. *Id.* at *6.

155. *Id.* at *5.

156. *See* U.C.C. § 9-610 (2013).

157. *See id.* § 9-611(b)-(d).

158. *See id.* § 9-613(1). In a transaction other than a consumer-goods transaction, a notification that does not include this information might nevertheless be sufficient. *Compare id.* § 9-613(1)-(2) (stating that a notification of disposition in a transaction other than a consumer-goods transaction will be sufficient if it contains specified content but indicating that a notification lacking some of that content might nevertheless be sufficient), *with id.* § 9-614(1) (specifying the content that must be included in a notification of disposition in a consumer-goods transaction notification).

159. *See id.* § 9-614(1)(B).

160. No. CPU4-18-001993, 2019 WL 1308126 (Del. Ct. Com. Pl. Mar. 21, 2019).

161. *Id.* at *3.

162. 134 N.E.3d 695 (Ohio Ct. App. 2019).

163. *Id.* at 707.

In contrast, in *McDonald v. Wells Fargo Bank*,¹⁶⁴ a notification of disposition sent by the secured party failed to state that the debtor was entitled to “an accounting” but did state, “[i]f you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at . . . and request a written explanation.” The court ruled this was sufficient because the Uniform Commercial Code emphasizes substance over form, and thus permits a secured party to use language its customers can understand.¹⁶⁵ Although the notification did not indicate the charge for an accounting, the notification included a summary of the overdue charges, and that, according to the court, was sufficient.¹⁶⁶ Moreover, there was no evidence that the secured party charged for an accounting and, if it did not, there is no need for the notification to expressly state that there is no charge.¹⁶⁷ There was, however, a jury question about whether a subsequent notification, sent after the collateral was not sold as planned, rendered the disposition commercially unreasonable.¹⁶⁸ The initial notification stated a minimum price and the subsequent notification failed to indicate the minimum did not apply to the second attempted sale.¹⁶⁹

Article 9 does not specify to where a secured party must send a notification of disposition, leaving that matter largely to the agreement of the parties, albeit with the non-variable duty that the notification be “reasonable.”¹⁷⁰ Moreover, Article 9 leaves to other law whether a secured party must send the debtor a new notification if it learns that the debtor did not receive original notification.¹⁷¹ There were two interesting cases last year dealing with the address to which a notification of disposition was sent.

In *SunTrust Bank v. Howard*,¹⁷² a secured party sent notification of a planned disposition of collateral to the debtor’s home address listed on the loan application rather than to the address initially identified on the loan application as a business address but later, in a refinancing application, as the debtor’s home address and used as the debtor’s billing address. The court ruled that notification was not reasonable.¹⁷³ In so doing, the court noted that section 9-307, which provides that an individual debtor is located at the debtor’s residence, applies only to Part 3, dealing with perfection, not to Part 6, which deals with enforcement.¹⁷⁴

164. 374 F. Supp. 3d 462 (W.D. Pa. 2019).

165. *Id.* at 483.

166. *Id.*

167. *Id.*

168. *Id.* at 484.

169. *Id.* at 484–85. The court appears to have improperly conflated the requirement of reasonable notification with the requirement of a commercially reasonable disposition. The requirements are distinct, and a failure to send proper notification does not render the disposition itself unreasonable.

170. See U.C.C. §§ 9-602(7), 9-611(b) (2013). The duty to send reasonable notification of a disposition is waivable but only after default. See *id.* § 9-624(a).

171. See *id.* § 9-611 cmt. 6.

172. 105 N.Y.S.3d 446 (App. Div. 2019).

173. *Id.* at 449.

174. *Id.* at 448–49.

In *Meruelo v. East West Bank*,¹⁷⁵ a bank that, prior to conducting a public disposition of a secured promissory note, sent notification to the individual debtor at five different addresses, including the address provided for in the loan agreement, and to two lawyers for the debtor. The court ruled that this satisfied the bank's obligation to send reasonable notification.¹⁷⁶ The bank had no duty to send notification to the address indicated on a change-of-address form that the debtor had previously submitted to the bank because the form concerned only billing, not all notifications, and there was no evidence that it was sent by any of the methods specified in the loan agreement for a change of address for all purposes (i.e., registered or certified mail, personal delivery, facsimile, overnight mail, or overnight courier).¹⁷⁷

D. CONDUCTING A COMMERCIALLY REASONABLE DISPOSITION

A secured party may dispose of collateral by a sale, lease, license, or other disposition.¹⁷⁸ The disposition may be public—that is, typically an auction—or private.¹⁷⁹ However, every aspect of a disposition must be “commercially reasonable.”¹⁸⁰ If a secured party's compliance with this standard is challenged, the secured party has the burden of proof.¹⁸¹ There were two notable cases last year dealing with a secured party's disposition of equity securities.

In *Robb v. Bond Purchase, LLC*,¹⁸² a secured party conducted a public disposition of thinly traded shares of bank stock. The secured party advertised the disposition in three local papers, two of which regularly published real property foreclosure notices but not notices of sales of publicly traded stock.¹⁸³ The secured party never notified the bank or its shareholders of the sale or offered to sell them the shares.¹⁸⁴ One day before the sale, the terms of the same were modified to allow buyers to pay 10 percent of the price down and the balance the following day—instead of full payment at the conclusion of the sale, as had been advertised—but the modification was not announced until the day of the sale.¹⁸⁵ The shares were purchased by a newly formed company controlled by a friend of and for the benefit of the individual who owned the secured party and who was a dissident shareholder of the bank.¹⁸⁶ The appellate court affirmed the trial court's ruling that all this indicated that the disposition was

175. B279575, 2019 WL 1567561 (Cal. Ct. App. Apr. 11, 2019).

176. *Id.* at *5–6.

177. *Id.* The court also ruled that the bank had no duty to send the notification to the debtor's son, even though he was the bank's main contact with respect to the loan and a potential bidder at the sale. *Id.* at *6.

178. U.C.C. § 9-610(a) (2013).

179. *See id.* § 9-610(b).

180. *Id.*

181. *Id.* § 9-626(a)(1), (2).

182. 580 S.W.3d 70 (Mo. Ct. App. 2019).

183. *Id.* at 82.

184. *Id.*

185. *Id.*

186. *Id.* at 83.

structured to allow the secured party's owner to acquire the shares both at a reduced price and without the danger of outside competition, and thus the disposition was not commercially reasonable.¹⁸⁷

In *Atlas MF Mezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC*,¹⁸⁸ the court could not resolve on a motion to dismiss the debtor's claim that the secured party conducted a disposition of collateral—equity interests in a subsidiary—in a commercially unreasonable manner. The debtor claimed that the secured party: (i) gave potential bidders a mere two weeks to learn of the sale and conduct due diligence, which was inadequate because the subsidiary indirectly owned eleven separate properties, each with its own loan and loan documents; (ii) improperly attempted to deprive the debtor of its right to bid at the sale by subjecting it to ever-changing requirements; (iii) refused to provide the final terms of the sale sufficiently in advance; and (iv) improperly rejected the debtor's high bid. This raised a factual question of whether the sale was conducted in a commercially reasonable manner.¹⁸⁹

E. COLLECTING ON COLLATERAL

Section 9-607 provides that, upon default, or when the debtor agrees otherwise, a secured party may instruct account debtors to make payment directly to the secured party.¹⁹⁰ Section 9-406 provides that, after receipt of such an instruction, along with proof of the secured party's security interest, if requested and not previously provided, an account debtor may discharge its obligation only by paying the secured party; payment to the debtor will not discharge the obligation.¹⁹¹ Largely for historical reasons, however, section 9-406 does not use the terms "debtor" or "secured party." Instead, it uses the more general terms "assignor" and "assignee." This difference in terminology caused one court to badly misinterpret the rule last year.

In *Durham Commercial Capital Corp. v. Ocwen Loan Servicing, LLC*,¹⁹² the U.S. Court of Appeals for the Eleventh Circuit ruled that a lender with a security interest in accounts had no cause of action under section 9-406 against an account debtor that paid the debtor after receiving an instruction to pay the secured party because section 9-406 applies only to assignees, not to secured parties. In doing so, the court overlooked its own strongly worded precedent interpreting the similarly worded provision of the original version of Article 9.¹⁹³ More important,

187. *Id.* at 83–84. The court also ruled that the secured party tortiously interfered with the debtor's business expectancy—a planned sale of the collateral—by ignoring repeated requests for pay-off balances and then providing intentionally inflated pay-off balances, all for the purpose of indirectly acquiring the shares at a commercially unreasonable disposition for a fraction of the market price. *Id.* at 84–86.

188. 105 N.Y.S.3d 59 (App. Div. 2019).

189. *Id.* at 68–70.

190. See U.C.C. § 9-607(a)(1) (2013).

191. See *id.* § 9-406(a), (c).

192. 777 F. App'x 952 (11th Cir. 2019).

193. See *First Nat'l Bank of Boston v. Thomson Consumer Elecs., Inc.*, 84 F.3d 397, 399 (11th Cir. 1996) (interpreting former U.C.C. § 9-318).

the court's rationale was based on its belief that treating lender secured parties as "assignees" under section 9-406(a) would render that provision duplicative of U.C.C. section 9-607. But that is incorrect. Section 9-607(a) details a secured party's rights vis-à-vis *the debtor*. Section 9-406(a) deals with an assignee's rights vis-à-vis *an account debtor*. Put another way, section 9-607(a) deals with *when* (i.e., under what circumstances) a secured party may collect, whereas section 9-406(a) deals with *what* (i.e., how much) a secured party may collect. Not only is there no conflict or overlap between the two provisions, but if section 9-406(a) did not apply to secured parties whose security interest secures an obligation, Article 9 would be left with a gaping hole: it would lack any rules on the relative rights and obligations of such a secured party and an account debtor. There would be no rules on when the account debtor's obligation is discharged or what setoff rights the account debtor would be entitled to assert against the secured party. Those issues would then be relegated to the vagaries of the common law, which could undermine the U.C.C.'s stated goal of uniformity¹⁹⁴ and elevate the need to resolve conflicts-of-law issues, all for no good reason.¹⁹⁵

The court's decision is so clearly wrong and so potentially damaging to accounts financing that the Permanent Editorial Board has already issued a commentary rejecting the decision and revising the official comments accordingly.¹⁹⁶

Another interesting decision last year involved the appropriate language for a secured party to use in an instruction to an account debtor. In *Lake City Bank v. R.T. Milord Co.*,¹⁹⁷ an account debtor paid the debtor after receiving an instruction to pay the secured party. When the secured party sued, the account debtor moved to dismiss, claiming that the instruction did not reasonably identify the rights assigned because the instruction identified the debtor as "K-Com Transport Services, Inc.," rather than as "K-Com Environmental." The court ruled, however, that if, as alleged by the secured party, the name used was the debtor's trade name, the instruction was sufficient because it identified the specific invoices and, if the account debtor was confused, the account debtor could have contacted the secured party for clarification.¹⁹⁸

194. See U.C.C. § 1-103(a)(3) (2013).

195. For a strong criticism of the case, see Carl S. Bjerre & Stephen L. Sepinuck, *Spotlight*, COM. L. NEWSL. 8-10 (Aug. 2019), https://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL190000/full-issue-201908.pdf.

196. See PEB Commentary No. 21 (Mar. 11, 2020) (amending comment 26 to section 9-102 and adding comment 8 to section 9-401); see also *ARA Inc. v. City of Glendale*, 360 F. Supp. 3d 957, 967 (D. Ariz. 2019) (quoting *In re Apex Oil Co.*, 975 F.2d 1365, 1369 (8th Cir. 1992), for the proposition that there is no meaningful difference between a security interest and an assignment for the purposes of section 9-406).

At least two state trial courts, one in Connecticut and one in Nebraska, issued unpublished rulings last year similar to the Eleventh Circuit's ruling in *Durham*. Both are on appeal. The Commercial Law Amicus Initiative, a non-profit organization of which the author is President and Executive Director, has filed an *amicus curiae* brief in the Nebraska case and it sought but was denied permission to file an *amicus curiae* brief in the Connecticut case.

197. No. 18 C 7159, 2019 WL 1897068 (N.D. Ill. Apr. 29, 2019).

198. *Id.* at *5.

F. ACCEPTING COLLATERAL

After default, a secured party may propose to accept some or all of the collateral in full or partial satisfaction of the secured obligation.¹⁹⁹ To have an effective acceptance, the secured party must send the proposal to the debtor and not receive an objection from the debtor or anyone else with an interest in the collateral subordinate to the secured party's security interest.²⁰⁰ In two cases last year involving the same secured party, the Montana Supreme Court ruled that the secured party had not conducted an effective acceptance of collateral.²⁰¹ In each case, the debtor voluntarily vacated a mobile home encumbered by a security interest, allowed the secured party to take possession of the mobile home, and thereafter signed a document purporting to release all rights in the mobile home. The secured party then sold the home. In each case, the court ruled that the debtor was entitled to the resulting surplus. The secured party had not conducted an acceptance of the collateral, the court ruled, because the release did not state that the secured party accepted or consented to accept the collateral in full satisfaction of the debt; instead, the release purported to waive the debtor's rights but included no commitment by the secured party.²⁰² Moreover, the debtor had not waived the right to a surplus because that right is nonwaivable.²⁰³

V. LIABILITY ISSUES

A buyer of collateral at an Article 9 disposition acquires the debtor's rights in the collateral,²⁰⁴ but does not normally assume responsibility for the debtor's obligations. However, the fact that the collateral is sold through an Article 9 disposition does not insulate the buyer from any of the four general bases of successor liability: (i) the buyer expressly or impliedly assumed the debtor's liabilities; (ii) there was a de facto merger between the buyer and the debtor; (iii) the buyer was a mere continuation of the debtor; or (iv) the transaction was entered into fraudulently to escape liability.²⁰⁵ There were two notable cases last year on a buyer's successor liability following a foreclosure sale.

199. See U.C.C. § 9-620 (2013).

200. See *id.* § 9-620(a)(1), (2), (c).

201. *Hutzenbiler v. RJC Inv., Inc.*, 439 P.3d 378 (Mont. 2019); *Kapor v. RJC Inv., Inc.*, 434 P.3d 869 (Mont. 2019).

202. *Hutzenbiler*, 439 P.3d at 382; *Kapor*, 434 P.3d at 876-78.

203. *Kapor*, 434 P.3d at 873-74 (citing U.C.C. § 9-602(5)).

204. See U.C.C. § 9-617(a)(1) (2013).

205. See, e.g., *Call Center Techs., Inc. v. Grand Adventures Tour & Travel Publ'g Corp.*, 635 F.3d 48 (2d Cir. 2011); *Elvis Presley Enters., Inc. v. Passport Video*, 334 F. App'x 810 (9th Cir. 2009); *Murphy & King v. BlackJet, Inc.*, No. 13-80280-CIV-HURLEY, 2016 WL 3017224 (S.D. Fla. May 26, 2016); *Sourcing Mgmt., Inc. v. Simclar, Inc.*, 118 F. Supp. 3d 899 (N.D. Tex. 2015); *Opportunity Fund, LLC v. Savana, Inc.*, No. 2:11-CV-528, 2014 WL 4079974 (S.D. Ohio Aug. 19, 2014); *Ortiz v. Green Bull, Inc.*, No. 10-CV-3747 (ADS) (ETB), 2011 WL 5554522 (E.D.N.Y. Nov. 14, 2011); *Perceptron, Inc. v. Silicon Video, Inc.*, No. 5:06-CV-0412 (GTS/DEP), 2010 WL 3463098 (N.D.N.Y. Aug. 27, 2010); *Miller v. Forge Mench P'ship Ltd.*, No. 00 Civ. 4314(MBM), 2005 WL 267551 (S.D.N.Y. Feb. 2, 2005); *Wells Fargo Vendor Fin. Servs., LLC v. Nationwide Learning LLC*, 429 P.3d 221 (Kan. Ct. App. 2018); *La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC*, 805

In *Shaoxing Daqin Import & Export Co., Ltd. v. Notations, Inc.*,²⁰⁶ a newly formed entity purchased substantially all of the debtor's assets at an Article 9 disposition. The court denied the buyer's motion for summary judgment on an implied assumption of liabilities theory of successor liability based on evidence that: (i) the debtor told its customers that they should turn to the buyer after the acquisition; (ii) the buyer was operating out of the same location, employed many of the same employees, and provided the same services; and (iii) the buyer expressly asked the plaintiff to fulfill pending orders placed by the debtor and made payment for those orders.²⁰⁷ The court also denied summary judgment with respect to fraud based on some evidence that the debtor and the buyer worked in concert to favor one of the debtor's unsecured creditors, which suggested that the consideration the buyer paid might have been inadequate, and that the debtor continued to build up debt very close to the time of the sale.²⁰⁸ However, the court granted summary judgment against a claim of successor liability based on a de facto merger because there was no evidence of continuity of ownership,²⁰⁹ and against successor liability based on the buyer being a mere continuation of the debtor because the debtor continued to exist and there was no identity of ownership.²¹⁰

In *Ronnoco Coffee, LLC v. Westfeldt Brothers, Inc.*,²¹¹ the buyer fared a bit better. In the case, a competitor of the debtor, through a newly formed subsidiary, bought substantially all of the debtor's assets at a commercially reasonable, private foreclosure sale. The trial court granted summary judgment against a mere-continuation claim of successor liability and the court of appeals affirmed. Although the buyer continued the debtor's operations at the same location, retained most of the debtor's employees, and for a few months employed both the debtor's president and the debtor's chief financial officer, the competitor was not a mere continuation of the debtor given the arm's-length nature of the transaction and the absence of continuity of ownership or management.²¹²

S.E.2d 399 (Va. 2017); *Milliken & Co. v. Duro Textiles, LLC*, 887 N.E.2d 244 (Mass. 2008); *Cont'l Ins. Co. v. Schneider, Inc.*, 873 A.2d 1286 (Pa. 2005).

206. 19-cv-2732 (JSR), 2019 WL 6498397 (S.D.N.Y. Dec. 3, 2019).

207. *Id.* at *9.

208. *Id.* at *9–10.

209. *Id.* at *10–11.

210. *Id.* at *11.

211. 939 F.3d 914 (8th Cir. 2019).

212. *Id.* at 920–22. The court also upheld the trial court's rejection of successor liability based on fraud because there was no evidence that the plaintiff, an unpaid supplier, was prejudiced by the sale. *Id.* at 922.