

**Secured Transactions:  
Recent Development, Current  
Issues and Future Reform Efforts**

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**May 17, 2003**

# Organization of Presentation

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## Status of Revised Article 9

- In effect in all states, the District of Columbia and the U.S. Virgin Islands
- Former Article 9 is still in effect in Puerto Rico and Guam
  - Caveat re choice of law issues where forum is Puerto Rico or Guam
- Caveat re non-uniform provisions

# Proposed Federal Legislation

- Durbin-Delahunt bill (S. 2798/H. 5221) would amend the Bankruptcy Code
- Secured transactions provisions
  - Would abolish perfection by filing
  - Would permit any secured party's collateral to charged with claims under pension and benefit plans for fiduciary non-compliance
  - Would permit any transaction to be recharacterized as secured loan
- Secured transactions provisions would apply retroactively

## Attachment

- *Shelby County State Bank v. Van Diest Supply Company*, 303 F.3d 832 (7th Cir. September 17, 2002)
- The granting clause (simplified) of the security agreement read as follows:
  - “Debtor grants to Secured Party a security interest in all inventory including fertilizer sold by Secured Party to Debtor, whether now owned or hereafter acquired.”

# Attachment

- **Proceeds:** to what extent may a commercial tort claim be proceeds of other collateral?
- **Example:** Supplier supplies defective inventory to Debtor. Debtor sells the inventory to its customers, ruining debtor's reputation in the market place. Debtor sues supplier for fraud. Secured Party has a security interest in Debtor's assets other than the commercial tort claim, which is not specifically described in the security agreement.
  - Is the commercial tort claim proceeds of other collateral?

# Attachment

- Supporting obligations with anti-assignment terms
- Example: Leasing Co. leases equipment to Lessee. Guarantor guarantees payment of Lessee's obligations under the lease. The guaranty states: "This guaranty is not assignable without the consent of the guarantor."
  - Leasing Co. then sells the lease to Bank, and Lessee later defaults on the lease. May Bank enforce the guaranty?
  - What if the guaranty was silent as to assignability but Guarantor was located in a jurisdiction that had the common law rule that a guaranty was non-assignable unless expressly made so in the guaranty?

# Perfection

- *In re World Auxiliary Power Co.*, 303 F.3d 1120 (9th Cir. September 11, 2002)
- Is a security interest in an unregistered copyright perfected by a federal filing under the Copyright Act or by a state law filing under Article 9?

# Perfection

- Cross-border financing between U.S. and Canada
  - The debtor is an Ontario corporation with its chief executive office in Toronto and goods located in New York State
  - How does the secured party perfect a non-possessory security interest in the goods located in New York State?

# Perfection

- *In re Charles*, \_\_\_ F.3d \_\_\_ (10th Cir. March 20, 2003)
- In a lease of titled goods which creates a security interest, is the secured party perfected by being listed as owner on the certificate of title rather than lien holder?

# Perfection

- Does a bank which acts as agent in a lending syndicate and which is also the debtor's depository bank need a control agreement with itself - as agent and as depository bank - to perfect by control the agent's security interest in the debtor's deposit accounts?

## Priority

- *In re Dial Business Forms, Inc.*, 283 B.R. 537 (BAP 8th Cir. October 1, 2002)
- As part of a Chapter 11 plan, a creditor was granted a security interest “subordinate” to a prior perfected, senior secured party.
- If the senior secured party’s security interest lapses post-Chapter 11, is the junior creditor’s interest now senior?

# Priority

- Does the filing of a financing statement establish priority even if the filing is not effective to perfect?
  - May 1: SP1 agrees to purchase all of D's existing and after-acquired payment intangibles and files a financing statement against D
  - June 1: SP2 extends credit to D and takes a filed perfected security interest in all of D's existing and after-acquired payment intangibles
  - July 1: D creates a payment intangible which is sold to SP1

## Priority

- *In re Kroskie*, 315 F.3d 644 (6th Cir. January 14, 2003)
- Secured party perfected a security interest in a mobile home by filing a real estate mortgage but not by notation of its name on the certificate of title for the home.
- Is the security interest unperfected?

## Priority

- 9-338 refers to the possibility of a filed secured party's security interest being subordinated if its financing statement contains incorrect 9-516(b)(5) information.
- Does 9-338 apply if the information is omitted from the financing statement?

## Third Party Rights

- Original Payee of a negotiable installment note sells the note, and delivers it, to Buyer
- Maker, unaware of the sale, continues to make installment payments to Original Payee
- Original Payee disappears with the post-sale payments, and Buyer seeks the payments from Maker
- Is Maker liable to Buyer for the post-sale installments paid to Original Payee?

## Enforcement

- *In re Kalter*, 292 F.3d 1350 (11th Cir. June 7, 2002); contra, *In re Robinson*, 285 B. R. 732 (Bankr. W. D. Okla. 2002)
- If a secured party repossesses a motor vehicle in which it has a security interest and the debtor files for bankruptcy before the motor vehicle is sold by the secured party at foreclosure, is the motor vehicle property of the debtor's bankruptcy estate?

# Enforcement

- *In re Atlantic Orient Corporation*, 2003 WL 1233045 (Bankr. D. N.H. February 20, 2003)
- If the debtor files for bankruptcy post-foreclosure auction but before completion of the foreclosure sale to the winning bidder, is the collateral still part of the debtor's estate?

## Enforcement

- *In re Cadiz Properties, Inc.*, 278 B.R. 744 (Bkrcty. N. D. Tex. May 16, 2002)
- May a pledgee of stock, following the pledgor's default, vote the stock without either going through a foreclosure disposition or retaining the stock in whole or partial satisfaction of the secured obligations?

## Enforcement

- 9-619 now provides a title clearing mechanism for titled goods
- Does 9-619 permit the secured party to title the goods in its own name without conducting a disposition of the goods under part 6 of Article 9?

## Enforcement

- The debtor and the debtor's consumer goods collateral are located in State A
- Secured party is located in State B. The security agreement is governed by the law of State B
- State A has an absolute bar rule for a secured party which does not comply with part 6 of Article 9; State B does not
- Does the absolute bar rule apply if the secured party fails to comply with part 6?

## Enforcement

- *Federal Communications Commission v. Nextwave Personal Communications, Inc.*, 123 S.Ct. 832 (January 27, 2003)
- Is a governmental licensing agency barred by the automatic stay from enforcing a security interest securing payment for a governmental license?

## Revised Article 9 Transition

- *In re Stout*, 284 B.R. 511 (Bkrtcy. KS October 22, 2002)
- Does a pre-effective date security agreement which was not enforceable under former Article 9 become valid as of Revised Article 9's effective date if it meets the requirements for enforceability under Revised Article 9?

## Revised Article 9 Transition

- Assume that a secured party files an “in lieu” initial financing statement that omits any reference to the most recent amendment of the pre-effective date financing statement.
- May the secured party merely amend the “in lieu” to add the information and still obtain priority back to the date of the filing of the pre-effective date financing statement?

# Law Reform Process

- Is the current process for effecting UCC secured transactions revisions effective?
- Is the UCC secured transactions process sufficiently fair and open?
- What is the best way to handle additional statutory changes coming out of a UCC secured transactions revision process?
- What is the best way to handle changes to the Official Comments?