

# Principles of Business Credit

Eighth Edition

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# **UCC ARTICLE 2 – SALES**

- **OFFER AND ACCEPTANCE**
- **MUTUAL ASSENT**
- **CAPACITY TO CONTRACT**
- **LEGALITY OF SUBJECT MATTER**
- **CONSIDERATION**

# UCC ARTICLE 2 – DEFINITIONS

- **Goods** – tangible items, other than money, stocks and bonds, which are capable of being moved
- **Merchant** – a person who deals in goods of a specific kind and/or holds himself as having knowledge or skill peculiar to the practices of goods involved in a particular transaction
- **Tender of Delivery** – means that the seller must make the goods available to the buyer
- **Passage of Title** – when the seller has completely performed its duties under the contract concerning physical delivery of the goods

# **UCC ARTICLE 2-701**

## **Stoppage of Delivery**

- **UCC 2-701 provides that if a buyer is insolvent, the seller of goods has the right to withhold delivery until the buyer pays for the goods as well as for any goods previously shipped**
- **UCC-2-703 and 2-705 provides that a seller who has concerns that payment will not be made may**
  - **Withhold delivery of goods in creditor's possession**

# UCC ARTICLE 2-702

## Reclamation

- **UCC 2-702 permits a creditor to reclaim goods sold to an insolvent debtor within 10 days of the debtor's receipt of those goods**

# **UCC ARTICLE 2**

## **Warranty Issues**

- **A warranty is a contractual promise by the seller regarding the character or suitability of the goods sold**
- **An express warranty is an oral or written statement, promise or other representation about the quality of a product**

# UCC ARTICLE 2-A

- **A Lease is defined as the transfer of the right to possession and use of goods for a term in return for consideration**
- **Allows firms with limited capital budgets an alternative way to obtain resources or goods**
- **A Finance Lease is a lease in which the lessor does not manufacture or produce the goods and only acquires the goods in connection with the lease**

# UCC ARTICLE 6

- **REPEALED IN MOST STATES**
- **CONCEPT:**
  - **Enables debtor to sell all of its assets without paying creditors**
  - **Proceeds of sale are to be used to pay creditors whatever their *pro rata* share is**



# UCC ARTICLE 6

- **REPLACEMENT STATUTES:**
  - **UNIFORM FRAUDULENT CONVEYANCE ACT**
  - **UNIFORM VOIDABLE TRANSACTIONS ACT**
    - **Replaced the Uniform Fraudulent Transaction Act in 2014**
- **Concept: Payment or transfer of property of a debtor for less than reasonably equivalent value at a time when the debtor is insolvent or will be rendered insolvent by virtue of the transfer**

# **UCC ARTICLE 6 – CREDITOR’S REMEDIES**

- **Pursue the Debtor**
- **Pursue the Recipient of the Debtor’s Property**
- **Pursue the Secured Party who may have been paid from the transfer proceeds**

# **UCC ARTICLE 9 – SECURITY INTERESTS**

- **Securing the payment of a debt by pledging personal property owned by the debtor is known as a secured transaction**
- **Imperative to business transactions to enable certain credit transactions to take place**

# **UCC ARTICLE 9 - EXCEPTIONS**

- **Mechanic's Liens and Other Statutory Liens**
- **Maritime Liens (Ships)**
- **Aircraft and Motor Vehicles Liens**
- **Wages – assignment of an individual's wages are excluded**
- **Insurance Contracts – transfer or assignment of an interest in an insurance policy general excluded**

# UCC ARTICLE 9 – IMPORTANT DEFINITIONS

## Authenticate

- To sign
- With present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process

## Collateral

- Is the property of the debtor which is pledged to secure a debt

## Debtor

- Is the party who owes payment or other performance of a secured obligation

# UCC ARTICLE 9 – IMPORTANT DEFINITIONS

- **“Registered organization”** means an organization organized solely under the law of a single State or the United States by the filing of a public organic record with, the issuance of a *public organic record* by, or the enactment of legislation by the State or the United States. The term includes a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust’s organic record be filed with the State.

# UCC ARTICLE 9 – IMPORTANT DEFINITIONS

- **“Public Organic Record”**
  - (A) a record consisting of the record initially filed with or issued by a State or the United States to form or organize an organization and any record filed with or issued by the State or the United States which amends or restates the initial record;
  - (B) an organic record of a business trust consisting of the record initially filed with a State and any record filed with the State which amends or restates the initial record, if a statute of the State governing business trusts requires that the record be filed with the State; or
  - (C) a record consisting of legislation enacted by the legislature of a State or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the State or United States which amends or restates the name of the organization.

# UCC ARTICLE 9 – IMPORTANT DEFINITIONS

- **Secured Party** – any creditor who has a security interest in the debtor’s collateral
- **Security Agreement** – the contract between the creditor and the debtor which creates the security interest
- **Security Interest** – is the interest in the collateral that secures the payment or performance of the obligation



# UCC ARTICLE 9 – TYPE OF COLLATERAL

## Categories of Collateral Include

- **Accounts and general intangibles**
- **Deposit accounts**
- **Goods, such as inventory and equipment**
- **Instruments**
- **Investment property, such as securities and brokerage accounts**
- **Chattel paper**

# UCC ARTICLE 9 – TYPE OF LIEN

## General or Floating/Blanket Lien

- **A lien can be created on property that a debtor currently owns and on property which a debtor does not yet own**
- **Therefore, the lien continually floats over the debtor's collateral**
- **A floating lien can also cover products and proceeds arising from the debtor's collateral**

# CREATION OF SECURITY INTERESTS

- **Creditor provided value to the debtor**
  - **Goods or services**
- **Debtor has rights in the Collateral and power to grant that Collateral to the Creditor**
- **Valid Security Agreement (contract) must be created and executed**

# ESSENTIAL COMPONENTS OF SECURITY AGREEMENT

- **Indebtedness must be referenced**
  - **Current and future indebtedness**
- **Collateral must be defined**
  - **“Blanket”**
  - **Specific collateral if a PMSI**
  - **“Now owned or hereafter acquired”**
  - **Products and/or Proceeds**

# ESSENTIAL COMPONENTS OF SECURITY AGREEMENT

- **Granting Clause**
  - **Specific language that grants a security interest to the creditor of the Collateral**
- **Debtor's warranties, covenants and agreements**
  - **Examples:**
    - **Events of Default**
    - **Acceleration clause**
    - **Insurance provisions**

# PERFECTION OF SECURITY INTEREST

- **Perfection by Possession**

- Occurs when secured party/creditor has exclusive possession and control of the Collateral

- **Perfection by Control**

- Occurs when secured party does not have physical possession but can exercise sufficient power over the collateral so as to control it

# PERFECTION BY FILING

- **Financing Statement**
  - **Is the form which is used to document the secured transaction with the appropriate filing officer – often referred to as a UCC-1 Form**
- **Electronic Filing – Intention of Article 9 revisions is that all financing statements are to be electronically filed**
- **Filing Officer**
  - **Generally Secretary of State is appropriate filing officer**
  - **Some states have specific agents designated for filing**
  - **Louisiana still requires filing with individual parishes**

# WHERE TO FILE THE FINANCING STATEMENT

- **Location –Where Financing Statement must be filed**
  - **Individual Debtor located at principal residence**
  - **Organization with one place of business located at its place of business**
  - **Organization with multiple places of business located at its chief executive office**
  - **Registered organization (i.e. Corp/LLC/LLP) located in state of organization**



# FILING AGAINST REGISTERED ORGANIZATION

- Registered organization (i.e. Corp/LLC/LLP) located in state of organization Name of Debtor
  - If the debtor is a registered organization (Corp, LLC, etc.) financing statement must provide name of the debtor as indicated on public record of debtor's jurisdiction or organization.
  - Trade name not needed
  - Trade name alone insufficient

# **NAME OF DEBTOR REQUISITES**

- **If the debtor is an individual**
  - **Sole proprietor**
  - **Personal guarantor who has granted you a lien on personal property**
- **Then FULL LEGAL NAME is required**
  - **E.g. – “Michael D. Larsen” NOT Mike D. Larsen**
    - **If Debtor has a driver’s license, name on most recent driver’s license should be used**
    - **Birth Certificate name may be used if that is what the Debtor currently uses**

# **COLLATERAL DESCRIPTION**

- **Collateral description on Financing Agreement is limited to what is granted on the Security Agreement**
- **All assets or all personal property acceptable**
  - **ONLY if description of collateral in the security agreement includes all categories of collateral or the security agreement otherwise authorizes it**
- **For Fixtures**
  - **Real estate description must be included**
  - **Name of record owner of real estate must be included if different than the debtor**
    - **Filings should take place as required for perfecting personal property interests as well as for perfecting real property liens**

# UCC ARTICLE 9 – TYPE OF LIEN

- **Purchase Money Security Interest**
  - **Covers only goods you sell or finance**
    - **Includes Products**
    - **Includes Proceeds**
- **Ability to become #1**
- **Notification to Prior secured parties essential**

# **UCC ARTICLE 9 – TYPE OF LIEN**

- **Purchase Money Security Interest**
  - **UCC search Mandatory**
  - **Need to know if prior secured parties have lien on same goods you will be selling**
  - **Notification to Prior Secured Parties**
    - **Mail**
    - **Facsimile Transmission**
    - **Electronic Transmission**

# UCC ARTICLE 9 – PMSI NOTIFICATION

- PLEASE TAKE NOTICE THAT [Name of Creditor] IS ABOUT TO ENTER INTO A PURCHASE MONEY SECURITY INTEREST WITH [Name of Customer] COVERING ALL GOODS OF CREDITOR [be specific] SOLD AND DELIVERED TO CUSTOMER, INCLUDING ALL PRODUCTS AND PROCEEDS THEREOF

# UCC ARTICLE 9 – PMSI REQUISITES

- **Necessary Steps**
  - **Timing of Notification**
  - **Prior Secured Party need not respond**
  - **Prepare paperwork**
  - **File UCC Financing Statement**
    - **Generally good for 5 years**
    - **Puerto Rico and Wyoming now 10 years**

# UCC ARTICLE 9 - CONSIGNMENTS

- **Consignments – covered by Article 2 & 9**
  - **goods delivered to a merchant for sale**
  - **Merchant engaged in selling goods of others**
  - **Aggregate value of goods \$1000 or more**
  - **Goods are not consumer goods**
  - **Transaction does not create a security interest**



# **CONSIGNMENTS REQUISITES**

- **Properly written consignment agreement**
- **UCC Search Mandatory**
- **Notification to Secured Creditors Mandatory**
- **UCC Financing Statement must be Filed**
- **Failure to perfect a Consignment Interest will have serious consequences**

# SECURITY AGREEMENTS

## COMMON DEFAULT PROVISIONS

- Failure to pay the principal or any installment of principal on the indebtedness when due and to then cure such failure after 30 days written notice thereof by Secured Party to Debtor..
- Failure by Debtor to comply with or perform any provision of this agreement, after notice and a 30 day cure period.
- False or misleading written material representations or warranties made or given by Debtor in connection with this agreement to Secured Party.
- Subjection of the collateral to levy of execution or other judicial process in an amount greater than \$25,000 which is not released or bonded around by Debtor within 60 days..

# SECURITY AGREEMENTS

## COMMON DEFAULT PROVISIONS

- Commencement of any insolvency proceeding by or against the Debtor or of any guarantor of or surety for the Debtor's obligations which is not dismissed or otherwise disposed of within 60 days of commencement.
- Any material reduction in the value of the collateral or any act of the Debtor which materially imperils the prospect of full performance or satisfaction of the Debtor's obligations herein based on tangible evidence, such as adverse credit reports or delinquent payments to Secured Party.
- Any sale of the collateral by the Debtor outside the ordinary course of business operations
- Failure of the Debtor to fully insure the collateral

# **NON-JUDICIAL REPOSSESSION OF COLLATERAL**

- Peaceful repossession of collateral is permitted by Article 9
- Not generally used
- Not often successful

# **JUDICIAL REPOSSESSION OF COLLATERAL**

- Foreclosure proceeding in court
- State court or federal court may be used if necessary jurisdiction exists
- Summons & Complaint or Petition begins the process

# **DISPOSITION OF COLLATERAL AFTER REPOSSESSION**

- Property may be sold, leased, licensed or otherwise disposed of by public or private disposition
- Advance Notice of Disposition must be given to debtor, and guarantors or other secondary obligors
  - Except for perishable items
- Sale or other disposition must be commercially reasonable
- Secured Party may purchase collateral at public sale

# **STRICT FORECLOSURE**

- Secured party accepts collateral in full satisfaction of debt owed
- Notice must be provided to the Debtor and all secured parties and other lienholders with a junior interest in the collateral
  - Noticed parties have 20 days to act

# PROCEEDS FROM DISPOSITION OF COLLATERAL

- Applied to
  - expenses, including attorneys' fees
  - Payment of secured party's claim
  - Payment to other junior lien creditors
- Secured Creditor must account to the debtor for the distribution of the proceeds



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