

Secured Transactions

Outline

I. General UCC Principles

A. Rules of Construction and Application (UCC § 1-101 et seq.)

- The **UCC governs the sale of goods**, displacing common law rules where there is a conflict. Goods are defined as movable items, excluding intangibles, money, legal claims, services, and real property.
- In **hybrid contracts** involving both goods and services, the **predominant purpose test** determines whether the UCC or common law governs.
- UCC provisions often contain **special rules for merchants**, defined as those with special knowledge or skill regarding the goods or practices involved. A person can be a merchant even if they only have knowledge of the goods or the practices, not necessarily both.

B. General Definitions and Principles of Interpretation (UCC § 1-201 et seq.)

- **"Agreement"**: Under the UCC, the terms of an agreement include express terms, course of performance, course of dealing, and trade usage.
- **Course of Dealing**: A sequence of conduct concerning previous transactions between parties that establishes a common basis for interpreting their expressions and conduct. Course of dealing is admissible to explain or supplement a final written agreement, even if it is complete and exclusive.
- **Trade Usage**: Any practice or method of dealing observed so regularly in a place or trade that it justifies an expectation it will be observed in the transaction.

C. General Rules (UCC § 1-301 et seq.)

- **Good Faith**: Every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement. For merchants, good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."
- **Modification**: UCC Article 2 states that good faith contract modifications do not require consideration.

II. Applicability and Definitions (UCC § 9-101 et seq.)

A. Subject Matter of Article 9 (UCC § 9-109)

- Article 9 governs transactions intended to create a **security interest** in **personal property** or **fixtures**, regardless of the transaction's form. It also covers certain non-security interests, including consignments exceeding \$1,000, and sales of accounts, promissory notes, healthcare receivables, and commercial tort claims. Security interests in fixtures arise when goods become so related to real estate that an interest arises under real property law.
- Article 9 governs the **creation, perfection, and enforcement of security interests**, as well as priority disputes. A **consignment** is when a consignee sells property for a consignor.

B. Perfection of Security Interests in Multiple State Transactions (UCC § 9-301)

- **Perfection** puts the world on notice of the security interest. The location of the **debtor** generally dictates where to file for perfection. Filing a financing statement is generally how a security interest is perfected. Perfection makes secured parties' rights fully enforceable.

C. Excluded Transactions (UCC § 9-109)

- Article 9 excludes landlord's liens, statutory liens, and wage assignments.

D. Definitions (UCC §§ 9-102 through 9-107)

- **Account**: Any right to payment for goods sold or leased or for services rendered. Upon default, the secured party can collect from the **account debtor**.
- **Purchase Money Security Interest (PMSI)**: A security interest held by the seller to secure all or part of the purchase price, or by a lender who gives value to the debtor to acquire the collateral. A **PMSI** in consumer goods is perfected upon attachment.
- **Control** refers to having the right to sell or cash in an asset.

E. Classification of Goods (UCC § 9-102)

- **Goods**: All things movable when a security interest attaches.
- **Consumer Goods**: Used primarily for personal, family, or household purposes.
- **Inventory**: Goods held for sale or lease. The **classification of goods** depends on 1) the debtor's intent at the time of purchase and 2) the actual use of the goods, with some disagreement on which should govern.

F. Sufficiency of Description (UCC § 9-108)

- A security agreement must **reasonably identify** the **collateral**. Description by category is sufficient (e.g., "equipment"), but not super-generic descriptions like "all assets."

G. Security Interests Arising Under Article 2 (UCC § 9-110)

H. Priority of Consignments (UCC §§ 9-103, 9-324)

- The **consignee** is treated as having the **consignor's** rights and title to the consigned goods to protect the consignee's creditors. The consignor retains title to the consigned goods.

III. Validity of Security Agreements and Rights of Parties (UCC § 9-201 et seq.)

A. Title to Collateral Immaterial (UCC § 9-202)

- A security interest is enforceable regardless of whether the secured party or the debtor has title to the collateral.

B. Enforceability of a Security Interest (UCC § 9-203)

- A security interest attaches when it becomes enforceable.
- **Attachment** requires:
 - A valid **security agreement**: The debtor must authenticate (sign) a security agreement that describes the collateral.
 - **Possession or control** of collateral by the secured party can substitute for authentication in certain situations.
 - The **collateral description** must reasonably identify the property. Specific listing or UCC type is sufficient, but super-generic descriptions like "all assets" are not.
 - **The debtor has rights in the collateral**: The debtor must have more than mere possession; they must have a legal interest in the collateral.
 - **Value has been given by the secured party**: This can be consideration, extending credit, accepting delivery, or satisfying a pre-existing claim.
 - **Future advances** can be secured if explicitly included in the agreement.

C. After-Acquired Property and Future Advances (UCC § 9-204)

- A security interest can cover **after-acquired property** if the agreement explicitly states so.
- **Exception**: An after-acquired property clause is not effective for consumer goods unless acquired within 10 days of the secured party giving value or for commercial tort claims.

D. Use or Disposition of Collateral by Debtor (UCC § 9-205)

- A security agreement is not invalid just because the debtor can use or dispose of the collateral.

E. Collateral in Secured Party's Possession (UCC §§ 9-207, 9-208)

- A secured party in possession of the collateral must use **reasonable care** to preserve it.

- The secured party can charge the debtor for **reasonable expenses** incurred in caring for the collateral.
- The **risk of loss or damage** to the collateral remains with the debtor, even when the secured party possesses it.

F. Request for Accounting (UCC § 9-210)

- The debtor can request an **accounting** from the secured party, which must include information about the debt and the collateral.
- The secured party must respond within **14 days** of receiving the request.
- The debtor is entitled to **one free accounting every six months**.

IV. Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority (UCC § 9-301 et seq.)

A. Priority over Unperfected Security Interests (UCC § 9-317)

- A perfected security interest has priority over an unperfected security interest.
- A **lien creditor** generally has priority over an unperfected security interest.

B. Requirement of Filing and Steps for Perfection (UCC §§ 9-308 through 9-316, 9-501 et seq.)

- **Perfection** generally requires **filing a financing statement** in the appropriate jurisdiction.
 - The financing statement must contain the **debtor's name**, the **secured party's name**, a description of the **collateral**, and the **filing fee**.
 - The debtor's signature is **not required**, but the filing must be authorized by the debtor.
- **Perfection occurs** when both **attachment** and the required **perfection steps** (e.g., filing) have been completed.
- **Assignment of Security Interest (UCC §§ 9-514, 9-519)**
 - A secured party can **assign its security interest** to another party.
 - The assignee steps into the shoes of the assignor and takes the assigned interest subject to all defenses the debtor could assert against the original secured party.

C. Protection of Buyers of Goods and Chattel Paper (UCC §§ 9-320, 9-330)

- Certain buyers take the collateral **free of a security interest**, even if it is perfected. These include:
 - **Buyers in the ordinary course of business:** A person who buys goods in good faith, without knowledge that the sale violates a security interest, and from a seller in the business of selling goods of that kind.
 - **Buyers of consumer goods from other consumers:** A person who buys consumer goods for value, without knowledge of the security interest, primarily

for personal use, and before a financing statement covering the goods is filed.

- **Protection of Holders and Purchasers of Negotiable Instruments (UCC § 9-331)**

- Holders in due course and purchasers of negotiable instruments generally take the instrument free of any security interest. Information on negotiable instruments is not included in the sources.

D. Priority of Liens Arising by Law (UCC § 9-333)

- **Liens arising by operation of law** (e.g., statutory liens) may have priority over security interests, even perfected ones. The specific rules depend on the type of lien and the applicable state law.

E. Alienability of Debtor's Rights (UCC § 9-401)

- Generally, a debtor can transfer its rights in the collateral, subject to the existing security interest.

F. Priority among Conflicting Security Interests (UCC §§ 9-322 through 9-329)

- **General Rule:** The first to file or perfect has priority. This applies even if the first to file perfects later.
 - **Example:** Bank A files a financing statement on January 1st but doesn't perfect until January 15th. Bank B files and perfects on January 6th. Bank A has priority because it filed first.
- **Exceptions:**
 - **PMSI in inventory:** A PMSI in inventory has priority over a conflicting security interest if it is perfected when the debtor receives possession and notice is given to prior secured parties.
 - **PMSI in non-inventory:** A PMSI in collateral other than inventory has priority over a conflicting security interest if it is perfected when the debtor receives possession or within 20 days after.
- **Control over Collateral:** A secured party with control over the collateral (e.g., a bank holding a deposit account) has priority over a secured party who only filed or perfected by another method.

G. Fixtures (UCC § 9-334)

- **Fixtures** are goods so attached to real estate that they become part of the real property.
- **Perfection:** A security interest in fixtures can be perfected by filing under Article 9 or by recording a fixture filing under real estate law.
- **Priority:** A security interest in fixtures is generally subordinate to a conflicting interest in the real property (e.g., a mortgage).
 - **Exceptions:**

- **PMSI in fixtures:** A PMSI in fixtures generally prevails over prior real estate interests if perfected within 20 days of the goods becoming fixtures.
- **Construction mortgages:** A construction mortgage generally has priority over a fixture security interest that is perfected after the goods become fixtures but before construction is complete.

H. Accessions and Commingling (UCC §§ 9-335, 9-336)

- **Accession:** Goods physically united with other goods, but retaining a separate identity (e.g., a new engine installed in a car).
- **Commingled goods:** Goods that lose their separate identity when mixed with other goods (e.g., grain mixed in a silo).
- **Priority:** Generally, a security interest in an accession or commingled goods is subject to any existing perfected security interest in the whole. Special rules apply to determine priority among multiple security interests in accessions.

I. Subordination (UCC § 9-339)

- A secured party can agree to **subordinate its priority** to another secured party.

J. Defenses against Assignee; Modification of Contract (UCC §§ 9-404 through 9-406)

- An assignee of a security interest takes the interest **subject to all defenses** the debtor could raise against the assignor.
- A **modification** of the underlying contract between the debtor and the original secured party is effective against the assignee.

K. Termination Statement (UCC § 9-513); Release of Collateral (UCC § 9-512)

- Upon satisfaction of the debt, the secured party must file a **termination statement** to remove the financing statement from the public record.
- A secured party can **release its security interest** in all or part of the collateral.

V. Default (UCC § 9-601 et seq.)

A. Rights and Remedies on Default (UCC §§ 9-601 through 9-606)

- Upon the debtor's default, the secured party can:
 - **Seek possession of the collateral** and sell it (**disposition**) or retain it (**strict foreclosure**).
 - **Sue for a judgment** on the underlying debt.
- These remedies are **cumulative**, meaning the secured party can pursue any or all of them.

- **Collection Rights (UCC § 9-607):** The secured party can collect directly from the account debtor upon the debtor's default.
- **Right to Take Possession and Dispose of Collateral (UCC §§ 9-608 through 9-624)**
 - The secured party can **repossess the collateral** without judicial process if it can be done without a **breach of the peace**.
 - The secured party must provide **reasonable notice** to the debtor and other interested parties before disposing of the collateral.
 - The notice must state the time and place of any public sale and must be given in time for the parties to protect their interests.
 - The collateral can be disposed of by **public or private sale**, but the sale must be **commercially reasonable**.
 - **Strict foreclosure:** The secured party can purchase the collateral at a public sale or, in limited circumstances, by private sale.
 - Strict foreclosure requires the debtor's consent, either explicitly given after default or implied by failing to object to the secured party's proposal.
 - **Right of Redemption (UCC § 9-623):** The debtor can redeem the collateral before the sale by paying the full debt plus reasonable expenses.
 - The right of redemption cannot be waived before default.

B. Debtor's Rights (UCC §§ 9-625 through 9-628)

- The debtor has the right to **receive notice** of the disposition of the collateral.
- The debtor can **redeem** the collateral before the sale.
- The debtor can **sue the secured party** for damages if the secured party fails to comply with Article 9's requirements.
 - The debtor may be entitled to **statutory damages** or **actual damages** for the secured party's non-compliance.
 - A court may order the secured party to **dispose of the collateral** or **refrain from disposing of it** if the secured party is not complying with Article 9.

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