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Witkin Summary of California Law, Tenth Edition
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CHAPTER VII - Secured Transactions in Personal Property

Witkin Summary of California Law
 I. METHODS USED BEFORE UNIFORM COMMERCIAL CODE
 A. In General.

4 Witkin Sum. Cal. Law STPP § 1

[§ 1] In General.

Before the Uniform Commercial Code, the following were important methods by which the title to or a lien on personal property could become security for the payment of money or the performance of some other act:

- (1) *Pledge*. (See *infra*, §2 et seq.)
- (2) *Trust receipt*. (See *infra*, §10 et seq.)
- (3) *Chattel mortgage*. (See *infra*, §13 et seq.)
- (4) *Conditional sale*, between seller and buyer. (See *infra*, §17.)
- (5) *Inventory lien*. (See *infra*, §18.) (See *8 U.C.L.A. L. Rev. 813* [California devices before adoption of Uniform Commercial Code].)
- (6) *Possessory lien*. (See *13 Summary* (10th), *Personal Property*, §217 et seq.)
- (7) *Assignment of accounts receivable*. (See *1 Summary* (10th), *Contracts*, §739.)

The California statutes dealing with these transactions were repealed on the adoption of the Code, which eliminated the formal distinctions between the several types, and applied the advanced principles and practices of the former Trust Receipts Act to other transactions. (See Comment 1 to U.C.C. 9101; *infra*, §19 et seq.; for general discussion of Code's adoption, purposes, and policies, see *4 Summary* (10th), *Sales*, §6 et seq.)

Nevertheless, a brief review of the background of statutory and case law dealing with the superseded forms is desirable. The combination of old and new law in the Code will be better understood if significant parts of the old law are restated.

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Witkin Summary of California Law
 I. METHODS USED BEFORE UNIFORM COMMERCIAL CODE

B. Pledge.

1. Nature of Pledge.

4 Witkin Sum. Cal. Law STPP § 2

[§ 2] Nature of Pledge.

A pledge is a form of bailment; in brief, a bailment for security. (See *Rest., Security §1.*) Before adoption of the Uniform Commercial Code, which became effective in 1965 (see *4 Summary* (10th), *Sales*, §6 et seq.), pledges were governed in California by former C.C. 2986 et seq., which defined the transaction as "a deposit of personal property by way of security for the performance of another act." (On traditional and colloquial uses of term, see *Greve v. Leger, Ltd.* (1966) *64 C.2d* 853, 857, *52 C.R. 9*, *415 P.2d* 824 [as used in liquor control law, pledge does not cover repurchase option for liquor license].)

Any personal property, including choses in action, negotiable or nonnegotiable, may be pledged. (*Rest., Security §1.*) The pledgor retains the legal title, notwithstanding an apparent transfer of title to the pledgee. (See *Sparks v. Caldwell* (1910) *157 C.* 401, *108 P.* 276; on limited importance of title under Code, see *infra*, §23.) The pledgee is estopped to deny that title, just as a bailee is estopped to deny a bailor's title (see *13 Summary* (10th), *Personal Property*, §157), unless a claim to the property has been made by a third party and the pledgee defends on that claim. (*Bumiller v. Bumiller* (1918) *179 C.* 119, 123, *175 P.* 897.) The increase and profits belong to the pledgor, although they are added to the pledged security and held by the pledgee. (See *McAulay v. Moody* (1900) *128 C.* 202, 208, *60 P.* 778; *Rest., Security §§3, 27.*)

The usual rule of bailments applies, that either the pledgor or the pledgee may sue a third person for damage to or conversion of the property. But the pledgor's rights are subject to two limitations. (1) The pledgor can only recover for damage to his or her interest. (2) The pledgor cannot recover at all if the pledgee has already obtained a judgment or settlement for the full amount of the injury. (See *Rest., Security §38*; *Watson v. Stockton Morris Plan Co.* (1939) *34 C.A.2d* 393, 400, *93 P.2d* 855 [action by pledgee]; *13 Summary* (10th), *Personal Property*, §158.)

The pledgor's creditors could formerly reach the pledgor's interest by garnishment proceedings. (*Raffo v. Foltz* (1930) *106 C.A.* 51, 57, *288 P.* 884; see *6 Cal. Proc.* (4th), *Provisional Remedies*, §160; on new attachment law covering garnishment, see *6 Cal. Proc.* (4th), *Provisional Remedies*, §52 et seq.)

A pledge differs from a chattel mortgage in that it requires a change of possession instead of writing and recordation. (See *Ruggles v. Cannedy* (1899) *127 C.* 290, 295, 296, *53 P.* 911, *59 P.* 827.) But persons in the business of lending money on the security of pledged property customarily used a pledge agreement to state the terms of the pledge.

(See *Wade v. Markwell & Co. (1953) 118 C.A.2d 410, 416, 258 P.2d 497.*)

The pledgee's rights under a "drastic pledge agreement" may be lost by waiver or estoppel. Thus, in *Wade v. Markwell & Co., supra*, the contract gave the right to sell without notice, but the right was waived when the pledgor called with reference to redemption and the pledgee failed to inform her of the pending sale. "The pledgee doubtless has the right to exact strict performance of the contract according to its terms, and, upon default in the payment of the debt at the time stipulated, he may, under a contract like this, dispose of the pledge. But if he waives the right to exact strict performance and gives time and indulgence to the debtor, he cannot recall this waiver at his own option, without notice to the pledgor, to the end that the latter may have an opportunity of protecting the pledge. The good faith which the law exacts from a person dealing with trust property will not permit the pledgee, after having once waived the forfeiture or right to dispose of the pledge upon default of payment at the prescribed time, to suddenly stop short and insist upon the forfeiture for the nonpayment of the debt when the other party is unprepared to redeem. Strict performance in such cases may be waived by any agreement, declaration or course of conduct on the part of the pledgee which leads the owner to believe that a forfeiture will not be insisted upon without an opportunity given him to redeem." (*118 C.A.2d 429.*) (On redemption of pawned property, see *infra*, §9.)

SUPPLEMENT: [This section is current through the latest supplement]

Reaching pledgor's interest by garnishment proceedings:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §159.

New attachment law covering garnishment:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §52 et seq.



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B. Pledge.

2. Delivery of Possession.

a. Necessity of Delivery.

4 Witkin Sum. Cal. Law STPP § 3

[§ 3] Necessity of Delivery.

A pledge is effected by delivery of possession. This is ordinarily essential, for the lien of the pledgee depends on possession, and no pledge is valid until the property is delivered to the pledgee or to a pledgeholder. (See *Rest., Security §14.*) Also, unless there is immediate change of possession, the pledge is void as against the pledgor's creditors. (C.C. 3440; *McCaffey Canning Co. v. Bank of America (1930) 109 C.A. 415, 435, 294 P. 45*, infra, §4; see 4 *Summary (10th), Sales*, §215 et seq.)

The delivery need not be to the pledgee. The parties may agree on any third person with whom to deposit the property, who, if he accepts it, is called a pledgeholder. (See *Stephan v. Lagerqvist (1921) 52 C.A. 519, 524, 199 P. 52* [pledgor's agent may be pledgeholder]; *Aero Properties v. Gottlieb (1962) 206 C.A.2d 711, 716, 24 C.R. 277.*)

The usual method of pledging tangible property is manual delivery of the goods, or the means of obtaining them. (See *Rest., Security §5.*) But if the goods are represented by a document of title, such as a warehouse receipt or bill of lading, delivery of the document is a sufficient symbolic or constructive delivery. (*Yokohama Specie Bank v. Trans-Oceanic Co. (1921) 54 C.A. 533, 535, 202 P. 346*; see *Rest., Security §2.*)

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B. Pledge.

2. Delivery of Possession.

b. Exceptions to Requirement.

4 Witkin Sum. Cal. Law STPP § 4

[§ 4] Exceptions to Requirement.

(1) *Pledgee or Third Person in Possession.* In some situations, a pledge is created without change of possession. Where the property is already in possession of the pledgee or some third person, the object of the pledge--the pledgor giving up possession--is accomplished, and no further transfer is required. (*Rest., Security §§7, 8.*) In the case of property in possession of a third person, e.g., a carrier or warehouseperson, the third person must be notified of the pledge. (*Rest., Security §8.*)

(2) *Bulky Goods.* Where the goods are too bulky for convenient removal, it is sufficient if they be identified, and the pledgee assumes some control over them, without actual change of location. (*DuBois v. Spinks* (1896) 114 C. 289, 294, 46 P. 95; *Rest., Security §6.*)

This relaxation of the possession requirement was the basis for judicial support of the practice of field warehousing or field storage warehousing. The owner of a processing plant, e.g., wishes to borrow money on the security of the owner's goods. The quantity and bulk make delivery to a warehouse impracticable, and delivery would also make processing and sale impossible. To permit the owner to have free access to and easy release of the goods, and at the same time protect the creditor, the owner (pledgor) leases part of the plant to a warehouseperson (pledgeholder) for a nominal rent. That part is then treated as a warehouse, warehouse receipts are issued, and withdrawals of goods are made in accordance with standard practice. (See *Rest., Security §11*, Comment d; *19 Cal. L. Rev.* 333 [description of field warehousing].)

In *McCaffey Canning Co. v. Bank of America* (1930) 109 C.A. 415, 294 P. 45, Ventura Canning Co., owing money to defendant bank, sublet its factory to Lawrence Warehouse Co. for \$ 1 per month. The Warehouse Co. had no sign on the outside of the building. The superintendent of the Canning Co. acted as sole representative of the Warehouse Co. The Canning Co. packed its product, and the cases were stacked on one side of the shop marked with cards of the Warehouse Co., "Warehoused to Bank of America." Warehouse receipts were issued to defendant bank, which claimed that it held a valid pledge. Plaintiff was an attaching creditor of the Canning Co. *Held*, under these facts, a question for the jury was presented as to whether there was the necessary segregation and open, unequivocal change of possession, such as to indicate to businessmen of ordinary prudence the rights of the pledgee. The warehouseman must take the same exclusive possession as an ordinary pledgee. Here the lack of outward manifestations of possession, and the

common employee of the pledgor and warehouseman, were circumstances tending to show invalidity. (109 C.A. 435, 436.) (See *Rest., Security §11*, Comment d.)

(3) *Other Situations.* Certain transactions are regarded as pledges although no act of transfer of possession occurs; e.g., purchase of stock by a broker on margin (*Griffin v. Payne (1933) 133 C.A. 363, 371, 24 P.2d 370*; *Rest., Security §12*), and the transmission of a bill of lading or other document of title attached to a draft, the document being deemed pledged as security for the acceptance or payment of the draft (*Rest., Security §13*).

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 B. Pledge.
 3. Termination of Pledge.

4 Witkin Sum. Cal. Law STPP § 5

[§ 5] Termination of Pledge.

(1) *Performance or Tender*. The normal manner of terminating the pledge is performance (payment of the debt) or tender of performance by the pledgor. A proper unaccepted tender will likewise discharge the lien, although it does not satisfy the underlying obligation itself. (*Latta v. Tutton* (1898) 122 C. 279, 283, 54 P. 844; see 1 *Summary* (10th), *Contracts*, §769 et seq.; *Rest., Security* §37; 55 *Harv. L. Rev.* 713 [contractual relation between pledgor and pledgee].)

(2) *Wrongful Acts of Pledgee*. Various improper acts of the pledgee may also terminate the lien; e.g., assignment of the pledge in violation of a condition in the agreement (*Rest., Security* §29(4), *infra*, §7), or assignment of the debt without the property (*Rest., Security* §29(2), *infra*, §7). (On conversion by pledgee, see *infra*, §6.)

(3) *Relinquishment of Possession*. The pledgee's lien depends on possession of the property. If the pledgee voluntarily gives up complete and unconditional possession to the pledgor, the lien is lost. (*Rest., Security* §11(1).) But the pledgee may deliver the property to the pledgor for some limited or special purpose, e.g., to collect an instrument or to sell goods for the benefit of the pledgee. In those cases, the pledgor takes the property in a new character, as agent or special bailee; the relinquishment of possession is temporary and conditional; and the pledgee is protected against other creditors of the pledgor, although not against bona fide purchasers without notice. (See *Rest., Security* §11(2); *Palmtag v. Doutrick* (1881) 59 C. 154, 159; *National Bank of New Zealand v. Finn* (1927) 81 C.A. 317, 331, 253 P. 757.)

(4) *Where Pledgor Is Surety*. Where the owner of property pledges it for accommodation, to secure another's debt, and the pledgee knows this, the pledgor is a surety, entitled to invoke suretyship defenses. Hence, an extension or release given to the principal debtor without consent of the pledgor will terminate the pledge. (See *Bridge v. Connecticut Mut. Life Ins. Co.* (1914) 167 C. 774, 782, 141 P. 375; *Rest., Security* §36.)

In *Pearl v. General Motors Acceptance Corp.* (1993) 13 C.A.4th 1023, 16 C.R.2d 805, a motor vehicle dealership obtained a revolving line of credit from defendant to finance the dealership's purchases of vehicles. Plaintiff, a shareholder in the dealership, executed a continuing guaranty to secure the line of credit, and pledged shares of stock. The pledge agreement secured all present and future obligations of the dealership to defendant. When plaintiff later learned that the dealership was experiencing financial difficulties, he delivered to defendant a letter intended as a notice of termination of all documents plaintiff had signed, including the pledge agreement and the continuing guaranty. Defendant acknowledged plaintiff's termination of the guaranty as to future advances, but told plaintiff that the pledge

agreement continued in effect. Plaintiff sought a declaratory judgment that the letter terminated the pledge agreement, but the trial judge granted summary judgment for defendant. *Held*, reversed; the termination letter effectively revoked plaintiff's responsibility for advances made to the dealership after defendant received the letter.

(a) *C.C. 2815 applies to pledge agreement.* C.C. 2815 provides that a continuing guaranty may be revoked at any time by the guarantor, with respect to future transactions, unless there is continuing consideration as to those future transactions which the guarantor does not renounce. C.C. 2787 defines a guarantor as one who promises to answer for the debt of another, or who hypothecates property as security for that debt. Under the agreement here, plaintiff pledged his stock as security for the dealership's debts. Thus, plaintiff qualified as a guarantor, and the pledge agreement, which secured the line of credit, was a continuing guaranty under C.C. 2815. Accordingly, in the absence of a waiver, C.C. 2815 permitted plaintiff to revoke the pledge agreement at any time as to future extensions of credit. (*13 C.A.4th 1028.*)

(b) *Rights under C.C. 2815 may be waived.* Whether rights under C.C. 2815 may be waived is an issue of first impression. The statute allows a guarantor to effectively limit his potential losses to those advances made up to the time of revocation. This right, although an important one for a guarantor to possess, may be waived. "[P]arties should generally be free to contract with each other upon such terms as they agree. Thus, if two contracting parties desire to waive the provisions of section 2815, they generally should be free to do so. If a guarantor desires to retain his section 2815 right to revoke a continuing guaranty at any time, he can do so by refusing to execute any document purporting to waive such right. On the other hand, if the guarantor knowingly waives such right as being relatively unimportant to him or her, such waiver should not be prohibited by an overprotective court interpretation of section 2815 which could hinder a needy borrower's access to credit." (*13 C.A.4th 1030.*)

(c) *Pledge agreement did not contain waiver of plaintiff's rights.* Any waiver of the rights granted by C.C. 2815 must be clear, so that a guarantor would know that he has no right to revoke the guaranty as to future advances and thus, that he may have no control over his ultimate responsibility for the debtor's obligations. Here, the pledge agreement neither specifically referred to C.C. 2815 nor prohibited plaintiff from revoking the continuing security interest at any time as to future advances. A clause stating that the agreement was to remain in full force and effect until all obligations owing to defendant were satisfied did not implicitly effect a waiver of C.C. 2815 rights. "It is unclear whether this provision implicitly precludes other means of termination or revocation of the agreement, such as pursuant to section 2815. It is possible this provision could mean the pledge remains effective as to all advances made to [the dealership] prior to any termination by [plaintiff] under section 2815 or, if none, upon full satisfaction of [the dealership's] obligations. Thus, a section 2815 revocation would not technically 'terminate' the entire pledge agreement, since it would continue in full force and effect as to all advances made to [the dealership] before such revocation." (*13 C.A.4th 1032.*)

(d) *Uniform Commercial Code does not preclude application of C.C. 2815.* The pledge agreement here, creating a security interest in personal property (plaintiff's stock), is subject to U.C.C. 9101 et seq. However, under U.C.C. 1103, all supplemental bodies of law continue to apply, except insofar as they are explicitly displaced by the Code, and no Code provision explicitly displaces C.C. 2815. (*13 C.A.4th 1033.*)

(5) *Statute of Limitations.* The general rule is that the running of the statute of limitations on the debt does not terminate the pledge, for it merely bars an action on the obligation without affecting the property right of the pledgee. (See *Rest., Security* §47.) Hence, while the pledgee cannot bring an action to enforce the lien, the pledgor cannot take affirmative action to recover the property unless the pledgor pays the debt. (*Puckhaber v. Henry* (1907) 152 C. 419, 422, 423, 93 P. 114; *Anglo-Calif. Trust Co. v. Holbrook* (1933) 218 C. 531, 534, 24 P.2d 169; *Mitchell v. Automobile Owners Indem. Underwriters* (1941) 19 C.2d 1, 4, 118 P.2d 815 ["although the pledge lien is extinguished and the affirmative action of foreclosure thus lost, the pledgee nevertheless has the negative right to retain the pledged security until the principal obligation has been satisfied"]; *Woodruff v. Benbow* (1931) 118 C.A. 318, 5 P.2d 73.)

(6) *Bankruptcy.* The pledgor's discharge in bankruptcy only bars the debt; it does not affect the pledgee's lien. (See *Rest., Security* §47.)

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B. Pledge.

4. Duties and Liabilities of Pledgee.

4 Witkin Sum. Cal. Law STPP § 6

[§ 6] Duties and Liabilities of Pledgee.

(1) *Reasonable Care and Protection of Security.* The pledgee, as a bailee for hire, has a duty to exercise ordinary care to preserve and protect the property, unless it is, by agreement, in the possession of a third person or the pledgor. For violation of this duty, the pledgee is liable in damages to the pledgor. (*Rest., Security §17*; see *Rest., Security §§19, 20* [neither negligence nor wilful harm terminates pledge unless it destroys or substantially alters the property]; *Wade v. Markwell & Co. (1953) 118 C.A.2d 410, 258 P.2d 497*, supra, §2 [duty to seek fair price in pledge sale].)

In addition to this general duty of ordinary protection, a special affirmative duty is imposed on the pledgee of a chose in action. Just as tangible property may deteriorate for lack of physical care, so a chose in action may be lost if the rights under it are not asserted in time. Hence, the pledgee should exercise reasonable diligence to enforce or collect instruments or claims, and must sue on them where this is necessary to prevent the running of the statute of limitations. (*Mitchell v. Automobile Owners Indem. Underwriters (1941) 19 C.2d 1, 6, 118 P.2d 815*; see *45 A.L.R.3d 248* [duty of pledgee of commercial paper to enforce or collect it].)

(2) *Conversion or Breach of Trust by Pledgee.* The pledgee is guilty of conversion if the pledgee wrongfully sells or otherwise transfers the property without authority (*Rest., Security §23*), if the pledgee makes an unauthorized use of the property (*Rest., Security §22*), or if the pledgee merely fails to return the property when the loan is repaid. The pledgor is entitled to the return of the property on performance or proper tender of performance of the obligation. After tender and demand for the property's return, the refusal of the pledgee is a conversion. (*Loughborough v. McNevin (1887) 74 C. 250, 255, 14 P. 369, 15 P. 773.*)

Normally, the pledgee must return the identical property. An exception is made in the case of fungible goods. The fungible goods rule is applied to shares of stock, e.g., where purchased by a broker for a customer and held in pledge by the broker for the payment of the price. The pledgee may dispose of the particular certificates and return others of similar character, provided that at all times the pledgee possesses, ready for delivery, sufficient certificates of the same kind to satisfy the claims of all of the pledgors. (See *Horn v. Klatt (1944) 65 C.A.2d 510, 521, 151 P.2d 149.*) In *Henning v. Akin (1928) 91 C.A. 246, 255, 256, 266 P. 981*, the pledgee sold the certificates, and then, at the time of performance, bought others solely for the purpose of returning possession to the pledgor. *Held*, the pledgor was entitled to an accounting to recover the profits of the sale. (See *People v. Fleming (1934) 220 C. 601, 607, 32 P.2d 593*; *Rest., Security §12.*)

Where pledged property is destroyed and insurance money is received, the insurance proceeds take the place of the property and are subject to the same trust. The pledgee may apply them to discharge the obligation secured, but failure to return any surplus to the pledgor is a breach of trust. (*Ferro v. Citizens Nat. Trust & Savings Bank* (1955) 44 C.2d 401, 408, 282 P.2d 849.)

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 5. Rights of Pledgee.

4 Witkin Sum. Cal. Law STPP § 7

[§ 7] Rights of Pledgee.

(1) *Possession and Profits.* The pledgee is entitled to possession until the debt is paid, and may enforce this right against the pledgor. (See *Rest., Security §39.*) The pledgee is also entitled to reimbursement for expenses incurred in the care and protection of the property or the pledgee's security interest in the property. (*Rest., Security §§25, 26.*)

The increase of the property is pledged with it. The pledgee, therefore, can collect stock dividends and add them to the security, although they are, of course, the property of the pledgor. (*McAulay v. Moody* (1900) 128 C. 202, 208, 60 P. 778; *Rest., Security §§3, 27.*) If changes in pledged securities are made, e.g., by a corporation changing financial structure, and an option to take one or more classes of new securities or cash is offered, the pledgor has the right to make the choice if the pledgor acts promptly. (*Rest., Security §21.*)

(2) *Assignment and Repledge.* The pledgee may repledge the property to the extent of the lien. If the pledgee attempts to repledge for a greater amount than the claim, the pledgee is guilty of conversion. (*Fiedler v. Allen* (1931) 117 C.A. 622, 626, 4 P.2d 292; *Rest., Security §23.*) (On mingling and repledging by stockbrokers, with permission of pledgor, see *Rest., Security §42 et seq.*)

If the pledgee assigns the claim alone, without actually transferring the security, the effect is nevertheless the same. The assignment of the claim carries with it the security, which is an incident of the claim. The assignee becomes entitled to the possession of the pledged property, and the pledgee holds it as agent or trustee for assignee. (*Ramboz v. Stansbury* (1910) 13 C.A. 649, 652, 653, 110 P. 472.) An attempted assignment of the claim and retention of the property terminates the pledge and permits the pledgor to recover the property, for the assignee has no interest in the property and the pledgee-assignor has no interest in the claim. (*Rest., Security §29(2).*)

The pledgee may also assign the claim and the security, unless the agreement forbids. (See *Rest., Security §29(4).*) The assignee takes the claim and the property in the same capacity as the original pledgee, and the pledgee is not liable to the pledgor for any breach of duty by the assignee. (*Revert v. Hesse* (1920) 184 C. 295, 300, 193 P. 943; see *Rest., Security §29 et seq.*) If the claim is a negotiable instrument and is negotiated to a holder in due course to whom the property is also delivered, the holder takes the note and pledged property free from any defenses of the pledgor. This is the doctrine of imparted negotiability. (See *Rest., Security §34*; 4 *Summary* (10th), *Security Transactions in Real Property*, §105.)

(3) *Collection of Collateral Security*. Where collateral securities (choses in action) are pledged, the pledgee has the right to take necessary legal action to collect the instruments when due, the money collected to be held in place of the securities. "[I]t is of paramount interest to the pledgor that the pledgee retain the right of collection under such circumstances. ... [U]nless he is able and willing to satisfy the outlawed debt, the pledgor may not compel the pledgee to relinquish the pledged collateral. Without the right of collection in the pledgee, no one would have a cause of action to enforce payment of the collateral when due, and the statute of limitations would ultimately run upon it." (*Mitchell v. Automobile Owners Indem. Underwriters (1941) 19 C.2d 1, 6, 118 P.2d 815.*)

In *Security-First Nat. Bank of Los Angeles v. Spring Street Properties (1937) 20 C.A.2d 618, 67 P.2d 720*, Realty Corp., defendant's predecessor, owner of the ground lease on hotel property, subleased the hotel and sold the furnishings to the sublessee, taking back a chattel mortgage on them as security. Then it issued bonds, and executed as security a trust indenture to plaintiff bank, pledging with the bank as trustee the ground lease, sublease and chattel mortgage. The operating sublessee defaulted and, against objection of the trustee bank, defendant Spring Street Properties (successor to Realty Corp.) cancelled the sublease and sold the furnishings on foreclosure. Defendant Federated Realty Co., a large stockholder of the other defendant, bought the property at the sale. *Held*, the sale was void. The pledge of the sublease and chattel mortgage to the trustee was a vital part of the security for the bonds, for the hotel could not be operated without furnishings. By that pledge, the pledgee received the right to exercise any remedies with respect to the pledged securities; hence the pledgee (trustee) and not the pledgor (defendant) was the proper party to take any action to enforce the pledged security. The objection of the pledgor defendant that this left it without any remedy was of no force, because this was the necessary effect of its pledge. (*20 C.A.2d 628, 629.*)

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 6. Remedies of Pledgee.

4 Witkin Sum. Cal. Law STPP § 8

[§ 8] Remedies of Pledgee.

(1) *Four Options*. On default of the pledgor, the pledgee has the option of three remedies: suit on the principal obligation, foreclosure sale, and pledge sale. (See *Rest., Security §48* [covering traditional remedies and recognizing special rights that may be given by agreement].) An additional remedy, suit on a secondary obligation, was the subject of conflicting decisions.

(2) *Suit on Principal Obligation*. Pursuant to the first remedy, the pledgee may disregard the security, sue the pledgor on the principal obligation without first surrendering or tendering the property, and obtain a personal judgment. (*Commercial Savings Bank of San Jose v. Hornberger* (1903) 140 C. 16, 73 P. 625 [by bringing suit within period of statute of limitations, pledgee may keep lien alive]; *Traders Bank of Los Angeles v. Wilcox* (1919) 42 C.A. 24, 31, 183 P. 256; see *Rest., Security §48*.) C.C.P. 726, requiring exhaustion of security before suit against the debtor, does not apply to a pledge. (*Jones v. Evans* (1907) 6 C.A. 88, 91, 92, 91 P. 532; see 4 *Summary* (10th), *Security Transactions in Real Property*, §125.)

The judgment does not terminate the pledge. The pledgee may retain the property until the judgment is satisfied, and, if the pledgee later desires to sell the security, the pledgee must give the usual notice to the pledgor. (*Baird v. Olsheski* (1931) 116 C.A. 109, 111, 2 P.2d 493.)

California holds, however, that if the pledgee in the action levies execution on the pledged property, the pledgee waives the pledge lien on it. (*Gault v. Wiens* (1916) 32 C.A. 1, 3, 161 P. 996.) The Security Restatement (§58) is contra, chiefly for the reason that, if a levy of attachment or execution terminated the pledge lien, and the pledgor became a bankrupt within 4 months, the attachment or execution lien could be avoided by the trustee in bankruptcy and the pledgee would then be without security.

(3) *Suit on Secondary Obligation*. Ordinary promissory notes may be pledged as collateral. Suppose the pledgor, as security for a debt, indorses or guarantees the note of a third party which the pledgor gives to the pledgee, and the third party (the maker) fails to pay it. Can the pledgee, during the pledge, sue the pledgor on the pledgor's indorsement or guaranty? The theoretical difficulty is that the pledgor retains legal title to the security. The transfer in pledge gives the pledgee, as agent of the pledgor, the right merely to enforce judgment on the note against the maker, and to apply the proceeds to the satisfaction of the debt. Therefore, the pledgee cannot sue. (*Sparks v. Caldwell* (1910) 157 C. 401, 403,

404, 108 P. 276.)

In *Cooke v. Mesmer* (1912) 164 C. 332, 340, 128 P. 917, the pledgee was allowed to sue the pledgor on his guaranty written on the note, on the ground that the guaranty was an independent contract. In *Stradley v. Tout* (1924) 65 C.A. 530, 533, 224 P. 469, the court followed *Sparks v. Caldwell* and denied the right to sue. However, *Anglo-Calif. Trust Co. v. Oakland Ry.* (1924) 193 C. 451, 463, 464, 225 P. 452, held that, if the transfer is made in trust, even though for purposes of pledge, the title actually passes to the trustee, and he may sue. (See 13 Cal. L. Rev. 170.)

(4) *Foreclosure*. The pledgee may bring an action of foreclosure and have the property sold at a judicial sale under the direction of the court, with a deficiency judgment where the property sells for less than the debt. (See *Rest., Security* §§48(d), 51.) There is no statutory right of redemption after a judicial sale of personal property. (C.C.P. 701.680(a); see 8 Cal. Proc. (4th), *Enforcement of Judgment*, §155.)

(5) *Pledge Sale*. This is the principal remedy. The pledgee may sell the pledged property at a public sale after notice, apply the proceeds to the satisfaction of the debt and expenses of the sale, and return any surplus to the pledgor. (See *Tracy v. Stock Assur. Bureau* (1933) 132 C.A. 573, 580, 23 P. 41; *Rest., Security* §48.) (On former C.C. 3006, prohibiting sale of private note, and restricting pledgee's remedy to collection or action against obligor, see *Traders Bank of Los Angeles v. Wilcox* (1919) 42 C.A. 24, 28, 183 P. 256; *Birkhofer v. Krumm* (1938) 27 C.A.2d 513, 521, 81 P.2d 609; *Salem Dev. Co. v. Ross* (1967) 251 C.A.2d 53, 58, 59 C.R. 548; on waiver of benefit of former C.C. 3006, see *Johnson v. Mortgage Guarantee Co.* (1931) 117 C.A. 416, 421, 4 P.2d 208.)

The pledgee must act in good faith and must seek to obtain the best price. Although inadequacy of price alone will not invalidate the sale, a price greatly disproportionate to the actual value, coupled with evidence of irregularities or unfairness, may justify the inference of a fraudulent purpose to acquire the pledgor's property. (See *Hudgens v. Chamberlain* (1911) 161 C. 710, 717, 120 P. 422; *English v. Culley* (1927) 85 C.A. 291, 297, 259 P. 355; *Wade v. Markwell & Co.* (1953) 118 C.A.2d 410, 428, 258 P.2d 497 [pawnbroker's private, perfunctory sale of mink coat worth far more than pledgor's obligation violated trust relationship]; *Rest., Security* §§49, 53; 37 A.L.R.2d 1381 [pledgee's purchase of subject of pledge]; on statutory provision for redemption of pawned property, see *infra*, §9.)

If the pledgee sells before default, or without notice, the purported sale is invalid, and according to the general rule the pledgor may set it aside or hold the pledgee for conversion. But the pledgee is still entitled to satisfaction of the obligation, and therefore the pledgor can only recover the property on payment of the debt, or the value of the property less the amount of the debt. (*Rest., Security* §§24, 50; *Cushing v. Building Assn. of the Soc. of the New or Practical Psychology* (1913) 165 C. 731, 134 P. 324 [pledgee sold wrongfully, and bought the property himself; pledge contract not affected at all, unless pledgor chose to recognize attempted sale as valid].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Foreclosure*.

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §164.



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B. Pledge.

7. Redemption of Pawned Property.

4 Witkin Sum. Cal. Law STPP § 9

[§ 9] Redemption of Pawned Property.

(1) *Written Contract Required.* Every loan made by a pawnbroker for which goods are received in pledge as security must be evidenced by a written contract, a copy of which must be furnished to the borrower. The loan contract must provide a 4-month loan period, must set forth the loan period and the date on which the loan is due and payable, and must clearly inform the borrower of the right to redeem the pledge during the loan period. (*Fin.C. 21201.*)

(2) *Notice.* Under *Fin.C. 21201*, the loan contract must contain the following notice, in at least 8-point boldface type and circumscribed by a box, immediately above the space for the borrower's signature:

"You may redeem the property you have pledged at any time until the close of business on ____ [fill in date four months from date loan begins]. To redeem, you must pay the amount of the loan and the applicable charges which have accrued through the date on which you redeem."

(3) *Period for Retaining Possession.* The pawnbroker must retain possession, for 4 months, of every article pledged. A borrower may redeem an article during this period, on payment of the amount of the loan and any applicable charges. If the borrower and the pawnbroker agree in writing to store the pawned property off premises, the pawnbroker, following a request for redemption of the loan, must return the pledged property on the next calendar day when both the pawnbroker's store and the storage facility are open, but not to exceed 2 business days. (*Fin.C. 21201.*)

(4) *Additional Grace Period.* If a pledged article is not redeemed during the 4-month loan period as provided, and the borrower and pawnbroker do not mutually agree in writing to extend the loan period, the pawnbroker must notify the borrower within 30 days after expiration of the loan period. If the pawnbroker fails to notify the borrower within 30 days after the expiration of the loan period, the pawnbroker must not charge interest from the day after the expiration of the 30-day period. The pawnbroker must notify the borrower at his or her last known address of the termination of the loan period, by a means that can be verified, that the right of redemption is extended, during posted business hours, for a period of 10 days from date of mailing of that notice. The 10-day notice must include a statement that: "If the tenth day falls on a day when the pawnshop is closed, the time period is extended to the next day that the pawnshop is open." (*Fin.C. 21201.*)

Sale of the property before title has vested in the pawnbroker is a misdemeanor. (*Fin.C. 21201.*)

(5) *Receipt on Redemption.* On redemption of a loan contract, a pawnbroker must provide the borrower with a receipt stating in detail all the fees, charges, and compensation the borrower paid the pawnbroker. (*Fin.C. 21204.*)

(6) *New Loan After Expiration of Original Period.* On the pledgor's request, the pawnbroker may consent to a new loan to take effect on or after the expiration of the original loan period. The pledgor must pay in cash or in another form acceptable to the pawnbroker all charges and interest due under the original loan, and the remaining unpaid balance must be debited to the new loan on which the same article or articles are pledged. The loan contract must disclose the amount of the original loan debited to the new loan. The loan must be processed as a new loan, and is subject to origination, storage, and other authorized fees, when applicable. (*Fin.C. 21201.5.*)

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C. Trust Receipt.
1. Nature and Distinctions.

4 Witkin Sum. Cal. Law STPP § 10

[§ 10] Nature and Distinctions.

(1) *Method of Financing Wholesale Sales.* The trust receipt is a three-party method of financing sales between wholesalers and retail dealers. The dealer seeks to buy goods and pay for them after resale. The "entruster" (a bank or finance company) arranges to pay the wholesaler, and has the dealer execute a trust receipt, which recites that title remains in the entruster, and that the dealer acts as agent or trustee in reselling the goods. The surplus over the loan (the amount paid to the wholesaler by the entruster) goes to the dealer. (See *Commercial Credit Co. v. Barney Motor Co. (1938) 10 C.2d 718, 720, 76 P.2d 1181*; *Klett v. Security Acceptance Co. (1952) 38 C.2d 770, 783, 242 P.2d 873*; *19 Cal. L. Rev. 257* [trust receipts].)

(2) *Distinctions.* Although it bears some resemblance to a pledge, chattel mortgage, and conditional sale, the trust receipt transaction is distinguishable from each of these other forms of security transaction.

(a) *Pledge.* The trust receipt transaction involves three parties (dealer, wholesaler and entruster). This, however, is not a fundamental difference because there may be three parties to a pledge (pledgor, pledgee, and pledgeholder). The important distinction is that transfer of possession to the pledgee-creditor is necessary for the validity of a pledge (*supra*, §3). In the trust receipt transaction, the entruster-creditor does not have possession of the goods.

(b) *Chattel mortgage.* The chattel mortgagee has only a lien. The entruster in a trust receipt transaction has been regarded as having title, although under the Uniform Trust Receipts Act, the entruster was said to have only a "security interest." The chattel mortgage must be promptly recorded. A statement of the trust receipt transaction need only be filed under a simple arrangement. Also, a trust receipt cannot be classified as a chattel mortgage for purposes of exemption from taxation. (*Commercial Discount Co. v. Los Angeles (1940) 16 C.2d 158, 162, 105 P.2d 115.*)

(c) *Conditional sale.* The conditional seller sells goods and retains title as security. (See *infra*, §17.) In the trust receipt transaction, the entruster, although retaining title as security, is not selling goods, but simply extending credit. It has been pointed out, also, that the term "trust receipt" is misleading, for it suggests that the dealer is trustee for the entruster, whereas there is in fact no trust in the strict sense, nor has the dealer the rights and duties of a strict trustee. (See *19 Cal. L. Rev. 257.*)

(3) *Uniform Trust Receipts Act.* This Act was approved in 1933, and enacted in California in 1935. (See former

C.C. 3012 et seq.; *Chichester v. Commercial Credit Co.* (1940) 37 C.A.2d 439, 442, 99 P.2d 1083; *C.I.T. Corp. v. Commercial Bank of Patterson* (1944) 64 C.A.2d 722, 727, 149 P.2d 439.) It was repealed on enactment of the Uniform Commercial Code in 1965.

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4 Witkin Sum. Cal. Law STPP § 11

[§ 11] Entruster and Trustee.

(1) *Written Trust Receipt for New Value.* The security interest was created under the Uniform Trust Receipts Act by either a prior written agreement or a trust receipt executed and delivered by the trustee (the dealer being financed) to the entruster (the lender bank or finance company). The entruster had to give "new value," as distinguished from "value" or ordinary consideration sufficient to support a simple contract. (See *Commercial Discount Co. v. Mehne (1940) 42 C.A.2d 220, 224, 108 P.2d 735.*)

(2) *Title First to Dealer.* Under the early law, a valid trust receipt relationship could not be created unless the lender bank took title to the goods from the original seller. If the dealer received title, and attempted to transfer it back to the bank, the transaction was void against creditors as a purported transfer of title to goods without change of possession. (*Arena v. Bank of Italy (1924) 194 C. 195, 210, 228 P. 441.*) The Act abolished this rule and permitted the creation of the security interest regardless of whether the entruster (lender bank) or the trustee (dealer) originally had the title. (See *Chichester v. Commercial Credit Co. (1940) 37 C.A.2d 439, 445, 99 P.2d 1083; Universal Credit Co. v. M.C. Gale (1940) 40 C.A.2d 796, 800, 105 P.2d 1003.*)

(3) *Filing Statement of Financing.* Instead of the total absence of a recording requirement, as in conditional sales, and the cumbersome requirements of chattel mortgages, the Act provided a simple system of filing to give constructive notice. But the particular trust receipt was not filed; the entruster (lender) simply filed a statement of the financing for the trustee of a certain type of goods or of a certain type of business, and third parties were thus warned of the entruster's interest.

(4) *Remedies of Entruster.* On default of the dealer, the entruster was entitled to possession of the goods or documents, which he held thereafter as a pledgee. He could then, on notice to the dealer, sell them at a public or private sale, holding the dealer liable for any deficiency.

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4 *Witkin Sum. Cal. Law STPP § 12*

[§ 12] Entruster and Third Parties.

(1) *Entruster and Creditors of Trustee.* The entruster who filed prevailed over the ordinary creditors of the trustee in the event of the latter's bankruptcy, receivership, assignment for benefit of creditors, etc. An exception was made in favor of the specific liens of processors, warehousemen, or shippers, who could rely on the dealer's possession.

(2) *Entruster and Bona Fide Purchaser.* "The Act proceeds on the theory that the entruster ... is entitled to protection only against honest insolvency of the trustee. Dishonest action of the trustee is a credit risk and bona fide purchasers are to be protected against the entruster who has taken that risk by entrusting." (Commissioners' Note to Uniform Trust Receipts Act.) Hence, unlike the conditional sale transaction (in which the secret reserved title of the seller prevailed over bona fide purchasers from the buyer), the "buyer in the ordinary course of trade" took free of the entruster's interest, irrespective of filing. (See *Commercial Discount Co. v. Mehne* (1940) 42 C.A.2d 220, 224, 108 P.2d 735; *Bank of America v. National Funding Corp.* (1941) 45 C.A.2d 320, 330, 114 P.2d 49.)

(3) *Entruster and Bona Fide Purchaser of Documents.* The bona fide purchaser of negotiable instruments or negotiable documents of title from the trustee was in the same position as a buyer in the ordinary course of trade. The bona fide purchaser took free of any claim of the entruster. Thus, in *Commercial Credit Co. v. Barney Motor Co.* (1938) 10 C.2d 718, 76 P.2d 1181, plaintiff entruster financed the purchase of cars for an automobile dealer, giving him authority to sell for cash. The dealer sold on conditional sale, and financed the sale by selling the contract to a bank, whose representative made no inquiry of the dealer as to any prior financing. *Held*, the bank was a bona fide purchaser for value, and the entruster, by permitting the dealer to assume the appearance of having authority to sell, was estopped to question the bank's title. (10 C.2d 721, 722.) This decision is questionable. An ordinary buyer of the car should be protected, but it would seem that the purchaser of the contract, with knowledge of the practice of "flooring cars" under trust receipt financing, should have made inquiry as to the existence of such financing. (See *Security-First Nat. Bank v. Taylor* (1954) 123 C.A.2d 380, 385, 266 P.2d 914 [approving *Commercial Credit*, but treating lender bank as if it were purchaser of goods rather than documents].)

The bank was again favored over the entruster in *Citizens Nat. Trust & Savings Bank v. Beverly Finance Co.* (1954) 127 C.A.2d Supp. 835, 273 P.2d 714. A used car dealer whose cars were obtained under trust receipts from defendant entruster made a purported conditional sale to his employee, the contract falsely reciting a downpayment not made, and the car remaining on the dealer's lot. The dealer assigned the conditional sales contract to plaintiff bank. *Held*, plaintiff

was entitled to recover the car or its value. Knowledge by the bank that defendant entruster had "floored" cars with the dealer did not put it on inquiry as to the title to the automobile, and plaintiff was a bona fide purchaser of instruments "in such form as are by common practice purchased and sold as if negotiable." (127 C.A.2d Supp. 840.)

(4) *Priorities Between Entrusters.* In *Peoples Finance & Thrift Co. of Visalia v. Bowman* (1943) 58 C.A.2d 729, 137 P.2d 729, the dealer financed a new car with defendant entruster, sold it, taking a used car in part payment, and financed the used car with plaintiff entruster. *Held*, plaintiff was entitled to the proceeds of the used car. Both entrusters were innocent parties, but defendant, by allowing the dealer to sell the new car, knowing that a used car would commonly be taken in trade, permitted him to deceive the plaintiff, and should bear the loss under C.C. 3543. (58 C.A.2d 735, 736.) The court observed, on the authority of *Commercial Credit Co. v. Barney Motor Co.*, *supra*, that plaintiff was not placed on inquiry by the mere fact that the dealer was financing his new cars elsewhere. (58 C.A.2d 737.)

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 1. Nature of Mortgage.

4 Witkin Sum. Cal. Law STPP § 13

[§ 13] Nature of Mortgage.

"A mortgage is a contract by which specific property ... is hypothecated for the performance of an act, without the necessity of a change of possession." (C.C. 2920(a); see 68A *Am.Jur.2d* (2003 ed.), *Secured Transactions* §25.) Although the act is usually payment of a debt, a mortgage may be given to secure performance of any contractual duty. (*Stub v. Belmont* (1942) 20 C.2d 208, 213, 124 P.2d 826.) An instrument that seeks to accomplish the objects of a chattel mortgage may be treated as one even if it is given a different designation. (See *Teater v. Good Hope Dev. Corp.* (1939) 14 C.2d 196, 209, 211, 93 P.2d 112 [contract for sale of land providing that, if purchaser defaulted, all unattached and movable tools, equipment and machinery should be deemed "security for the payment" of past due installments]; *Stewart v. Leasure* (1936) 12 C.A.2d 652, 657, 55 P.2d 917 [lease of gas station providing that fixtures should be treated as appurtenant to land or property of landlord until rent was paid].)

With certain exceptions (goods not capable of manual delivery, wearing apparel, merchants' stock in trade), a mortgage can be made on any kind of personal property, including growing crops. (See 71 *A.L.R.2d* 1416 [validity of chattel mortgage on stock of goods that mortgagor has right to sell, where mortgagee takes possession of goods before third person's rights attach].) Future advances can be covered.

The mortgagee obtains only a lien, notwithstanding an apparent transfer of the legal title; i.e., the transfer, if intended merely as security, is treated as a mortgage. (See *Alferitz v. Borgwardt* (1899) 126 C. 201, 207, 58 P. 460; *A. Paladini v. Durchman* (1932) 216 C. 212, 215, 13 P.2d 731; *Blodgett v. Rheinschild* (1922) 56 C.A. 728, 736, 206 P. 674; *Bonestell v. Western Auto. Finance Corp.* (1924) 69 C.A. 719, 723, 232 P. 734; *Mercantile Acceptance Corp. v. Pioneer Credit Indem. Co.* (1932) 124 C.A. 593, 597, 12 P.2d 988; *Hannin v. Fisher* (1935) 5 C.A.2d 673, 676, 677, 43 P.2d 815; 4 *Summary* (10th), *Security Transactions in Real Property*, §3.)

It is not essential that the mortgagor have title to the property. A limited or special interest, legal or equitable, may be mortgaged. Thus, an occupant of land who, under contract with the owner, is entitled to a specified share of the crops to be produced, may mortgage his interest in the crops. (*Merriman v. Martin* (1931) 113 C.A. 167, 174, 175, 298 P. 95.) Moreover, the buyer under a conditional sales contract has sufficient interest in the property to give a mortgage on it. (*Pacific States Savings & Loan Co. v. Strobeck* (1934) 139 C.A. 427, 432, 33 P.2d 1063.) (See *Callahan v. General Oil Well Supply Co.* (1933) 130 C.A. 32, 35, 36, 19 P.2d 508 [mortgagor had no title, but owner held estopped to deny it against purchaser after default, where owner allowed mortgagor to assert title in making loan for their joint benefit].)

If the lease allows a tenant to remove fixtures, the tenant may mortgage them, but the chattel mortgagee receives no greater rights than the tenant-mortgagor. Accordingly, the mortgagee's rights are lost by failure to remove the fixtures within a reasonable time after termination of the lease. (*United Pac. Ins. Co. v. Cann* (1954) 129 C.A.2d 272, 275, 276 P.2d 858; see 12 *Summary* (10th), *Real Property*, §685.)

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 2. Description of Property.

4 Witkin Sum. Cal. Law STPP § 14

[§ 14] Description of Property.

A mortgage must describe the property. The purpose of this requirement is to protect third parties, and a description is sufficient if it furnishes a reasonable basis for identification, even though it is not specific enough to fully identify the property by itself. (See *Metzler v. Foster Holding Co. (1936) 5 C.2d 278, 281, 54 P.2d 447*; *United Bank & Trust Co. of Calif. v. Powers (1928) 89 C.A. 690, 699, 265 P. 403*; *Pacific States Savings & Loan Co. v. Hoffman (1933) 134 C.A. 604, 606, 25 P.2d 1007*; *Security-First Nat. Bank v. Haden (1962) 211 C.A.2d 459, 463, 27 C.R. 282*, citing the text; *Merced Production Credit Assn. v. Bayer (1963) 222 C.A.2d 793, 797, 798, 35 C.R. 511*; *32 A.L.R.2d 929* [sufficiency of description of property, as against third persons, in chattel mortgage on farm equipment, machinery, and implements].)

Thus, a crop mortgage is valid where the real property is described or designated by its common name. But a crop mortgage that fails to identify particular real property is insufficient. In *Pace v. Threewit (1939) 31 C.A.2d 509, 88 P.2d 247*, a crop mortgage was executed to appellant covering crops on described land and also "upon any other land situated in said county and state and owned, planted or farmed during said crop years by the mortgagor." Plaintiff sued the mortgagor and attached a crop on undescribed land. Appellant claimed as crop mortgagee. *Held*, the mortgage was void as to that crop. The provision would leave the parties free to apply the mortgage to land that later might be picked by the mortgagor for his farming operations, thus requiring the third party to investigate every piece of land in the county with such a crop growing, and it would open the door to fraud. (*31 C.A.2d 514.*) (See *Witt v. Milton (1957) 147 C.A.2d 554, 557, 305 P.2d 944* [motel furniture listed but no location given and nothing in instrument suggested means of identification; mortgage void as to third parties].)

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3. Rights of Creditors Where Mortgage Invalid.

4 Witkin Sum. Cal. Law STPP § 15

[§ 15] Rights of Creditors Where Mortgage Invalid.

The former law gave rise to a number of problems involving mortgages that were invalid because the property was not mortgageable, or because the mortgage was not made in conformity with the strict requisites of execution, acknowledgment, and recordation. The mortgage was not wholly void; it was valid (1) between the parties, their heirs, legatees, and personal representatives; (2) as to subsequent creditors who had notice thereof before parting with value; and (3) as to subsequent purchasers and encumbrancers who were not in good faith and for value. (*Wolpert v. Gripton* (1931) 213 C. 474, 480, 481, 2 P.2d 767; *Treat v. Burns* (1932) 216 C. 216, 217, 13 P.2d 724; *Fred C. Silverthorn & Sons v. Pacific Finance Corp.* (1933) 133 C.A. 163, 166, 23 P.2d 798; *Hollywood State Bank v. Cook* (1950) 99 C.A.2d 338, 341, 221 P.2d 988.)

It was void, however, as against subsequent creditors of the mortgagor without notice, and subsequent purchasers and encumbrancers in good faith, for value, and without notice. It was also void as against all prior creditors of the mortgagor, even if they had actual notice; i.e., those who extended credit before execution of the mortgage were no longer in a position to withhold it and were entitled to protection regardless of whether they had notice of the invalid mortgage. (See *Old Settlers' Inv. Co. v. White* (1910) 158 C. 236, 240, 110 P. 922; *Noyes v. Bank of Italy* (1929) 206 C. 266, 271, 274 P. 68.)

The creditor could not, however, attack the defective mortgage unless the creditor first obtained a lien, e.g., by attachment or execution. (*Lemon v. Wolff* (1898) 121 C. 272, 275, 53 P. 801; *Ruggles v. Cannedy* (1899) 127 C. 290, 301, 53 P. 911, 59 P. 827; *Fred C. Silverthorn & Sons v. Pacific Finance Corp.* (1933) 133 C.A. 163, 165, 166, 23 P.2d 798.) But a trustee in bankruptcy was, under federal law, exempt from this restriction; i.e., although representing only general creditors without liens, the trustee could still attack the invalid mortgage in the same manner as a creditor with a lien. (*Noyes v. Bank of Italy*, supra; *Schuch v. Northrup-Jones* (1958) 162 C.A.2d 279, 288, 328 P.2d 279.)

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4. Remedies of Mortgagee.

4 Witkin Sum. Cal. Law STPP § 16

[§ 16] Remedies of Mortgagee.

Under former law, the mortgagee had two statutory remedies: an action of foreclosure, and a sale as in pledge, after obtaining possession of the property. (See *Podrat v. Oberndorff* (1929) 207 C. 457, 459, 278 P. 1035; on pledge sale, see *supra*, §8.) But the mortgagee had only one action. Under *C.C.P.* 726, the mortgagee had to exhaust the security before bringing a foreclosure action. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §124 et seq.)

The mortgage instrument could give the mortgagee a power of sale, with the right to take possession after default for that purpose. (See *Jolly v. Thornton* (1940) 40 C.A.2d Supp. 819, 820, 102 P.2d 467; *Bessesen v. Dorshkind* (1957) 156 C.A.2d 220, 319 P.2d 369.)

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4 Witkin Sum. Cal. Law STPP § 17

[§ 17] Conditional Sale.

(1) *Nature of Transaction.* A conditional sale is one in which the buyer receives possession of the goods and uses them, and the seller retains title as security for the payment of the purchase price. Reservation of title is its outstanding characteristic; the interest of the conditional seller is not a lien. (See *Hougham v. Rowland* (1939) 33 C.A.2d 11, 14, 15, 90 P.2d 860; *Phelps v. Loupias* (1950) 97 C.A.2d 350, 355, 217 P.2d 748; 68A Am.Jur.2d (2003 ed.), *Secured Transactions* §24.) The former Sales Act did not expressly refer to such sales, and the former Uniform Conditional Sales Act was never adopted in California.

No particular form is necessary, except where a regulatory statute prescribes it, as in the case of sales of motor vehicles. (See 4 *Summary* (10th), *Sales*, §239.)

(2) *Beneficial Interest of Conditional Buyer.* The reservation of title is for security only, to assure payment of the purchase price. The buyer has the use and possession to the complete exclusion of the seller unless the buyer defaults, and the buyer may secure title by performing the buyer's obligations without any further assent by the seller. (See *Walker v. Houston* (1932) 215 C. 742, 746, 747, 12 P.2d 952; *San Diego v. Davis* (1934) 1 C.2d 145, 147, 33 P.2d 827; *Bowden v. Bank of America* (1950) 36 C.2d 406, 413, 224 P.2d 713; 23 *Cal. L. Rev.* 557 [rights and remedies under California conditional sales].)

(3) *Remedies of Conditional Seller.* On default by the buyer, the conditional seller could treat the sale as absolute and sue for the purchase price. (See *Harris v. Kessler* (1932) 124 C.A. 299, 301, 302, 12 P.2d 467; *Bagwill v. Spence* (1932) 127 C.A. 263, 268, 15 P.2d 810.) The more common remedy was repossession of the goods. (See *Goldberg v. List* (1938) 11 C.2d 389, 393, 79 P.2d 1087; *Jordan v. Reynolds* (1951) 108 C.A.2d 91, 94, 237 P.2d 1005.) This remedy could, however, be waived by acceptance of late payments. (See *Loughan v. Harger-Haldeman* (1960) 184 C.A.2d 495, 503, 7 C.R. 581.)

A further remedy could be provided for in the contract: repossession, resale, and suit against the buyer for the deficiency, i.e., the difference between the original price and the resale price. (See *General Motors Acceptance Corp. v. Brown* (1934) 2 C.A.2d 646, 649, 38 P.2d 482; *Construction Machinery Co. v. Willard & Rodman* (1962) 208 C.A.2d 31, 37, 25 C.R. 13; *McMillen v. Pippin* (1963) 211 C.A.2d 674, 27 C.R. 590.)

(4) *Election of Remedies.* The conditional seller normally had to elect between the inconsistent remedies of suit for

the price and repossession of the goods with the possible right to forfeit prior installments of the purchase price. (See *Martin Music Co. v. Robb* (1931) 115 C.A. 414, 419, 1 P.2d 1000; *James v. Allen* (1937) 23 C.A.2d 205, 72 P.2d 570; *Smith v. Greenfield State Bank* (1963) 222 C.A.2d 869, 873, 35 C.R. 579; *B. K. K. Co. v. Schultz* (1970) 7 C.A.3d 786, 792, 86 C.R. 760.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER VII - Secured Transactions in Personal Property

Witkin Summary of California Law
I. METHODS USED BEFORE UNIFORM COMMERCIAL CODE
F. Inventory Lien.

4 Witkin Sum. Cal. Law STPP § 18

[§ 18] Inventory Lien.

The traditional security methods discussed in the preceding sections failed to meet the needs of "inventory financing" by small manufacturers, processors, and wholesale merchants. The security consists of a shifting stock of goods, and a special lien--not dependent on possession or identified units--was the only practical solution. The device known as a "floating lien" thus came into commercial use. This lien is sometimes called a "factor's lien," although it in no way resembles the common law lien of a factor who sells goods on commission (see 3 *Summary* (10th), *Agency and Employment*, §44).

The California statute governing inventory liens became effective January 1, 1958. (See 6 *U.C.L.A. L. Rev.* 404 [discussion of statute].) The simple procedure called for a preliminary written agreement, designation of merchandise by subsequent written statements, and filing of notice of lien. The lender thereby obtained a "continuing lien" on merchandise not physically in the lender's possession.

The lien could be obtained on raw materials, parts, goods in process of manufacture, and finished goods intended for sale, including after-acquired goods. Excluded were trade fixtures, machinery and equipment, and merchandise represented by documents of title. The lien became effective 10 days after filing of the notice, and terminated 3 years after the date of filing, unless extended for another 3-year period by the filing of a new notice. On the borrower's default, the lender was entitled to possession of the merchandise and could dispose of it in any manner agreed on by the parties.

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Witkin Summary of California Law
 II. DEVELOPMENT OF UNIFORM COMMERCIAL CODE
 A. Former Versions.
 1. Original Version.

4 Witkin Sum. Cal. Law STPP § 19

[§ 19] Original Version.

(1) *Scope.* The Uniform Commercial Code became effective January 1, 1965. (See 4 *Summary* (10th), *Sales*, §7.) Article 9 (Division 9 in California), entitled "Uniform Commercial Code--Secured Transactions," established a unified and comprehensive scheme for regulation of all security transactions in personal property, superseding the existing statutes on pledges, chattel mortgages, conditional sales, inventory liens, trust receipts, assignment of accounts receivable, and any others in this field. (Former U.C.C. 9102.)

(2) *Purpose of Code.* In the Comment to former U.C.C. 9101, the framers of the Code pointed to a number of defects in the prior law governing secured transactions:

(a) A wide variety of security devices, developing over a long period of time, retained burdensome and often useless differences in their formal requisites, in the secured party's rights against the debtor and third parties, in the debtor's rights against the secured party, and in filing requirements.

(b) The great expansion of financing transactions resulted in continuous state legislation recognizing new security devices and regulating them in a nonuniform manner.

(c) Gaps in the structure of the law remained, notwithstanding the large number of existing security devices.

The Uniform Commercial Code takes a new approach to these problems. (See *infra*, §21 et seq.)

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A. Former Versions.

2. Adoption of Revised Division 9.

4 Witkin Sum. Cal. Law STPP § 20

[§ 20] Adoption of Revised Division 9.

The original Article 9 was the subject of considerable comment, some of it adverse, and many variations appeared in the state codes. (See *79 Harv. L. Rev.* 229 [application of Article 9 to subordination agreements, security interests in money and deposits, negative pledge clauses, and participation agreements]; *27 So. Cal. L. Rev.* 265 [comparing Official and California Codes]; *8 U.C.L.A. L. Rev.* 806 [exhaustive and critical discussion of Article 9]; *30 A.L.R.3d* 9 [construction and effect of Article 9].) In response to criticisms, the National Conference of Commissioners on Uniform State Laws undertook a lengthy study of the subject and drafted a proposed revision of the Article, published as the 1972 Official Text, with voluminous comments. (See 3A, 3B U.L.A. (Master Ed.); for general discussions of revised Article 9, see *86 Harv. L. Rev.* 477; *35 Stanf. L. Rev.* 175; *21 U.C.L.A. L. Rev.* 937.) The revised Article 9 was adopted in California as Division 9 in 1974, with an effective date of January 1, 1976. (For transition provisions applicable to transactions entered into between January 1, 1965, and January 1, 1976, see U.C.C. 14101 et seq.)

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 B. Current Version.
 1. Revision and Enactment.

4 Witkin Sum. Cal. Law STPP § 21

[§ 21] Revision and Enactment.

(1) *Revised (2000) Article 9 (Official Text)*. The American Law Institute and the National Conference of Commissioners on Uniform State Laws approved Revised (2000) Article 9, Secured Transactions, in 1998. (See U.C.C. 9101, Uniform Commercial Code Comment 2.) The official text of the 2000 Article 9 is reproduced, with official comments, in 3 U.L.A. (Master Ed.). All states, as well as the District of Columbia, have adopted the 2000 version of Article 9. (See 3 U.L.A. (Master Ed.), p. 14 et seq.) Commentary and practice aids concerning Article 9 are extensive. (See 11 Anderson 3d (1999 Rev. ed.), [Rev.] §9-101 et seq.; White & Summers, 4 Uniform Commercial Code 5th, §30-1 et seq.; 3 Uniform Commercial Code Legal Forms 4th, Chap. 9; Cal. Civil Practice, 4 Business Litigation, §46:128 et seq.; Cal. Transactions Forms, 5 Business Transactions, Chap. 30; 68 *Am.Jur.2d* (2003 ed.), *Secured Transactions* §1 et seq.)

(2) *Adoption of Revised Article 9 in California*. The 1999 Legislature repealed the 1976 version of Division 9 and replaced it with the 2000 revised version (Stats. 1999, Ch. 991, §§34, 35), but the revised division did not become operative until July 1, 2001 (U.C.C. 9701). The drafters of revised Article 9 contemplated that all the states would adopt a uniform effective date for the Article, because "[a]ny one State's failure to adopt the uniform effective date will greatly increase the cost and uncertainty surrounding the transition" to the new Article. (Uniform Commercial Code Comment to U.C.C. 9701.) Division 9 may be cited as the "Uniform Commercial Code-Secured Transactions." (U.C.C. 9101.) (See C.E.B., *Secured Transactions* 2d, §1.2.)

(3) *Official Comments*. All sections of revised Article 9 are followed by official comments, entitled "Uniform Commercial Code Comments," which were supplied by the Article's Drafters. California's Division 9 includes these comments. For many sections, Division 9 also includes "Assembly Committee Comments," supplied by the California Legislature. The Assembly Committee Comments are usually identical to the Uniform Commercial Code Comments. The official comments included in this chapter are taken from the Assembly Committee Comments, whenever possible. If there are no Assembly Committee Comments for a particular section, Uniform Commercial Code Comments are cited instead.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Revised (2000) Article 9 (Official Text)*. See 11 Lawrence's Anderson 3d (2007 ed.), [Rev] §9-101 et seq. (replacing 11 Anderson 3d (1999 Rev. ed.), [Rev] §9-101 et seq.).



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 B. Current Version.
 2. Purpose and Benefits.

4 Witkin Sum. Cal. Law STPP § 22

[§ 22] Purpose and Benefits.

(1) *Purpose of Division 9.* The 2000 version of Division 9 supersedes former U.C.C. Division 9. It provides a comprehensive scheme for the regulation of security interests in personal property and fixtures. The new division follows the general approach and retains much of the terminology of its predecessor. (Uniform Commercial Code Comment 1 to U.C.C. 9101.)

(2) *Summary of Revisions.* Uniform Commercial Code Comment 4 to U.C.C. 9101 summarizes in detail the more significant revisions of Division 9. Among other things, revised Division 9 does the following:

(a) Expands the scope of collateral and transactions covered by Division 9. (Uniform Commercial Code Comment 4(a); see *infra*, §23.)

(b) Expands the duties of secured parties. (Uniform Commercial Code Comment 4(b); see *infra*, §§153 et seq., 187.)

(c) Alters the choice-of-law rules for the law governing perfection, the effect of perfection or nonperfection, and priority. (Uniform Commercial Code Comment 4(c); see *infra*, §146 et seq.)

(d) Alters the rules governing perfection of security interests and agricultural liens, and includes provisions for perfection of a security interest in electronic chattel paper. (Uniform Commercial Code Comment 4(d); see *infra*, §§61 et seq., 74.)

(e) Alters the rules governing priority of security interests and agricultural liens, and includes several new priority rules and some special rules relating to banks and deposit accounts. (Uniform Commercial Code Comment 4(e); see *infra*, §§105 et seq., 127.)

(f) Expands the definition of "proceeds" of collateral. (Uniform Commercial Code Comment 4(f); see *infra*, §45.)

(g) Adds provisions relating to the relationships between certain third parties and the parties to secured transactions. (Uniform Commercial Code Comment 4(g); see *infra*, §158 et seq.)

(h) Substantially rewrites the provisions governing filing, "to simplify the statutory text and to deal with the numerous problems of interpretation and implementation that have arisen over the years." (Uniform Commercial Code Comment 4(h); see *infra*, §76 et seq.)

(i) Extensively revises the provisions governing default and enforcement. (Uniform Commercial Code Comment 4(i); see *infra*, §171 et seq.)

(j) Creates several special rules for "consumer goods," "consumer transactions," and "consumer-goods transactions." (Uniform Commercial Code Comment 4(j); see *infra*, §§38, 48, 160, 161, 183, 187, 193, 200.)

(k) Expands the definition of "good faith." (Uniform Commercial Code Comment 4(k); see U.C.C. 9102(a)(43).)

(l) Sets forth provisions to govern the transition from former Division 9 to the revised version. (Uniform Commercial Code Comment 4(l); see *infra*, §25 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Summary of Revisions.*(k) *Definition of "good faith":* U.C.C. 9102(a)(43) was deleted in 2006. U.C.C. 1201(b)(20), as amended in 2006, defines "good faith" in the same way that former U.C.C. 9102(a)(43) did, and the definition applies to Division 9 (U.C.C. 1201(b)).



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B. Current Version.

3. Scope of Division 9.

a. Transactions to Which Division 9 Applies.

4 Witkin Sum. Cal. Law STPP § 23

[§ 23] Transactions to Which Division 9 Applies.

(1) *In General.* Division 9 applies to each of the following:

(a) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract. (U.C.C. 9109(a)(1); on definition of security interest, see *infra*, §36.)

(b) An agricultural lien. (U.C.C. 9109(a)(2).) This is an expansion in scope from former Division 9. (Assembly Committee Comment 3.)

(c) A sale of accounts, chattel paper, payment intangibles, or promissory notes. (U.C.C. 9109(a)(3); for definitions, see *infra*, §42.) Payment intangibles and promissory notes are new additions to the scope of Division 9. (Assembly Committee Comment 4.) Moreover, the definition of "accounts" has been expanded to include health care insurance receivables and numerous other payment obligations arising out of the sale, lease, license, or assignment of tangible and intangible property. (See U.C.C. 9102(a)(2) and Assembly Committee Comment 5a.)

(d) A consignment. (U.C.C. 9109(a)(4).) This is a new addition to the scope of Division 9. (Assembly Committee Comment 6.)

(e) A security interest arising under U.C.C. 2401 or 2505 (reservation of security interest by seller of goods; see 4 *Summary* (10th), *Sales*, §131), under U.C.C. 2711(3) (buyer's security interest in rightfully rejected goods; see 4 *Summary* (10th), *Sales*, §163), or under U.C.C. 10508(5) (lessee's security interest in rightfully rejected goods; see U.C.C. 10508(e), 13 *Summary* (10th), *Personal Property*, §214). (U.C.C. 9109(a)(5), 9110.)

(f) A security interest arising under U.C.C. 4210 (collecting bank's security interest in item, accompanying documents or proceeds; see 4 *Summary* (10th), *Negotiable Instruments*, §106) or U.C.C. 5118 (issuer's or nominated person's security interest in document presented under letter of credit; see 4 *Summary* (10th), *Negotiable Instruments*, §143). (U.C.C. 9109(a)(6).)

(g) Commercial tort claims. (See U.C.C. 9109(d)(12), *infra*, §24.) For a claim to qualify as a commercial tort claim, either the claimant must be an organization or, if the claimant is an individual, the claim must have arisen in the course

of the claimant's business or profession and must not include damages for the personal injury or death of an individual. (U.C.C. 9102(a)(13).)

The applicability of Division 9 to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which the division does not apply. (U.C.C. 9109(b).) Thus, for example, a security interest in a promissory note may be covered by Division 9 even though the note is secured by a real property mortgage. (See Example 1 in Assembly Committee Comment 7; 76 A.L.R.4th 765 [applicability of Article 9 (former U.C.C. 9102(3)) to assignment of rights under real estate sales contract, lease agreement, or mortgage as collateral for separate transaction]; on applicability of Division 9 generally, see C.E.B., Secured Transactions 2d, §1.16.)

(2) *Title to Collateral Immaterial.* Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of Division 9 with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor. (U.C.C. 9202.)

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B. Current Version.

3. Scope of Division 9.

b. Exceptions.

4 Witkin Sum. Cal. Law STPP § 24

[§ 24] Exceptions.

(1) *Preemption by Other Statutes or Laws.* Division 9 does not apply to the extent that a statute, regulation, or treaty of the United States preempts it. (U.C.C. 9109(c)(1); see *46 Hastings L. J. 581* [software copyrights and former Article 9].) Furthermore, the division is inapplicable to the extent that a transferee beneficiary or nominated person under a letter of credit has independent and superior rights under U.C.C. 5114, which provides for assignment of the proceeds of a letter of credit. (U.C.C. 9109(c)(2).)

(2) *Other Exceptions to Applicability.* Division 9 does not apply to any of the following:

(a) A landlord's lien, other than an agricultural lien. (U.C.C. 9109(d)(1).)

(b) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but U.C.C. 9333 (*infra*, §139) applies with respect to priority of the lien. (U.C.C. 9109(d)(2).)

(c) An assignment of a claim for wages, salary, or other compensation of an employee. (U.C.C. 9109(d)(3).)

(d) A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose. (U.C.C. 9109(d)(4).)

(e) An assignment of accounts, chattel paper, payment intangibles, or promissory notes when the assignment is for the purpose of collection only. (U.C.C. 9109(d)(5).)

(f) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract. (U.C.C. 9109(d)(6).)

(g) An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness. (U.C.C. 9109(d)(7).)

(h) Any loan made by an insurance company pursuant to the provisions of a policy or contract issued by it and on the sole security of the policy or contract. (U.C.C. 9109(d)(8).)

(i) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral. (U.C.C. 9109(d)(9).)

(j) A right of recoupment or setoff, provided that both U.C.C. 9340 applies with respect to the effectiveness of rights of recoupment or setoff against deposit accounts and U.C.C. 9404 applies with respect to defenses or claims of an account debtor. (U.C.C. 9109(d)(10).) (See *39 Stanf. L. Rev.* 235 [setoffs and former Article 9]; *3 A.L.R.4th* 998 [effect of former Article 9 on conflict, as to funds in debtor's bank account, between secured creditor and bank claiming right of setoff].)

(k) The creation or transfer of an interest in or lien on real property, including a lease or rents, except to the extent that provision is made for liens on real property in U.C.C. 9203 (infra, §57) and U.C.C. 9308 (infra, §65), fixtures in U.C.C. 9334 (infra, §§131, 132), fixture filings in U.C.C. 9501, 9502, 9512, 9516, and 9519 (infra, §§79, 87, 89, 91, 100), and security agreements covering personal and real property in U.C.C. 9604 (infra, §173). (U.C.C. 9109(d)(11).)

(l) An assignment of a claim arising in tort, other than a commercial tort claim. However, U.C.C. 9315 (infra, §§64, 136, 137) and U.C.C. 9322 (infra, §§115, 117) apply with respect to proceeds and priorities in proceeds. (U.C.C. 9109(d)(12).)

(m) An assignment of a deposit account in a consumer transaction. However, U.C.C. 9315 and 9322 apply with respect to proceeds and priorities in proceeds. (U.C.C. 9109(d)(13).)

(n) A security interest created by the assignment of the benefits of a public construction contract under the Improvement Act of 1911 (*Sts. & H.C. 5000* et seq.). (U.C.C. 9109(d)(14).)

(o) Transition property, as defined in *Pub.Util.C. 840*, except to the extent that the provisions of Division 9 are referred to in *Pub.Util.C. 840* et seq., and recovery property, as defined in *Pub.Util.C. 848*, except to the extent that the provisions of Division 9 are referred to in *Pub.Util.C. 848* et seq. (U.C.C. 9109(d)(15).)

(p) A claim or right of an employee or employee's dependents to receive workers' compensation under *Lab.C. 50* et seq. or *Lab.C. 3200* et seq. (U.C.C. 9109(d)(16).)

(q) A transfer by a government or governmental unit. (U.C.C. 9109(d)(17).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Other Exceptions to Applicability.*(l) *Assignment of claim arising in tort, other than commercial tort claim:* See *Waltrip v. Kimberlin (2008) 164 C.A.4th 517, 528, 529, 79 C.R.3d 460* [although security interest may be granted in pending commercial tort claim under U.C.C. 9109(d)(12), 1996 security agreement did not create security interest in settlement of commercial tort claims here; case that resulted in settlement in 2005 could not have been specifically described as collateral in 1996 security agreement because case did not yet exist, and security agreement was never amended to include case claims as collateral].



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II. DEVELOPMENT OF UNIFORM COMMERCIAL CODE
C. Transition Provisions.

1. Transactions Entered into Before Effective Date.

4 Witkin Sum. Cal. Law STPP § 25

[§ 25] Transactions Entered into Before Effective Date.

(1) *General Rule.* The effective date for new Division 9 was July 1, 2001. (U.C.C. 9701.) Except as otherwise provided in U.C.C. 9701 et seq., Division 9 applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before Division 9 took effect. (U.C.C. 9702(a).) (For detailed discussion and examples of transition provisions of new Division 9, see Weise, *How To Get Your Act Together for the New Uniform Commercial Code Article 9*, 42 UCC Bulletin (October 2000).)

(2) *Exceptions.* Except as otherwise provided in U.C.C. 9702(c) and in U.C.C. 9703 to 9709 (infra, §26 et seq.), transactions and liens that were not governed by former Division 9, were validly entered into or created before July 1, 2001, and would be subject to new Division 9 if they had been entered into or created after July 1, 2001, and the rights, duties, and interests flowing from those transactions and liens remain valid after July 1, 2001. (U.C.C. 9702(b)(1).) The transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by Division 9 or by the law that otherwise would apply if Division 9 had not taken effect. (U.C.C. 9702(b)(2).)

Division 9 does not affect an action, case, or proceeding commenced before July 1, 2001. (U.C.C. 9702(c).)

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C. Transition Provisions.

2. Security Interest Enforceable Before Effective Date.
 - a. Perfected Before Effective Date.

4 Witkin Sum. Cal. Law STPP § 26

[§ 26] Perfected Before Effective Date.

(1) *Where Security Interest Satisfies Division 9 Requirements for Enforceability.* A security interest that was enforceable immediately before July 1, 2001, and would have had priority over the rights of a person that became a lien creditor at that time, is a perfected security interest under Division 9 if, on July 1, 2001, the applicable requirements for enforceability and perfection under Division 9 were satisfied without further action. (U.C.C. 9703(a).)

(2) *Where Security Interest Does Not Satisfy Division 9 Requirements for Enforceability.* Except as otherwise provided in U.C.C. 9705 (infra, §28 et seq.), if, immediately before July 1, 2001, a security interest was enforceable and would have had priority over the rights of a person that became a lien creditor at that time, but the applicable requirements for enforceability or perfection under Division 9 were not satisfied on July 1, 2001, then the security interest was a perfected security interest until July 1, 2002. (U.C.C. 9703(b)(1).) It remains enforceable thereafter only if the security interest became enforceable under U.C.C. 9203 (infra, §50) before July 1, 2002. (U.C.C. 9703(b)(2).) It remains perfected thereafter only if the applicable requirements for perfection under Division 9 were satisfied before July 1, 2002. (U.C.C. 9703(b)(3).)

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2. Security Interest Enforceable Before Effective Date.
b. Unperfected Before Effective Date.

4 Witkin Sum. Cal. Law STPP § 27

[§ 27] Unperfected Before Effective Date.

(1) *Enforceability.* A security interest that was enforceable immediately before July 1, 2001, but that would have been subordinate to the rights of a person that became a lien creditor at that time, remained an enforceable security interest until July 1, 2002. (U.C.C. 9704(1).) It remains enforceable thereafter if the security interest became enforceable under U.C.C. 9203 (infra, §50) on July 1, 2001, or on July 1, 2002. (U.C.C. 9704(2).)

(2) *How To Perfect.* A security interest that was enforceable immediately before July 1, 2001, but that would have been subordinate to the rights of a person that became a lien creditor at that time, becomes perfected in either of the following ways:

(a) Without further action, on July 1, 2001, if the applicable requirements for perfection under Division 9 were satisfied on or before that time. (U.C.C. 9704(3)(A).)

(b) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time. (U.C.C. 9704(3)(B).)

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C. Transition Provisions.

3. Perfection Step Taken Before Effective Date and Attachment Occurring After Effective Date.

a. Perfection Step Other Than Filing.

4 Witkin Sum. Cal. Law STPP § 28

[§ 28] Perfection Step Other Than Filing.

If action, other than the filing of a financing statement, was taken before July 1, 2001, and the action would have resulted in priority of a security interest over the rights of a person that became a lien creditor had the security interest become enforceable before July 1, 2001, the action is effective to perfect a security interest that attached under Division 9 on or before July 1, 2002. An attached security interest became unperfected on July 1, 2002, unless the security interest became a perfected security interest under Division 9 before that date. (U.C.C. 9705(a).)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Perfection Step Taken Before Effective Date and Attachment Occurring After Effective Date.

b. Perfection by Filing.

4 Witkin Sum. Cal. Law STPP § 29

[§ 29] Perfection by Filing.

(1) *Ineffective Filings Made Effective.* The filing of a financing statement before July 1, 2001, is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under Division 9. (U.C.C. 9705(b).) U.C.C. 9705(b) deals with financing statements that were filed under former Division 9 and that would not have perfected a security interest under the former law (because, e.g., they did not accurately describe the collateral or were filed in the wrong place), but that would perfect a security interest under new Division 9. Under U.C.C. 9705(b), such a financing statement is effective to perfect a security interest to the extent it complies with Division 9. U.C.C. 9705(b) applies regardless of the reason for the filing. (Uniform Commercial Code Comment 3.)

(2) *Change in Applicable Law.* Division 9 does not render ineffective an effective financing statement that, before July 1, 2001, was filed and satisfied the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former U.C.C. 9103. However, except as otherwise provided in U.C.C. 9705(d) and 9705(e) and in U.C.C. 9706, the financing statement ceases to be effective either at the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed, or on June 30, 2006, whichever is earlier. (U.C.C. 9705(c).)

The June 30, 2006, date applies to a financing statement that, before July 1, 2001, was filed against a transmitting utility and satisfied the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former U.C.C. 9103 only to the extent that U.C.C. 9301 et seq. (infra, §146 et seq.) provide that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement. (U.C.C. 9705(e).)

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c. Continuing Effectiveness of Filed Financing Statement.

4 Witkin Sum. Cal. Law STPP § 30

[§ 30] Continuing Effectiveness of Filed Financing Statement.

The filing of a continuation statement after July 1, 2001, does not continue the effectiveness of the financing statement filed before July 1, 2001. However, on the timely filing of a continuation statement after July 1, 2001, and in accordance with the law of the jurisdiction governing perfection as provided in U.C.C. 9301 et seq. (infra, §146 et seq.), the effectiveness of a financing statement filed in the same office in that jurisdiction before July 1, 2001, continues for the period provided by the law of that jurisdiction. (U.C.C. 9705(d).)

A financing statement that includes a financing statement filed before July 1, 2001, and a continuation statement filed after July 1, 2001, is effective only to the extent that it satisfies the requirements of U.C.C. 9501 et seq. (infra, §86 et seq.) for an initial financing statement. (U.C.C. 9705(f).)

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4. When Initial Filing Statement Suffices To Continue Effectiveness of Statement.

a. Conditions for Effectiveness.

4 Witkin Sum. Cal. Law STPP § 31

[§ 31] Conditions for Effectiveness.

The filing of an initial financing statement in the office specified in U.C.C. 9501 (infra, §87) continues the effectiveness of a financing statement filed before July 1, 2001, if all of the following conditions are satisfied:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under Division 9. (U.C.C. 9706(a)(1).)

(2) The pre-effective-date financing statement was filed in an office in another state or another office in California. (U.C.C. 9706(a)(2).)

(3) The initial financing statement satisfies U.C.C. 9706(c). (U.C.C. 9706(a)(3).)

U.C.C. 9706(c) provides that, to be effective for purposes of U.C.C. 9706(a), an initial financing statement must:

(1) Satisfy the requirements of U.C.C. 9501 et seq. (infra, §86 et seq.) for an initial financing statement. (U.C.C. 9706(c)(1).)

(2) Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement. (U.C.C. 9706(c)(2).)

(3) Indicate that the pre-effective-date financing statement remains effective. (U.C.C. 9706(c)(3).)

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4. When Initial Filing Statement Suffices To Continue Effectiveness of Statement.
 - b. Period of Effectiveness.

4 Witkin Sum. Cal. Law STPP § 32

[§ 32] Period of Effectiveness.

The filing of an initial financing statement under U.C.C. 9706(a) continues the effectiveness of the pre-effective-date financing statement for the following periods:

(1) If the initial financing statement was filed before July 1, 2001, for the period provided in former U.C.C. 9403 with respect to a financing statement. (U.C.C. 9706(b)(1).)

(2) If the initial financing statement is filed after July 1, 2001, for the period provided in U.C.C. 9515 (infra, §97) with respect to an initial financing statement. (U.C.C. 9706(b)(2).)

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4. When Initial Filing Statement Suffices To Continue Effectiveness of Statement.
 - c. Persons Entitled To File Initial Financing Statement or Continuation Statement.

4 Witkin Sum. Cal. Law STPP § 33

[§ 33] Persons Entitled To File Initial Financing Statement or Continuation Statement.

A person may file an initial financing statement or a continuation statement under U.C.C. 9701 et seq. if the secured party of record authorizes the filing (U.C.C. 9708(1)) and the filing is necessary under U.C.C. 9701 et seq. to continue the effectiveness of a financing statement filed before July 1, 2001 (U.C.C. 9708(2)(A)) or to perfect or continue the perfection of a security interest (U.C.C. 9708(2)(B)).

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5. Amendment and Termination of Financing Statement Filed Before Effective Date.

4 Witkin Sum. Cal. Law STPP § 34

[§ 34] Amendment and Termination of Financing Statement Filed Before Effective Date.

(1) *Choice of Law.* After July 1, 2001, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a financing statement filed before July 1, 2001, only in accordance with the law of the jurisdiction governing perfection as provided in U.C.C. 9301 et seq. However, the effectiveness of the financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed. (U.C.C. 9707(b), 9707(a).)

(2) *Conditions for Amendment.* Except as otherwise provided by U.C.C. 9707(d), if California law governs perfection of a security interest, the information in a financing statement filed before July 1, 2001, may be amended after that date only if any of the following occur:

(a) The statement filed before July 1, 2001, and an amendment are filed in the office specified in U.C.C. 9501 (infra, §87). (U.C.C. 9707(c)(1).)

(b) An amendment is filed in the office specified in U.C.C. 9501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies U.C.C. 9706(c) (supra, §31). (U.C.C. 9707(c)(2).)

(c) An initial financing statement that provides the information as amended and satisfies U.C.C. 9706(c) is filed in the office specified in U.C.C. 9501. (U.C.C. 9707(c)(3).)

(3) *Continued Effectiveness.* If California law governs perfection of a security interest, the effectiveness of a financing statement filed before July 1, 2001, may be continued only under U.C.C. 9705(d) or 9705(f) (supra, §30) or 9706 (supra, §31). (U.C.C. 9707(d).)

(4) *Termination.* Whether or not California law governs the perfection of a security interest, the effectiveness of a financing statement filed in California before July 1, 2001, may be terminated after that date by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial filing statement that satisfies U.C.C. 9706(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in U.C.C. 9301 et seq. as the office in which to file a financing statement. (U.C.C. 9707(e).)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Priority.

4 Witkin Sum. Cal. Law STPP § 35

[§ 35] Priority.

(1) *Law Governing Priority.* New Division 9 determines priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before July 1, 2001, former Division 9 determines priority. (U.C.C. 9709(a).)

(2) *Financing Statements Ineffective Under Former Division 9 but Effective Under New Division 9.* For purposes of U.C.C. 9322(a) (infra, §114), the priority of a security interest that becomes enforceable under U.C.C. 9203 (infra, §50) dates from July 1, 2001, if the security interest was perfected under Division 9 by the filing of a financing statement before July 1, 2001, which would not have been effective to perfect the security interest under former Division 9. (U.C.C. 9709(b).) By its own terms, U.C.C. 9709(b) does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement.

SUPPLEMENT: [This section is current through the latest supplement]



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A. Definitions.

1. Security Interest.

a. In General.

4 Witkin Sum. Cal. Law STPP § 36

[§ 36] In General.

(1) *Security Interest Defined.* A security interest is an interest in personal property or fixtures that secures payment or performance of an obligation. It includes an interest of a cosignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Division 9. (U.C.C. 1201(36)(a).)

(2) *Interests That Are Not Security Interests.* The special property interest of a buyer of goods on identification of those goods to a contract for sale under U.C.C. 2401 (see 4 *Summary* (10th), *Sales*, §125) is not a security interest, but a buyer may acquire a security interest by complying with Division 9. Similarly, except as otherwise provided in U.C.C. 2505, the right of a seller or lessor of goods under Division 2 (Sales) or Division 10 (Personal Property Leases) to retain or acquire possession of the goods is not a security interest, although a seller or lessor may acquire a security interest by complying with Division 9. (U.C.C. 1201(36)(a); on reservation of security interest by seller of goods under U.C.C. 2505, see 4 *Summary* (10th), *Sales*, §131.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Security Interest Defined.* U.C.C. 1201(36)(a) was renumbered U.C.C. 1201(b)(35) in 2006.

(2) *Interests That Are Not Security Interests.* U.C.C. 1201(36)(a) was renumbered U.C.C. 1201(b)(35) in 2006.



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III. CREATION OF SECURITY INTEREST

A. Definitions.

1. Security Interest.

b. Determining Whether Transaction Creates Security Interest.

4 Witkin Sum. Cal. Law STPP § 37

[§ 37] Determining Whether Transaction Creates Security Interest.

(1) *Conditions Creating Security Interest.* Whether a transaction creates a lease or security interest is determined by the facts of each case. (U.C.C. 1201(36)(b).) However, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and any of the following conditions applies:

(a) The original term of the lease is equal to or greater than the remaining economic life of the goods. (U.C.C. 1201(36)(b)(i); on determining remaining economic life of goods, see U.C.C. 1201(36)(d)(ii).)

(b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods. (U.C.C. 1201(36)(b)(ii).)

(c) The lessee has an option to renew the lease for the remaining economic life of the goods, or to become the owner of the goods, for no additional consideration or nominal additional consideration on compliance with the lease agreement. (U.C.C. 1201(36)(b)(iii), (36)(b)(iv); on determining whether additional consideration is nominal, see U.C.C. 1201(36)(d)(i).) (See *Triple C. Leasing v. All-Amer. Mobile Wash* (1976) 64 C.A.3d 244, 248, 134 C.R. 328 [guidelines to determine whether instrument in form of chattel lease is intended as security and should be treated as security interest; instrument was valid lease]; *Addison v. Burnett* (1996) 41 C.A.4th 1288, 1293, 49 C.R.2d 132 [car lease was valid lease, and not security agreement under former U.C.C. 1201(37)(b) (now U.C.C. 1201(36)(b)); car retained some useful life beyond lease term, lessee had no duty or right to renew lease or buy car, and lessor retained right to do whatever it wished with car on its return]; 76 A.L.R.3d 11 [equipment lease as security interest within former Unif.Com.C. §1-201(37)]; C.E.B., Secured Transactions 2d, §§1.21, 1.22.)

(2) *Conditions Not Creating Security Interest.* A transaction does not create a security interest merely because it provides one or more of the following:

(a) That the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or greater than the fair market value of the goods at the time the lease is entered into. (U.C.C. 1201(36)(c)(i); on determining present value, see U.C.C. 1201(36)(d)(iii).)

(b) That the lessee assumes the risk of loss of the goods, or agrees to pay the taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods. (U.C.C. 1201(36)(c)(ii).)

(c) That the lessee has an option to renew the lease or to become the owner of the goods. (U.C.C. 1201(36)(c)(iii).)

(d) That the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed. (U.C.C. 1201(36)(c)(iv); on determining reasonably predictable fair market rent or value, see U.C.C. 1201(36)(d)(ii).)

(e) That the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed. (U.C.C. 1201(36)(c)(v).)

(f) In the case of a motor vehicle or a trailer, not to be used primarily for personal, family, or household purposes, that the amount of rental payments may be increased or decreased by reference to the amount the lessor realizes by selling or disposing of the vehicle or trailer. (U.C.C. 1201(36)(c)(vi); see C.E.B., *Secured Transactions* 2d, §1.23; for definition of motor vehicle, see *Veh.C. 415*; for definition of trailer, see *Veh.C. 630*; on personal property leases, see 13 *Summary* (10th), *Personal Property*, §196 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Conditions Creating Security Interest.* U.C.C. 1201(36)(b) was renumbered U.C.C. 1203(a) in 2006. (a) *Original term of lease:* U.C.C. 1201(36)(b)(i) was renumbered U.C.C. 1203(b)(1) in 2006. U.C.C. 1201(36)(d)(ii) was renumbered U.C.C. 1203(e) in 2006.

(b) *Lessee bound to renew:* U.C.C. 1201(36)(b)(ii) was renumbered U.C.C. 1203(b)(2) in 2006.

(c) *Lessee has option to renew:* U.C.C. 1201(36)(b)(iii) and (36)(b)(iv) were renumbered U.C.C. 1203(b)(3) and (b)(4), respectively, in 2006. U.C.C. 1201(36)(d)(i) was renumbered U.C.C. 1203(d) in 2006. U.C.C. 1201(36)(b) was renumbered U.C.C. 1203(b) in 2006.

(2) *Conditions Not Creating Security Interest.*

(a) *Present value equal to or greater than fair market value:* U.C.C. 1201(36)(c)(i) was renumbered U.C.C. 1203(c)(1) in 2006. The definition of present value in former U.C.C. 1201(36)(d)(iii) was not continued in U.C.C. 1203.

(b) *Lessee assumes risk of loss or agrees to pay costs:* U.C.C. 1201(36)(c)(ii) was renumbered U.C.C. 1203(c)(2) and (c)(3) in 2006.

(c) *Lessee has option to renew:* U.C.C. 1201(36)(c)(iii) was renumbered U.C.C. 1203(c)(4) in 2006.

(d) *Lessee has option to renew for fixed rent equal to or greater than fair market rent:* U.C.C. 1201(36)(c)(iv) was renumbered U.C.C. 1203(c)(5) in 2006. U.C.C. 1201(36)(d)(ii) was renumbered U.C.C. 1203(e) in 2006. (e) *Lessee has option to become owner for fixed price:* U.C.C. 1201(36)(c)(v) was renumbered U.C.C. 1203(c)(6) in 2006.

(f) *Amount of motor vehicle rental payments:* U.C.C. 1201(36)(c)(vi) was renumbered U.C.C. 1203(c)(7) in 2006.



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A. Definitions.

1. Security Interest.

c. Purchase Money Security Interest.

4 Witkin Sum. Cal. Law STPP § 38

[§ 38] Purchase Money Security Interest.

(1) *Significance.* Special rules regarding perfection (*infra*, §61 et seq.) and priority (*infra*, §105 et seq.) apply to security interests that have purchase money status. (Uniform Commercial Code Comment 2 to U.C.C. 9103.) Only security interests in goods, including fixtures, and software can be purchase money security interests. (U.C.C. 9103(b), 9103(c); see Uniform Commercial Code Comment 5; *68A Am.Jur.2d (2003 ed.)*, *Secured Transactions* §69 et seq.; for definition of goods and software, see *infra*, §41.)

(2) *Requirements for Security Interest in Goods.* A security interest in goods is a purchase money security interest to the extent that the goods are purchase money collateral with respect to that security interest. (U.C.C. 9103(b)(1).) "Purchase money collateral" means goods or software that secures a purchase money obligation incurred with respect to that collateral. (U.C.C. 9103(a)(1).) A purchase money obligation is an obligation that is incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used. (U.C.C. 9103(a)(2).)

If the security interest is in inventory that is or was purchase money collateral, it is a purchase money security interest to the extent that the security interest secures a purchase money obligation incurred with respect to other inventory in which the secured party holds or held a purchase money security interest. (U.C.C. 9103(b)(2).) This provision deals with the problem of cross-collateralized purchase money security interests in inventory. (Uniform Commercial Code Comment 4 [providing example].)

Finally, a security interest in goods qualifies as a purchase money security interest to the extent that the security interest secures a purchase money obligation incurred with respect to software in which the secured party holds or held a purchase money security interest. (U.C.C. 9103(b)(3).)

(3) *Requirements for Security Interest in Software.* U.C.C. 9103(c) describes the limited circumstances under which a security interest in goods may be accompanied by a purchase money security interest in software. (Uniform Commercial Code Comment 5.) A security interest in software is a purchase money security interest to the extent that the security interest also secures a purchase money obligation incurred with respect to goods in which the secured party holds or held a purchase money security interest. (U.C.C. 9103(c).) Both of the following conditions must be satisfied:

(a) The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods. (U.C.C. 9103(c)(1).)

(b) The debtor acquired its interest in the software for the principal purpose of using the software in the goods. (U.C.C. 9103(c)(2).)

(4) *Consignor's Security Interest.* The security interest of a consignor in goods that are the subject of a consignment is a purchase money security interest in inventory. (U.C.C. 9103(d).) Under former U.C.C. 9114, the priority of the consignor's interest was similar to that of a purchase money security interest. U.C.C. 9103(d) achieves this result more directly, by defining the interest of a consignor to be a purchase money security interest in inventory for purposes of Division 9. "This drafting convention obviates any need to set forth special priority rules applicable to the interest of a consignor. Rather, the priority of the consignor's interest as against the rights of lien creditors of the consignee, competing secured parties, and purchasers of the goods from the consignee can be determined by reference to the priority rules generally applicable to inventory," such as U.C.C. 9317 (infra, §105 et seq.), U.C.C. 9320 (infra, §111), U.C.C. 9322 (infra, §114 et seq.), and U.C.C. 9324 (infra, §120). (Uniform Commercial Code Comment 6; see C.E.B., Secured Transactions 2d, §1.29.)

(5) *Dual-Status Rule for Nonconsumer Goods Transactions.* For transactions other than consumer goods transactions, Division 9 approves what some cases have called the "dual-status" rule, under which a security interest may be a purchase money security interest to some extent and a nonpurchase money security interest to some extent. Division 9 rejects the "transformation" rule adopted by some cases, under which any cross-collateralization, refinancing, or the like destroys the purchase money status entirely. (Uniform Commercial Code Comment 7a.) The dual-status rule is made explicit in U.C.C. 9103(e), which provides that in a transaction other than a consumer goods transaction, if the extent to which a security interest is a purchase money security interest depends on the application of a payment to a particular obligation, the payment must be applied as follows:

(a) In accordance with any reasonable method of application to which the parties agree. (U.C.C. 9103(e)(1).)

(b) In the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment. (U.C.C. 9103(e)(2).)

(c) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, to obligations that are not secured (U.C.C. 9103(e)(3)(A)), and then, if more than one obligation is secured, to obligations secured by purchase money security interests in the order in which those obligations were incurred (U.C.C. 9103(e)(3)(B)).

U.C.C. 9103(f) buttresses the dual-status rule by making it clear that (in a transaction other than a consumer-goods transaction) cross-collateralization and renewals, refinancings, and restructurings do not cause a purchase money security interest to lose its status. It provides that in a transaction other than a consumer-goods transaction, a purchase money security interest does not lose its status, even if the purchase money collateral also secures an obligation that is not a purchase money obligation (U.C.C. 9103(f)(1)), collateral that is not purchase money collateral also secures the purchase money obligation (U.C.C. 9103(f)(2)), or the purchase money obligation has been renewed, refinanced, consolidated, or restructured (U.C.C. 9103(f)(3)). In these nonconsumer-goods transactions, a secured party claiming a purchase money security interest has the burden of establishing the extent to which the security interest is a purchase money security interest. (U.C.C. 9103(g).)

Uniform Commercial Code Comments 7a and 7b to U.C.C. 9103 provide an illustration of the operation of U.C.C. 9103(e) and 9103(f).

(6) *Consumer Goods Transactions.* The limitation of the rules in U.C.C. 9103(e), 9103(f), and 9103(g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in

consumer-goods transactions and may continue to apply established approaches. (U.C.C. 9103(h); see C.E.B., Secured Transactions 2d, §7.7.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Definitions.

2. Security Agreement.

4 *Witkin Sum. Cal. Law STPP* § 39

[§ 39] Security Agreement.

(1) *Definition.* A security agreement is an agreement that creates or provides for a security interest. (U.C.C. 9102(a)(73).) The term "security agreement" frequently was used colloquially in former Division 9 to refer to the document or writing that contained a debtor's security agreement. The present version of Division 9 "eliminates that usage, reserving the term for the more precise meaning specified" in U.C.C. 9102(a)(73). (Assembly Committee Comment 3b; see *Estate of Hinds* (1970) 10 C.A.3d 1021, 1023, 89 C.R. 341 [assignment qualified as security agreement under former Division 9]; *Needle v. Lasco Industries* (1970) 10 C.A.3d 1105, 1107, 89 C.R. 593 [financing statement did not qualify as "security agreement" under former Division 9; it neither purported to grant security interest in listed collateral nor contained indication of obligation for which collateral was security]; *New West Fruit Corp. v. Coastal Berry Corp.* (1991) 1 C.A.4th 92, 99, 1 C.R.2d 664 [sales and marketing agreement between strawberry broker and grower qualified as security agreement despite lacking precision in identifying obligation secured, where broker loaned money to grower and deducted amounts owed from proceeds of crop sales, in context of ongoing business relationship; distinguishing *Needle v. Lasco Industries*].)

(2) *Intent of Parties Is Not Dispositive.* Whether an agreement creates a security interest does not depend on whether the parties intend that the law characterize the transaction as a security interest. It depends instead on whether the transaction falls within the definition of "security interest" in U.C.C. 1201(36) (supra, §36). Thus, an agreement that the parties characterize as a "lease" of goods may be a security agreement, even when the parties state their intention that the law treat the transaction as a lease and not as a secured transaction. (Assembly Committee Comment 3b to U.C.C. 9102; for forms, see C.E.B., Secured Transactions 2d, §2.20 et seq.; Cal. Transactions Forms, 5 Business Transactions §30:26 et seq.)

(3) *No Requirement of Separate Document.* A separate formal document entitled "security agreement" is not necessary. Under the general definition of "agreement" in U.C.C. 1201(3) (4 *Summary* (10th), *Sales*, §18), as the bargain found in language or by implication from other circumstances, an effective security agreement may be found when a financing statement is considered together with other documents. (*Komas v. Future Systems* (1977) 71 C.A.3d 809, 814, 816, 139 C.R. 669 [financing statement, loan application, promissory note and other documents, taken together, established that there was agreement to create or provide for security interest; construing former Division 9].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Intent of Parties Is Not Dispositive.* U.C.C. 1201(36) was renumbered U.C.C. 1201(b)(35) in 2006.

(3) *No Requirement of Separate Document.* U.C.C. 1201(3) was renumbered U.C.C. 1201(b)(3) in 2006.



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III. CREATION OF SECURITY INTEREST

A. Definitions.

3. Collateral.

a. In General.

4 Witkin Sum. Cal. Law STPP § 40

[§ 40] In General.

Collateral is the property subject to a security interest or agricultural lien. (U.C.C. 9102(a)(12).) It includes:

(1) Proceeds to which a security interest attaches. (U.C.C. 9102(a)(12)(A).) This is an expansion of the definition from former Division 9. (Assembly Committee Comment 3a; for definition of proceeds, see *infra*, §45.)

(2) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold. (U.C.C. 9102(a)(12)(B).)

(3) Goods that are the subject of a consignment. (U.C.C. 9102(a)(12)(C).)

The definition of collateral in U.C.C. 9102(a)(12) reflects the broadened scope of Division 9 by including property subject to an agricultural lien as well as payment intangibles and promissory notes that have been sold. (Assembly Committee Comment 3a; see C.E.B., *Secured Transactions* 2d, §1.4 et seq.; *68A Am.Jur.2d* (2003 ed.), *Secured Transactions* §39 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Definitions.

3. Collateral.

b. Goods.

4 Witkin Sum. Cal. Law STPP § 41

[§ 41] Goods.

(1) *General Definition.* "Goods" are all things that are movable when a security interest attaches. The term includes (a) fixtures, (b) standing timber that is to be cut and removed under a conveyance or contract for sale, (c) the unborn young of animals, (d) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (e) manufactured homes. It does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction. (U.C.C. 9102(a)(44); see C.E.B., Secured Transactions 2d, §1.9.)

(2) *Classes of Goods.* The new Division 9 retains the four types of collateral that consist of goods: "consumer goods" (see U.C.C. 9102(a)(23)), "equipment" (see U.C.C. 9102(a)(33)), "farm products" (U.C.C. 9102(a)(34)), and "inventory" (U.C.C. 9102(a)(48)). These classes of goods are mutually exclusive. The same property cannot simultaneously be, for example, both equipment and inventory; the principal use to which the property is put is determinative. Nevertheless, goods can fall into different classes at different times. "For example, a radio may be inventory in the hands of a dealer and consumer goods in the hands of a consumer. As under former Division 9, goods are 'equipment' if they do not fall into another category." (Assembly Committee Comment 4a; see 77 A.L.R.3d 1225 [what constitutes "consumer goods" under former Unif.Com.C. 9-109(1)]; 77 A.L.R.3d 1266 [what constitutes "inventory" under former Unif.Com.C. 9-109(4)].)

(3) *Computer Programs.* The term "goods" includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (a) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (b) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. (U.C.C. 9102(a)(44).)

Software, by contrast, is not a good. It is a computer program and any supporting information provided in connection with a transaction relating to the program. Software does not include a computer program that is included in the definition of goods. (U.C.C. 9102(a)(75).) Software is a type of general intangible for the purposes of Division 9. (Assembly Committee Comment 25; on general intangibles, see *infra*, §42.)

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A. Definitions.

3. Collateral.

c. Receivables.

4 Witkin Sum. Cal. Law STPP § 42

[§ 42] Receivables.

(1) *Accounts*. An account is a right to payment of a monetary obligation, whether or not earned by performance, (a) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (b) for services rendered or to be rendered, (c) for a policy of insurance issued or to be issued, (d) for a secondary obligation incurred or to be incurred, (e) for energy provided or to be provided, (f) for the use or hire of a vessel under a charter or other contract, (g) arising out of the use of a credit or charge card or information contained on or for use with the card, or (h) as winnings in a state lottery or other game of chance. Health care insurance receivables are accounts. (U.C.C. 9102(a)(2).)

The term "account" does not include (a) rights to payment evidenced by chattel paper or an instrument (see *infra*, this section), (b) commercial tort claims (see *infra*, this section), (c) deposit accounts (see *infra*, §44), (d) investment property (see *infra*, §43), (e) letter-of-credit rights or letters of credit (see *infra*, this section), or (f) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card. (U.C.C. 9102(a)(2); see C.E.B., Secured Transactions 2d, §1.4.)

(2) *Chattel Paper*. Chattel paper is a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. For this purpose, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. Chattel paper does not include charters or other contracts involving the use or hire of a vessel. Neither does it include records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper. (U.C.C. 9102(a)(11); see C.E.B., Secured Transactions 2d, §1.5.)

The definition of chattel paper has been expanded from the one in former Division 9 to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, or a lease of specific goods and license of software used in the goods. (Assembly Committee Comment 5b.)

Electronic chattel paper is chattel paper evidenced by a record or records consisting of information stored in an electronic medium. (U.C.C. 9102(a)(31).)

(3) *Instruments and Promissory Notes.* An instrument is a negotiable instrument or other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term "instrument" does not include (a) investment property, (b) letters of credit, or (c) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. (U.C.C. 9102(a)(47); see C.E.B., Secured Transactions 2d, §1.10.)

A promissory note is an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds. (U.C.C. 9102(a)(65).) This definition is new to Division 9, "necessitated by the inclusion of sales of promissory notes within the scope of Division 9." (Assembly Committee Comment 5c.)

(4) *Intangibles.* A general intangible is any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. (U.C.C. 9102(a)(42).) Thus, "general intangible" is the residual category of personal property that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument. (Assembly Committee Comment 5d; see 33 *Loyola L.A. L. Rev.* 1205 [security interests in copyrights]; C.E.B., Secured Transactions 2d, §1.8; 56 *A.L.R.4th* 1131 [liquor license as "general intangible" in which security interest can be created].)

General intangibles include software and payment intangibles, which are general intangibles under which the account debtor's principal obligation is a monetary obligation (U.C.C. 9102(a)(61)). (U.C.C. 9102(a)(42).) Accordingly, except as otherwise provided, statutory provisions applicable to general intangibles apply to payment intangibles and software. (Assembly Committee Comment 5d.)

(5) *Letter-of-Credit Rights.* A letter-of-credit right is a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit. (U.C.C. 9102(a)(51).) Transfer of that right to a transferee beneficiary is governed by Division 5 (see 4 *Summary* (10th), *Negotiable Instruments*, §136 et seq.). (Assembly Committee Comment 5e.)

(6) *Supporting Obligations.* Supporting obligations are letter-of-credit rights or secondary obligations that support the payment or performance of an account, chattel paper, document, general intangible, instrument, or investment property. (U.C.C. 9102(a)(77).) This term is new to Division 9 and covers the most common types of credit enhancements. (Assembly Committee Comment 5f.)

(7) *Commercial Tort Claims.* Under U.C.C. 9102(a)(13), a commercial tort claim is a claim arising in tort with respect to which either of the following conditions is satisfied:

(a) The claimant is an organization.

(b) The claimant is an individual, the claim arose in the course of the claimant's business or profession, and the claim does not include damages arising out of personal injury to or the death of an individual.

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- A. Definitions.
- 3. Collateral.
- d. Investment Property.

4 Witkin Sum. Cal. Law STPP § 43

[§ 43] Investment Property.

Investment property is a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account. (U.C.C. 9102(a)(49); for definitions of "security" and "security entitlement," see U.C.C. 8102, 9 *Summary* (10th), *Corporations*, §§134, 147; for definition of "securities account," see U.C.C. 8501, 9 *Summary* (10th), *Corporations*, §147.) A commodity contract is a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is either (1) traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws, or (2) traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer. (U.C.C. 9102(a)(15).) A commodity account is an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer. (U.C.C. 9102(a)(14).)

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- 3. Collateral.
- e. Deposit Account.

4 Witkin Sum. Cal. Law STPP § 44

[§ 44] Deposit Account.

Deposit accounts are demand, time, savings, passbook, or similar accounts maintained with a bank. Accounts evidenced by an instrument or investment property cannot be deposit accounts. (U.C.C. 9102(a)(29).) Thus, shares in a money-market mutual fund are not deposit accounts, even if the shares are redeemable by check. An uncertificated certificate of deposit would be a deposit account (assuming there is no writing evidencing the bank's obligation to pay) whereas a nonnegotiable certificate of deposit would be a deposit account only if it is not an "instrument" as defined in U.C.C. 9102(a)(47). (Assembly Committee Comment 12.)

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- A. Definitions.
- 3. Collateral.
- f. Proceeds.

4 *Witkin Sum. Cal. Law STPP* § 45

[§ 45] Proceeds.

Proceeds, except as used in U.C.C. 9609(b) (infra, §178), are any of the following:

(1) Whatever is acquired on the sale, lease, license, exchange, or other disposition of collateral. (U.C.C. 9102(a)(64)(A); see *Johanson Trans. Service v. Rich Pik'd Rite* (1985) 164 C.A.3d 583, 591, 210 C.R. 433 ["proceeds" include payment for economic subcomponents of product, including raw materials and transportation]; *Producers Cotton Oil Co. v. Amstar Corp.* (1988) 197 C.A.3d 638, 647, 650, 242 C.R. 914 [discussing cases interpreting term, and citing *Johanson Trans. Service v. Rich Pik'd Rite*]; 79 A.L.R.4th 903 [government agricultural program payments as "proceeds" of agricultural products].)

(2) Whatever is collected on, or distributed on account of, collateral. (U.C.C. 9102(a)(64)(B).)

(3) Rights arising out of collateral. (U.C.C. 9102(a)(64)(C).)

(4) To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral. (U.C.C. 9102(a)(64)(D).)

(5) To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral. (U.C.C. 9102(a)(64)(E).)

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3. Collateral.

g. Accessions and Commingled Goods.

4 Witkin Sum. Cal. Law STPP § 46

[§ 46] Accessions and Commingled Goods.

(1) *Accessions*. Accessions are goods that are physically united with other goods in such a manner that the identity of the original goods is not lost. (U.C.C. 9102(a)(1).) If one person's collateral becomes physically united with another person's collateral, each is an "accession." (Uniform Commercial Code Comment 3 to U.C.C. 9335 [giving example of tractor and later installed tractor engine].) A security interest may be created in an accession and continues in collateral that becomes an accession. (U.C.C. 9335(a).) However, U.C.C. 9335 "does not address whether a secured party acquires a security interest in the whole if its collateral becomes an accession. Normally this will turn on the description of the collateral in the security agreement." (Uniform Commercial Code Comment 5; on description of collateral, see *infra*, §48.)

(2) *Commingled Goods*. Commingled goods are goods that are physically united with other goods in such a manner that their identity is lost in a product or mass. (U.C.C. 9336(a).) Commingled goods include not only goods whose identity is lost through manufacturing or production, such as flour that has become part of baked goods, but also goods whose identity is lost by commingling with other goods from which they cannot be distinguished, such as ball bearings. (Uniform Commercial Code Comment 2.)

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A. Definitions.

4. Parties to Secured Transactions.

4 Witkin Sum. Cal. Law STPP § 47

[§ 47] Parties to Secured Transactions.

(1) *Debtor*. A debtor is any of the following:

(a) A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor. (U.C.C. 9102(a)(28)(A).)

(b) A seller of accounts, chattel paper, payment intangibles, or promissory notes. (U.C.C. 9102(a)(28)(B).)

(c) A consignee. (U.C.C. 9102(a)(28)(C); for definition of consignee, see U.C.C. 9102(a)(19).)

Persons who may have a stake in the proper enforcement of a security interest by virtue of their nonlien property interest in the collateral are debtors. The debtor's property interest is typically an ownership interest. (Assembly Committee Comment 2a; see C.E.B., Secured Transactions 2d, §1.14.)

(2) *Obligor*. An obligor is a person who, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (a) owes payment or other performance of the obligation, (b) has provided property other than the collateral to secure payment or other performance of the obligation, or (c) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit. (U.C.C. 9102(a)(59).) An obligor who incurs an obligation as part of a transaction entered into primarily for personal, family, or household purposes is a consumer obligor. (U.C.C. 9102(a)(25).)

(3) *Secondary Obligor*. A secondary obligor is an obligor to the extent that either of the following conditions are satisfied:

(a) The obligor's obligation is secondary. (U.C.C. 9102(a)(71)(A).) "One must consult the law of suretyship to determine whether an obligation is secondary." (Assembly Committee Comment 2a.)

(b) The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either. (U.C.C. 9102(a)(71)(B).)

Persons who may have a stake in the proper enforcement of the security interest because of their obligation to pay

the debt are secondary obligors, assuming that some portion of the obligation is secondary or that the person has a right of recourse against the debtor or another obligor. (Assembly Committee Comment 2a.)

(4) *Secured Party*. Each of the following qualifies as a secured party:

(a) A person in whose favor a security interest is created or provided for under a security agreement, whether or not an obligation to be secured is outstanding. (U.C.C. 9102(a)(72)(A).)

(b) A person who holds an agricultural lien. (U.C.C. 9102(a)(72)(B).)

(c) A consignor. (U.C.C. 9102(a)(72)(C); for definition of consignor, see U.C.C. 9102(a)(21).)

(d) A person to whom accounts, chattel paper, payment intangibles, or promissory notes have been sold. (U.C.C. 9102(a)(72)(D).)

(e) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for. (U.C.C. 9102(a)(72)(E).)

(f) A person who holds a security interest arising under U.C.C. 2401 or 2505 (4 *Summary* (10th), *Sales*, §131), U.C.C. 4210 (4 *Summary* (10th), *Negotiable Instruments*, §106), or U.C.C. 5118 (4 *Summary* (10th), *Negotiable Instruments*, §143), or under U.C.C. 2711(3) (4 *Summary* (10th), *Sales*, §163) or U.C.C. 10508(5) (see U.C.C. 10508(e), 13 *Summary* (10th), *Personal Property*, §214). (U.C.C. 9102(a)(72)(F); see C.E.B., *Secured Transactions* 2d, §1.13.)

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III. CREATION OF SECURITY INTEREST
B. Description of Collateral.

4 Witkin Sum. Cal. Law STPP § 48

[§ 48] Description of Collateral.

(1) *Detailed Specificity Not Required.* A description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described. (U.C.C. 9108(a).) Under U.C.C. 9108(b), a description of collateral reasonably identifies the collateral if it identifies the collateral by any of the following:

- (a) Specific listing.
- (b) Category.
- (c) A type of collateral defined in Division 9. (But see exceptions for commercial tort claims and consumer transactions, *infra*, this section.)
- (d) Quantity.
- (e) Computational or allocational formula or procedure.
- (f) Any other method, if the identity of the collateral is objectively determinable.

A description of consumer goods also must meet the applicable requirements of C.C. 1799.100, concerning consumer credit contracts. (U.C.C. 9108(f).)

The test of sufficiency of a description under U.C.C. 9108 is that the description must "do the job assigned to it: make possible the identification of the collateral described." U.C.C. 9108 rejects a requirement that a description must be exact and detailed (the so-called serial number test). (Assembly Committee Comment 2; see C.E.B., *Secured Transactions* 2d, §2.7; *68A Am.Jur.2d* (2003 ed.), *Secured Transactions* §174 et seq.)

(2) *Insufficient Description.* A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using similar words does not reasonably identify the collateral. (U.C.C. 9108(c).) Furthermore, a description only by type of collateral defined in Division 9 is an insufficient description of a commercial tort claim. (U.C.C. 9108(e)(1).)

(3) *Special Rules for Descriptions of Investment Property.* Under U.C.C. 9108(d), a description of a security

entitlement, securities account, or commodity account is sufficient if it describes either of the following:

- (a) The collateral by those terms or as investment property.
- (b) The underlying financial asset or commodity contract.

Thus, the use of the wrong Division 8 terminology generally does not render a description invalid. For example, a security agreement intended to cover a debtor's "security entitlements" is sufficient if it refers to the debtor's "securities." (Assembly Committee Comment 4.)

In a consumer transaction, a description only by type of collateral defined in Division 9 is an insufficient description of consumer goods, a security entitlement, a securities account, or a commodity account. (U.C.C. 9108(e)(2).) As it does with commercial tort claims, *supra*, U.C.C. 9108(e) requires greater specificity of description to prevent debtors from inadvertently encumbering certain property. (Assembly Committee Comment 5.) Moreover, a description of investment property collateral also must meet the applicable requirements of C.C. 1799.103, concerning consumer credit contracts. (U.C.C. 9108(f).)

(4) *After-Acquired Collateral*. Uniform Commercial Code Comment 3 to U.C.C. 9108 notes that "[m]uch litigation has arisen over whether a description in a security agreement is sufficient to include after-acquired collateral if the agreement does not explicitly so provide. This question is one of contract interpretation and is not susceptible to a statutory rule." Accordingly, U.C.C. 9108 contains no reference to descriptions of after-acquired collateral.

SUPPLEMENT: [This section is current through the latest supplement]



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 III. CREATION OF SECURITY INTEREST
 C. Effectiveness of Security Agreement.

4 *Witkin Sum. Cal. Law STPP* § 49

[§ 49] Effectiveness of Security Agreement.

(1) *General Rule of Effectiveness.* Except as otherwise provided in the Commercial Code, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors. (U.C.C. 9201(a).)

(2) *Exceptions and Qualifications.* "Security agreement" is defined as "an agreement that creates or provides for a security interest" (see U.C.C. 9102(a)(73), *supra*, §39). Therefore, U.C.C. 9201(a) does not provide that every term or provision contained in a record that contains a security agreement or that is so labeled is effective. (Uniform Commercial Code Comment 2.)

Exceptions to the general rule of U.C.C. 9201(a) arise where there is an overriding provision in Division 9 or another division of the Commercial Code. For example, U.C.C. 9317 (*infra*, §105 *et seq.*) subordinates unperfected security interests to lien creditors and certain buyers, and several provisions in U.C.C. 9301 *et seq.* subordinate some security interests to other security interests and interests of purchasers. (Uniform Commercial Code Comment 2 to U.C.C. 9201; see *infra*, §§111 *et seq.*, 114 *et seq.*)

Under U.C.C. 9201(b), certain transactions, although subject to Division 9, also are subject to other applicable laws relating to consumers or laws specified in U.C.C. 9201(b). (See, e.g., Retail Installment Sales Act (C.C. 1801 *et seq.*); Automobile Sales Finance Act (C.C. 2981).) In case of conflict between Division 9 and a rule of law, statute, or regulation described in U.C.C. 9201(b), the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in U.C.C. 9201(b) has only the effect the statute or regulation specifies. (U.C.C. 9201(c).) Thus, violation of the other law does not necessarily constitute a violation of Division 9. (Uniform Commercial Code Comment 3.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule of Effectiveness.* In *People v. Green* (2004) 125 C.A.4th 360, 22 C.R.3d 736, defendant was charged with grand theft, burglary, and forgery. Various assets were seized from him pursuant to a search warrant, including cash and a number of vehicles. The prosecution asserted a right to retain the assets under P.C. 186.11 ("Freeze and Seize Law"; see 3 *Cal. Crim. Law* (3d), *Punishment*, §293), which permits a trial court to enjoin a defendant from disposing of assets before trial, and to levy on those assets to pay restitution to victims following trial. Defendant gave his attorney, B, a security interest in the assets for unpaid attorneys' fees. However, B was unable to perfect his security

interest in the cash because the sheriff had possession of it (see U.C.C. 9312(b)(3), text, §68), and was unable to perfect his security interest in the vehicles because the sheriff had possession of the title documents (see U.C.C. 9311(a)(2)(A), text, §66). Defendant was convicted, the property was sold at auction, and the trial judge ruled that B had priority over the victims only to the extent that he had perfected his security interest. *Held*, reversed.

(a) Because the prosecution had never filed a petition and motion for a preliminary injunction under P.C. 186.11, that statute did not apply and the trial court lacked authority to sell the property or distribute the proceeds as restitution. However, B consented to the sale, but challenged the disposition of the proceeds. (*125 C.A.4th 375.*)

(b) Defendant had the power to create a valid security interest in the property in question because there was insufficient evidence that this specific property had been stolen or purchased with stolen funds. Thus, B had a valid, though unperfected, security interest in that property. (*125 C.A.4th 376.*) Because none of defendant's victims had levied on the property or filed a notice of judgment lien, they were merely unsecured creditors. Under U.C.C. 9201(a), B's unperfected security interest had priority over their claims; thus, B had the right to the proceeds. (*125 C.A.4th 377.*)*Correction:* Page 607, line 6, reference to C.C. 2981 should be to C.C. 2981 et seq.



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CHAPTER VII - Secured Transactions in Personal Property

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IV. ATTACHMENT OF SECURITY INTEREST
A. Requirements.
1. In General.

4 *Witkin Sum. Cal. Law STPP* § 50

[§ 50] In General.

(1) *When Security Interest Attaches.* A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment. (U.C.C. 9203(a).)

(2) *Conditions of Enforceability.* U.C.C. 9203(b) prescribes the three following conditions that must be satisfied before a security interest is enforceable against the debtor and third parties with respect to the collateral:

(a) Value must be given. (U.C.C. 9203(b)(1).)

(b) The debtor must have rights in the collateral or the power to transfer rights in the collateral to a secured party. (U.C.C. 9203(b)(2), *infra*, §51.)

(c) There must be a security agreement plus satisfaction of one of four evidentiary requirements in the nature of a statute of frauds. (U.C.C. 9203(b)(3); Uniform Commercial Code Comment 3.) The four evidentiary alternatives are (1) authentication (see *infra*, §52); (2) possession (see *infra*, §53); (3) delivery (see *infra*, §53); and (4) control (see *infra*, §54). (See *Raleigh Industries of America v. Tassone* (1977) 74 C.A.3d 692, 698, 141 C.R. 641 [failure to file financing statement did not affect validity of security agreement]; *Burlesci v. Petersen* (1998) 68 C.A.4th 1062, 1068, 80 C.R.2d 704 [recognizing security interest without written security agreement would violate intent of former U.C.C. 9203]; 3 A.L.R.4th 502 [sufficiency of debtor's signature on security agreement under former Unif.Com.C. §9-203].)

One purpose of the formal requisites stated in U.C.C. 9203(b) is to minimize the possibility of future disputes as to the terms of a security agreement (e.g., as to the property that stands as collateral for the obligation secured). (Uniform Commercial Code Comment 5; see C.E.B., *Secured Transactions* 2d, §3.2 et seq.; 68A *Am.Jur.2d* (2003 ed.), *Secured Transactions* §242 et seq.)

(3) *Exceptions.* U.C.C. 9203(b) is subject to U.C.C. 4210 (see 4 *Summary* (10th), *Negotiable Instruments*, §106) on the security interest of a collecting bank, U.C.C. 5118 (see 4 *Summary* (10th), *Negotiable Instruments*, §143) on the security interest of a letter-of-credit issuer or nominated person, and U.C.C. 9206 on security interests in investment property (see *infra*, §59). (U.C.C. 9203(c).)

Moreover, with regard to a security interest arising under U.C.C. 2401, 2505, 2711(3), or 10508(e), until the debtor

obtains possession of the goods, the security interest is enforceable even if U.C.C. 9203(b)(3) has not been satisfied. (U.C.C. 9110(1), 9203(c).)

West's Key Number Digest, Secured Transactions k.41 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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A. Requirements.

2. Debtor's Transfer Rights.

4 Witkin Sum. Cal. Law STPP § 51

[§ 51] Debtor's Transfer Rights.

Under U.C.C. 9203(b)(2), attachment depends on the debtor's having "rights in the collateral or the power to transfer rights in the collateral to a secured party." A debtor's limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. However, in general, "a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be." (Uniform Commercial Code Comment 6; see *Mother Lode Bank v. General Motors Acceptance Corp.* (1975) 46 C.A.3d 807, 813, 120 C.R. 429 [no valid security agreement with defendant finance company where debtor, a motor vehicle dealer, knew that plaintiff bank, not he, had title to repossessed vehicles covered by agreement; construing former U.C.C. 9204]; *Chartered Bank of London v. Chrysler Corp.* (1981) 115 C.A.3d 755, 760, 171 C.R. 748 [necessity of debtor's rights in collateral]; C.E.B., Secured Transactions 2d, §3.4.)

Certain exceptions to the general rule enable a debtor to transfer, and a security interest to attach to, greater rights than the debtor has. (See U.C.C. 9322 et seq. [priority rules], *infra*, §114 et seq.) The phrase "or the power to transfer rights in the collateral to a secured party" accommodates those exceptions. In some cases, a debtor may have power to transfer another person's rights only to a class of transferees that excludes secured parties. (See, e.g., U.C.C. 2403(2), 4 *Summary* (10th), *Sales*, §137 [giving certain merchants power to transfer entruster's rights to buyer in ordinary course of business].) Under those circumstances, the debtor would not have the power to create a security interest in the other person's rights, and the condition in U.C.C. 9203(b)(2) would not be satisfied. (Uniform Commercial Code Comment 6.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Requirements.

3. Evidentiary Alternatives.

a. Authentication.

4 Witkin Sum. Cal. Law STPP § 52

[§ 52] Authentication.

The most basic of the four evidentiary alternatives under U.C.C. 9203(b)(3) allows the debtor to authenticate a security agreement that provides a description of the collateral, and if the security interest covers timber to be cut, a description of the land concerned. (U.C.C. 9203(b)(3)(A).) A debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security. Similarly, a self-styled "lease" may serve as a security agreement if the agreement creates a security interest. (Uniform Commercial Code Comment 3; see C.E.B., *Secured Transactions* 2d, §§2.5, 3.5; *68A Am.Jur.2d* (2003 ed.), *Secured Transactions* §134.)

The other three evidentiary alternatives dispense with the requirement of an authenticated security agreement. (Uniform Commercial Code Comment 4; see *68A Am.Jur.2d* (2003 ed.), *Secured Transactions* §135; *infra*, §§53, 54.)

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A. Requirements.

3. Evidentiary Alternatives.

b. Possession or Delivery.

4 Witkin Sum. Cal. Law STPP § 53

[§ 53] Possession or Delivery.

(1) *Possession.* The secured party's possession of the collateral under U.C.C. 9313, pursuant to the debtor's security agreement, substitutes for the debtor's authentication under U.C.C. 9203(b)(3)(A) (*supra*, §52), as long as the collateral is not a certificated security. (U.C.C. 9203(b)(3)(B); Uniform Commercial Code Comment 4; see C.E.B., *Secured Transactions* 2d, §3.5.)

The phrase "pursuant to the debtor's security agreement" refers to the debtor's agreement to the secured party's possession for the purpose of creating a security interest. It should not be confused with the phrase "debtor has authenticated a security agreement," used in U.C.C. 9203(b)(3)(A) (*supra*, §52), which contemplates the debtor's authentication of a record. "In the unlikely event that possession is obtained without the debtor's agreement, possession would not suffice as a substitute for an authenticated security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party's possession is maintained without the agreement of a subsequent debtor (e.g., a transferee)." Possession as contemplated by U.C.C. 9313 is possession for purposes of U.C.C. 9203(b)(3)(B), even though it may not constitute possession "pursuant to the debtor's agreement" and consequently might not serve as a substitute for an authenticated security agreement under U.C.C. 9203(b)(3)(A). (Uniform Commercial Code Comment 4; see *Burlesci v. Petersen* (1998) 68 C.A.4th 1062, 1067, 80 C.R.2d 704 [creditor did not have security interest in restaurant equipment that debtor had voluntarily delivered to creditor; creditor did not take possession "pursuant to" security agreement, but rather stored equipment solely as favor; construing former U.C.C. 9203(1)(a)].)

(2) *Delivery.* If the collateral is a certificated security in registered form, delivery of the security certificate to the secured party under U.C.C. 8301 pursuant to the debtor's security agreement substitutes for an authenticated security agreement. (U.C.C. 9203(b)(3)(C).)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Requirements.

3. Evidentiary Alternatives.

c. Control.

4 Witkin Sum. Cal. Law STPP § 54

[§ 54] Control.

(1) *Control as Alternative to Authentication.* The final alternative to authentication of a security agreement applies only when the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights. The secured party's control of those types of collateral under U.C.C. 9104, 9105, 9106, or 9107 satisfies the evidentiary test of U.C.C. 9203(b)(3), as long as the control is pursuant to the debtor's security agreement. (U.C.C. 9203(b)(3)(D); Uniform Commercial Code Comment 4.)

(2) *Control of Deposit Account.* A secured party has control of a deposit account (supra, §44) if any of the following conditions is satisfied:

(a) The secured party is the bank with which the deposit account is maintained. (U.C.C. 9104(a)(1).)

(b) The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the deposit account's funds without further consent by the debtor. (U.C.C. 9104(a)(2).)

(c) The secured party becomes the bank's customer with respect to the deposit account. (U.C.C. 9104(a)(3).)

A secured party that has satisfied U.C.C. 9104(a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account. (U.C.C. 9104(b).)

(3) *Control of Electronic Chattel Paper.* A secured party has control of electronic chattel paper (supra, §42) if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that each of the following conditions is satisfied:

(a) A single authoritative copy of the record or records exists which is unique, identifiable, and, except as otherwise provided in U.C.C. 9105(4), 9105(5), and 9105(6), unalterable. (U.C.C. 9105(1).)

(b) The authoritative copy identifies the secured party as the assignee of the record or records. (U.C.C. 9105(2).)

(c) The authoritative copy is communicated to and maintained by the secured party or its designated custodian. (U.C.C. 9105(3).)

(d) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the secured party's participation. (U.C.C. 9105(4).)

(e) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy. (U.C.C. 9105(5).)

(f) A revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision. (U.C.C. 9105(6).)

(4) *Control of Investment Property.* A person has control of a certificated security, uncertificated security, or security entitlement as provided in U.C.C. 8106 (9 *Summary* (10th), *Corporations*, §§138, 140, 147). (U.C.C. 9106(a).) A secured party has control of a commodity contract if either: (a) the secured party is the commodity intermediary with which the commodity contract is carried (U.C.C. 9106(b)(1)); or (b) the commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without the commodity customer's further consent (U.C.C. 9106(b)(2)). A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account. (U.C.C. 9106(c).)

(5) *Control of Letter-of-Credit Rights.* A secured party has control of a letter-of-credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of the letter of credit's proceeds under U.C.C. 5114(c) or otherwise applicable law or practice. (U.C.C. 9107.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Control as Alternative to Authentication.* U.C.C. 9203(b)(3)(D) was amended in 2006 to add electronic documents to the list of collateral and U.C.C. 7106 to the list of relevant statutes.



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 B. New Debtors.

4 Witkin Sum. Cal. Law STPP § 55

[§ 55] New Debtors.

(1) *When New Debtor Becomes Bound.* A person becomes bound as a debtor by a security agreement entered into by another person if, by operation of law other than Division 9 or by contract, either of the following conditions is satisfied:

(a) The security agreement becomes effective to create a security interest in the person's property. (U.C.C. 9203(d)(1).)

(b) The person becomes generally obligated for the other person's obligations, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the other person's assets. (U.C.C. 9203(d)(2).) Persons who become bound under this condition are limited to those who both become primarily liable for the original debtor's obligations and succeed to or acquire its assets. Thus, U.C.C. 9203(d)(2) "excludes sureties and other secondary obligors as well as persons who become obligated through veil piercing and other non-successorship doctrines. In many cases, paragraph (2) will exclude successors to the assets and liabilities of a division of a debtor." (Uniform Commercial Code Comment 7; see *68A Am.Jur.2d (2003 ed.), Secured Transactions §136.*)

(2) *Satisfaction of Enforceability Requirements.* If a new debtor becomes bound as a debtor by a security agreement entered into by another person, the agreement satisfies U.C.C. 9203(b)(3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement. (U.C.C. 9203(e)(1).) Another agreement is not necessary to make a security interest in the property enforceable. (U.C.C. 9203(e)(2).) (On effect of new debtor on filed financing statement, see *infra*, §85.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Extent of Attachment.

1. Proceeds and Supporting Obligations.

4 Witkin Sum. Cal. Law STPP § 56

[§ 56] Proceeds and Supporting Obligations.

The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by U.C.C. 9315 (infra, §§136, 137) and is also attachment of a security interest in a supporting obligation for the collateral. (U.C.C. 9203(f).) Implicit in this rule is "the principle that the secured party's interest in a supporting obligation extends to the supporting obligation only to the extent that it supports the collateral in which the secured party has a security interest. Complex issues may arise, however, if a supporting obligation supports many separate obligations of a particular account debtor and if the supported obligations are separately assigned as security to several secured parties. The problems may be exacerbated if a supporting obligation is limited to an aggregate amount that is less than the aggregate amount of the obligations it supports. [Division 9] does not contain provisions dealing with competing claims to a limited supporting obligation. As under [the predecessor to Division 9], the law of suretyship and the agreements of the parties will control." (Uniform Commercial Code Comment 8.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Extent of Attachment.
2. Right to Payment or Performance.

4 Witkin Sum. Cal. Law STPP § 57

[§ 57] Right to Payment or Performance.

The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien. (U.C.C. 9203(g).) This provision "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." (Uniform Commercial Code Comment 9.)

SUPPLEMENT: [This section is current through the latest supplement]



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 3. After-Acquired Property.

4 *Witkin Sum. Cal. Law STPP* § 58

[§ 58] After-Acquired Property.

(1) *General Rule Permitting Floating Liens.* A security agreement may create or provide for a security interest in after-acquired collateral. (U.C.C. 9204(a); on description of after-acquired collateral, see *supra*, §48.) This provision adopts the principle of a "continuing general lien" or "floating lien." It validates a security interest in the debtor's existing and, on acquisition, future assets, even though, under U.C.C. 9205 (*infra*, this section), the debtor may use or dispose of collateral without being required to account for proceeds or substitute new collateral. U.C.C. 9204(a) clarifies that "a security interest arising by virtue of an after-acquired property clause is no less valid than a security interest in collateral in which the debtor has rights at the time value is given." The secured party is not required to take any further action, such as a supplemental agreement covering the new collateral. (Uniform Commercial Code Comment 2; see *Cerritos Valley Bank v. Stirling* (2000) 81 C.A.4th 1108, 1115, 97 C.R.2d 432 [security agreement that defined "collateral" as "all inventory, accounts, equipment, general intangibles and fixtures" whether "now owned or hereafter acquired" included debtor's microbrewery equipment; language was clear and unambiguous and was designed to cover all of debtor's personal property, including after-acquired property]; 72 *Harv. L. Rev.* 838 [priorities among secured creditors and floating liens under former Division 9]; 17 *Stanf. L. Rev.* 822 [issues surrounding floating liens]; 50 *So. Cal. L. Rev.* 429 [floating lienor as good faith purchaser]; 15 *U.C.L.A. L. Rev.* 678 [potential conflict between after-acquired property provisions of former Division 9 and Bankruptcy Act, §60(a)]; C.E.B., *Secured Transactions* 2d, §2.12 et seq.; 68A *Am.Jur.2d* (2003 ed.), *Secured Transactions* §210 et seq.)

(2) *Exceptions.* A security interest does not attach under a term constituting an after-acquired property clause to consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value. (U.C.C. 9204(b)(1).) Similarly, an after-acquired property clause does not reach future commercial tort claims. (U.C.C. 9204(b)(2).) For a security interest in a tort claim to attach, the claim must exist when the security agreement is authenticated. In addition, the security agreement must describe the tort claim with greater specificity than simply "all tort claims" (see U.C.C. 9108(e), *supra*, §48). (Uniform Commercial Code Comment 4.)

(3) *Future Advances Secured.* A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment. (U.C.C. 9204(c).) Together, U.C.C. 9204(a) and 9204(c) validate "cross-collateral" clauses under which collateral acquired at any time secures advances whenever made.

(Uniform Commercial Code Comment 2; see 37 *Hastings L. J.* 1007 [allowable scope of future advance and all obligations clauses]; 90 *A.L.R.4th* 859 [construction and effect of future advances clauses].)

"Determining the obligations secured by collateral is solely a matter of construing the parties' agreement under applicable law. [Division 9] rejects the holdings of cases decided under former [Division 9] that applied other tests, such as whether a future advance or other subsequently incurred obligation was of the same or a similar type or class as earlier advances and obligations secured by the collateral." (Uniform Commercial Code Comment 5.)

(4) *Use or Disposition of Collateral Permissible.* A security interest is not invalid or fraudulent against creditors solely because the debtor is at liberty to dispose of the collateral without being required to account to the secured party for proceeds or to substitute new collateral. (U.C.C. 9205; Uniform Commercial Code Comment 2.) Specifically, the debtor may have the right or ability to:

(a) Use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods. (U.C.C. 9205(a)(1)(A).)

(b) Collect, compromise, enforce, or otherwise deal with collateral. (U.C.C. 9205(a)(1)(B).) This language contemplates the many types of collateral that a debtor may wish to "collect, compromise, or enforce," such as deposit accounts, documents, general intangibles, instruments, investment property, and letter-of-credit rights. (Uniform Commercial Code Comment 4.)

(c) Accept the return of collateral or make repossessions. (U.C.C. 9205(a)(1)(C).)

(d) Use, commingle, or dispose of proceeds. (U.C.C. 9205(a)(1)(D).)

Furthermore, the secured party need not require the debtor to account for proceeds or replace collateral. (U.C.C. 9205(a)(2).)

U.C.C. 9205 does not relax the requirements of possession if attachment, perfection, or enforcement of a security interest depends on possession of the collateral by the secured party. (U.C.C. 9205(b); on perfection, see *infra*, §61 et seq.; on enforcement, see *infra*, §171 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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 4. Investment Property.

4 Witkin Sum. Cal. Law STPP § 59

[§ 59] Investment Property.

(1) *Attachment of Security Entitlements and Commodity Contracts.* The attachment of a security interest in a securities account or a commodity account is also attachment of a security interest in the security entitlements carried in the securities account or in the commodity contracts carried in the commodity account. (U.C.C. 9203(h), (i).)

(2) *Broker's Lien.* A security interest in favor of a securities intermediary attaches to a person's security entitlement if:

(a) The person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase (U.C.C. 9206(a)(1)); and

(b) The securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary (U.C.C. 9206(a)(2)).

The security interest described in U.C.C. 9206(a) secures the person's obligation to pay for the financial asset. (U.C.C. 9206(b).)

U.C.C. 9206(a) and 9206(b) codify and adapt to the indirect holding system the so-called broker's lien, which has long been recognized. It acknowledges that, for example, many brokers permit retail customers to pay for financial assets by check. The broker may not receive final payment of the check until several days after the broker has credited the customer's securities account for the financial assets. Thus, the customer will have acquired a security entitlement before payment. The broker's lien secures the customer's obligation to pay for the financial asset in question. (Assembly Committee Comment 2.)

(3) *Assets Delivered Against Payment.* A security interest in favor of a person who delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if both of the following conditions are satisfied:

(a) The security or other financial asset is, in the ordinary course of business, transferred by delivery with any necessary endorsement or assignment (U.C.C. 9206(c)(1)(A)) and is delivered under an agreement between persons in the business of dealing with those securities or financial assets (U.C.C. 9206(c)(1)(B)).

(b) The agreement calls for delivery against payment. (U.C.C. 9206(c)(2).)

The security interest described in U.C.C. 9206(c) secures the obligation to make payment for the delivery. (U.C.C. 9206(d).)

Assembly Committee Comment 3 illustrates the purpose of U.C.C. 9206(c) and 9206(d): "In some arrangements for settlement of transactions in physical financial assets, the seller's securities custodian will deliver physical certificates to the buyer's securities custodian and receive a time-stamped delivery receipt. The buyer's securities custodian will examine the certificate to ensure that it is in good order, and that the delivery matches a trade in which the buyer has instructed the seller to deliver to that custodian. If all is in order, the receiving custodian will settle with the delivering custodian through whatever funds settlement system has been agreed upon or is used by custom and usage in that market. The understanding of the trade, however, is that the delivery is conditioned upon payment, so that if payment is not made for any reason, the security will be returned to the deliverer. Subdivision (c) clarifies the rights of persons making deliveries in such circumstances. It provides the person making delivery with a security interest in the securities or other financial assets; under subdivision (d), the security interest secures the seller's right to receive payment for the delivery."

(4) *Automatic Attachment.* U.C.C. 9206(a) and 9206(c) refer to attachment of a security interest. Attachment under U.C.C. 9206 has the same incidents (enforceability, right to proceeds, etc.) as attachment under U.C.C. 9203, *supra*, §50. U.C.C. 9206 overrides the general attachment rules in U.C.C. 9203. (Assembly Committee Comment 4 to U.C.C. 9206; see U.C.C. 9203(c).)

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5. Commingled Goods.

4 Witkin Sum. Cal. Law STPP § 60

[§ 60] Commingled Goods.

A security interest does not exist in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods. (U.C.C. 9336(b); for definition of commingled goods, see supra, §46.) "By definition, the identity of the original collateral cannot be determined once the original collateral becomes commingled goods." Therefore, the security interest in the specific original collateral alone is lost once the collateral becomes commingled goods, and no security interest in the original collateral can be created after that time except as a part of the resulting product or mass. (Uniform Commercial Code Comment 3.)

If collateral becomes commingled goods, a security interest attaches to the product or mass. (U.C.C. 9336(c).) Thus, once collateral becomes commingled goods, the secured party's security interest is transferred from the original collateral to the product or mass. (Uniform Commercial Code Comment 3.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER VII - Secured Transactions in Personal Property

Witkin Summary of California Law
 V. PERFECTION OF SECURITY INTEREST
 A. Significance of Perfection.

4 Witkin Sum. Cal. Law STPP § 61

[§ 61] Significance of Perfection.

(1) *Perfection Defined.* When it attaches, a security interest may be either perfected or unperfected. "Perfected" means that the security interest has attached and the secured party has taken all the steps required by Division 9 as specified in U.C.C. 9310(a) through U.C.C. 9316. (U.C.C. 9308(a); Uniform Commercial Code Comment 2; on required steps, see *infra*, §62 et seq.) Similarly, an agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in U.C.C. 9310 have been satisfied. (U.C.C. 9308(b).) (See C.E.B., *Secured Transactions* 2d, §3.6; *Cal. Transactions Forms*, 5 Business Transactions §30:40 et seq.; *68A Am.Jur.2d (2003 ed.)*, *Secured Transactions* §259 et seq.)

A perfected security interest may still be subordinate to other interests (see, e.g., U.C.C. 9320, 9322, *infra*, §§111 et seq., 114 et seq.). "However, in general, after perfection, the secured party is protected against creditors and transferees of the debtor and, in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor" (see, e.g., U.C.C. 9317, *infra*, §105 et seq.). (Uniform Commercial Code Comment 2 to U.C.C. 9308.)

(2) *Time of Perfection.* The time of perfection is when the security interest has attached and any necessary steps for perfection, such as taking possession or filing, have been taken. (U.C.C. 9308(a); Uniform Commercial Code Comment 2.) A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches. (U.C.C. 9308(a).) Likewise, an agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective. (U.C.C. 9308(b).)

(3) *Continuity of Perfection.* A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under Division 9 and is later perfected by another method under Division 9, without an intermediate period when it was unperfected. (U.C.C. 9308(c); on continued perfection of proceeds, see *infra*, §64; on continued perfection following change in governing law, see *infra*, §67.)

West's Key Number Digest, Secured Transactions k.81 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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V. PERFECTION OF SECURITY INTEREST
B. Perfection Other Than by Filing.
1. In General.

4 Witkin Sum. Cal. Law STPP § 62

[§ 62] In General.

A "central" principle of Division 9 is that a financing statement must be filed to perfect all security interests and agricultural liens. (U.C.C. 9310(a); Assembly Committee Comment 2; on filing, see *infra*, §76 et seq.) However, there are numerous exceptions to this principle. In particular, the filing of a financing statement is not necessary to perfect a security interest that satisfies any of the following conditions:

- (1) It is perfected under U.C.C. 9308(d), 9308(e), 9308(f), or 9308(g). (U.C.C. 9310(b)(1); see *infra*, §65.)
- (2) It is perfected under U.C.C. 9309 when it attaches. (U.C.C. 9310(b)(2); see *infra*, §63.)
- (3) It is a security interest in property subject to a statute, regulation, or treaty described in U.C.C. 9311(a). (U.C.C. 9310(b)(3); see *infra*, §66.)
- (4) It is a security interest in goods in possession of a bailee that is perfected under U.C.C. 9312(d)(1) or (d)(2). (U.C.C. 9310(b)(4); see *infra*, §69.)
- (5) It is a security interest in certificated securities, documents, goods, or instruments that is perfected without filing or possession under U.C.C. 9312(e), 9312(f), or 9312(g). (U.C.C. 9310(b)(5); see *infra*, §65.)
- (6) It is a security interest in collateral in the secured party's possession under U.C.C. 9313. (U.C.C. 9310(b)(6); see *infra*, §68.)
- (7) It is a security interest in a certificated security that is perfected by delivery of the security certificate to the secured party under U.C.C. 9313. (U.C.C. 9310(b)(7); see *infra*, §73.)
- (8) It is a security interest in deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights that is perfected by control under U.C.C. 9314. (U.C.C. 9310(b)(8); see *infra*, §74; *Johanson Trans. Service v. Rich Pik'd Rite (1985) 164 C.A.3d 583, 592, 210 C.R. 433* [applying exemption for deposit accounts from former U.C.C. 9302(1)(g)].)
- (9) It is a security interest in proceeds that is perfected under U.C.C. 9315. (U.C.C. 9310(b)(9); see *infra*, §64.)

(10) It is perfected under U.C.C. 9316. (U.C.C. 9310(b)(10); see *infra*, §67.)

(11) It is a security interest in, or claim in or under, any policy of insurance including unearned premiums that is perfected by written notice to the insurer under U.C.C. 9312(b)(4). (U.C.C. 9310(b)(11); see *infra*, §75.)

In addition, if a secured party assigns a perfected security interest or agricultural lien, a filing under Division 9 is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor. (U.C.C. 9310(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Security interest in certificated securities, etc.:* U.C.C. 9310(b)(5) was amended in 2006 to refer to a security interest in the listed items that is perfected without filing, *control*, or possession.

(8) *Security interest in deposit accounts, etc.:* U.C.C. 9310(b)(8) was amended in 2006 to add electronic documents to the list of collateral.



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B. Perfection Other Than by Filing.

2. Methods.

a. Automatic Perfection.

1. On Attachment.

4 Witkin Sum. Cal. Law STPP § 63

[§ 63] On Attachment.

The filing of a financing statement is not necessary to perfect a security interest that is perfected under U.C.C. 9309 when it attaches. (U.C.C. 9310(b)(2); see C.E.B., *Secured Transactions* 2d, §3.7 et seq.; Cal. Transactions Forms, 5 Business Transactions §30:86; 68A *Am.Jur.2d* (2003 ed.), *Secured Transactions* §428.) The following security interests are perfected automatically when they attach:

(1) A purchase money security interest in consumer goods, except as otherwise provided in U.C.C. 9311(b) with respect to consumer goods that are subject to a statute or treaty described in U.C.C. 9311(a). (U.C.C. 9309(1); for definition of purchase money security interest, see *supra*, §38; on U.C.C. 9311, see *infra*, §66.)

(2) An assignment of accounts or payment intangibles that does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles. (U.C.C. 9309(2).) U.C.C. 9309(2) expands on former U.C.C. 9302(1)(e) by affording automatic perfection to certain assignments of payment intangibles as well as accounts. "The purpose of paragraph (2) is to save from *ex post facto* invalidation casual or isolated assignments--assignments which no one would think of filing. Any person who regularly takes assignments of any debtor's accounts or payment intangibles should file." In this connection, U.C.C. 9109(d)(4)-(d)(7) (*supra*, §24), which excludes certain transfers of accounts, chattel paper, payment intangibles, and promissory notes from Division 9, should be consulted. (Uniform Commercial Code Comment 4; see 85 *A.L.R.3d* 1050 [automatic perfection of assignment of accounts under former Unif.Com.C. §9-302(1)(e)].)

(3) A sale of a payment intangible (U.C.C. 9309(3)) or a promissory note (U.C.C. 9309(4)). U.C.C. 9309(3) and 9309(4), which are new, "reflect the practice under former [Division] 9. Under that [Division], filing a financing statement did not affect the rights of a buyer of payment intangibles or promissory notes, inasmuch as the former [Division] did not cover those sales. To the extent that the exception in [U.C.C. 9309(2)] covers outright sales of payment intangibles, which automatically are perfected under [U.C.C. 9309(3)], the exception is redundant." (Uniform Commercial Code Comment 4.)

(4) A security interest created by the assignment of a health care insurance receivable to the provider of the health

care goods or services. (U.C.C. 9309(5).) The primary effect of this provision is that, when an individual assigns a right to payment under an insurance policy to the person who provided health care goods or services, the provider has no need to file a financing statement against the individual. The normal filing requirements apply to other assignments of health care insurance receivables covered by this Division, such as assignments from the health care provider to a financier. (Uniform Commercial Code Comment 5.)

(5) A security interest arising under U.C.C. 2401 or 2505 (reservation of security interest by seller of goods; see 4 *Summary* (10th), *Sales*, §131), under U.C.C. 2711(3) (buyer's security interest in rightfully rejected goods; see 4 *Summary* (10th), *Sales*, §163), or under U.C.C. 10508(5) (lessee's security interest in rightfully rejected goods; see U.C.C. 10508(e), 13 *Summary* (10th), *Personal Property*, §214), until the debtor obtains possession of the collateral. (U.C.C. 9309(6).)

(6) A security interest of a collecting bank arising under U.C.C. 4210 (collecting bank's security interest in item, accompanying documents or proceeds; see 4 *Summary* (10th), *Negotiable Instruments*, §106). (U.C.C. 9309(7).)

(7) A security interest of an issuer or nominated person arising under U.C.C. 5118 (issuer's or nominated person's security interest in document presented under letter of credit; see 4 *Summary* (10th), *Negotiable Instruments*, §143). (U.C.C. 9309(8).)

(8) A security interest arising in the delivery of a financial asset under U.C.C. 9206(c) (*supra*, §59). (U.C.C. 9309(9).)

(9) A security interest in investment property created by a broker or securities intermediary. (U.C.C. 9309(10).)

(10) A security interest in a commodity contract or a commodity account created by a commodity intermediary. (U.C.C. 9309(11).)

(11) An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee under that assignment. (U.C.C. 9309(12).)

(12) A security interest created by an assignment of a beneficial interest in a decedent's estate. (U.C.C. 9309(13).)

(13) A sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance. (U.C.C. 9309(14).)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Perfection Other Than by Filing.

2. Methods.

a. Automatic Perfection.

2. In Proceeds.

4 *Witkin Sum. Cal. Law STPP* § 64

[§ 64] In Proceeds.

(1) *20-Day Automatic Perfection Period.* A security interest in proceeds is automatically a perfected security interest if the security interest in the original collateral was perfected. (U.C.C. 9315(c).) It is not necessary to file a financing statement to perfect the security interest. (U.C.C. 9310(b)(9).) Generally, a perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds. (U.C.C. 9315(d); see C.E.B., *Secured Transactions* 2d, §3.59; 68A *Am.Jur.2d* (2003 ed.), *Secured Transactions* §§427, 448 et seq.)

(2) *Exception: Cash Proceeds.* Perfection continues beyond the 20-day period when the proceeds are identifiable cash proceeds. (U.C.C. 9315(d)(2).) Thus, under U.C.C. 9315(d)(2), if the security interest in the original collateral was perfected, a security interest in identifiable cash proceeds will remain perfected indefinitely, regardless of whether the security interest in the original collateral remains perfected. In many cases, however, a purchaser or other transferee of the cash proceeds will take free of the perfected security interest (see, e.g., U.C.C. 9330(d), *infra*, §130 [purchaser of check], U.C.C. 9331, *infra*, §143 [holder in due course of check], U.C.C. 9332, *infra*, §127 [transferee of money or funds from deposit account]). (Assembly Committee Comment 7.) Cash proceeds retain their character as cash proceeds while in the possession of a levying officer under *C.C.P.* 481.010 et seq. (6 *Cal. Proc.* (4th), *Provisional Remedies*, §55 et seq.) or *C.C.P.* 680.010 et seq. (8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §9 et seq.). (U.C.C. 9315(f).)

(3) *Exception: Proceeds Not Acquired With Cash Proceeds.* A security interest in proceeds remains perfected beyond the automatic 20-day perfection period if (a) a filed financing statement covers the original collateral (U.C.C. 9315(d)(1)(A)), (b) the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed (U.C.C. 9315(d)(1)(B)), and (c) the proceeds are not acquired with cash proceeds (U.C.C. 9315(d)(1)(C)). Thus, continued perfection is inapplicable to proceeds acquired with cash proceeds, leaving perfection of a security interest in those proceeds to the generally applicable perfection rules under U.C.C. 9315(d)(3), *infra*, this section. (Assembly Committee Comment 5.) (See *Cassel v. Kolb* (1999) 72 *C.A.4th* 568, 576, 84 *C.R.2d* 878 [bank had perfected security interest in proceeds of debtor's accounts receivable, including securities given in payment of account, by operation of law under former U.C.C. 9306(3)(a) (from which U.C.C. 9315(d)(1) was derived); security interest in original collateral (accounts receivable) was perfected and proceeds (securities) could also be perfected by filing].)

Assembly Committee Comment 5 provides the following example of the operation of U.C.C. 9315(d)(1): Lender perfects a security interest in Debtor's inventory by filing a financing statement covering "inventory." Debtor sells the inventory and deposits the buyer's check into a deposit account. Debtor draws a check on the deposit account and uses it to pay for equipment. The funds used to pay for the equipment were identifiable proceeds of the inventory. Because the proceeds (equipment) were acquired with cash proceeds (deposit account), U.C.C. 9315(d)(1) does not extend perfection beyond the 20-day automatic period.

(4) *Exception: Other Means of Perfection on Attachment or During 20-Day Period.* A perfected security interest in proceeds continues to be perfected beyond the 20-day period if the security interest in the proceeds is perfected other than under U.C.C. 9315(c), either when the security interest attaches to the proceeds or within 20 days thereafter. (U.C.C. 9315(d)(3).)

Assembly Committee Comment 5 explains how U.C.C. 9315(d)(3) offers a different result from the one in U.C.C. 9315(d)(1): As in the example given above, Lender perfects a security interest in Debtor's inventory by filing a financing statement, except this time the statement covers "all debtor's property." As in the above example, Debtor sells the inventory, deposits the buyer's check into a deposit account, draws a check on the deposit account, and uses the check to pay for equipment. Again, the funds used to pay for the equipment were identifiable proceeds of the inventory and because the proceeds (equipment) were acquired with cash proceeds (deposit account), U.C.C. 9315(d)(1) does not extend perfection beyond the 20-day automatic period. However, because the financing statement in this example is sufficient to perfect a security interest in debtor's equipment, under U.C.C. 9315(d)(3), the security interest in the equipment proceeds remains perfected beyond the 20-day period.

(5) *Lapse or Termination of Financing Statement During 20-Day Period.* A security interest in proceeds perfected under U.C.C. 9315(d)(1) ceases to be perfected when the financing statement covering the original collateral lapses under U.C.C. 9515 (infra, §98) or is terminated under U.C.C. 9513 (infra, §103). If the lapse or termination occurs before the 21st day after the security interest attaches, however, the security interest in the proceeds remains perfected until the 21st day. (U.C.C. 9315(e); Assembly Committee Comment 6.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Exception: Cash Proceeds.*

Cross-References: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §52 et seq.; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §18 et seq.



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B. Perfection Other Than by Filing.

2. Methods.

a. Automatic Perfection.

3. For Specified Collateral.

4 *Witkin Sum. Cal. Law STPP § 65*

[§ 65] For Specified Collateral.

Under U.C.C. 9310(b)(1) and 9310(b)(5), automatic perfection, without the need for filing of a financing statement, is available for each of the following:

(1) *Supporting obligations.* Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral. (U.C.C. 9308(d).) This provision is new to the 2001 revision of Division 9. (Uniform Commercial Code Comment 5.)

(2) *Rights to payments secured by lien.* Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right. (U.C.C. 9308(e).) This provision was also introduced to Division 9 in the 2001 revision. (Uniform Commercial Code Comment 6.)

(3) *Investment property.* Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account. (U.C.C. 9308(f).) Similarly, perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account. (U.C.C. 9308(g).)

(4) *Certificated securities.* A security interest in certificated securities is perfected without filing or the taking of possession for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement. (U.C.C. 9312(e).) Moreover, a perfected security interest in a certificated security remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of ultimate sale or exchange (U.C.C. 9312(g)(1)), or presentation, collection, enforcement, renewal, or registration of transfer (U.C.C. 9312(g)(2)). After the 20-day period of U.C.C. 9312(e) or 9312(g) expires, perfection depends on compliance with Division 9. (U.C.C. 9312(h).)

(5) *Documents.* A security interest in negotiable documents is perfected without filing or the taking of possession for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated

security agreement. (U.C.C. 9312(e).) After the 20-day period of U.C.C. 9312(e) expires, perfection depends on compliance with Division 9. (U.C.C. 9312(h).)

(6) *Goods*. A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of either ultimate sale or exchange (U.C.C. 9312(f)(1)), or loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange (U.C.C. 9312(f)(2)). After the 20-day period of U.C.C. 9312(f) expires, perfection depends on compliance with Division 9. (U.C.C. 9312(h); see C.E.B., Secured Transactions 2d, §3.33 et seq.)

(7) *Instruments*. A security interest in instruments is perfected without filing or the taking of possession for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement. (U.C.C. 9312(e).) Moreover, a perfected security interest in an instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of either ultimate sale or exchange (U.C.C. 9312(g)(1)), or presentation, collection, enforcement, renewal, or registration of transfer (U.C.C. 9312(g)(2)). After the 20-day period of U.C.C. 9312(e) or 9312(g) expires, perfection depends on compliance with Division 9. (U.C.C. 9312(h); see C.E.B., Secured Transactions 2d, §3.39.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Certificated securities*. U.C.C. 9312(e) was amended in 2006 to provide that a security interest in certificated securities is perfected under the specified circumstances without filing or the taking of possession or control.

(5) *Documents*. U.C.C. 9312(e) was amended in 2006 to provide that a security interest in negotiable documents is perfected under the specified circumstances without filing or the taking of possession or control.(7) *Instruments*. U.C.C. 9312(e) was amended in 2006 to provide that a security interest in instruments is perfected under the specified circumstances without filing or the taking of possession or control.



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B. Perfection Other Than by Filing.

2. Methods.

b. Perfection Under Other Law.

1. Property Subject to Certain Statutes, Regulations, and Treaties.

4 Witkin Sum. Cal. Law STPP § 66

[§ 66] Property Subject to Certain Statutes, Regulations, and Treaties.

(1) *General Rule.* A financing statement need not be filed to perfect a security interest in property subject to a statute, regulation, or treaty described in U.C.C. 9311(a). (U.C.C. 9310(b)(3); see C.E.B., Secured Transactions 2d, §3.64 et seq.) Thus, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to any of the following:

(a) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt U.C.C. 9310(a). (U.C.C. 9311(a)(1); see *31 Loyola L.A. L. Rev. 1415* [perfection of security interests in copyrights under former U.C.C. 9302(3)(a) (now U.C.C. 9311(a))].)

(b) Vehicle Code provisions that require registration of a vehicle or boat. (U.C.C. 9311(a)(2)(A).)

(c) Health and Safety Code provisions that require registration of a mobilehome or commercial coach, except that during any period in which collateral is inventory, the filing provisions of U.C.C. 9501 et seq. apply to a security interest in that collateral. (U.C.C. 9311(a)(2)(B).)

(d) Health and Safety Code provisions that require registration of all interests in approved air contaminant emission reductions (*Health & Saf.C. 40709 to 40713*). (U.C.C. 9311(a)(2)(C).)

(e) A certificate of title statute of another jurisdiction that provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property. (U.C.C. 9311(a)(3).)

(2) *Consequences of Perfection Under Other Law.* Compliance with the requirements of a statute, regulation, or treaty described in U.C.C. 9311(a) for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under Division 9. Except as otherwise provided in U.C.C. 9313(d) (infra, §70), and in U.C.C. 9316(d) and 9316(e) (infra, §67) for goods covered by a certificate of title, a security interest in property subject to a

statute, regulation, or treaty described in U.C.C. 9311(a) may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral. (U.C.C. 9311(b).)

Except as otherwise provided in U.C.C. 9316(d) and 9316(e) (*infra*, §67), duration and renewal of perfection of a security interest perfected by compliance with the other statute, regulation, or treaty are governed by that statute, regulation, or treaty. In other respects, the security interest is subject to Division 9. (U.C.C. 9311(c).)

(3) *Dealers' Inventory*. The consequences set forth in U.C.C. 9311(b) and 9311(c), *supra*, are subject to U.C.C. 9311(d), which governs dealers' inventory. During a period in which collateral subject to a statute specified in U.C.C. 9311(a)(2) is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, U.C.C. 9311 does not apply to a security interest in that collateral created by that person. (U.C.C. 9311(d).) Thus, perfection of a security interest in the inventory of a person in the business of selling goods of that kind is governed by the normal perfection rules, even if the inventory is subject to a certificate-of-title statute. Compliance with a certificate-of-title statute is both unnecessary and ineffective to perfect a security interest in inventory to which U.C.C. 9311(d) applies. Thus, a secured party who finances an automobile dealer that is in the business of selling and leasing its inventory of automobiles can perfect a security interest in all the automobiles by filing a financing statement, but not by compliance with a certificate-of-title statute. (Uniform Commercial Code Comment 4.)

SUPPLEMENT: [This section is current through the latest supplement]



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V. PERFECTION OF SECURITY INTEREST

B. Perfection Other Than by Filing.

2. Methods.

b. Perfection Under Other Law.

2. Continued Perfection Following Change in Governing Law.

4 *Witkin Sum. Cal. Law STPP* § 67

[§ 67] Continued Perfection Following Change in Governing Law.

(1) *General Rule.* The filing of a financing statement is not necessary to perfect a security interest that is perfected under U.C.C. 9316, which governs the continued perfection of a security interest that has been perfected under the law of another jurisdiction. (U.C.C. 9310(b)(10); on choice-of-law provisions for Division 9, see *infra*, §146 et seq.) In general, U.C.C. 9316 provides that a security interest perfected under the law of one jurisdiction remains perfected for a fixed period of time (4 months or 1 year, depending on the circumstances), even though the jurisdiction whose law governs perfection changes. However, cessation of perfection under the law of the original jurisdiction cuts short the fixed period. (Assembly Committee Comment 2 to U.C.C. 9316.)

(2) *Fixed Period for Reperfection.* A security interest perfected under the law of a jurisdiction designated in U.C.C. 9301(1) (*infra*, §146) or in U.C.C. 9305(c) (*infra*, §150) remains perfected until the earliest of any of the following:

(a) The time perfection would have ceased under the law of that jurisdiction. (U.C.C. 9316(a)(1).)

(b) The expiration of 4 months after a change of the debtor's location to another jurisdiction. (U.C.C. 9316(a)(2).)

(c) The expiration of 1 year after a transfer of collateral to a person who becomes a debtor and is located in another jurisdiction. (U.C.C. 9316(a)(3).)

The 4-month and 1-year periods are "long enough for a secured party to discover in most cases that the law of a different jurisdiction governs perfection and to reperfect (typically by filing) under the law of that jurisdiction. If a secured party properly reperfects a security interest before it becomes unperfected under subdivision (a), then the security interest remains perfected continuously thereafter." (Assembly Committee Comment 2.)

(3) *Consequences of Failure To Reprofect.* If the security interest described in U.C.C. 9316(a) becomes perfected under the law of the new jurisdiction before the earliest time or event described in that subdivision, it remains perfected from then on. If the security interest does not become perfected under the law of the new jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the

collateral for value. (U.C.C. 9316(b).) Thus, it becomes unperfected prospectively, and, as against purchasers for value, including buyers and secured parties, but not as against donees or lien creditors, retroactively. (Assembly Committee Comment 3.)

"Of course, the expiration of the time period specified in subdivision (a) does not of itself prevent the secured party from later reperfecting under the law of the new jurisdiction. If the secured party does so, however, there will be a gap in perfection, and the secured party may lose priority as a result." (Assembly Committee Comment 3.)

(4) *Possessory Security Interests.* A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if all of the following conditions are satisfied:

(a) The collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction. (U.C.C. 9316(c)(1).)

(b) Thereafter the collateral is brought into another jurisdiction. (U.C.C. 9316(c)(2).)

(c) On entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction. (U.C.C. 9316(c)(3).)

U.C.C. 9316(c) applies not only to security interests perfected solely by the secured party's having taken possession of the collateral, but also to security interests perfected by a method that includes as an element of perfection the secured party's having taken possession. Examples of such methods include perfection by taking delivery of a certificated security in registered form (see U.C.C. 9313(a), *infra*, §73) and perfection by obtaining control over a certificated security (see U.C.C. 9314(a), *infra*, §74). (Assembly Committee Comment 4.)

(5) *Goods Covered by Certificate of Title.* A security interest in goods covered by a certificate of title that is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from California remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered. (U.C.C. 9316(d).) However, a security interest described in U.C.C. 9316(d) becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under U.C.C. 9311(b) (*supra*, §66) or under U.C.C. 9313 (*infra*, §68) are not satisfied before the earlier of either of the following:

(a) The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from California. (U.C.C. 9316(e)(1).)

(b) The expiration of 4 months after the goods had become so covered. (U.C.C. 9316(e)(2).)

(6) *Deposit Accounts, Letter-of-Credit Rights, or Investment Property.* U.C.C. 9316(f) and 9316(g) are analogous to the general rules set forth in U.C.C. 9316(a) and 9316(b), *supra*. They provide that a security interest in deposit accounts, letter-of-credit rights, or investment property that is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, remains perfected until the earlier of the following:

(a) The time the security interest would have become unperfected under the law of that jurisdiction. (U.C.C. 9316(f)(1).)

(b) The expiration of 4 months after a change of the applicable jurisdiction to another jurisdiction. (U.C.C. 9316(f)(2).)

If a security interest described in U.C.C. 9316(f) becomes perfected under the law of the new jurisdiction before the

specified deadlines, it remains perfected from then on. If not, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value. (U.C.C. 9316(g).)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Statutory Authorization.

4 Witkin Sum. Cal. Law STPP § 68

[§ 68] Statutory Authorization.

(1) *General Rule.* The filing of a financing statement is not necessary to perfect a security interest in collateral in the secured party's possession under U.C.C. 9313. (U.C.C. 9310(b)(6).) A secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. (U.C.C. 9313(a).) A security interest in money may be perfected *only* by the secured party's taking possession under U.C.C. 9313, except as otherwise provided in U.C.C. 9315(c) and 9315(d) (*supra*, §64) for proceeds. (U.C.C. 9312(b)(3); see Cal. Transactions Forms, 5 Business Transactions §30:69 et seq.; *68A Am.Jur.2d (2003 ed.)*, *Secured Transactions §412* et seq.)

(2) *Eligible Types of Collateral.* U.C.C. 9313 permits a security interest to be perfected by the taking of possession only when the collateral is goods, instruments, negotiable documents, money, or tangible chattel paper. Accounts, commercial tort claims, deposit accounts, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction are excluded. A security interest in accounts and payment intangibles (property not ordinarily represented by any writing whose delivery operates to transfer the right to payment) may be perfected only by filing. (Uniform Commercial Code Comment 2; on filing, see *infra*, §76 et seq.)

A secured party may perfect a security interest in goods covered by a California-issued certificate of title by taking possession of the goods only in the circumstances described in U.C.C. 9316(d) (*supra*, §67). (U.C.C. 9313(b).) U.C.C. 9313(b) is necessary to effect changes to the choice-of-law rules governing goods covered by a certificate of title. These changes are described in the Comments to U.C.C. 9311. U.C.C. 9313(b), like U.C.C. 9313(a), "does not create a right to take possession. Rather, it indicates the circumstances under which the secured party's taking possession of goods covered by a certificate of title is effective to perfect a security interest in the goods: the goods become covered by a certificate of title issued by this State at a time when the security interest is perfected by any method under the law of another jurisdiction." (Uniform Commercial Code Comment 7.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* U.C.C. 9313(a) was amended in 2006 to refer to tangible negotiable documents, rather than negotiable documents.



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2. How Possession Is Taken.

4 *Witkin Sum. Cal. Law STPP § 69*

[§ 69] How Possession Is Taken.

(1) *In General.* A secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when either of the following conditions is satisfied:

(a) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit. (U.C.C. 9313(c)(1).)

(b) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit. (U.C.C. 9313(c)(2).)

(2) *Exception: Certificated Securities.* This manner of perfection by possession does not apply to certificated securities. (U.C.C. 9313(c).) Security interests in certificated securities are perfected by delivery. (See *infra*, §73.)

(3) *Exception: Goods Covered by Documents.* U.C.C. 9313 governs perfection of a security interest in goods in the possession of a bailee who has *not* issued a document of title. (Assembly Committee Comment 7 to U.C.C. 9312.) Perfection by possession under this statute does not apply to goods covered by documents. (U.C.C. 9313(c).)

Goods covered by documents are governed by U.C.C. 9312(c) and 9312(d). In particular, while goods are in the possession of a bailee that has issued a *negotiable* document covering the goods, a security interest in the goods may be perfected by perfecting a security interest in the document. (U.C.C. 9312(c)(1).) A security interest perfected in the document has priority over a security interest that becomes perfected in the goods by another method during that time. (U.C.C. 9312(c)(2).)

U.C.C. 9312(c) clarifies the perfection and priority rules in former U.C.C. 9304(2). "Consistently with the provisions of Division 7, subdivision (c) takes the position that, as long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document. Accordingly, a security interest in goods covered by a negotiable document may be perfected by perfecting a security interest in the document. The security interest also

may be perfected by another method, e.g., by filing." (Assembly Committee Comment 7.)

While goods are in the possession of a bailee that has issued a *nonnegotiable* document covering the goods, a security interest in the goods may be perfected by any of the following methods:

(a) Issuance of a document in the name of the secured party. (U.C.C. 9312(d)(1).)

(b) The bailee's receipt of notification of the secured party's interest. (U.C.C. 9312(d)(2); see *Estate of Hinds (1970) 10 C.A.3d 1021, 1024, 89 C.R. 341* [construing former U.C.C. 9305; "there is no requirement that the secured party personally give notice, only that the bailee receive it".])

(c) Filing as to the goods. (U.C.C. 9312(d)(3).)

U.C.C. 9312(d) "takes a different approach to the problem of goods covered by a nonnegotiable document. Here, title to the goods is not looked on as being locked up in the document, and the secured party may perfect its security interest directly in the goods by filing as to them. The subdivision provides two other methods of perfection: issuance of the document in the secured party's name (as consignee of a straight bill of lading or the person to whom delivery would be made under a nonnegotiable warehouse receipt) and receipt of notification of the secured party's interest by the bailee. Perfection under subdivision (d) occurs when the bailee receives notification of the secured party's interest in the goods, regardless of who sends the notification. Receipt of notification is effective to perfect, regardless of whether the bailee responds. Unlike former [U.C.C. 9304(3)], from which it derives, subdivision (d) does not apply to goods in the possession of a bailee who has not issued a document of title. [U.C.C. 9313(c), *supra*,] covers that case and provides that perfection by possession as to goods not covered by a document requires the bailee's acknowledgment." (Assembly Committee Comment 7.)

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3. Timing of Possession.

4 *Witkin Sum. Cal. Law STPP § 70*

[§ 70] Timing of Possession.

(1) *Perfection at Time of Possession.* If perfection of a security interest depends on possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession. (U.C.C. 9313(d).)

(2) *No Relation Back.* Former Division 9 provided (in U.C.C. 9305) that a security interest is perfected by possession from the time possession is taken "without a relation back." Because the relation-back theory, under which the taking of possession was deemed to relate back to the date of the original security agreement, has had little vitality since the 1938 revision of the Federal Bankruptcy Act, present U.C.C. 9313(d) deletes the quoted phrase as unnecessary. Where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected. The only exceptions to this rule are the short, 20-day periods of perfection provided in U.C.C. 9312(e), 9312(f), and 9312(g) (*supra*, §65), during which a debtor may have possession of specified collateral in which there is a perfected security interest. (Uniform Commercial Code Comment 5.)

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4. Acknowledgment Not Required.

4 Witkin Sum. Cal. Law STPP § 71

[§ 71] Acknowledgment Not Required.

A person in possession of collateral is not required to acknowledge that he or she holds possession for a secured party's benefit. (U.C.C. 9313(f).) If a person does acknowledge holding possession for the secured party's benefit, then the acknowledgment is effective under U.C.C. 9313(c), supra, §69, or under U.C.C. 8301(a) (9 *Summary* (10th), *Corporations*, §138), even if the acknowledgment violates the rights of a debtor. (U.C.C. 9313(g)(1).) Moreover, unless the person otherwise agrees or law other than Division 9 otherwise provides, the person does not owe a duty to the secured party and is not required to confirm the acknowledgment to another person. (U.C.C. 9313(g)(2).)

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 5. Delivery to Third Party by Secured Party.

4 Witkin Sum. Cal. Law STPP § 72

[§ 72] Delivery to Third Party by Secured Party.

A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery to hold possession of the collateral for the secured party's benefit (U.C.C. 9313(h)(1)) or to redeliver the collateral to the secured party (U.C.C. 9313(h)(2)). A secured party does not relinquish possession, even if a delivery under U.C.C. 9313(h) violates the rights of a debtor. A person to whom collateral is delivered under U.C.C. 9313(h) does not owe a duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than Division 9 otherwise provides. (U.C.C. 9313(i).)

U.C.C. 9313(h) and 9313(i) are new to the 2001 revision of Division 9. They "address the practice of mortgage warehouse lenders. These lenders typically send mortgage notes to prospective purchasers under cover of letters advising the prospective purchasers that the lenders hold security interests in the notes. These lenders relied on notification to maintain perfection under former [U.C.C. 9305]. Requiring them to obtain authenticated acknowledgments from each prospective purchaser under [U.C.C. 9313(c)] could be unduly burdensome and disruptive of established practices. Under [U.C.C. 9313(h)], when a secured party in possession itself delivers the collateral to a third party, instructions to the third party would be sufficient to maintain perfection by possession; an acknowledgment would not be necessary." (Uniform Commercial Code Comment 9.)

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d. Delivery of Certificated Security.

4 Witkin Sum. Cal. Law STPP § 73

[§ 73] Delivery of Certificated Security.

The filing of a financing statement is not necessary to perfect a security interest in a certificated security that is perfected by delivery of the certificated security to the secured party under U.C.C. 9313. (U.C.C. 9310(b)(7).) A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under U.C.C. 8301 (9 *Summary* (10th), *Corporations*, §138). (U.C.C. 9313(a).) A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under U.C.C. 8301 and remains perfected by delivery until the debtor obtains possession of the security certificate. (U.C.C. 9313(e).)

U.C.C. 9313(e), together with 9313(f) and 9313(g) (*supra*, §71), all of which are new, apply to a person in possession of security certificates or holding security certificates for the secured party's benefit under U.C.C. 8301. For delivery to occur when a person other than a secured party holds possession for the secured party, the person may not be a securities intermediary. (Uniform Commercial Code Comment 6.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Methods.

e. Control.

4 *Witkin Sum. Cal. Law STPP* § 74

[§ 74] Control.

(1) *When Available.* A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral under U.C.C. 9104, 9105, 9106, or 9107 (*supra*, §54). (U.C.C. 9314(a).) Moreover, a security interest in either a deposit account or a letter-of-credit right may be perfected *only* by control under U.C.C. 9314, except as otherwise provided in U.C.C. 9315(c) and 9315(d) (*supra*, §64) for proceeds or in U.C.C. 9308(d) (*supra*, §65) for supporting obligations. (U.C.C. 9312(b)(1), 9312(b)(2); Assembly Committee Comments 5 and 6; see C.E.B., *Secured Transactions* 2d, §§3.44 [deposit accounts], 3.45 [form], 3.52 et seq. [investment property].)

(2) *Consequences of Control.* The filing of a financing statement is not necessary to perfect a security interest in deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights that is perfected by control under U.C.C. 9314. (U.C.C. 9310(b)(8).)

(3) *Timing of Perfection.* A security interest in deposit accounts, electronic chattel paper, or letter-of-credit rights is perfected by control under U.C.C. 9104, 9105, or 9107 when the secured party obtains control and remains perfected by control only while the secured party retains control. (U.C.C. 9314(b).) Like U.C.C. 9313(d) and for the same reasons, U.C.C. 9314(b) makes no reference to the doctrine of relation back (see U.C.C. 9313, Comment 5, *supra*, §70). (Uniform Commercial Code Comment 2.)

U.C.C. 9314(c) provides a special rule for investment property. (Uniform Commercial Code Comment 3.) A security interest in investment property is perfected by control under U.C.C. 9106 from the time the secured party obtains control. (U.C.C. 9314(c).) It remains perfected by control until the secured party does not have control (U.C.C. 9314(c)(1)) and one of the following occurs:

(a) If the collateral is a certificated security, the debtor has or acquires possession of the security certificate (U.C.C. 9314(c)(2)(A));

(b) If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner (U.C.C. 9314(c)(2)(B)); or

(c) If the collateral is a security entitlement, the debtor is or becomes the entitlement holder (U.C.C. 9314(c)(2)(C)).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Available.* U.C.C. 9314(a) was amended in 2006 to add electronic documents to the list of collateral and U.C.C. 7106 to the list of relevant statutes.

(2) *Consequences of Control.* U.C.C. 9310(b)(8) was amended in 2006 to add electronic documents to the list of collateral.

(3) *Timing of Perfection.* U.C.C. 9314(b) was amended in 2006 to add electronic documents to the list of collateral and U.C.C. 7106 to the list of relevant statutes.



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2. Methods.

f. Notice to Insurer.

4 Witkin Sum. Cal. Law STPP § 75

[§ 75] Notice to Insurer.

A security interest in, or claim in or under, a policy of insurance, including unearned premiums, may be perfected only by giving written notice of the security interest or claim to the insurer. (U.C.C. 9312(b)(4).) The filing of a financing statement is not necessary when the security interest or claim has been perfected in this way. (U.C.C. 9310(b)(11).)

U.C.C. 9312(b)(4) is subject to U.C.C. 9315(c) and (d) (*supra*, §64) for proceeds. (U.C.C. 9312(b).) Furthermore, it does not apply to a health care insurance receivable, which may be perfected only as otherwise provided in Division 9 (U.C.C. 9312(b)(4)), normally by the filing of a financing statement (Assembly Committee Comment 6.5).

SUPPLEMENT: [This section is current through the latest supplement]



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1. When Filing Is Available.

a. Types of Collateral.

4 Witkin Sum. Cal. Law STPP § 76

[§ 76] Types of Collateral.

(1) *Filing Generally Required.* Filing a financing statement is generally necessary for perfection of security interests and agricultural liens. (U.C.C. 9310(a); Assembly Committee Comment 2; see C.E.B., *Secured Transactions* 2d, §3.76 et seq.; Cal. Transactions Forms, 5 Business Transactions §30:43 et seq.; *68A Am.Jur.2d* (2003 ed.), *Secured Transactions* §277 et seq.; on exceptions, see U.C.C. 9310(b) and 9312(b), supra, §62 et seq.)

(2) *Filing Permitted.* Under U.C.C. 9312(a), a security interest in the following types of collateral *may* be perfected by filing:

(a) *Instruments.* "This rule represents an important change from former Division 9, under which the secured party's taking possession of an instrument was the only method of achieving long-term perfection. The rule is likely to be particularly useful in transactions involving large number of notes that a debtor uses as collateral but continues to collect from the makers." (Assembly Committee Comment 2.) Note, however, that a "security interest perfected by filing is subject to defeat by certain subsequent purchasers (including secured parties)" (see U.C.C. 9330, infra, §130, and U.C.C. 9331, infra, §143). (Uniform Commercial Code Comment 2.)

(b) *Chattel paper.* Tangible chattel paper is sometimes delivered to the assignee, and sometimes left in the hands of the assignor for collection. U.C.C. 9312(a) allows the assignee to perfect its security interest by filing in the latter case. Alternatively, the assignee may perfect by taking possession (see U.C.C. 9313(a), supra, §68). An assignee of electronic chattel paper may perfect by taking control (see U.C.C. 9314(a), supra, §74, U.C.C. 9105, supra, §54). The security interest of an assignee who takes possession or control may qualify for priority over a competing security interest perfected by filing (see U.C.C. 9330, infra, §130). (Assembly Committee Comment 3.)

(c) *Negotiable documents.* Negotiable documents may be, and usually are, delivered to the secured party. The secured party's taking possession will suffice as a perfection step (see U.C.C. 9313(a), supra, §68). However, as is the case with chattel paper, a security interest in a negotiable document may be perfected by filing. (Assembly Committee Comment 3.)

(d) *Investment property.* A security interest in investment property, including certificated securities, uncertificated

securities, security entitlements, and securities accounts, may be perfected by filing. However, security interests created by brokers, securities intermediaries, or commodity intermediaries are automatically perfected; filing is of no effect (see U.C.C. 9309(10), *supra*, §63, U.C.C. 9309(11), *supra*, §63). A security interest in all kinds of investment property also may be perfected by control (see U.C.C. 9314, *supra*, §74, U.C.C. 9106, *supra*, §54), and a security interest in a certificated security also may be perfected by the secured party's taking delivery under U.C.C. 8301 (see U.C.C. 9313(a), *supra*, §73). (Assembly Committee Comment 4.)

Assembly Committee Comment 4 adds this note of caution: A security interest perfected only by filing is subordinate to a conflicting security interest perfected by control or delivery (see U.C.C. 9328(1) and 9328(5), *infra*, §128). "Thus, although filing is a permissible method of perfection, a secured party who perfects by filing takes the risk that the debtor has granted or will grant a security interest in the same collateral to another party who obtains control. Also, perfection by filing would not give the secured party protection against other types of adverse claims, since the Division 8 adverse claim cut-off rules require control" (see U.C.C. 8510, 9 *Summary* (10th), *Corporations*, §147).

(3) *Filing Not Required for Certain Security Interests in Goods*. A security interest arising under U.C.C. 2401 or 2505 (reservation of security interest by seller of goods; see 4 *Summary* (10th), *Sales*, §131), under U.C.C. 2711(3) (buyer's security interest in rightfully rejected goods; see 4 *Summary* (10th), *Sales*, §163), or under U.C.C. 10508(e) (lessee's security interest in rightfully rejected goods; see 13 *Summary* (10th), *Personal Property*, §214) is subject to Division 9. However, until the debtor obtains possession of the goods, filing is not required to perfect the security interest. (U.C.C. 9110(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Filing Generally Required*. See *Corona Fruits & Veggies v. Frozsun Foods* (2006) 143 C.A.4th 319, 322, 48 C.R.3d 868, Supp., *infra*, §83, citing the text.



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C. Perfection by Filing.

1. When Filing Is Available.

b. Prior Authorization Required.

4 *Witkin Sum. Cal. Law STPP § 77*

[§ 77] Prior Authorization Required.

(1) *Statutory Requirement.* A person may file an initial financing statement only if the debtor authorizes the filing in an authenticated record or under U.C.C. 9509(b) or 9509(c), *infra*, this section. (U.C.C. 9509(a)(1); on persons entitled to file amendment of financing statement, see *infra*, §101.) Alternatively, the person may file if he or she holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien. (U.C.C. 9509(a)(2).)

Records filed in the filing office do not require signatures for their effectiveness. U.C.C. 9509(a)(1) substitutes for the debtor's signature on a financing statement the requirement that the debtor authorize the filing of an initial financing statement in an authenticated record. A person who files an unauthorized record in violation of these provisions is liable under U.C.C. 9625 (*infra*, §197) for actual and statutory damages. (Uniform Commercial Code Comment 3.)

(2) *Ipsa Facto Authorization.* By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral described in the security agreement. (U.C.C. 9509(b)(1).) The authorization also covers property that becomes collateral under U.C.C. 9315(a)(2) (*infra*, §136), whether or not the security agreement expressly covers proceeds. (U.C.C. 9509(b)(2).) (For examples of operation of U.C.C. 9509(b)(2), see Uniform Commercial Code Comment 4.)

By acquiring collateral in which a security interest or agricultural lien continues under U.C.C. 9315(a)(1) (*infra*, §136), a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under U.C.C. 9315(a)(2). (U.C.C. 9509(c).)

(3) *Effectiveness of Filed Record.* A filed record is effective only to the extent that it was filed by a person who may file it under U.C.C. 9509. (U.C.C. 9510(a).) Thus, for example, if a debtor authorizes the filing of a financing statement covering inventory, the secured party, under U.C.C. 9509(a), may file a financing statement covering only inventory; it may not file a financing statement covering other collateral. If the secured party then files a financing statement covering inventory and equipment, the financing statement will be effective to perfect a security interest in inventory but ineffective to perfect a security interest in equipment. (Uniform Commercial Code Comment 2.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. When Filing Is Available.

c. Precautionary Filing.

4 Witkin Sum. Cal. Law STPP § 78

[§ 78] Precautionary Filing.

Uniform Commercial Code Comment 2 to U.C.C. 9505(a) notes that "[o]ccasionally, doubts arise concerning whether a transaction creates a relationship to which [Division 9] or its filing provisions apply. For example, questions may arise over whether a 'lease' of equipment in fact creates a security interest or whether the 'sale' of payment intangibles in fact secures an obligation, thereby requiring action to perfect the security interest." U.C.C. 9505, which derives from former U.C.C. 9408, "affords the option of filing of a financing statement with appropriate changes of terminology but without affecting the substantive question of classification of the transaction."

A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in U.C.C. 9311(a) (supra, §66), using the terms "consignor," "consignee," "lessor," "lessee," "bailor," "bailee," "licensor," "licensee," "owner," "registered owner," "buyer," "seller," or words of similar import, instead of the terms "secured party" and "debtor." (U.C.C. 9505(a).)

U.C.C. 9501 et seq. apply to the filing of a financing statement under U.C.C. 9505(a) and, as appropriate, to compliance that is equivalent to filing a financing statement under U.C.C. 9311(b) (supra, §66), but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, licensor, owner, or buyer that attaches to the collateral is perfected by the filing or compliance. (U.C.C. 9505(b).)

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 2. Contents of Financing Statement.
 a. Statutory Requirements.

4 Witkin Sum. Cal. Law STPP § 79

[§ 79] Statutory Requirements.

(1) *Notice Filing Sufficient.* A financing statement must do all of the following:

- (a) Provide the name of the debtor. (U.C.C. 9502(a)(1); see *infra*, §80.)
- (b) Provide the name of the secured party or a representative of the secured party. (U.C.C. 9502(a)(2); see *infra*, §81.)
- (c) Indicate the collateral covered by the financing statement. (U.C.C. 9502(a)(3); see *infra*, §82.) (For acceptable form of statement, see U.C.C. 9521 and *Govt.C. 12194*, *infra*, §90; C.E.B., *Secured Transactions 2d*, §3.86 et seq.; *Cal. Transactions Forms, 5 Business Transactions §30:92 et seq.*)

U.C.C. 9502 adopts the system of "notice filing." Under pre-UCC chattel mortgage and conditional sales acts, the security agreement itself was required to be filed. Under U.C.C. 9502, only a simple record, called a financing statement, providing a limited amount of information is required. The notice indicates merely that a person may have a security interest in the collateral indicated. The parties concerned will need to inquire further to disclose the complete state of affairs. (Uniform Commercial Code Comment 2; see U.C.C. 9210, *infra*, §156 [statutory procedure under which secured party, at debtor's request, may be required to make disclosure].)

"Notice filing has proved to be of great use in financing transactions involving inventory, accounts, and chattel paper, because it obviates the necessity of refile on each of a series of transactions in a continuing arrangement under which the collateral changes from day to day. However, even in the case of filings that do not necessarily involve a series of transactions (e.g., a loan secured by a single item of equipment), a financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the indication of collateral in the financing statement is sufficient to cover the collateral concerned. Similarly, a financing statement is effective to cover after-acquired property of the type indicated and to perfect with respect to future advances under security agreements, regardless of whether after-acquired property or future advances are mentioned in the financing statement and even if not in the contemplation of the parties at the time the financing statement was authorized to be filed." (Uniform Commercial Code Comment 2.)

(2) *Debtor's Signature No Longer Required.* Former U.C.C. 9402(1) required the debtor's signature to appear on a financing statement, but Division 9 contains no signature requirement. The elimination of the signature requirement facilitates paperless filing. (Uniform Commercial Code Comment 3; on authentication through debtor's prior authorization, see U.C.C. 9509 and 9510, *supra*, §77; on remedy for unauthorized filings, see U.C.C. 9625, *infra*, §197.)

(3) *Real Property Related Filings.* A financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy U.C.C. 9502(a) and:

(a) Indicate that it covers this type of collateral (U.C.C. 9502(b)(1));

(b) Indicate that it is to be recorded in the real property records (U.C.C. 9502(b)(2));

(c) Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under California law if the description were contained in a record of the mortgage of the real property (U.C.C. 9502(b)(3)); and

(d) If the debtor does not have an interest of record in the real property, provide the name of a record owner (U.C.C. 9502(b)(4)).

U.C.C. 9502(b) rejects the view that the real property description must be by metes and bounds, or otherwise conforming to traditional real property practice in conveyancing, although "the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real property must be sufficient so that the financing statement will fit into the real property search system and be found by a real property searcher." (Uniform Commercial Code Comment 5.)

(4) *Record of Mortgage as Financing Statement.* A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if all of the following conditions are satisfied:

(a) The record indicates the goods or accounts that it covers. (U.C.C. 9502(c)(1).)

(b) The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut. (U.C.C. 9502(c)(2).)

(c) The record satisfies the requirements for a financing statement in U.C.C. 9502 other than an indication that it is to be filed in the real property records. (U.C.C. 9502(c)(3).)

(d) The record is duly recorded. (U.C.C. 9502(c)(4).)

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2. Contents of Financing Statement.

b. Name of Debtor.

4 Witkin Sum. Cal. Law STPP § 80

[§ 80] Name of Debtor.

(1) *In General.* The requirement that a financing statement provide the debtor's name is particularly important. Financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name. (Uniform Commercial Code Comment 2 to U.C.C. 9503; see *K. N. C. Wholesale v. AWMCO (1976) 56 C.A.3d 315, 319, 128 C.R. 345* [construing former U.C.C. 9402(1); financing statement must include names of both actual debtor and owner of collateral, where they are not same person]; *99 A.L.R.3d 478* [designation of debtor].)

If the debtor has a name, the financing statement must provide the individual or organizational name of the debtor. (U.C.C. 9503(a)(4)(A).) If the debtor does not have a name, it must provide the names of the partners, members, associates, or other persons comprising the debtor. (U.C.C. 9503(a)(4)(B).)

(2) *Registered Organization.* If the debtor is a registered organization, the financing statement must provide the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized. (U.C.C. 9503(a)(1).)

(3) *Decedent's Estate.* If the debtor is a decedent's estate, the financing statement must provide the name of the decedent and indicate that the debtor is an estate. (U.C.C. 9503(a)(2).)

(4) *Trust or Trustee.* If the debtor is a trust or a trustee acting with respect to property held in trust, the financing statement must provide the name specified for the trust in its organic documents or, if no name is specified, provide the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors. (U.C.C. 9503(a)(3)(A).) It must also indicate, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust. (U.C.C. 9503(a)(3)(B).)

(5) *Other Names Are Not Required.* A financing statement that complies with U.C.C. 9503(a) is not rendered ineffective by the absence of a trade name or other name of the debtor. (U.C.C. 9503(b)(1).) Nor must it contain the names of partners, members, associates, or other persons comprising the debtor, unless required under U.C.C. 9503(a)(4)(B). (U.C.C. 9503(b)(2).)

(6) *Trade Name Alone Is Not Sufficient.* A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor. (U.C.C. 9503(c).)

(7) *Multiple Names Allowed.* A financing statement may provide the name of more than one debtor. (U.C.C. 9503(e); on records relating to more than one debtor, see U.C.C. 9520(d), *infra*, §90.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Corona Fruits & Veggies v. Frozsun Foods* (2006) 143 C.A.4th 319, 322, 48 C.R.3d 868, *Supp.*, *infra*, §83, quoting the text.



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 2. Contents of Financing Statement.
 c. Name of Secured Party.

4 Witkin Sum. Cal. Law STPP § 81

[§ 81] Name of Secured Party.

(1) *Failure To Indicate Representative.* Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement. (U.C.C. 9503(d).) Thus, when the secured party is a representative, a financing statement is sufficient if it names the secured party, whether or not it indicates any representative capacity. Similarly, a financing statement that names a representative of the secured party is sufficient, even if it does not indicate the representative capacity. (Uniform Commercial Code Comment 3 [giving example]; see *99 A.L.R.3d 478* [designation of secured party].)

(2) *More Than One Secured Party.* A financing statement may provide the name of more than one secured party. (U.C.C. 9503(e); see U.C.C. 9509(e) and 9510(b), *infra*, §101; *LeFlore v. Grass Harp Productions (1997) 57 C.A.4th 824, 835, 67 C.R.2d 340* [failure to include names of both secured parties in financing statement rendered their security interest unperfected].)

(3) *Secured Party of Record.* A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under U.C.C. 9514(a) (*infra*, §101), the assignee named in the initial financing statement is the secured party of record with respect to the financing statement. (U.C.C. 9511(a).) If an amendment of a financing statement that provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under U.C.C. 9514(b) (*infra*, §101), the assignee named in the amendment is a secured party of record. (U.C.C. 9511(b).) A person remains a secured party of record until the filing of an amendment that deletes the person. (U.C.C. 9511(c).)

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- d. Indication of Collateral.

4 Witkin Sum. Cal. Law STPP § 82

[§ 82] Indication of Collateral.

A financing statement sufficiently indicates the collateral that it covers if it describes the collateral under U.C.C. 9108 (supra, §48). (U.C.C. 9504(1).) Alternatively, it may indicate that the financing statement covers all assets or all personal property. (U.C.C. 9504(2).) (See *Cassel v. Kolb (1999) 72 C.A.4th 568, 573, 84 C.R.2d 878* [bank's financing statement sufficiently described law firm's accounts receivable and proceeds from accounts receivable as collateral; statement incorporated "Schedule A," which defined collateral to include debtor's accounts, general intangibles and rights to payment, and gave notice to third parties that the included items might be secured by another]; *100 A.L.R.3d 10* [sufficiency of description of collateral].)

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2. Contents of Financing Statement.

e. Effect of Errors or Omissions.

4 *Witkin Sum. Cal. Law STPP* § 83

[§ 83] Effect of Errors or Omissions.

(1) *Minor Errors Acceptable*. A financing statement substantially satisfying the requirements of U.C.C. 9501 et seq. is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading. (U.C.C. 9506(a).)

(2) *Error in Debtor's Name*. A financing statement that fails sufficiently to provide the debtor's name in accordance with U.C.C. 9503(a) is seriously misleading. (U.C.C. 9506(b).) However, if a search of the filing office's records under the debtor's correct name, using the filing office's standard search logic, if any, would nevertheless disclose that financing statement, the name provided does not make the financing statement seriously misleading. (U.C.C. 9506(c).) For purposes of U.C.C. 9508(b) (infra, §85) regarding new debtors, the "debtor's correct name" in U.C.C. 9506(c) means the correct name of the new debtor. (U.C.C. 9506(d).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Error in Debtor's Name*. In *Corona Fruits & Veggies v. Frozsun Foods* (2006) 143 C.A.4th 319, 48 C.R.3d 868, C subleased farm land to a strawberry farmer (debtor) whose full, true name was "Armando Munoz Juarez." C advanced the debtor money for payroll and farm production expenses, and filed two financing statements listing the debtor's name as "Armando Munoz." Six months later, the debtor contracted with F to sell processed strawberries. F also advanced money, which was secured by a financing statement correctly listing the debtor's name as "Armando Juarez." When the debtor was subsequently unable to meet his loan obligations, C took back the farm land, harvested the strawberry crop, and kept the crop proceeds. C and F filed collection actions that were consolidated for trial. The trial judge found that only F had recorded its financing statement under the debtor's true last name, and that F's financing statement thus perfected a security interest superior to C's claim. *Held*, affirmed.

(a) Because financing statements are indexed by last names, it is crucial that a creditor filing a financing statement correctly state the debtor's true last name. By doing so, a subsequent creditor who might loan money to a debtor with the same name is put on notice that its lien would be secondary. (143 C.A.4th 321.) Here, the debtor's true last name was "Juarez," not "Munoz." Checks issued by C to the debtor, letters C sent to the debtor, and many of C's business records state "Juarez" as the debtor's last name. The debtor provided C with a photo identification and green card bearing the name "Armando Munoz Juarez." The debtor identified himself as "Juarez" on tax returns and in tax documents issued

by C. In short, C knew that the debtor's legal name was "Armando Juarez" or "Armando Munoz Juarez." C's account manager testified that she did not know why she had failed to list the correct last name on the financing statement, and that she might have made a mistake. (*143 C.A.4th 323, 324.*)

(b) Although under U.C.C. 9506(b), a financing statement that fails sufficiently to provide the debtor's name is seriously misleading, U.C.C. 9506(c) provides a safe harbor if a search of the filing office's records under the debtor's correct name, using the filing office's standard search logic, would nonetheless disclose the financing statement. Here, however, F's agent conducted a "Juarez" debtor name search and did not discover C's financing statements, and there was no evidence that a financing statement would have been discovered under the debtor's true legal name using the filing office's standard search logic. (*143 C.A.4th 323, 324.*) C could have protected itself by using both names on its financing statements, in accordance with U.C.C. 9503(e), but did not. (*143 C.A.4th 325*, citing the text, §80.)

(c) Although the debtor was from Mexico, the debtor name requirement was not governed by the naming convention of Latin American countries, whereby surnames are formed by listing first the father's name and then the mother's. The strawberry crop was planted in California, and the debt obligation also arose here, not in Mexico. "Debtor's last name did not change when he crossed the border into the United States. The 'naming convention' is legally irrelevant for UCC-1 financing statement purposes and, if accepted, would seriously undermine the concept of lien perfection." (*143 C.A.4th 324.*)

See *28 A.L.R.6th 461* [sufficiency and effectiveness of designation of debtor in financing statement under U.C.C. 9503 and 9506].



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 f. Effect of Post-Filing Events.

4 Witkin Sum. Cal. Law STPP § 84

[§ 84] Effect of Post-Filing Events.

(1) *Disposition of Collateral.* In some situations, the information in a proper financing statement becomes inaccurate after the statement is filed. Under U.C.C. 9507(a), a filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

(2) *Other Post-Filing Changes.* As a general matter, post-filing changes that render a financing statement inaccurate and seriously misleading have no effect; the financing statement remains effective. There are two exceptions to this rule. The first occurs when a new debtor becomes bound by the original debtor's security agreement (see U.C.C. 9508, *infra*, §85). (U.C.C. 9507(b); Uniform Commercial Code Comment 4.)

The second exception, set forth in U.C.C. 9507(c), addresses a "pure" change of the debtor's name, i.e., a change that does not implicate a new debtor. It clarifies former U.C.C. 9402(7). If a debtor's name change renders a filed financing statement seriously misleading, the financing statement is not effective to perfect a security interest in collateral the debtor acquires more than 4 months after the change, unless before the expiration of the 4 months an amendment is filed that specifies the debtor's new correct name (or provides an incorrect name that renders the financing statement not seriously misleading under U.C.C. 9506). As under former U.C.C. 9402(7), the original financing statement would continue to be effective with respect to collateral acquired before the name change as well as collateral acquired within the 4-month period. (Uniform Commercial Code Comment 4; see *31 Hastings L. J. 959* [debtor's change of name]; *99 A.L.R.3d 1194* [effectiveness of original statement after change in debtor's name, identity, or business structure].)

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 g. Effect of New Debtor.

4 Witkin Sum. Cal. Law STPP § 85

[§ 85] Effect of New Debtor.

(1) *General Rule.* A filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral. (U.C.C. 9508(a).)

U.C.C. 9508, and U.C.C. 9203(d) and 9203(e) (supra, §55), deal with situations where one party (the new debtor) becomes bound as debtor by a security agreement entered into by another person (the original debtor). These situations often arise as a consequence of changes in business structure. For example, the original debtor may be an individual debtor who operates a business as a sole proprietorship and then incorporates it. Or, the original debtor may be a corporation that is merged into another corporation. Under both former Division 9 and the present Division 9, collateral that is transferred in the course of the incorporation or merger normally would remain subject to a perfected security interest (see U.C.C. 9315(a), *infra*, §136, and U.C.C. 9507(a), *supra*, §84). Former Division 9 was less clear with respect to whether an after-acquired property clause in a security agreement signed by the original debtor would be effective to create a security interest in property acquired by the new corporation or the merger survivor and, if so, whether a financing statement filed against the original debtor would be effective to perfect the security interest. U.C.C. 9508 and 9203(d) and 9203(e) are a clarification. (Uniform Commercial Code Comment 2 to U.C.C. 9508.)

(2) *Exception: Seriously Misleading Filing.* If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under U.C.C. 9508(a) to be seriously misleading under U.C.C. 9506 (*supra*, §83), the financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within 4 months after, the new debtor becomes bound under U.C.C. 9203(d). (U.C.C. 9508(b)(1).) It is not effective to perfect a security interest in collateral acquired after 4 months, unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time. (U.C.C. 9508(b)(2).)

(3) *Transferred Collateral.* U.C.C. 9508 does not apply to collateral as to which a filed financing statement remains effective against the new debtor under U.C.C. 9507(a), *i.e.*, collateral transferred by the original debtor to a new debtor. (U.C.C. 9508(c); Uniform Commercial Code Comment 5.) Under those circumstances, the filing against the original debtor continues to be effective until it lapses or perfection is lost for another reason. (Uniform Commercial Code

Comment 5.)

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3. Procedure for Filing Statement.

a. Time for Filing.

4 Witkin Sum. Cal. Law STPP § 86

[§ 86] Time for Filing.

A financing statement may be filed before a security agreement is made or a security interest otherwise attaches, or thereafter. (U.C.C. 9502(d); Uniform Commercial Code Comment 2; see U.C.C. 9308(a), *supra*, §61 [contemplating situations in which financing statement is filed before security interest attaches]; C.E.B., *Secured Transactions* 2d, §3.79.)

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3. Procedure for Filing Statement.

b. Filing Office.

4 *Witkin Sum. Cal. Law STPP* § 87

[§ 87] Filing Office.

(1) *General Rule.* If the local law of California governs perfection of a security interest or agricultural lien, a financing statement to perfect the security interest or agricultural lien generally should be filed in the office of the Secretary of State. (U.C.C. 9501(a)(2).) Former Article 9 afforded each state three alternative approaches, depending on the extent to which the state desired central filing (usually with the Secretary of State), local filing (usually with a county office), or both. Present Article 9 recognizes that the more completely the files are centralized on a statewide basis, the easier and less costly it becomes to procure credit information, whereas the more the files are scattered in local filing units, the more burdensome and costly gathering information becomes. Accordingly, Article 9, and thus Division 9 in California, dictate central filing for most situations. (Uniform Commercial Code Comment 2; see C.E.B., *Secured Transactions* 2d, §3.78; *infra*, §91.)

(2) *Exception: Minerals and Timber.* If the collateral is as-extracted collateral or timber to be cut, the statement should be filed in the office designated for the filing or recording of a record of a mortgage on the related real property. (U.C.C. 9501(a)(1)(A).)

(3) *Exception: Fixtures.* If the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, the statement should be filed in the office designated for the filing or recording of a record of a mortgage on the related real property. (U.C.C. 9501(a)(1)(B).) If the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing, the Secretary of State's office is the appropriate filing office. (U.C.C. 9501(a)(2); see 23 *Loyola L.A. L. Rev.* 681 [argument that, under former Division 9, fixture filing did not perfect security interest in fixtures; perfection required filing with Secretary of State].)

(4) *Transmitting Utility.* A financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility should be filed in the Secretary of State's office. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement that is or is to become fixtures. (U.C.C. 9501(b).)

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3. Procedure for Filing Statement.

c. Filing Fees.

4 *Witkin Sum. Cal. Law STPP § 88*

[§ 88] Filing Fees.

(1) *Filing and Indexing Fees.* The fees for filing and indexing a record under U.C.C. 9501 et seq. are set forth in *Govt.C. 12194(a)*, (b) and (c). (U.C.C. 9525(a).) They are:

(a) \$ 10 if the record is communicated in writing and consists of one or two pages. (*Govt.C. 12194(a)*.)

(b) \$ 20 if the record is communicated in writing and consists of more than two pages. (*Govt.C. 12194(b)*.)

(c) \$ 5 if the record is communicated by another medium authorized by a rule adopted by the Secretary of State's office. (*Govt.C. 12194(c)*.)

The number of names required to be indexed does not affect the amount of the fee in U.C.C. 9525(a). (U.C.C. 9525(b); see C.E.B., Secured Transactions 2d, §3.82.)

(2) *Response Fees.* The fees for responding to a request for information from the filing office, including for issuing a certificate showing whether there is on file any financing statement naming a particular debtor, are as follows:

(a) \$ 10 if the request is communicated in writing. (U.C.C. 9525(c)(1).)

(b) \$ 5 if the request is communicated by another medium authorized by a rule adopted by the filing office. (U.C.C. 9525(c)(2).)

(3) *No Fee Required for Record of Mortgage.* U.C.C. 9525 does not require a fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under U.C.C. 9502(c) (*supra*, §79). However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply. (U.C.C. 9525(d).)

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d. What Constitutes Effective Filing.

4 *Witkin Sum. Cal. Law STPP § 89*

[§ 89] What Constitutes Effective Filing.

(1) *General Rule.* Either acceptance of a record by the filing office or presentation of the record and tender of the filing fee constitutes filing. (U.C.C. 9516(a); Uniform Commercial Code Comment 2; see C.E.B., Secured Transactions 2d, §3.80.)

(2) *Office's Refusal To Accept Record.* U.C.C. 9516(b) provides an exclusive list of grounds on which the filing office may reject a record. (Uniform Commercial Code Comment 3; on acceptance and rejection of record generally, see U.C.C. 9520(a), *infra*, §90.) Filing does not occur with respect to a record that a filing office refuses to accept for any of the following reasons:

(a) The record is not communicated by a method or medium of communication authorized by the filing office. (U.C.C. 9516(b)(1).) Rejection on this ground "properly should be understood to mean noncompliance with procedures relating to security, authentication, or other communication-related requirements that the filing office may impose." U.C.C. 9516(b)(1) does not authorize a filing office to impose additional substantive requirements. (Uniform Commercial Code Comment 4.)

(b) An amount equal to or greater than the applicable filing fee is not tendered. (U.C.C. 9516(b)(2).)

(c) The filing office is unable to index the record because, in the case of an initial financing statement, the record does not provide a name for the debtor. (U.C.C. 9516(b)(3)(A).)

(d) The filing office is unable to index the record because, in the case of an amendment or correction statement, either the record does not identify the initial financing statement as required by U.C.C. 9512 or 9518 (U.C.C. 9516(b)(3)(B)(i)) or it identifies an initial financing statement whose effectiveness has lapsed under U.C.C. 9515 (U.C.C. 9516(b)(3)(B)(ii)).

(e) The filing office is unable to index the record because, in the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual that was not previously provided in the financing statement to which the record relates, the record does not

identify the debtor's last name. (U.C.C. 9516(b)(3)(C).)

(f) The filing office is unable to index the record because, in the case of a record filed or recorded in the filing office described in U.C.C. 9501(a)(1), the record does not provide a sufficient description of the real property to which it relates. (U.C.C. 9516(b)(3)(D).)

(g) In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record. (U.C.C. 9516(b)(4).) (See *99 A.L.R.3d 1080* [sufficiency of address of secured party].)

(h) In the case of an initial financing statement or an amendment that provides a name of a debtor that was not previously provided in the financing statement to which the amendment relates, the record does not provide a mailing address for the debtor (U.C.C. 9516(b)(5)(A)) and indicate whether the debtor is an individual or an organization (U.C.C. 9516(b)(5)(B)). Moreover, if the financing statement indicates that the debtor is an organization, it must provide a type of organization for the debtor (U.C.C. 9516(b)(5)(C)(i)), a jurisdiction of organization for the debtor (U.C.C. 9516(b)(5)(C)(ii)), and an organizational identification number for the debtor or an indication that the debtor has none (U.C.C. 9516(b)(5)(C)(iii)). (See *99 A.L.R.3d 807* [sufficiency of address of debtor].)

(i) In the case of an assignment reflected in an initial financing statement under U.C.C. 9514(a) or an amendment filed under U.C.C. 9514(b), the record does not provide a name and mailing address for the assignee. (U.C.C. 9516(b)(6).)

(j) In the case of a continuation statement, the record is not filed within the 6-month period prescribed by U.C.C. 9515(d). (U.C.C. 9516(b)(7).)

(3) *Inability of Filing Office To Decipher Information.* For purposes of U.C.C. 9516(b), a record does not provide information if the filing office is unable to read or decipher the information. (U.C.C. 9516(c)(1).)

(4) *Classification of Records.* For purposes of U.C.C. 9516(b), a record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by U.C.C. 9512, 9514, or 9518, is deemed to be an initial financing statement. (U.C.C. 9516(c)(2).)

(5) *Unjustified Refusal To Accept Record.* A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in U.C.C. 9516(b), is effective as a filed record. (U.C.C. 9516(d).) The filer is in no position to prevent the rejection and as a general matter should not be prejudiced by it. (Uniform Commercial Code Comment 3.) The record is not effective, however, as against a purchaser of the collateral who gives value in reasonable reliance on the absence of the record from the files. (U.C.C. 9516(d).) As against a person who searches the public record and reasonably relies on what the public record shows, U.C.C. 9516(d) imposes on the filer the risk that a record failed to make its way into the filing system because of the filing office's wrongful rejection of it. "This risk is likely to be small, particularly when a record is presented electronically, and the filer can guard against this risk by conducting a post-filing search of the records." Moreover, U.C.C. 9520(b) (*infra*, §90) requires the filing office to give prompt notice of its refusal to accept a record for filing. (Uniform Commercial Code Comment 3.)

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4 *Witkin Sum. Cal. Law STPP § 90*

[§ 90] Filing Office's Acceptance or Refusal of Record.

(1) *Refusal on Statutory Grounds Only.* A filing office must refuse to accept a record for filing for a reason set forth in U.C.C. 9516(b) (*supra*, §89). The reasons set forth in that subsection are the only ones for which an office may refuse to accept a record. (U.C.C. 9520(a).)

Uniform Commercial Code Comment 2 to U.C.C. 9520 notes that in some states, filing offices considered themselves obligated by former Article 9 to review the form and content of a financing statement and to refuse to accept those that they determined were legally insufficient. Some filing offices imposed requirements for filing that did not appear in the statute. Under U.C.C. 9520, the filing office is not expected to make legal judgments and is not permitted to impose additional conditions or requirements.

(2) *"Safe Harbor" Forms.* U.C.C. 9521 provides sample written forms that must be accepted in every filing office in the country, as long as the filing office's rules permit it to accept written communications. By completing one of the forms in U.C.C. 9521, a secured party can be certain that the filing office is obligated to accept it. (Uniform Commercial Code Comment 2.) However, the filing office must still refuse to accept a form for any of the reasons set forth in U.C.C. 9516(b) (*supra*, §89). (U.C.C. 9521(a), 9521(b).)

In California, financing statements and other Uniform Commercial Code filings must be submitted on national standard forms as approved by the Secretary of State's office, or on those forms but lacking a space identified for disclosure of an individual's Social Security number. (*Govt.C. 12194.*)

(3) *Office's Duties Following Rejection of Record.* If a filing office refuses to accept a record for filing, it must communicate that refusal to the person that presented the record. It must inform the person of the reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing office rule. (U.C.C. 9520(b); on filing office rules, see *infra*, §95.) In the case of a filing office described in U.C.C. 9501(a)(2) (Secretary of State's office; see *supra*, §87), the communication must be made no later than 2 business days after the filing office receives the record. (U.C.C. 9520(b).)

(4) *Consequences of Accepting Rejectable Record.* A filed financing statement satisfying U.C.C. 9502(a) and

9502(b) (supra, §79) is effective, even if the filing office is required to refuse to accept it for filing under U.C.C. 9520(a). (U.C.C. 9520(c).)

The information identifying the debtor that is required by U.C.C. 9516(b)(5) (supra, §89) assists searchers in weeding out "false positives," i.e., records that a search reveals but that do not pertain to the debtor in question. It assists filers by helping to ensure that the debtor's name is correct and that the financing statement is filed in the proper jurisdiction. If the filing office accepts a financing statement that does not give this information at all, the filing is fully effective under U.C.C. 9520(c). (Uniform Commercial Code Comment 3 to U.C.C. 9520.) The financing statement also generally is effective if the information is given but is incorrect at the time the financing statement is filed. However, U.C.C. 9338 (infra, §135) affords protection to buyers and holders of perfected security interests who give value in reasonable reliance on the incorrect information. (U.C.C. 9520(c); Uniform Commercial Code Comment 3.)

(5) *Rejection Where Financing Statement Relates to Multiple Debtors.* If a record communicated to a filing office provides information that relates to more than one debtor, U.C.C. 9501 et seq. apply as to each debtor separately. (U.C.C. 9520(d).) Thus, a filing office may reject an initial financing statement or other record as to one named debtor but accept it as to the other. (Uniform Commercial Code Comment 5.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *"Safe Harbor" Forms.* U.C.C. 9526.5, added in 2007, provides that the Secretary of State must not produce or make available financing statements that provide a space identified for the disclosure of an individual's Social Security number. (U.C.C. 9526.5(h).) Instead, the Secretary of State must produce and make available financing statements in the form and format described in U.C.C. 9521, except that those financing statements must not provide a space for an individual's Social Security number. (U.C.C. 9526.5(i).)



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1. Numbering and Indexing Records.

4 Witkin Sum. Cal. Law STPP § 91

[§ 91] Numbering and Indexing Records.

(1) *General Requirements.* For each record filed in a filing office, the filing office must:

(a) Assign a unique number to the filed record. (U.C.C. 9519(a)(1); on specifics of numbering, see U.C.C. 9519(b) and 9519(i).)

(b) Create a record that bears the number assigned to the filed record and the date and time of filing. (U.C.C. 9519(a)(2).)

(c) Maintain the filed record for public inspection. (U.C.C. 9519(a)(3).)

(d) Index the filed record in accordance with U.C.C. 9519(c), 9519(d), and 9519(e). (U.C.C. 9519(a)(4).)

(2) *Indexing Requirements.* In general, the filing office must index an initial financing statement according to the name of the debtor. It must index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement. (U.C.C. 9519(c)(1).) It must index a record that provides a name of a debtor that was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided. (U.C.C. 9519(c)(2).)

The filing office may not remove a debtor's name from the index until 1 year after the effectiveness of a financing statement naming the debtor lapses under U.C.C. 9515 (infra, §98) with respect to all secured parties of record. (U.C.C. 9519(g).)

(3) *Indexing Requirements for Fixture Filings or Statements Covering As-Extracted Collateral.* If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, it must be recorded. The filing office must index it under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described. (U.C.C. 9519(d)(1).) In addition, to the extent that California law provides for indexing of records of mortgages under the name of the mortgagee, the filing office must index the financing statement under the name of the secured party as if the secured party were the

mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described. (U.C.C. 9519(d)(2).)

If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office must index an assignment filed under U.C.C. 9514(a) (infra, §101) or an amendment filed under U.C.C. 9514(b) under the name of the assignor as grantor. (U.C.C. 9519(e)(1).) The amendment or assignment must also be indexed under the name of the assignee, to the extent that California law provides for indexing a record of the assignment of a mortgage under the name of the assignee. (U.C.C. 9519(e)(2).)

(4) *Retrieval Requirements.* U.C.C. 9519(f) requires the filing office to maintain appropriate storage and retrieval facilities. (Uniform Commercial Code Comment 2.) If the filing office is a local office described in U.C.C. 9501(a)(1) (supra, §87), the filing office must be able to retrieve a record by the name of the debtor, and by the file number assigned to the initial financing statement to which the record relates and the date that the record was filed or recorded. (U.C.C. 9519(f)(1)(A).) If the filing office is the Secretary of State's office, as described in U.C.C. 9501(a)(2) (supra, §87), the office must be able to retrieve the record by the name of the debtor and the file number assigned to the initial financing statement to which the record relates. (U.C.C. 9519(f)(1)(B).)

The filing office must also be able to associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement. (U.C.C. 9519(f)(2).) U.C.C. 9519(c), supra, and 9519(f) are designed to ensure that an initial financing statement and all filed records relating to it are associated with one another, indexed under the name of the debtor, and retrieved together. (Uniform Commercial Code Comment 5.)

(5) *Deadline for Performing Duties.* The filing office must perform the acts required by U.C.C. 9519(a) through 9519(e) at the time and in the manner prescribed by filing office rule, but not later than 2 business days after the filing office receives the record in question. (U.C.C. 9519(h); on filing office rules, see infra, §95.) U.C.C. 9519(h) does not apply to a filing office described in U.C.C. 9501(a)(1) (supra, §87). (U.C.C. 9519(i).)

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2. Maintenance and Destruction of Records.

4 Witkin Sum. Cal. Law STPP § 92

[§ 92] Maintenance and Destruction of Records.

The filing office must maintain a record of the information provided in a filed financing statement for at least 1 year after the effectiveness of the financing statement has lapsed under U.C.C. 9515 (infra, §98) with respect to all secured parties of record. (U.C.C. 9522(a).) The record must be retrievable by using the name of the debtor and, if the record was filed or recorded in a filing office described in U.C.C. 9501(a)(1) (supra, §87), by using the file number assigned to the initial financing statement to which the record relates and the date that the record was filed or recorded (U.C.C. 9522(a)(1)). If the record was filed in the Secretary of State's office, as described in U.C.C. 9501(a)(2) (supra, §87), it must be retrievable by using the debtor's name and the file number assigned to the initial financing statement to which the record relates. (U.C.C. 9522(a)(2).)

Except to the extent that a statute governing disposition of public records provides otherwise, the filing office immediately may destroy any written record evidencing a financing statement. However, if the filing office destroys a written record, it must maintain another record of the financing statement that complies with U.C.C. 9522(a). (U.C.C. 9522(b).)

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4 Witkin Sum. Cal. Law STPP § 93

[§ 93] Acknowledgments and Responses to Requests.

(1) *Acknowledgment of Filing of Written Record.* If a person who files a written record requests an acknowledgment of the filing, the filing office must send the person an image of the record showing the number assigned to the record under U.C.C. 9519(a)(1) (supra, §91) and the date and time of the filing of the record. (U.C.C. 9523(a).) However, if the person furnishes a copy of the record to the filing office, the filing office may instead note on the copy the number assigned to the record under U.C.C. 9519(a)(1) and the date and time of the filing of the record. (U.C.C. 9523(a)(1).) The office must then send the copy to the person. (U.C.C. 9523(a)(2).)

(2) *Acknowledgment of Filing of Other Records.* If a person files a record other than a written record, the filing office must communicate to the person an acknowledgment that provides the information in the record (U.C.C. 9523(b)(1)), the number assigned to the record under U.C.C. 9519(a)(1) (U.C.C. 9523(b)(2)), and the date and time of the filing of the record (U.C.C. 9523(b)(3)). This communication is required even in the absence of a request from the filer. (Uniform Commercial Code Comment 3.)

(3) *Response to Search Request.* On request by any person, the filing office must communicate whether there is on file on a date and time specified by the filing office, but not a date earlier than 3 business days before the filing office receives the request, any financing statement that satisfies all of the following conditions:

(a) It designates a particular debtor or, if the request so states, designates a particular debtor at the address specified in the request. (U.C.C. 9523(c)(1)(A).)

(b) It has not lapsed under U.C.C. 9515 (infra, §98) with respect to all secured parties of record. (U.C.C. 9523(c)(1)(B).)

(c) If the request so states, it has lapsed under U.C.C. 9515 and a record of the financing statement is maintained by the filing office under U.C.C. 9522(a). (U.C.C. 9523(c)(1)(C).)

Also on request, the filing office must communicate the date and time of filing of each financing statement (U.C.C.

9523(c)(2)) and the information provided in each financing statement (U.C.C. 9523(c)(3)). The requirement in U.C.C. 9523(c)(3) can be satisfied by providing copies, images, or reports. "The requirement does not in any manner inhibit the filing office from also offering to provide less than all of the information (presumably for a lower fee) to a person who asks for less. Thus, subsection (c) accommodates the practice of providing only the type of record (e.g., initial financing statement, continuation statement), number assigned to the record, date and time of filing, and names and addresses of the debtor and secured party when a requesting person asks for no more (i.e., when the person does not ask for copies of financing statements)." (Uniform Commercial Code Comment 4.)

(4) *Medium of Communication.* In complying with its duty under U.C.C. 9523(c), supra, the filing office may communicate information in any medium. However, if requested, the filing office must communicate information by issuing its written certificate. (U.C.C. 9523(d).)

(5) *Performance Standards.* The utility of the filing system depends on the ability of searchers to get current information quickly. (Uniform Commercial Code Comment 8.) Accordingly, the Secretary of State's office must perform the acts required by U.C.C. 9523(a) through 9523(d) at the time and in the manner prescribed by filing office rule, but not later than 2 business days after the filing office receives the request. (U.C.C. 9523(e).) The information in the response must be current as of a date no earlier than 3 business days before the filing office receives the request. (See U.C.C. 9523(c)(1), supra.)

(6) *Sales of Records in Bulk.* At least weekly, the Secretary of State's office must offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under U.C.C. 9501 et seq., in every medium from time to time available to the filing office. (U.C.C. 9523(f).)

(7) *Duty To Issue Combined Certificate.* On request of any person, the Secretary of State must issue a combined certificate showing the information as to financing statements specified in U.C.C. 9523, the information as to state tax liens as specified in *Govt.C. 7226*, the information as to attachment liens as specified in *C.C.P. 488.375* and *488.405*, the information as to judgment liens as specified in *C.C.P. 697.580*, and the information as to federal liens as specified in *C.C.P. 2103*. (U.C.C. 9528.)

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4. (New) Nondisclosure of Social Security Numbers.

4 Witkin Sum. Cal. Law STPP § 93A

[§ 93A] (New) Nondisclosure of Social Security Numbers.

U.C.C. 9526.5, added in 2007 and amended in 2008, provides privacy protection for Social Security numbers.

(1) *Truncated Social Security Number.* A "truncated" Social Security number is a Social Security number displaying no more than the last four digits. (U.C.C. 9526.5(a)(4); see U.C.C. 9526.5(a)(3) ["truncate" means to redact at least first five digits of Social Security number].)

(2) *Official Filing Defined.* An "official filing" means the permanent archival filing of all instruments, papers, records, and attachments accepted for filing by the filing office. (U.C.C. 9526.5(a)(1).)

(3) *Public Filing Defined.* A "public filing" is a filing that is an exact copy of an official filing, except that any Social Security number contained in the copied filing is truncated. The public filing has the same legal force and effect as the official filing. (U.C.C. 9526.5(a)(2).)

(4) *Requirement of Public Filing.* The filing office must create a "public filing" for every filing containing an untruncated Social Security number filed before August 1, 2007. (U.C.C. 9526.5(b).) Beginning August 1, 2007, the filing office must create a public filing for every filing containing an untruncated Social Security number filed by means other than the filing office's website. (U.C.C. 9526.5(d).)

(5) *Disclosure of Filing.* When a public filing version of an official filing exists: (a) Upon request for inspection, copying, or other public disclosure of an official filing that is not exempt from disclosure, the filing office must make available only the public filing version (U.C.C. 9526.5(e)(1)); (b) the filing office must publicly disclose an official filing only in response to a subpoena or court order (U.C.C. 9526.5(e)(2)). However, U.C.C. 9526.5 does not restrict, delay, or modify access to an official filing, or modify existing agreements regarding access to an official filing, prior to the creation and availability of a public filing version of the official filing. (U.C.C. 9526.5(e)(3).)

(6) *Liability and Due Diligence of Filing Office.* A filing office is in compliance with U.C.C. 9526.5, and is not liable for failing to truncate a Social Security number, if the office uses due diligence to locate Social Security numbers

in official records and truncate those numbers in the public filing version of those official filings. The use of an automated program having a high rate of accuracy is deemed to be due diligence. (U.C.C. 9526.5(f).)

(7) *Request To Truncate Social Security Number.* If a filing office fails to truncate a Social Security number contained in a record as required by U.C.C. 9526.5, a person may request that the filing office truncate the number. Even if a filing office is deemed to be in compliance with the statute pursuant to U.C.C. 9526.5(f), if the office receives a request that identifies the exact location, within a specifically identified record, of an untruncated number that is required to be truncated, the office must truncate the number within 10 business days of receiving the request. The public filing with the truncated number replaces the record with the untruncated number. (U.C.C. 9526.5(g).)

(8) *Notice on Website.* A filing office must post a notice on its website informing filers not to include Social Security numbers in any portion of their filings, and a filing office's online filing system must not contain a field requesting a Social Security number. (U.C.C. 9526.5(c).)

(9) *Statute Inapplicable to County Recorders.* U.C.C. 9526.5 does not apply to a county recorder. (U.C.C. 9526.5(j).)

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g. Filing Mistakes and Delays.

4 *Witkin Sum. Cal. Law STPP § 94*

[§ 94] Filing Mistakes and Delays.

(1) *Effect of Indexing Error.* The filing office's failure to index a record correctly does not affect the effectiveness of the filed record. (U.C.C. 9517.) U.C.C. 9517 imposes the risk of filing-office error on those who search the files rather than on those who file. (Uniform Commercial Code Comment 2.)

(2) *Correction Statements.* A person may file a correction statement with respect to a record indexed under the person's name if the person believes that the record is inaccurate or was wrongfully filed. (U.C.C. 9518(a).) A correction statement must indicate that it is a correction statement. (U.C.C. 9518(b)(2).) It must identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates. (U.C.C. 9518(b)(1)(A).) If the correction statement relates to a record filed or recorded in a local filing office described in U.C.C. 9501(a)(1) (*supra*, §87), it must identify the record by the date that the initial financing statement was filed or recorded and the information specified in U.C.C. 9502(b) (*supra*, §79). (U.C.C. 9518(b)(1)(B).) The correction statement must provide the basis for the person's belief that the record was wrongfully filed or is inaccurate. It must indicate the manner in which the person believes the record should be amended to cure the inaccuracy. (U.C.C. 9518(b)(3).)

U.C.C. 9518 affords an aggrieved person the opportunity to state his or her position on the public record. It does not permit an aggrieved person to change the legal effect of the public record. Thus, although a filed correction statement becomes part of the financing statement, the filing does not affect the effectiveness of the initial financing statement or another filed record. (U.C.C. 9518(c); Uniform Commercial Code Comment 2.)

(3) *Delay by Filing Office.* Delay by the filing office beyond a time limit prescribed by U.C.C. 9501 et seq. is excused if the delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond the filing office's control. (U.C.C. 9524(1).) The delay is excused only if the filing office exercises reasonable diligence under the circumstances. (U.C.C. 9524(2); on time limits imposed by U.C.C. 9501 et seq., see *supra*, §§90, 91, 93.)

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3. Procedure for Filing Statement.

h. Filing Office Rules.

4 Witkin Sum. Cal. Law STPP § 95

[§ 95] Filing Office Rules.

(1) *Adoption of Rules.* "Operating a filing office is a complicated business, requiring many more rules and procedures than [Division 9] can usefully provide." (Uniform Commercial Code Comment 2 to U.C.C. 9526.) Thus, U.C.C. 9526(a) requires the Secretary of State to adopt and publish rules to implement Division 9. The filing office rules must be consistent with Division 9.

The publication requirement informs secured parties about filing office practices, aids secured parties in evaluating filing-related risks and costs, and promotes regularity of application within the filing office. (Uniform Commercial Code Comment 2.)

Recognizing that in "today's national economy, uniformity of the policies and practices of the filing offices will reduce the costs of secured transactions substantially" (Uniform Commercial Code Comment 3), U.C.C. 9526(b) requires the Secretary of State to consult with filing offices in other jurisdictions and to take their rules, practices, and technology into consideration when adopting, amending, and repealing filing office rules. The Secretary of State must also consult the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization. (U.C.C. 9526(b).)

(2) *Duty To Report.* The Secretary of State must report annually on or before January 31 to the Legislature on the operation of the filing office. The report must describe the extent to which the filing office rules are not in harmony with the rules of filing offices in other jurisdictions that enact substantially U.C.C. 9501 et seq. and the reasons for these variations. (U.C.C. 9527(1).) The report must also describe the extent to which the filing office rules are not in harmony with the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators, or any successor organization, and the reasons for these variations. (U.C.C. 9527(2).)

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3. Procedure for Filing Statement.

i. Option To Record Instead of File.

4 Witkin Sum. Cal. Law STPP § 96

[§ 96] Option To Record Instead of File.

(1) *Authorization.* Notwithstanding U.C.C. 9501 et seq. or any other provision of law, a financing statement to perfect a security interest or agricultural lien may, at the election of the recorder and subject to *Govt.C. 27291(b)*, be recorded instead of filed. (*Govt.C. 27291(a)*.)

(2) *Conditions.* A recorder may elect to record a financing statement if all of the following apply:

(a) The recorder employs a system of microphotography, optical disk, or other reproduction system that does not permit additions, deletions, or other changes to the permanent record of the original document. (*Govt.C. 27291(b)(1)*.)

(b) All film used in the microphotography process complies with minimum standards of quality approved by the United States Bureau of Standards and the American National Standards Institute. (*Govt.C. 27291(b)(2)*.)

(c) A true copy of the microfilm, optical disk, or other storage medium is kept in a safe and separate place for security purposes. (*Govt.C. 27291(b)(3)*.)

(3) *Admissibility of Record.* A certified copy of any record stored or retained on microfilm, optical disk, or other reproduction system under *Govt.C. 27291* is admissible in court to the same extent as the original record. (*Govt.C. 27291(c)*.)

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 4. Continued Effectiveness of Financing Statement.
 a. Duration.

4 Witkin Sum. Cal. Law STPP § 97

[§ 97] Duration.

(1) *General Rule.* In general, a filed financing statement is effective for a period of 5 years after the date of filing (U.C.C. 9515(a)), unless its effectiveness is continued (see *infra*, §99) or terminated under U.C.C. 9513 (*infra*, §103) (Uniform Commercial Code Comment 2). (See C.E.B., Secured Transactions 2d, §3.103.)

(2) *Exception: Public Finance or Manufactured Home Transaction.* An initial financing statement filed in connection with a public finance transaction or manufactured home transaction is effective for a period of 30 years after the date of filing if it indicates that it is filed in connection with a public finance transaction or manufactured home transaction. (U.C.C. 9515(b).)

(3) *Exception: Transmitting Utility.* If a debtor is a transmitting utility and a filed financing statement so indicates, the financing statement is effective until a termination statement is filed. (U.C.C. 9515(f); on termination statements, see *infra*, §103.)

(4) *Exception: Mortgage Filed as Fixture Filing.* A record of a mortgage that is effective as a financing statement filed as a fixture filing under U.C.C. 9502(c) (*supra*, §79) remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property. (U.C.C. 9515(g).)

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 b. Lapse.

4 Witkin Sum. Cal. Law STPP § 98

[§ 98] Lapse.

(1) *General Rule.* The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless a continuation statement is filed before the lapse. When it lapses, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected on lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value. (U.C.C. 9515(c); see C.E.B., Secured Transactions 2d, §§3.105, 3.107; for examples of retroactive unperfection under U.C.C. 9515(c), see Uniform Commercial Code Comment 3; on continuation statement, see *infra*, §99.)

(2) *Effect of Purchaser's Knowledge of Security Interest.* Former Division 9, similar to present Division 9, provided that if "the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse." (Former U.C.C. 9403(2); see Uniform Commercial Code Comment 3 [noting that retroactive unperfection no longer applies with respect to lien creditors].) The question arose whether the purchaser's knowledge of the security interest would preclude the purchaser from having priority over the previously secured party.

In *Growth Properties v. Lempert* (1983) 144 C.A.3d 983, 193 C.R. 102, the secured creditor failed to file a continuation statement and his rights in the collateral lapsed, but the 3-year statute of limitations had not run on his cause of action for conversion against a third party who purchased the property before lapse. *Held*, the action for conversion was barred. Under former U.C.C. 9403(2), when the security interest became unperfected on lapse, the purchaser's interest became prior, and knowledge of the purchaser was irrelevant to a determination of priorities. (144 C.A.3d 988, 989.)

To the extent that *Growth Properties v. Lempert* can be construed as including purchasers who, with actual knowledge, acquire an interest after the lapse, *Turbinator v. Superior Court* (1995) 33 C.A.4th 443, 39 C.R.2d 342, declined to follow it. Plaintiff's predecessor perfected a security interest in the collateral, but this interest lapsed before defendant buyer acquired possession. Defendant did, however, have actual knowledge of the security interest. Plaintiff filed an action seeking possession of the collateral, and sought a preliminary injunction to prevent its transfer pending resolution of the action. The trial judge, concluding that he was bound by *Growth Properties*, denied plaintiff's request

for a preliminary injunction. *Held*, mandamus granted; the injunction should have been granted, because plaintiff retained priority.

(a) Former U.C.C. 9403 was not primarily concerned with setting priorities. Instead, it merely noted the effect of lapse. (33 C.A.4th 450.)

(b) The lapse of a financing statement under former U.C.C. 9403 rendered the security interest unperfected, not null and void. The unperfected security interest remained effective, unless a specific statute made it ineffective as against a particular person. No such statute existed in this situation, i.e., one giving priority to a purchaser after the lapse with actual knowledge of the security interest. Thus, under former U.C.C. 9301(1)(c), which provided that buyers not in the ordinary course of business were prior to the extent that they gave value and received delivery of the collateral *without knowledge of the unperfected security interest*, purchasers with actual knowledge remained subordinate to the unperfected interest. (33 C.A.4th 448, 449.)

(3) *Effect of Debtor's Bankruptcy*. Under former U.C.C. 9403(2), lapse was tolled if the debtor entered bankruptcy or another insolvency proceeding. Nevertheless, being unaware that insolvency proceedings had been commenced, filing offices routinely removed records from the files as if lapse had not been tolled. U.C.C. 9515(c) deletes the former tolling provision, which had already been deleted in California in 1997, and thereby imposes a new burden on the secured party: to be sure that a financing statement does not lapse during the debtor's bankruptcy. The secured party can prevent lapse by filing a continuation statement, even without first obtaining relief from the automatic stay. (See *11 U.S.C.*, §362(b)(3).) "Of course, if the debtor enters bankruptcy before lapse, the provisions of this Article with respect to lapse would be of no effect to the extent that federal bankruptcy law dictates a contrary result (e.g., to the extent that the Bankruptcy Code determines rights as of the date of the filing of the bankruptcy petition)." (Uniform Commercial Code Comment 4 to U.C.C. 9515.)

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4. Continued Effectiveness of Financing Statement.

c. Continuation Statement.

4 Witkin Sum. Cal. Law STPP § 99

[§ 99] Continuation Statement.

A continuation statement may be filed only within 6 months before the expiration of the 5-year period specified in U.C.C. 9515(a) or the 30-year period specified in U.C.C. 9515(b), whichever is applicable. (U.C.C. 9515(d).) A continuation statement that is not filed within the 6-month period is ineffective (U.C.C. 9510(c)), even if the filing office fails to reject it as untimely (Uniform Commercial Code Comment 4 to U.C.C. 9510).

When a continuation statement is timely filed, the effectiveness of the initial financing statement continues for a period of 5 years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. When the 5-year period expires, the financing statement lapses in the same manner as provided in U.C.C. 9515(c), unless another continuation statement is filed before the lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement. (U.C.C. 9515(e).)

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4. Continued Effectiveness of Financing Statement.

d. Amendment.

1. Procedure.

4 Witkin Sum. Cal. Law STPP § 100

[§ 100] Procedure.

Subject to U.C.C. 9509 (infra, §101), a person may file an amendment that adds or deletes collateral covered by, continues or terminates the effectiveness of, or otherwise amends the information provided in, a financing statement. The amendment must identify, by its file number, the initial financing statement to which the amendment relates. (U.C.C. 9512(a)(1).) If the amendment relates to an initial financing statement filed or recorded in a local filing office described in U.C.C. 9501(a)(1) (supra, §87), the amendment must provide the date that the initial financing statement was filed or recorded and the information specified in U.C.C. 9502(b) (supra, §79). (U.C.C. 9512(a)(2); for forms, see C.E.B., Secured Transactions 2d, §3.114; Cal. Transactions Forms, 5 Business Transactions §§30:94, 30:94.10.)

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d. Amendment.

2. Persons Entitled To File Amendment.

4 Witkin Sum. Cal. Law STPP § 101

[§ 101] Persons Entitled To File Amendment.

(1) *When Authorization by Debtor Is Required.* A person may file an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if the debtor authorizes the filing in an authenticated record or under U.C.C. 9509(b) or 9509(c). (U.C.C. 9509(a)(1).) Alternatively, the person may file if he or she holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien. (U.C.C. 9509(a)(2).) By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an amendment covering the collateral described in the security agreement and property that becomes collateral under U.C.C. 9315(a)(2) (infra, §136). (U.C.C. 9509(b).)

By acquiring collateral in which a security interest or agricultural lien continues under U.C.C. 9315(a)(1) (infra, §136), a debtor authorizes the filing of an amendment covering the collateral and property that becomes collateral under U.C.C. 9315(a)(2). (U.C.C. 9509(c).)

(2) *When Authorization by Secured Party Is Required.* A person may file an amendment, other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement, only if the secured party of record authorizes the filing. (U.C.C. 9509(d)(1); on authorization for termination statement, see infra, §103.) If there is more than one secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under U.C.C. 9509(d). (U.C.C. 9509(e).) A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record. (U.C.C. 9510(b).) This provision prevents a filing authorized by one secured party of record from affecting the rights and powers of another secured party of record without the latter's consent. (Uniform Commercial Code Comment 3 to U.C.C. 9510.)

(3) *Assignment of Secured Party's Powers.* An initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party. (U.C.C. 9514(a).) A secured party of record may assign all or part of its power to authorize an amendment to a financing statement by filing an amendment of the financing statement that:

- (a) Identifies, by its file number, the initial financing statement to which it relates. (U.C.C. 9514(b)(1).)
- (b) Provides the name of the assignor. (U.C.C. 9514(b)(2).)
- (c) Provides the name and mailing address of the assignee. (U.C.C. 9514(b)(3).)

However, an assignment of record of a security interest in a fixture covered by a record of a mortgage that is effective as a financing statement filed as a fixture filing under U.C.C. 9502(c) (*supra*, §79) may be made only by an assignment of record of the mortgage in the manner provided by California law other than the Uniform Commercial Code. (U.C.C. 9514(c).)

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4. Continued Effectiveness of Financing Statement.

d. Amendment.

3. Effectiveness of Amendment.

4 Witkin Sum. Cal. Law STPP § 102

[§ 102] Effectiveness of Amendment.

(1) *Period of Effectiveness Determined by Original Filing.* Except as otherwise provided in U.C.C. 9515 (supra, §99), which governs continuation statements, the filing of an amendment does not extend the period of effectiveness of the financing statement. (U.C.C. 9512(b).)

(2) *Amendment To Add Collateral or Debtor.* A financing statement that is amended to add collateral is effective as to the added collateral only from the filing date of the amendment. (U.C.C. 9512(c).) Similarly, a financing statement that is amended to add a debtor is effective as to the added debtor only from the filing date of the amendment. (U.C.C. 9512(d).) Thus, an amendment that adds a debtor is effective, provided that the added debtor authorizes the filing (see U.C.C. 9509(a), supra, §101). "However, filing an amendment adding a debtor to a previously filed financing statement affords no advantage over filing an initial financing statement against that debtor and may be disadvantageous. With respect to the added debtor, for purposes of determining the priority of the security interest, the time of filing is the time of the filing of the amendment, not the time of the filing of the initial financing statement" (see U.C.C. 9512(d)). "However, the effectiveness of the financing statement lapses with respect to added debtor at the time it lapses with respect to the original debtor" (see U.C.C. 9512(b)). (Uniform Commercial Code Comment 4.)

(3) *Deletion of All Debtors or Secured Parties.* An amendment is ineffective to the extent that it purports to delete all debtors and fails to provide the name of a debtor to be covered by the financing statement (U.C.C. 9512(e)(1)) or purports to delete all secured parties of record and fails to provide the name of a new secured party of record (U.C.C. 9512(e)(2)). This provision assures that there will be a debtor and secured party of record for every financing statement. (Uniform Commercial Code Comment 5 [giving example of operation of provision].)

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4. Continued Effectiveness of Financing Statement.

e. Termination.

4 Witkin Sum. Cal. Law STPP § 103

[§ 103] Termination.

(1) *Financing Statements Covering Consumer Goods.* A secured party must cause the secured party of record for a financing statement to file a termination statement for a financing statement that covers consumer goods if there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value (U.C.C. 9513(a)(1)), or if the debtor did not authorize the filing of the initial financing statement (U.C.C. 9513(a)(2)). A secured party must cause the secured party of record to file the termination statement within 1 month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value (U.C.C. 9513(b)(1)), or, if earlier, within 20 days after the secured party receives an authenticated demand from a debtor (U.C.C. 9513(b)(2)). (See C.E.B., Secured Transactions 2d, §3.109.)

Because most financing statements expire in 5 years unless a continuation statement is filed (see U.C.C. 9515, supra, §99), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance to them of clearing the public record, an affirmative duty is put on the secured party in that case. (Uniform Commercial Code Comment 2; on liability imposed on secured party that fails to comply with U.C.C. 9513(a), see U.C.C. 9625(e), infra, §197.)

(2) *Other Financing Statements.* In cases not governed by U.C.C. 9513(a), the secured party must cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if any of the following conditions is satisfied:

(a) Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value. (U.C.C. 9513(c)(1).)

(b) The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation. (U.C.C. 9513(c)(2).)

(c) The financing statement covers goods that were the subject of a consignment to the debtor but are not in the

debtor's possession. (U.C.C. 9513(c)(3).)

(d) The debtor did not authorize the filing of the initial financing statement. (U.C.C. 9513(c)(4).)

The secured party must cause the termination statement to be sent to the debtor within 20 days after receiving an authenticated demand from the debtor. (U.C.C. 9513(c); on liability imposed on secured party that fails to comply with U.C.C. 9513(c), see U.C.C. 9625(e), *infra*, §197.)

(3) *When Secured Party's Authorization Is Not Needed.* A person may file an amendment that is a termination statement without the authorization of the secured party of record, if the secured party of record has failed to file or send a termination statement as required by U.C.C. 9513(a) or 9513(c), the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed. (U.C.C. 9509(d)(2); Uniform Commercial Code Comment 6; on need for secured party's authorization for other types of amendments, see *supra*, §101.)

(4) *Effect of Filing.* Except as otherwise provided in U.C.C. 9510 (*supra*, §§77, 101), when a termination statement is filed with the filing office, the financing statement to which the termination statement relates ceases to be effective. (U.C.C. 9513(d).) Thus, if one of several secured parties of record files a termination statement, U.C.C. 9513(d) applies only with respect to the rights of the person who authorized the filing of the termination statement; the financing statement remains effective with respect to the rights of the others. (Uniform Commercial Code Comment 5.)

Except as otherwise provided in U.C.C. 9510, for purposes of U.C.C. 9519(g), 9522(a), and 9523(c), filing a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse. (U.C.C. 9513(d).)

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D. Accessions and Commingled Goods.

4 Witkin Sum. Cal. Law STPP § 104

[§ 104] Accessions and Commingled Goods.

(1) *Accessions*. If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral. (U.C.C. 9335(b).) However, U.C.C. 9335 "does not determine whether perfection against collateral that becomes an accession is effective to perfect a security interest in the whole. Other provisions of [Division 9], including the requirements for indicating the collateral covered by a financing statement, resolve that question." (Uniform Commercial Code Comment 5.)

(2) *Commingled Goods*. If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under U.C.C. 9336(c) (*supra*, §60) is perfected. (U.C.C. 9336(d).) This perfection continues until lapse. (Uniform Commercial Code Comment 3.)

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VI. PRIORITY

A. Unperfected Security Interests as Against Other Claims.

1. Subordinate to Competing Security Interests Specified by Statute.

4 Witkin Sum. Cal. Law STPP § 105

[§ 105] Subordinate to Competing Security Interests Specified by Statute.

A security interest or agricultural lien is subordinate to the rights of a person entitled to priority under U.C.C. 9322 (infra, §114 et seq.). (U.C.C. 9317(a)(1).) U.C.C. 9322 states general rules for determining priority among conflicting security interests and refers to other sections that state special rules of priority in a variety of situations. The security interests given priority under U.C.C. 9322 and the other sections to which it refers take priority in general even over a perfected security interest. Hence, they take priority over an unperfected security interest. U.C.C. 9317(a)(1) so states. (Assembly Committee Comment 3.) (See *68A Am.Jur.2d (2003 ed.), Secured Transactions §743 et seq.*)

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VI. PRIORITY

A. Unperfected Security Interests as Against Other Claims.

2. Subordinate to Lien Creditors.

4 *Witkin Sum. Cal. Law STPP* § 106

[§ 106] Subordinate to Lien Creditors.

Except as otherwise provided in U.C.C. 9317(e) (*infra*, §108), a security interest or agricultural lien is subordinate to the rights of a person who becomes a lien creditor before the earlier of the time the security interest or agricultural lien is perfected or one of the conditions specified in U.C.C. 9203(b)(3) (*supra*, §50) is met and a financing statement covering the collateral is filed. (U.C.C. 9317(a)(2); see C.E.B., *Secured Transactions* 2d, §4.43; for definition of "lien creditor," see U.C.C. 9102(a)(52); *Estate of Hinds (1970) 10 C.A.3d 1021, 1026, 89 C.R. 341* [receiver in equity as lien creditor].)

Under former U.C.C. 9301(1)(b), a lien creditor's rights had priority over an unperfected security interest. (See *Mirolla v. Mendez (1980) 111 C.A.3d 518, 521, 168 C.R. 735* [unperfected security interest (seller's lien) subordinate to rights of judgment creditor who levied on property].) "Perfection required attachment [former U.C.C. 9303] and attachment required the giving of value [former U.C.C. 9203]. It followed that, if a secured party had filed a financing statement but had not yet given value, an intervening lien creditor whose lien arose after filing but before attachment of the security interest acquired rights that are senior to those of the secured party who later gives value. This result comported with the *nemo dat* concept: When the security interest attached, the collateral was already subject to the judicial lien." (Assembly Committee Comment 4.)

"On the other hand, this result treated the first secured advance differently from all other advances. The special rule for future advances in former [U.C.C. 9301(4)] (substantially reproduced in [U.C.C. 9323(b)]) afforded priority to a discretionary advance made by a secured party within 45 days after the lien creditor's rights arose as long as the secured party was 'perfected' when the lien creditor's lien arose--i.e., as long as the advance was not the first one and an earlier advance had been made." (Assembly Committee Comment 4; on U.C.C. 9323(b), see *infra*, §141.)

U.C.C. 9317(a)(2) revises former U.C.C. 9301(1)(b) and "treats the first advance the same as subsequent advances. That is, a judicial lien that arises after a financing statement is filed and before the security interest attaches and becomes perfected is subordinate to all advances secured by the security interest, even the first advance, except as otherwise provided in [U.C.C. 9323(b)]. However, if the security interest becomes unperfected (e.g., because the effectiveness of the filed financing statement lapses) before the judicial lien arises, the security interest is subordinate. If a financing statement is filed but a security interest does not attach, then no priority contest arises. The lien creditor has the only claim to the property." (Assembly Committee Comment 4.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER VII - Secured Transactions in Personal Property

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VI. PRIORITY

- A. Unperfected Security Interests as Against Other Claims.
 3. Subordinate to Purchasers Other Than Secured Parties.

4 Witkin Sum. Cal. Law STPP § 107

[§ 107] Subordinate to Purchasers Other Than Secured Parties.

(1) *Tangible Collateral.* A buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected. (U.C.C. 9317(b); see *Louis & Diederich v. Cambridge European Imports (1987) 189 C.A.3d 1574, 1587, 234 C.R. 889* [purchaser of automobile from broker (not dealer) had priority where purchaser gave value and had no knowledge of unperfected security interest; construing substantially similar former U.C.C. 9301(1)(c)]; *Turbinator v. Superior Court (1995) 33 C.A.4th 443, 448, 39 C.R.2d 342*, supra, §98 [no priority under former U.C.C. 9301(1)(c), where later purchaser had knowledge of lapsed security interest]; on rule governing buyer of goods *in ordinary course of business*, see U.C.C. 9320(a), infra, §111.)

Similarly, a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected. (U.C.C. 9317(c).) (On rule governing lessee of goods *in ordinary course of business*, see U.C.C. 9321, infra, §112; on exception to U.C.C. 9317(b) and 9317(c) for purchase money security interest, see infra, §108.)

(2) *Need To Take Delivery.* "Normally, there will be no question when a buyer of chattel paper, documents, instruments, or security certificates 'receives delivery' of the property. ... However, sometimes a buyer or lessee of goods, such as complex machinery, takes delivery of the goods in stages and completes assembly at its own location. Under those circumstances, the buyer or lessee 'receives delivery' within the meaning of [U.C.C. 9317(b) and 9317(c)] when, after an inspection of the portion of the goods remaining with the seller or lessor, it would be apparent to a potential lender to the seller or lessor that another person might have an interest in the goods." (Assembly Committee Comment 6.)

(3) *Collateral Consisting of Intangibles.* The rule of U.C.C. 9317(b) obviously is not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer. (Assembly Committee Comment 6.) Thus, a licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, general intangibles, or investment property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected. (U.C.C. 9317(d); on rule governing licensee of general intangible *in ordinary*

course of business, see U.C.C. 9321, *infra*, §113.)

Assembly Committee Comment 6 notes that unless U.C.C. 9109 (*supra*, §24) excludes the transaction from Division 9, a buyer of accounts, chattel paper, payment intangibles, or promissory notes is a secured party, according to U.C.C. 9102(a)(72)(D) (*supra*, §47), in which case U.C.C. 9317(b) and 9317(d) do not determine the priority of the security interest created by the sale. Instead, the priority rules generally applicable to competing security interests (see U.C.C. 9322, *infra*, §114) apply.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Tangible Collateral*. U.C.C. 9317(b) was amended in 2006 to refer to tangible documents, rather than documents.(3) *Collateral Consisting of Intangibles*. U.C.C. 9317(d) was amended in 2006 to add electronic documents to the list of collateral.



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A. Unperfected Security Interests as Against Other Claims.

4. Priority of Purchase Money Security Interests Over Other Claims.

4 Witkin Sum. Cal. Law STPP § 108

[§ 108] Priority of Purchase Money Security Interests Over Other Claims.

(1) *General Rule.* If a person files a financing statement with respect to a purchase money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor that arise between the time the security interest attaches and the time of filing. (U.C.C. 9317(e).) U.C.C. 9317(e) derives from former U.C.C. 9301(2). It differs from that former provision in two significant respects. First, U.C.C. 9317(e) protects a purchase money security interest against all buyers and lessees, not just against transferees in bulk. Second, U.C.C. 9317(e) conditions this protection on filing within 20, as opposed to 10, days after delivery. (Assembly Committee Comment 8.)

(2) *Exception: Purchasers in Ordinary Course of Business.* U.C.C. 9317(e) is, by its own terms, subject to U.C.C. 9320 and 9321, which provide for certain buyers, licensees, and lessees in the ordinary course of business to take free of security interests, whether perfected or not. (See *infra*, §111 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. PRIORITY

A. Unperfected Security Interests as Against Other Claims.

5. When Rights of Buyer of Accounts and Chattel Paper Are Subordinate to Seller's
 Creditors or Subsequent Transferees.

4 Witkin Sum. Cal. Law STPP § 109

[§ 109] When Rights of Buyer of Accounts and Chattel Paper Are Subordinate to Seller's Creditors or Subsequent Transferees.

(1) *General Rule.* A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold. (U.C.C. 9318(a).) Thus, the fact that a sale of an account, chattel paper, payment intangible, or promissory note gives rise to a "security interest" (see U.C.C. 9109(a), supra, §23, and U.C.C. 1201(36)(a), supra, §36) does not imply that the seller retains an interest in the property that has been sold. To the contrary, the seller retains no interest whatsoever in the property to the extent that it has been sold. (Uniform Commercial Code Comment 2.) Nevertheless, for purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold. (U.C.C. 9318(b).) As a consequence of U.C.C. 9318(b), if a buyer purchases an account or chattel paper and then fails to perfect the buyer's security interest, the seller can transfer, and the creditors of the seller can reach, the account or chattel paper as if it had not been sold. (Uniform Commercial Code Comment 3.)

(2) *Illustration.* Uniform Commercial Code Comment 3 offers the following example of how U.C.C. 9318(b) operates: "Debtor sells accounts or chattel paper to Buyer-1 and retains no interest in them. Buyer-1 does not file a financing statement. Debtor then sells the same receivables to Buyer-2. Buyer-2 files a proper financing statement. Having sold the receivables to Buyer-1, Debtor would not have any rights in the collateral so as to permit Buyer-2's security (ownership) interest to attach. Nevertheless, under this section, for purposes of determining the rights of purchasers for value from Debtor, Debtor is deemed to have the rights that Debtor sold. Accordingly, Buyer-2's security interest attaches, is perfected by the filing, and, under [U.C.C. 9322 (infra, §114)], is senior to Buyer-1's interest."

(3) *Effect of Perfection.* If the security interest of a buyer of accounts or chattel paper is perfected, the usual result would take effect: transferees from and creditors of the seller could not acquire an interest in the sold accounts or chattel paper. The same result generally would occur if payment intangibles or promissory notes were sold, because the buyer's security interest is automatically perfected under U.C.C. 9309 (supra, §63). However, in certain circumstances a purchaser who takes possession of a promissory note will achieve priority, under U.C.C. 9330 (infra, §130) or 9331 (infra, §143), over the security interest of an earlier buyer of the promissory note. It necessarily follows that the seller in those circumstances retains the power to transfer the promissory note, as if it had not been sold, to a purchaser who

obtains priority under either of those sections. (Uniform Commercial Code Comment 4 to U.C.C. 9318.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* U.C.C. 1201(36)(a) was renumbered U.C.C. 1201(b)(35) in 2006.



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VI. PRIORITY

A. Unperfected Security Interests as Against Other Claims.

6. When Rights of Consignor Are Subordinate to Consignee's Creditors or Subsequent Transferees.

4 Witkin Sum. Cal. Law STPP § 110

[§ 110] When Rights of Consignor Are Subordinate to Consignee's Creditors or Subsequent Transferees.

(1) *General Rule.* For purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer. (U.C.C. 9319(a).) U.C.C. 9319 takes an approach to consignments similar to that taken by U.C.C. 9318 (*supra*, §109) with respect to buyers of accounts and chattel paper. U.C.C. 9319(a) provides that, "for purposes of determining the rights of certain third parties, the consignee is deemed to acquire all rights and title that the consignor had, if the consignor's security interest is unperfected. The consignee acquires these rights even though, as between the parties, it purchases a limited interest in the goods (as would be the case in a true consignment, under which the consignee acquires only the interest of a bailee). As a consequence of this section, creditors of the consignee can acquire judicial liens and security interests in the goods." (Uniform Commercial Code Comment 2.)

(2) *Illustration.* Uniform Commercial Code Comment 2 offers the following example of how U.C.C. 9319(a) operates: "SP-1 delivers goods to Debtor in a transaction constituting a 'consignment' as defined in Section 9-102. SP-1 does not file a financing statement. Debtor then grants a security interest in the goods to SP-2. SP-2 files a proper financing statement. Assuming Debtor is a mere bailee, as in a 'true' consignment, Debtor would not have any rights in the collateral (beyond those of a bailee) so as to permit SP-2's security interest to attach to any greater rights. Nevertheless, under this section, for purposes of determining the rights of Debtor's creditors, Debtor is deemed to acquire SP-1's rights." Accordingly, SP-2's security interest attaches, is perfected by the filing, and, under U.C.C. 9322 (*infra*, §114), is senior to SP-1's interest.

Insofar as creditors of the consignee are concerned, Division 9 to a considerable extent reformulates the law of former U.C.C. 2-326 and former U.C.C. 9-114, without changing the results. (Uniform Commercial Code Comment 2 to U.C.C. 9319; on former U.C.C. 2-326 and former U.C.C. 9-114, see *Escrow Connection v. Haas* (1987) 189 C.A.3d 1640, 1644, 235 C.R. 200; *Minor v. Stevenson* (1991) 227 C.A.3d 1613, 1617, 278 C.R. 558; *Bank of California v. Thornton-Blue Pac.* (1997) 53 C.A.4th 841, 848, 62 C.R.2d 90; *South Beverly Wilshire Jewelry & Loan v. Superior Court* (2004) 121 C.A.4th 74, 79, 80, footnote 2, 16 C.R.3d 710 [jewelry wholesaler who voluntarily consigned various pieces to dealer and failed to file financing statement could not recover jewelry from lenders to whom dealer had unlawfully pawned jewelry, unless wholesaler could prove on remand that dealer was generally known by his creditors

to be substantially engaged in sale of goods belonging to others; noting that U.C.C. 9319 apparently would not alter this result[.]

(3) *Exception: Effect of Perfection.* For purposes of determining the rights of a creditor of a consignee, law other than Division 9 determines the rights and title of a consignee while goods are in the consignee's possession if, under U.C.C. 9301 et seq., a perfected security interest held by the consignor would have priority over the rights of the creditor. (U.C.C. 9319(b).) Example 2 in Uniform Commercial Code Comment 3 illustrates this provision: SP-1 delivers goods to Debtor in a transaction constituting a "consignment" as defined in U.C.C. 9102. SP-1 files a proper financing statement. Debtor then grants a security interest in the goods to SP-2. Under U.C.C. 9322, SP-1's security interest is senior to SP-2's. U.C.C. 9319(b) indicates that, for purposes of determining SP-2's rights, other law determines the rights and title of the consignee. If, for example, a consignee obtains only the special property of a bailee, then SP-2's security interest would attach only to that special property.

SUPPLEMENT: [This section is current through the latest supplement]



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VI. PRIORITY

B. Buyers and Lessees of Goods and Licensees of General Intangibles.

1. Buyers.

4 Witkin Sum. Cal. Law STPP § 111

[§ 111] Buyers.

(1) *Buyers in Ordinary Course of Business.* A buyer in ordinary course of business takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence. (U.C.C. 9320(a); see *Dowell v. Beech Acceptance Corp.* (1970) 3 C.3d 544, 548, 91 C.R. 1, 476 P.2d 401 [federal aircraft title recordation statute (former 49 U.S.C., §1403; now 49 U.S.C., §44107 et seq.) preempted predecessor to U.C.C. 9320(a), where security interests in aircraft were involved]; 36 *Hastings L. J.* 215 [buyer of used goods and problem of hidden security interests]; C.E.B., *Secured Transactions* 2d, §4.64; 68A *Am.Jur.2d* (2003 ed.), *Secured Transactions* §841 et seq.; 9 *A.L.R.5th* 708 [equitable estoppel of secured party's right to assert prior, perfected security interest against subsequent purchaser].)

A "buyer in ordinary course of business" means a person who buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods. (U.C.C. 1201(9); see *American Nat. Bank v. Cloud* (1988) 201 C.A.3d 766, 771, 247 C.R. 325 [buyer takes subject to security interest if buyer knows that sale violates term in security agreement not waived by secured party's words or conduct]; *Brasher's Cascade Auto Auction v. Valley Auto Sales & Leasing* (2004) 119 C.A.4th 1038, 1047, 15 C.R.3d 70 [former U.C.C. 9307, substantially similar predecessor to U.C.C. 9320, required merchant buyer to adhere to reasonable commercial standards to obtain status of buyer in ordinary course].) The buyer in ordinary course of business is one who buys in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. Thus, U.C.C. 9320(a) applies primarily to inventory collateral. (Assembly Committee Comment 3; see 73 *A.L.R.3d* 338 [who is "person in business of selling goods of that kind"].)

A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free, not only of Division 9 security interests, but also of interests arising out of an encumbrance. (U.C.C. 9320(d); Assembly Committee Comment 6.)

(2) *Buyers of Consumer Goods.* A buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if:

(a) The buyer buys without knowledge of the security interest (U.C.C. 9320(b)(1));

(b) The buyer buys for value (U.C.C. 9320(b)(2));

- (c) The buyer buys primarily for the buyer's personal, family, or household purposes (U.C.C. 9320(b)(3)); and
- (d) The buyer buys before the filing of a financing statement covering the goods (U.C.C. 9320(b)(4)).

The rights of a buyer under U.C.C. 9320(b) "turn on whether a financing statement has been filed against consumer goods. Occasionally, a debtor changes his or her location after a filing is made." (Assembly Committee Comment 4.) U.C.C. 9320(c) deals with the continued effectiveness of the filing under those circumstances. It provides that to the extent that it affects the priority of a security interest over a buyer of goods under U.C.C. 9320(b), the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by the reperfession rules in U.C.C. 9316(a) and 9316(b) (*supra*, §67).

(3) *Exception: Authorized Dispositions.* The limitations that U.C.C. 9320(a) and 9320(b) impose on the persons who may take free of a security interest apply only to unauthorized sales by the debtor. If the secured party authorized the sale in an express agreement or otherwise, the buyer takes free under U.C.C. 9315(a) (*infra*, §136) without regard to the limitations of U.C.C. 9320. (Assembly Committee Comment 5.)

(4) *Exception: Possessory Security Interests.* U.C.C. 9320(a) and 9320(b) do not affect a security interest in goods in the possession of the secured party under U.C.C. 9313 (*supra*, §68 et seq.). (U.C.C. 9320(e).)

(5) *Mobilehomes and Motor Vehicles.* The interest of a bona fide purchaser of a vehicle subject to registration under the Vehicle Code prevails over a technically perfected security interest not disclosed on the certificate of ownership. (See U.C.C. 9311(a)(2)(A) (*supra*, §66) [filing of financing statement is not effective to perfect security interest in property subject to Vehicle Code provisions that require registration of vehicle].) However, this rule does not apply in the case of mobilehome transactions occurring after July 1, 1981, when a separate system for the registration of mobilehomes was created by the Mobilehomes-Manufactured Housing Act of 1980 (*Health & Saf.C. 18000 et seq.*). (*T & O Mobile Homes v. United Calif. Bank* (1985) 40 C.3d 441, 454, 455, 220 C.R. 627, 709 P.2d 430; on Mobilehomes-Manufactured Housing Act, see 12 *Summary* (10th), *Real Property*, §761.) The Act provides for the establishment of a permanent title record and the issuance of a certificate of title, both of which must contain current listings of all security interests in the mobilehome. (*Health & Saf.C. 18090.5, 18091, 18100.5(a)(1).*) In particular, a mobilehome certificate of title must contain a warning that the certificate may not reflect all liens against title, and that the current title status can be confirmed by examining records maintained by the Department of Housing and Community Development. (*Health & Saf.C. 18091(d).*) (On electronic transmission or receipt of certificate of title by Department of Housing and Community Development, see *Health & Saf.C. 18090.6*; on authorization of Department of Housing and Community Development to establish programs for electronic processing of ownership and title documents for mobilehomes, see *Health & Saf.C. 18090.7.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Buyers in Ordinary Course of Business.* U.C.C. 1201(9) was renumbered U.C.C. 1201(b)(9) in 2006.(5) *Mobilehomes and Motor Vehicles.* *Health & Saf.C. 18000* was amended in 2007 to rename the Mobilehomes-Manufactured Housing Act of 1980 (*Health & Saf.C. 18000 et seq.*) the Manufactured Housing Act of 1980. (See *Health & Saf.C. 18000(b)(4)*, added in 2007 [statutory changes to clarify meaning of terms "mobilehomes" and "manufactured homes" are not intended to effect any substantive change with respect to treatment of those housing products or to consumer protections provided for them].)



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- B. Buyers and Lessees of Goods and Licensees of General Intangibles.
 - 2. Lessees in Ordinary Course of Business.

4 Witkin Sum. Cal. Law STPP § 112

[§ 112] Lessees in Ordinary Course of Business.

A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence. (U.C.C. 9321(c), which will be relettered U.C.C. 9321(a) on January 1, 2007.)

SUPPLEMENT: [This section is current through the latest supplement]

U.C.C. 9321(c) will be relettered U.C.C. 9321(a) on January 1, 2010, instead of on January 1, 2007.



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VI. PRIORITY

B. Buyers and Lessees of Goods and Licensees of General Intangibles.

3. Licensees in Ordinary Course of Business.

4 Witkin Sum. Cal. Law STPP § 113

[§ 113] Licensees in Ordinary Course of Business.

(1) *Definition of Licensee in Ordinary Course of Business.* A "licensee in ordinary course of business" is a person who becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor's own usual or customary practices. (U.C.C. 9321(a).)

(2) *General Rule.* A licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence. (U.C.C. 9321(b).) U.C.C. 9321(b), which is new to the 2001 revision of Division 9, "reflects the expectations of the parties and the marketplace: a licensee under a nonexclusive license takes subject to a security interest unless the secured party authorizes the license free of the security interest or other, controlling law such as that of this section (protecting ordinary-course licensees) dictates a contrary result." (Assembly Committee Comment 2.)

(3) *Application of Rule.* The rule of U.C.C. 9321(b) "pertains only to licenses that are nonexclusive. In this context, nonexclusivity is determined through examination of the actual terms of the license. A license is nonexclusive where the licensee does not have the sole or exclusive right to exploit the general intangible in the territory, period, and manner specified in the license, and the licensor is free to grant the identical rights to exploitation, in the same territory, period, and manner, to a competing licensee. This is a functional analysis, which cannot be defeated by recitations of nonexclusivity where the agreement or practice between the licensor and the licensee indicates otherwise. In the event of dispute whether a given license is nonexclusive, the party seeking the benefit of that status--for example, a licensee arguing that its license is not subject to a security interest granted by the licensor--bears the burden of proof concerning the licensee's nonexclusive status. Moreover, the nonexclusive licensee takes free only of security interests granted by its licensor. For example, assume a master licensor grants a security interest to a secured party and then the master licensor licenses rights on an exclusive basis to a primary licensee, who in turn licenses identical rights on a nonexclusive basis to several sublicensees. The sublicensees might take free of any security interest granted by the primary licensee, but would not take free of a security interest granted by the master licensor." (Assembly Committee Comment 4.)

(4) *Repeal of Rule.* U.C.C. 9321(a) and 9321(b) will be repealed by their own terms on January 1, 2007. (U.C.C. 9321(d).)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Repeal of Rule.* U.C.C. 9321(a) and 9321(b) will be repealed on January 1, 2010, rather than on January 1, 2007. (U.C.C. 9321(d), as amended in 2006.)



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C. Conflicting Security Interests in Same Collateral.

1. General Rules of Priority.

a. Temporal Priority.

4 Witkin Sum. Cal. Law STPP § 114

[§ 114] Temporal Priority.

(1) *Competing Perfected Security Interests.* In general, conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection. (U.C.C. 9322(a)(1); see *Bank of Stockton v. Diamond Walnut Growers* (1988) 199 C.A.3d 144, 152, 244 C.R. 744 [under former U.C.C. 9312(5) (now U.C.C. 9322(a)(1)), defendant's interest in walnut crop had priority over plaintiff's interest because defendant had been first to file financing statement; parties' agreement that each party reserved all rights and claims with respect to crop and its proceeds, and that transfer of physical possession of crop to defendant would not change parties' rights, did not alter this conclusion]; C.E.B., Secured Transactions 2d, §4.3 et seq.; 68A Am.Jur.2d (2003 ed.), *Secured Transactions* §782 et seq.)

The rule of U.C.C. 9322(a)(1), affording priority to the first to file or perfect, applies to security interests that are perfected by any method, including temporarily (see U.C.C. 9312, supra, §65) or on attachment (see U.C.C. 9309, supra, §63), even though there may be no notice to creditors or subsequent purchasers and notwithstanding any common law rule to the contrary. The form of the claim to priority, i.e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection as long as there is no intervening period without filing or perfection (see U.C.C. 9308(c), supra, §61). (Uniform Commercial Code Comment 4 to U.C.C. 9322.)

(2) *Competing Security Interests When One Is Perfected and Other Is Not.* In general, a perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien. (U.C.C. 9322(a)(2).)

(3) *Competing Unperfected Security Interests.* The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected. (U.C.C. 9322(a)(3).) "This rule may be of merely theoretical interest, inasmuch as it is hard to imagine a situation where the case would come into litigation without either secured party's having perfected its security interest. If neither security interest had been perfected at the time of the filing of a petition in bankruptcy, ordinarily neither would be good against the trustee in bankruptcy under the Bankruptcy Code." (Uniform Commercial Code Comment 11.)

West's Key Number Digest, Secured Transactions k.131 et seq.

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1. General Rules of Priority.

b. Priority in Proceeds.

4 Witkin Sum. Cal. Law STPP § 115

[§ 115] Priority in Proceeds.

For the purpose of U.C.C. 9322(a)(1) (supra, §114), the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds. (U.C.C. 9322(b)(1).)

U.C.C. 9322(b)(1) follows former U.C.C. 9312(6) and provides that the baseline rules of U.C.C. 9322(a) apply generally to priority conflicts in proceeds except where otherwise provided (e.g., as in U.C.C. 9322(c) through 9322(e), infra, §117). Under U.C.C. 9203 (supra, §50), attachment cannot occur (and therefore, under U.C.C. 9308 (supra, §61), perfection cannot occur) as to particular collateral until the collateral itself comes into existence and the debtor has rights in it. Thus, a security interest in proceeds of original collateral does not attach and is not perfected until the proceeds come into existence and the debtor acquires rights in them. (Uniform Commercial Code Comment 6.)

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c. Priority in Supporting Obligations.

4 Witkin Sum. Cal. Law STPP § 116

[§ 116] Priority in Supporting Obligations.

For the purpose of U.C.C. 9322(a)(1) (supra, §114), the time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation. (U.C.C. 9322(b)(2).) A security interest in collateral that qualifies for priority over a conflicting security interest under U.C.C. 9327 (infra, §127), U.C.C. 9328 (infra, §128), U.C.C. 9329 (infra, §129), U.C.C. 9330 (infra, §130), or U.C.C. 9331 (infra, §143) also has priority over a conflicting security interest in a supporting obligation for the collateral. (U.C.C. 9322(c)(1).)

Under U.C.C. 9322(b)(2) and 9322(c)(1), a security interest having priority in collateral also has priority in a supporting obligation for that collateral. However, the rules in these subsections are subject to the special rule in U.C.C. 9329 (infra, §129) governing the priority of security interests in a letter-of-credit right (see U.C.C. 9322(f)). Under U.C.C. 9329, a secured party's failure to obtain control (see U.C.C. 9107, supra, §54) of a letter-of-credit right that serves as supporting collateral leaves its security interest exposed to a priming interest of a party who does take control. (Uniform Commercial Code Comment 10 to U.C.C. 9322.)

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2. Special Rules of Priority.

a. Priority in Proceeds.

4 Witkin Sum. Cal. Law STPP § 117

[§ 117] Priority in Proceeds.

(1) *Distinction Between Filing and Nonfiling Collateral.* U.C.C. 9322(c), 9322(d), and 9322(e), *infra*, this section, which are new to the 2001 revision of Division 9, provide additional priority rules for proceeds of collateral in situations where the temporal (first-in-time) rules of U.C.C. 9322(a)(1) (*supra*, §114) are not appropriate. These new provisions distinguish what the Uniform Commercial Code Comments refer to as "nonfiling collateral" from "filing collateral." Nonfiling collateral is collateral of a type for which perfection may be achieved by a method other than filing (possession or control, mainly) and for which secured parties who so perfect generally do not expect or need to conduct a filing search. More specifically, nonfiling collateral is chattel paper, deposit accounts, negotiable documents, instruments, investment property, and letter-of-credit rights. Other collateral, such as accounts, commercial tort claims, general intangibles, goods, nonnegotiable documents, and payment intangibles, is filing collateral. (Uniform Commercial Code Comment 7; see C.E.B., *Secured Transactions* 2d, §4.27 *et seq.*)

(2) *Nontemporal Priority for Proceeds of Nonfiling Collateral.* A security interest in collateral that qualifies for priority over a conflicting security interest under U.C.C. 9327 (*infra*, §127), U.C.C. 9328 (*infra*, §128), U.C.C. 9329 (*infra*, §129), U.C.C. 9330 (*infra*, §130), or U.C.C. 9331 (*infra*, §143) also has priority over a conflicting security interest in proceeds of the collateral if all of the following conditions are satisfied:

(a) The security interest in proceeds is perfected. (U.C.C. 9322(c)(2)(A).)

(b) The proceeds are cash proceeds or of the same type as the collateral. (U.C.C. 9322(c)(2)(B).)

(c) In the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral. (U.C.C. 9322(c)(2)(C).)

U.C.C. 9322(c)(2) provides a baseline priority rule for proceeds of nonfiling collateral that applies if the secured party has taken the steps required for nontemporal priority over a conflicting security interest in nonfiling collateral (e.g., control, in the case of deposit accounts, letter-of-credit rights, and investment property). This rule determines priority in proceeds of nonfiling collateral whether or not there exists an actual conflicting security interest in the original nonfiling collateral. Under U.C.C. 9322(c)(2), the priority in the original collateral continues in proceeds if the

security interest in proceeds is perfected and the proceeds are cash proceeds or nonfiling proceeds "of the same type" as the original collateral. "Type" means a type of collateral defined in the Uniform Commercial Code and should be read broadly. For example, a security is "of the same type" as a security entitlement (i.e., investment property), and a promissory note is "of the same type" as a draft (i.e., an instrument). (Uniform Commercial Code Comment 8.)

(3) *Special Temporal Priority for Proceeds of Nonfiling Collateral.* If a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing. (U.C.C. 9322(d).) However, U.C.C. 9322(d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights. (U.C.C. 9322(e).)

Thus, under U.C.C. 9322(d) and (e), if a security interest in nonfiling collateral is perfected by a method other than filing (e.g., control or possession), it does not retain its priority over a conflicting security interest in proceeds that are filing collateral. Moreover, it is not entitled to priority in proceeds under the first-to-file or first-to-perfect rule of U.C.C. 9322(a)(1) (*supra*, §114) and 9322(b) (*supra*, §115). Instead, under U.C.C. 9322(d), priority is determined by a new first-to-file rule. (Uniform Commercial Code Comment 9.)

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b. Priority Determined by Other Commercial Code Provisions.

4 Witkin Sum. Cal. Law STPP § 118

[§ 118] Priority Determined by Other Commercial Code Provisions.

(1) *Division 9 Provisions.* The general rules governing priority of security interests and proceeds in U.C.C. 9322(a) to 9322(e) (*supra*, §114 et seq.) are subject to U.C.C. 9322(g) (U.C.C. 9322(f)(1)), which provides that a perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides. Thus, if another statute grants priority to an agricultural lien, the agricultural lien has priority only if the same statute creates the agricultural lien and the agricultural lien is perfected. Otherwise, U.C.C. 9322(a) applies the same priority rules to an agricultural lien as to a security interest, regardless of whether the agricultural lien conflicts with another agricultural lien or with a security interest. (Uniform Commercial Code Comment 12.)

The general rules governing priority of security interests and proceeds in U.C.C. 9322(a) to 9322(e) are also subject to the other provisions of U.C.C. 9301 et seq. (U.C.C. 9322(f)(1).) Rules that override U.C.C. 9322 include those applicable to purchase money security interests (see U.C.C. 9324, *infra*, §119 et seq.) and those qualifying for special priority in particular types of collateral, such as deposit accounts (U.C.C. 9327, *infra*, §127), investment property (U.C.C. 9328, *infra*, §128), letter-of-credit rights (U.C.C. 9329, *infra*, §129), chattel paper and instruments (U.C.C. 9330, *infra*, §130), and fixtures (U.C.C. 9334, *infra*, §131). (Uniform Commercial Code Comment 2.)

(2) *Provisions From Other U.C.C. Divisions.* The general rules governing priority of security interests and proceeds in U.C.C. 9322(a) to 9322(e) are also subject to the following:

(a) U.C.C. 4210 (4 *Summary* (10th), *Negotiable Instruments*, §106) with respect to a security interest of a collecting bank. (U.C.C. 9322(f)(2).)

(b) U.C.C. 5118 (4 *Summary* (10th), *Negotiable Instruments*, §143) with respect to a security interest of an issuer or nominated person. (U.C.C. 9322(f)(3).)

(c) U.C.C. 9110 with respect to a security interest arising under U.C.C. 2101 et seq. or U.C.C. 10101 et seq. (U.C.C. 9322(f)(4).) In particular, a security interest arising under U.C.C. 2401 or 2505 (reservation of security interest by seller of goods; see 4 *Summary* (10th), *Sales*, §131), under U.C.C. 2711(3) (buyer's security interest in rightfully

rejected goods; see 4 *Summary* (10th), *Sales*, §163), or under U.C.C. 10508(e) (lessee's security interest in rightfully rejected goods; see 13 *Summary* (10th), *Personal Property*, §214) is subject to Division 9. However, until the debtor obtains possession of the goods, the security interest has priority over a conflicting security interest created by the debtor. (U.C.C. 9110(4).) Thus, a security interest arising under U.C.C. 2401 or 2505 has priority over a conflicting security interest in the buyer's after-acquired goods, even if the goods in question are inventory. Arguably, the same result would obtain under U.C.C. 9322, but even if it would not, a purchase-money-like priority is appropriate. Similarly, a security interest under U.C.C. 2711(3) or U.C.C. 10508(5) has priority over security interests claimed by the seller's or lessor's secured lender. "This result is appropriate, inasmuch as the payments giving rise to the debt secured by the [Division 2 or Division 10] security interest are likely to be included among the lender's proceeds." (Uniform Commercial Code Comment 4 to U.C.C. 9110.)

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c. Priority of Purchase Money Security Interests.

1. In Goods Other Than Inventory and Livestock.

4 Witkin Sum. Cal. Law STPP § 119

[§ 119] In Goods Other Than Inventory and Livestock.

(1) *General Rule.* A perfected purchase money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, if the purchase money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter. (U.C.C. 9324(a); on priority of interest in proceeds of goods, see *supra*, §§115, 117; on exception where debtor creates two purchase money security interests in same collateral, see *infra*, §124.) The perfection requirement means that the purchase money secured party either has filed a financing statement before that time or has a temporarily perfected security interest in goods covered by documents under U.C.C. 9312(e) and 9312(f) (*supra*, §65) which is continued in a perfected status by filing before the expiration of the 20-day period specified in that section. A purchase money security interest qualifies for priority under U.C.C. 9324(a), even if the purchase money secured party knows that a conflicting security interest has been created "and or that the holder of the conflicting interest has filed a financing statement covering the collateral." (Uniform Commercial Code Comment 3; see *36 Hastings L. J.* 873 [purchase money security interest and federal tax lien]; *35 Stanf. L. Rev.* 1133 [preserving purchase money status of refinanced or commingled purchase money debt]; C.E.B., Secured Transactions 2d, §4.10.)

(2) *Requirement That Debtor Receive Possession.* "Normally, there will be no question when 'the debtor receives possession of the collateral' for purposes of [U.C.C. 9324(a)]. However, sometimes a debtor buys goods and takes possession of them in stages, and then assembly and testing are completed (by the seller or debtor-buyer) at the debtor's location. Under those circumstances, the buyer 'takes possession' within the meaning of subsection (a) when, after an inspection of the portion of the goods in the debtor's possession, it would be apparent to a potential lender to the debtor that the debtor has acquired an interest in the goods taken as a whole." (Uniform Commercial Code Comment 3.)

Uniform Commercial Code Comment 3 offers another example of an issue concerning the time when the debtor receives possession: A person may take possession of goods as lessee under a lease contract and then exercise an option to purchase the goods from the lessor on secured credit. Under Division 10 (Personal Property Leases), creditors of the lessee generally take subject to the lease contract; filing a financing statement against the lessee is unnecessary to protect the lessor's leasehold or residual interest. Once the lease is converted to a security interest, filing a financing statement is necessary to protect the seller's (former lessor's) security interest. Accordingly, the 20-day period in U.C.C.

9324(a) does not commence until the goods become collateral, i.e., until they are subject to a security interest.

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2. In Inventory.

4 Witkin Sum. Cal. Law STPP § 120

[§ 120] In Inventory.

(1) *General Rule.* U.C.C. 9324(b) and 9324(c) afford a means by which a purchase money security interest in inventory can achieve priority over an earlier-filed security interest in the same collateral. (Uniform Commercial Code Comment 4; on exception where debtor creates two purchase money security interests in the same collateral, see *infra*, §124; on priority of interest in proceeds of inventory, see *infra*, §123.) In particular, a perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory if:

(a) The purchase money security interest is perfected when the debtor receives possession of the inventory. (U.C.C. 9324(b)(1); on determining when debtor "receives possession," see Uniform Commercial Code Comment 3, *supra*, §119; Uniform Commercial Code Comment 4.) Unlike U.C.C. 9324(a), U.C.C. 9324(b) does not contain a 20-day grace period. (Uniform Commercial Code Comment 4.)

(b) The purchase money secured party sends an authenticated notification to the holder of the conflicting security interest. (U.C.C. 9324(b)(2).)

(c) The holder of the conflicting security interest receives the notification within 5 years before the debtor receives possession of the inventory. (U.C.C. 9324(b)(3).)

(d) The notification states that the person sending the notification has or expects to acquire a purchase money security interest in inventory of the debtor and describes the inventory. (U.C.C. 9324(b)(4).)

However, the notification requirements (U.C.C. 9324(b)(2), 9324(b)(3), and 9324(b)(4)) apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory before the date of the filing of the purchase money security interest, assuming that the purchase money security interest is perfected by filing. (U.C.C. 9324(c)(1).) If the purchase money security interest is temporarily perfected without filing or possession under U.C.C. 9312(f) (*supra*, §65), the holder of the conflicting security interest had to have filed before the beginning of the 20-day period under U.C.C. 9312(f). (U.C.C. 9324(c)(2); see C.E.B., *Secured Transactions* 2d, §4.14 et seq.)

(2) *Purpose of Notification Requirements.* The arrangement between an inventory secured party and its debtor typically requires the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though it has already given a purchase money security interest in the inventory to another secured party. For this reason, U.C.C. 9324(b)(2) through 9324(b)(4) and U.C.C. 9324(c) impose a second condition for the purchase money security interest's achieving priority: the purchase money secured party must give notification to the holder of a conflicting security interest who filed against the same item or type of inventory before the purchase money secured party filed or its security interest became perfected temporarily under U.C.C. 9312(e) or 9312(f). The notification requirement protects the non-purchase money inventory secured party in such a situation: if the inventory secured party has received notification, it presumably will not make an advance; if it has not received notification (or if the other security interest does not qualify as purchase money), any advance the inventory secured party may make ordinarily will have priority under U.C.C. 9322 (supra, § 114). Inasmuch as an arrangement for periodic advances against incoming goods is unusual outside the inventory field, U.C.C. 9324(a) does not contain a notification requirement. (Uniform Commercial Code Comment 4.)

(3) *Applicability to Consignments.* U.C.C. 9324(b) and 9324(c) also determine the priority of a consignor's interest in consigned goods as against a security interest in the goods created by the consignee. (Uniform Commercial Code Comment 7.)

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3. In Livestock.

4 Witkin Sum. Cal. Law STPP § 121

[§ 121] In Livestock.

U.C.C. 9324(d) and 9324(e), which are new to the 2001 revision to Division 9, provide a purchase money priority rule for farm products livestock. (Uniform Commercial Code Comment 10.) A perfected purchase money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock if:

(1) The purchase money security interest is perfected when the debtor receives possession of the livestock. (U.C.C. 9324(d)(1).)

(2) The purchase money secured party sends an authenticated notification to the holder of the conflicting security interest. (U.C.C. 9324(d)(2).)

(3) The holder of the conflicting security interest receives the notification within 6 months before the debtor receives possession of the livestock. (U.C.C. 9324(d)(3).)

(4) The notification states that the person sending the notification has or expects to acquire a purchase money security interest in livestock of the debtor and describes the livestock. (U.C.C. 9324(d)(4).) (On exception where debtor creates two purchase money security interests in the same collateral, see *infra*, §124; on priority of interest in proceeds and products of livestock, see *infra*, §123.)

However, the notification requirements (U.C.C. 9324(d)(2), 9324(d)(3), and 9324(d)(4)) apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock before the date of the filing of the purchase money security interest, assuming that the purchase money security interest is perfected by filing. (U.C.C. 9324(e)(1).) If the purchase money security interest is temporarily perfected without filing or possession under U.C.C. 9312(f) (*supra*, §65), the holder of the conflicting security interest had to have filed before the beginning of the 20-day period under U.C.C. 9312(f). (U.C.C. 9324(e)(2).)

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4. In Software.

4 Witkin Sum. Cal. Law STPP § 122

[§ 122] In Software.

U.C.C. 9324(f) governs the priority of purchase money security interests in software. Under U.C.C. 9103(c) (*supra*, §38), a purchase money security interest arises in software only if the debtor acquires its interest in the software for the principal purpose of using the software in goods subject to a purchase money security interest. A perfected purchase money security interest in software has priority over a conflicting security interest in the same collateral to the extent that the purchase money security interest in the goods in which the software was acquired for use has priority under U.C.C. 9324. (U.C.C. 9324(f).) This priority is determined under U.C.C. 9324(b) and 9324(c) (for inventory) or U.C.C. 9324(a) (for other goods). (Uniform Commercial Code Comment 12.)

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5. In Proceeds.

4 Witkin Sum. Cal. Law STPP § 123

[§ 123] In Proceeds.

(1) *Goods Other Than Inventory or Livestock.* A perfected security interest in the identifiable proceeds of goods has priority over a conflicting security interest in the same goods, if the purchase money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter. (U.C.C. 9324(a).)

(2) *Inventory.* A perfected purchase money security interest in inventory has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in U.C.C. 9330 (infra, §130), and also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if the possession and notification requirements for priority in inventory (see supra, §120) are satisfied. (U.C.C. 9324(b); see C.E.B., Secured Transactions 2d, §4.17 et seq.)

Uniform Commercial Code Comment 8 explains the operation of U.C.C. 9324(b). In the case of inventory collateral under U.C.C. 9324(b), where financing frequently is based on the resulting accounts, chattel paper, or other proceeds, the special priority of the purchase money secured interest carries over into only certain types of proceeds. As under former U.C.C. 9312(3), the purchase money priority in inventory under subsection (b) carries over into identifiable cash proceeds (defined in U.C.C. 9102) received on or before the delivery of the inventory to a buyer.

As a general matter, also like former U.C.C. 9312(3), the purchase money priority in inventory does not carry over into proceeds consisting of accounts or chattel paper. Many parties financing inventory are quite content to protect their first-priority security interest in the inventory itself. They realize that when the inventory is sold, someone else will be financing the resulting receivables (accounts or chattel paper), and the priority for inventory will not run forward to the receivables constituting the proceeds. Indeed, the cash supplied by the receivables financier often will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase money basis makes contractual arrangements that the proceeds of receivables financing by another be devoted to paying off the inventory security interest.

However, the purchase money priority in inventory does carry over to proceeds consisting of chattel paper and its

proceeds (and also to instruments) to the extent provided in U.C.C. 9330. Under U.C.C. 9330(e), the holder of a purchase money security interest in inventory is deemed to give new value for proceeds consisting of chattel paper. Taken together, U.C.C. 9324(b) and 9330(e) enable a purchase money inventory secured party to obtain priority in chattel paper constituting proceeds of the inventory, even if the secured party does not actually give new value for the chattel paper, provided the purchase money secured party satisfies the other conditions for achieving priority. (For examples of application of priority rules in U.C.C. 9324(b), see Uniform Commercial Code Comment 9.)

(3) *Livestock*. A perfected security interest in the livestock's identifiable proceeds and identifiable products in their unmanufactured states also has priority over a conflicting security interest in the same livestock if the possession and notification requirements of U.C.C. 9324(d) (see *supra*, §121) are satisfied. (U.C.C. 9324(d).)

Two differences between U.C.C. 9324(b) (inventory) and U.C.C. 9324(d) (livestock) are noteworthy. "First, unlike the purchase-money inventory lender, the purchase-money livestock lender enjoys priority in *all* proceeds of the collateral. Thus, under subsection (d), the purchase-money secured party takes priority in accounts over an earlier-filed accounts financier. Second, subsection (d) affords priority in certain products of the collateral as well as proceeds." (Uniform Commercial Code Comment 10.)

(4) *Software*. A perfected security interest in the identifiable proceeds of software has priority over a conflicting security interest in the same collateral, to the extent that the purchase money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under U.C.C. 9324(f). (U.C.C. 9324(f).)

(5) *Exception for Deposit Accounts*. All of the above priority rules for proceeds are subject to U.C.C. 9327 (*infra*, §127). (U.C.C. 9324(a), 9324(b), 9324(d), 9324(f).) Thus, when the proceeds of original collateral, either goods or software, consist of a deposit account, U.C.C. 9327 governs priority to the extent it conflicts with the priority rules of U.C.C. 9324. (Uniform Commercial Code Comment 8.)

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6. Multiple Purchase Money Security Interests.

4 Witkin Sum. Cal. Law STPP § 124

[§ 124] Multiple Purchase Money Security Interests.

If more than one security interest qualifies for priority in the same collateral under U.C.C. 9324(a), 9324(b), 9324(d), or 9324(f), a security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in, or the use of, collateral. (U.C.C. 9324(g)(1).) In all other cases, U.C.C. 9322(a) applies to the qualifying security interests. (U.C.C. 9324(g)(2).) Thus, purchase money security interests securing the price of collateral (i.e., created in favor of the seller) have priority over purchase money security interests that secure enabling loans. The first-to-file-or-perfect rule of U.C.C. 9322 (supra, §114) applies to multiple purchase money security interests securing enabling loans. (Uniform Commercial Code Comment 13.)

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C. Conflicting Security Interests in Same Collateral.

2. Special Rules of Priority.

d. Priority of Security Interests in Transferred Collateral.

4 Witkin Sum. Cal. Law STPP § 125

[§ 125] Priority of Security Interests in Transferred Collateral.

(1) *General Rule.* U.C.C. 9325(a), which is new to the 2001 revision of Division 9, addresses the "double debtor" problem, which arises when a debtor acquires property that is subject to a security interest created by another debtor. (Uniform Commercial Code Comment 2.) A security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if all of the following apply:

(a) The debtor acquired the collateral subject to the security interest created by the other person. (U.C.C. 9325(a)(1).)

(b) The security interest created by the other person was perfected when the debtor acquired the collateral. (U.C.C. 9325(a)(2).)

(c) There is no period thereafter when the security interest is unperfected. (U.C.C. 9325(a)(3).) (For several examples of operation of U.C.C. 9325, see Uniform Commercial Code Comments 3, 4, and 5.)

(2) *Limitations on Rule.* U.C.C. 9325(a) subordinates a security interest only if either of the following conditions is satisfied:

(a) The security interest otherwise would have priority solely under U.C.C. 9322(a) or under U.C.C. 9324. (U.C.C. 9325(b)(1).)

(b) The security interest arose solely under U.C.C. 2711(3) or U.C.C. 10508(5). (U.C.C. 9325(b)(2); see U.C.C. 10508(e), 13 *Summary* (10th), *Personal Property*, §214).

Uniform Commercial Code Comment 6 points out that "[t]he appropriateness of the rule of [U.C.C. 9325(a)] is most apparent when it works to subordinate security interests having priority under the basic priority rules of [U.C.C. 9322(a)] or the purchase-money priority rules of [U.C.C. 9324]. The rule also works properly when applied to the security interest of a buyer under [U.C.C. 2711(3)] or a lessee under [U.C.C. 10508(e)]. However, subsection (a) may provide an inappropriate resolution of the 'double debtor' problem in some of the wide variety of other contexts in which the problem may arise. Although subsection (b) limits the application of subsection (a) to those cases in which

subordination is known to be appropriate, courts should apply the rule in other settings, if necessary to promote the underlying purposes and policies of the Uniform Commercial Code."

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[§ 126] Priority of Security Interests Created by New Debtor.

(1) *General Rule.* U.C.C. 9326, which is new to Division 9, addresses the priority contests that may arise when a new debtor becomes bound by the security agreement of an original debtor and each debtor has a secured creditor. (Uniform Commercial Code Comment 2.) A security interest created by a new debtor that is perfected by a filed financing statement that is effective solely under U.C.C. 9508 (*supra*, §85) in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely under U.C.C. 9508. (U.C.C. 9326(a).) Thus, U.C.C. 9326(a) subordinates the original debtor's secured party's security interest perfected against the new debtor solely under U.C.C. 9508. The security interest is subordinated to security interests in the same collateral perfected by another method, e.g., by filing against the new debtor. (Uniform Commercial Code Comment 2.)

(2) *Limitation on Rule.* The other provisions of U.C.C. 9301 et seq. determine the priority among conflicting security interests in the same collateral perfected by filed financing statements that are effective solely under U.C.C. 9508. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound. (U.C.C. 9326(b).)

U.C.C. 9326(b) addresses the priority among security interests created by the original debtor. By invoking the other priority rules of U.C.C. 9301 et seq., as applicable, U.C.C. 9326(b) preserves the relative priority of security interests created by the original debtor. The second sentence of U.C.C. 9326(b) "effectively limits the applicability of the first sentence to situations in which a new debtor has become bound by more than one security agreement entered into by the *same* original debtor. When the new debtor has become bound by security agreements entered into by *different* original debtors, the second sentence provides that priority is based on priority in time of the new debtor's becoming bound." (Uniform Commercial Code Comment 3 [offering numerous examples of operation of U.C.C. 9326].)

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1. Deposit Accounts.

4 Witkin Sum. Cal. Law STPP § 127

[§ 127] Deposit Accounts.

(1) *Scope of Statutory Section.* The rules in U.C.C. 9327 govern priority among conflicting security interests in the same deposit account. They override conflicting priority rules. (Uniform Commercial Code Comment 2; see U.C.C. 9322(f)(1), *supra*, §118, and U.C.C. 9324(a), 9324(b), 9324(d), and 9324(f), *supra*, §119 et seq.; C.E.B., *Secured Transactions* 2d, §4.21.)

(2) *Priority of Security Interests Perfected by Control.* A security interest held by a secured party having control of the deposit account under U.C.C. 9104 (*supra*, §54) has priority over a conflicting security interest held by a secured party that does not have control. (U.C.C. 9327(1).) In other words, security interests perfected by control take priority over those perfected otherwise, e.g., as identifiable cash proceeds under U.C.C. 9315. "Secured parties for whom the deposit account is an integral part of the credit decision will, at a minimum, insist upon the right to immediate access to the deposit account upon the debtor's default (i.e., control). Those secured parties for whom the deposit account is less essential will not take control, thereby running the risk that the debtor will dispose of funds on deposit (either outright or for collateral purposes) after default but before the account can be frozen by court order or the secured party can obtain control." (Uniform Commercial Code Comment 3.)

Except as otherwise provided in U.C.C. 9327(3) and 9327(4), security interests perfected by control under U.C.C. 9314 rank according to priority in time of obtaining control. (U.C.C. 9327(2).) This provision "governs the case (expected to be very rare) in which a bank enters into a [U.C.C. 9104(a)(2)] control agreement with more than one secured party. It provides that the security interests rank according to time of obtaining control. If the bank is solvent and the control agreements are well drafted, the bank will be liable to each secured party, and the priority rule will have no practical effect." (Uniform Commercial Code Comment 3.)

(3) *Priority of Bank That Maintains Account.* Except as otherwise provided in U.C.C. 9327(4), a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party. (U.C.C. 9327(3).) "A rule of this kind enables banks to extend credit to their depositors without the need to examine either the public record or their own records to determine whether another party might have a security interest in the deposit account." (Uniform Commercial Code Comment 4.)

A secured party who takes a security interest in the deposit account as original collateral can protect itself against the results of U.C.C. 9327(3) in one of two ways. It can take control of the deposit account by becoming the bank's customer. Under U.C.C. 9327(4), which provides that a security interest perfected by control under U.C.C. 9104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained, this arrangement operates to subordinate the bank's security interest. Alternatively, the secured party can obtain a subordination agreement from the bank (see U.C.C. 9339, *infra*, §145). (Uniform Commercial Code Comment 4.)

(4) *Distinction: Funds Transferred From Deposit Account.* U.C.C. 9327 does not apply to funds transferred from a deposit account that serves as collateral. (Uniform Commercial Code Comment 5.) That circumstance is governed by U.C.C. 9332(b), which provides that a transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party. (For similar provision protecting transferee of money, see U.C.C. 9332(a).)

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(4) *Distinction: Funds Transferred From Deposit Account.* In *Orix Financial Services v. Kovacs* (2008) 167 C.A.4th 242, 83 C.R.3d 900, a case of first impression, a debtor, whose financial obligations to plaintiff were secured by interests in all of the debtor's goods, chattels, and property, defaulted. Separately, defendant obtained a judgment against the debtor, and satisfied that judgment from funds in the debtor's deposit accounts. The funds were derived entirely from the proceeds of the sale of the debtor's inventory and collection of its accounts receivable. Plaintiff sued defendant for unjust enrichment and imposition of a constructive trust. The trial judge sustained defendant's demurrer without leave to amend. *Held*, affirmed; an unsecured judgment creditor, which satisfies its judgment from deposit account funds, is a "transferee" within the meaning of U.C.C. 9332(b), and takes those funds free of a security interest.

(a) Plaintiff's position as a secured creditor is superior to defendant's position as an unsecured creditor under traditional creditors' priority analysis. However, that analysis is irrelevant to the question of the satisfaction of a judgment from a deposit account, which, under U.C.C. 9332(b), is completely free of a priority analysis. (167 C.A.4th 246.) Only those transferees who act in collusion with a debtor are excepted from the broad protections of the statute. Here, there were no allegations of collusion between defendant and the debtor to defeat plaintiff's interest. (167 C.A.4th 249.)

(b) Plaintiff's contention that a judgment creditor is not the kind of transferee contemplated by U.C.C. 9332(b) is not supported by the broad language of the statute. In fact, "a protected transferee need not be a creditor at all, but may have been paid by mistake or otherwise have provided no value to the debtor in exchange for the payment." (167 C.A.4th 250.) As noted in Uniform Commercial Code Comment 3 to U.C.C. 9332, "Broad protection for transferees helps to ensure that security interests in deposit accounts do not impair the free flow of funds. It also minimizes the likelihood that a secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules concerning recovery of payments traditionally have placed a high value on finality. The opportunity to upset a completed transaction, or even to place a completed transaction in jeopardy by bringing suit against the transferee of funds, should be severely limited." (167 C.A.4th 246, 247.)



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2. Investment Property.

4 Witkin Sum. Cal. Law STPP § 128

[§ 128] Investment Property.

(1) *Priority of Security Interests Perfected by Control.* U.C.C. 9328 states the rules governing the priority of conflicting security interests in investment property. U.C.C. 9328(1) states the "most important general rule" (see Uniform Commercial Code Comment 2): A security interest held by a secured party having control of investment property under U.C.C. 9106 (supra, §54) has priority over a security interest held by a secured party that does not have control of the investment property.

"The control priority rule does not turn on either temporal sequence or awareness of conflicting security interests. Rather, it is a structural rule, based on the principle that a lender should be able to rely on the collateral without question if the lender has taken the necessary steps to assure itself that it is in a position where it can foreclose on the collateral without further action by the debtor. The control priority rule is necessary because the perfection rules provide considerable flexibility in structuring secured financing arrangements. For example, at the 'retail' level, a secured lender to an investor who wants the full measure of protection can obtain control, but the creditor may be willing to accept the greater measure of risk that follows from perfection by filing. Similarly, at the 'wholesale' level, a lender to securities firms can leave the collateral with the debtor and obtain a perfected security interest under the automatic perfection rule of [U.C.C. 9309(10)] (supra, §63), but a lender who wants to be entirely sure of its position will want to obtain control. The control priority rule of paragraph (1) is an essential part of this system of flexibility. It is feasible to provide more than one method of perfecting security interests only if the rules ensure that those who take the necessary steps to obtain the full measure of protection do not run the risk of subordination to those who have not taken such steps. A secured party who is unwilling to run the risk that the debtor has granted or will grant a conflicting control security interest should not make a loan without obtaining control of the collateral." (Uniform Commercial Code Comment 3; see C.E.B., Secured Transactions 2d, §4.22.)

(2) *Temporal Priority Where More Than One Security Interest Is Perfected by Control.* U.C.C. 9328(2) governs priority in those circumstances in which more than one secured party (other than a broker, securities intermediary, or commodity intermediary) has control. It replaces the equal-priority rule for conflicting security interests in investment property with a temporal rule. (Uniform Commercial Code Comment 5.)

In particular, conflicting security interests held by secured parties, each of which has control under U.C.C. 9106, rank according to priority in time of one of the following:

(a) If the collateral is a security, obtaining control. (U.C.C. 9328(2)(A).)

(b) If the collateral is a security entitlement carried in a securities account and if the secured party obtained control under U.C.C. 8106(d)(1) (9 *Summary* (10th), *Corporations*, §147), the secured party's becoming the person for which the securities account is maintained. (U.C.C. 9328(2)(B).)

(c) If the collateral is a security entitlement carried in a securities account and if the secured party obtained control under U.C.C. 8106(d)(2) (9 *Summary* (10th), *Corporations*, §147), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried, or to be carried, in the securities account. (U.C.C. 9328(2)(C).)

(d) If the collateral is a security entitlement carried in a securities account and if the secured party obtained control through another person under U.C.C. 8106(d)(3) (9 *Summary* (10th), *Corporations*, §147), the time on which priority would be based under this paragraph if the other person were the secured party. (U.C.C. 9328(2)(D).)

(e) If the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in U.C.C. 9106(b)(2) (*supra*, §54), with respect to commodity contracts carried, or to be carried, with the commodity intermediary. (U.C.C. 9328(2)(E).)

(3) *Special Priority for Securities Intermediaries and Commodities Intermediaries.* The temporal priority rule of U.C.C. 9328(2) is subject to U.C.C. 9328(3) and 9328(4). A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party. (U.C.C. 9328(3).) Similarly, a security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party. (U.C.C. 9328(4).)

(4) *Certificated Securities Perfected by Delivery and Not by Control.* A security interest in a certificated security in registered form that is perfected by taking delivery under U.C.C. 9313(a) and not by control under U.C.C. 9314 has priority over a conflicting security interest perfected by a method other than control. (U.C.C. 9328(5).)

(5) *Broker-Created Security Interests Not Perfected by Control.* Conflicting security interests created by a broker, securities intermediary, or commodity intermediary that are perfected without control under U.C.C. 9106 (*supra*, §54) rank equally. (U.C.C. 9328(6).)

(6) *Residual Rule: First-in-Time Filing.* Priority among conflicting security interests in investment property is governed by U.C.C. 9322 (*supra*, §114) and 9323 (*infra*, §140 et seq.) in cases not covered by the specific rules in U.C.C. 9328. (U.C.C. 9328(7); Uniform Commercial Code Comment 2.) "The principal application of this residual rule is that the usual first in time of filing rule applies to conflicting security interests that are perfected only by filing. Because the control priority rule of [U.C.C. 9328(1)] provides for the ordinary cases in which persons purchase securities on margin credit from their brokers, there is no need for special rules for purchase-money security interests." (Uniform Commercial Code Comment 2; see U.C.C. 9103, *supra*, §38 [limiting purchase-money collateral to goods and software].)

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3. Letter-of-Credit Right.

4 Witkin Sum. Cal. Law STPP § 129

[§ 129] Letter-of-Credit Right.

U.C.C. 9329 governs priority among conflicting security interests in the same letter-of-credit right. A security interest held by a secured party having control of the letter-of-credit right under U.C.C. 9107 (supra, §54) has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control. (U.C.C. 9329(1).) Hence, U.C.C. 9329(1) "awards priority to a secured party who perfects a security interest directly in letter-of-credit rights (i.e., one that takes an assignment of proceeds and obtains consent of the issuer or any nominated person under [U.C.C. 5114(c)]) over another conflicting security interest (i.e., one that is perfected automatically in the letter-of-credit rights as supporting obligations under [U.C.C. 9308(d)]). This is consistent with international letter-of-credit practice and provides finality to payments made to recognized assignees of letter-of-credit proceeds." (Uniform Commercial Code Comment 2; see C.E.B., Secured Transactions 2d, §4.23.)

If an issuer or nominated person recognizes multiple security interests in a letter-of-credit right, resulting in multiple parties having control under U.C.C. 9107, U.C.C. 9329(2) applies. (Uniform Commercial Code Comment 2.) It provides that security interests perfected by control under U.C.C. 9314 (supra, §74) rank according to priority in time of obtaining control.

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4. Chattel Paper or Instrument.

4 Witkin Sum. Cal. Law STPP § 130

[§ 130] Chattel Paper or Instrument.

(1) *Chattel Paper Claimed Merely as Proceeds.* A purchaser of chattel paper has priority over a security interest in the chattel paper that is claimed merely as proceeds of inventory subject to a security interest if, in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under U.C.C. 9105. (U.C.C. 9330(a)(1).) In addition, for the purchaser to have priority, the chattel paper must not indicate that it has been assigned to an identified assignee other than the purchaser. (U.C.C. 9330(a)(2).) For purposes of U.C.C. 9330(a), the holder of a purchase money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory. (U.C.C. 9330(e); see C.E.B., Secured Transactions 2d, §4.24.)

U.C.C. 9330(a) "recognizes the common practice of placing a 'legend' on chattel paper to indicate that it has been assigned. This approach, under which the chattel paper purchaser who gives new value in ordinary course can rely on possession of unlegended, tangible chattel paper without any concern for other facts that it may know, comports with the expectations of both inventory and chattel paper financiers." (Uniform Commercial Code Comment 5.)

(2) *Chattel Paper Claimed Other Than Merely as Proceeds.* A purchaser of chattel paper has priority over a security interest in the chattel paper that is claimed other than merely as proceeds of inventory subject to a security interest, if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under U.C.C. 9105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party. (U.C.C. 9330(b).) For purposes of U.C.C. 9330(b), the holder of a purchase money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory. (U.C.C. 9330(e).) If chattel paper indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper has knowledge that the purchase violates the rights of the secured party. (U.C.C. 9330(f).)

(3) *Priority in Proceeds of Chattel Paper.* Except as otherwise provided in U.C.C. 9327 (supra, §127), a purchaser having priority in chattel paper under U.C.C. 9330(a) or 9330(b) also has priority in proceeds of the chattel paper to the extent that U.C.C. 9322 provides for priority in the proceeds. (U.C.C. 9330(c)(1).) Moreover, the purchaser has priority

in the proceeds to the extent that the proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected. (U.C.C. 9330(c)(2).)

(4) *Instruments*. A purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party. (U.C.C. 9330(d).) If an instrument indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the instrument has knowledge that the purchase violates the rights of the secured party. (U.C.C. 9330(f).)

U.C.C. 9330(d) is subject to U.C.C. 9331(a) (infra, §143), which provides that Division 9 does not limit the rights of a holder in due course under Division 3. "Thus, in the rare case in which the purchaser of an instrument qualifies for priority under subsection (d), but another person has the rights of a holder in due course of the instrument, the other person takes free of the purchaser's claim" under U.C.C. 3306 (4 *Summary* (10th), *Negotiable Instruments*, §32). (Uniform Commercial Code Comment 7; see C.E.B., *Secured Transactions* 2d, §4.25.)

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5. Fixtures and Crops.

aa. In General.

4 Witkin Sum. Cal. Law STPP § 131

[§ 131] In General.

(1) *Scope of Statute.* U.C.C. 9334 contains rules governing the priority of security interests in fixtures and crops as against persons who claim an interest in real property. Priority contests with other Division 9 security interests are governed by the other priority rules of Division 9. (Assembly Committee Comment 2.) Division 9 does not prevent creation of an encumbrance on fixtures under real property law. (U.C.C. 9334(b); see C.E.B., Secured Transactions 2d, §4.31 et seq.)

In considering priority problems under U.C.C. 9334, "one must first determine whether real property claimants *per se* have an interest in the crops or fixtures as part of real property. If not, it is immaterial, so far as concerns real property parties as such, whether a security interest arising under this Division is perfected or unperfected. In no event does a real property claimant (e.g., owner or mortgagee) acquire an interest in a 'pure' chattel just because a security interest therein is unperfected. If, on the other hand, real property law gives real property parties an interest in the goods, a conflict arises and this section states the priorities." (Assembly Committee Comment 4.)

(2) *Types of Goods That Can Be Fixtures.* Certain goods that are the subject of personal property financing become so affixed or otherwise so related to real property that they become part of the real property. These goods are called "fixtures." (Assembly Committee Comment 3.) A security interest under Division 9 may be created in goods that are fixtures or may continue in goods that become fixtures. However, a security interest does not exist under Division 9 in ordinary building materials incorporated into an improvement on land. (U.C.C. 9334(a).) Rather, the priority of claims to the building materials are determined by the law governing claims to real property. (Assembly Committee Comment 3.)

Thus, U.C.C. 9334 "recognizes three categories of goods: (1) those that retain their chattel character entirely and are not part of the real property; (2) ordinary building materials that have become an integral part of the real property and cannot retain their chattel character for purposes of finance; and (3) an intermediate class that has become real property for certain purposes, but as to which chattel financing may be preserved." (Assembly Committee Comment 3.)

(3) *General Rule of Priority for First To File or Record.* U.C.C. 9334(e)(1) states the usual priority rule of conveyancing: the first to file or record prevails. (Uniform Commercial Code Comment 6.) In particular, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in the real property or is in possession of the real property (U.C.C. 9334(e)(1)), the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record (U.C.C. 9334(e)(1)(A)), and the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner (U.C.C. 9334(e)(1)(B)).

The condition in U.C.C. 9334(e)(1)(B), that the security interest must have had priority over any conflicting interest of a predecessor in title of the conflicting encumbrancer or owner, "appears to limit the first-in-time principle. However, this apparent limitation is nothing other than an expression of the usual rule that a person must be entitled to transfer what he has." (Assembly Committee Comment 6.)

(4) *Residual Rule for Priority of Fixtures.* In cases not governed by U.C.C. 9334(d) to (h) (infra, §132), a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor. (U.C.C. 9334(c).)

(5) *Crops.* A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in, or is in possession of, the real property. (U.C.C. 9334(i).)

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[§ 132] Exceptions.

(1) *Purchase Money Security Interests.* U.C.C. 9334(d) contains the principal exception to the first-to-file-or-record rule of U.C.C. 9334(e)(1) (*supra*, §131). (Uniform Commercial Code Comment 7.) It provides that, except as otherwise provided in U.C.C. 9334(h), a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

- (a) The debtor has an interest of record in or is in possession of the real property (U.C.C. 9334(d));
- (b) The security interest is a purchase money security interest (U.C.C. 9334(d)(1));
- (c) The interest of the encumbrancer or owner arises before the goods become fixtures (U.C.C. 9334(d)(2)); and
- (d) The security interest is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter (U.C.C. 9334(d)(3)).

Assembly Committee Comment 7 emphasizes that "this purchase-money priority with the 20-day grace period for filing is limited to rights against real property interests that arise *before* the goods become fixtures. There is no such priority with the 20-day grace period as against real property interests that arise subsequently. The fixture security interest can defeat subsequent real property interests only if it is filed first and prevails under the usual conveyancing rule in subdivision (e)(1) or one of the other rules in this section."

(2) *Readily Removable Goods.* A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances that are consumer goods. (U.C.C. 9334(e)(2).) "This rule is made necessary by the confusion in the law as to whether certain machinery and appliances become fixtures. It protects a secured party who, perhaps in the mistaken belief that the readily removable goods will not become fixtures, makes a UCC filing (or otherwise perfects under this Division) rather than making a fixture filing." (Assembly Committee

Comment 8.)

(3) *Judicial Liens.* A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any Division 9 method. (U.C.C. 9334(e)(3).)

(4) *Manufactured Homes.* A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the security interest is created in a manufactured home in a manufactured home transaction (U.C.C. 9334(e)(4)(A)) and is perfected under a statute described in U.C.C. 9311(a)(2) (U.C.C. 9334(e)(4)(B)). (For definition of manufactured home and manufactured home transaction, see U.C.C. 9102(a)(53) and 9102(a)(54); on U.C.C. 9311(a)(2), see *supra*, §66.)

(5) *Encumbrancer's Consent or Debtor's Right To Remove Goods.* A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if the encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures. (U.C.C. 9334(f)(1).) The security interest also has priority if the debtor has a right to remove the goods as against the encumbrancer or owner (U.C.C. 9334(f)(2)), in which case the priority of the security interest continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates (U.C.C. 9334(g)).

(6) *Construction Mortgages.* A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if a recorded record of the mortgage so indicates. Except as otherwise provided in U.C.C. 9334(e) and (f), a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage. (U.C.C. 9334(h).)

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C. Conflicting Security Interests in Same Collateral.

2. Special Rules of Priority.

f. Special Priority in Particular Types of Collateral.

6. Accessions.

4 Witkin Sum. Cal. Law STPP § 133

[§ 133] Accessions.

(1) *General Rule.* The other provisions of U.C.C. 9301 et seq., including the rules governing purchase money security interests, determine the priority of a security interest in an accession, including the relative priority of a security interest in an accession and a security interest in the whole. (U.C.C. 9335(c); Uniform Commercial Code Comment 6; see C.E.B., Secured Transactions 2d, §4.41.)

(2) *Exception: Goods Covered by Certificate of Title.* A security interest in an accession is subordinate to a security interest in the whole that is perfected by compliance with the requirements of a certificate of title statute under U.C.C. 9311(b) (supra, §66). (U.C.C. 9335(d).) This provision "enables a secured party to rely upon a certificate of title without having to check the UCC files to determine whether any components of the collateral may be encumbered." U.C.C. 9335(d) imposes a corresponding risk on those who finance goods that may become part of goods covered by a certificate of title. (Uniform Commercial Code Comment 7.)

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7. Commingled Goods.

4 Witkin Sum. Cal. Law STPP § 134

[§ 134] Commingled Goods.

(1) *General Rule.* If collateral becomes commingled goods, a security interest attaches to the product or mass. (U.C.C. 9336(c), supra, §60.) The other provisions of U.C.C. 9301 et seq. determine the priority of a security interest that attaches to the product or mass under U.C.C. 9336(c). (U.C.C. 9336(e); see C.E.B., Secured Transactions 2d, §4.42.)

(2) *Multiple Security Interests Attaching Under U.C.C. 9336(c).* If more than one security interest attaches to the product or mass under U.C.C. 9336(c), priority is determined by whether the security interests are perfected. In particular, a security interest that is perfected under U.C.C. 9336(d) (supra, §104) has priority over a security interest that is unperfected at the time the collateral becomes commingled goods. (U.C.C. 9336(f)(1).) If, however, more than one security interest is perfected under U.C.C. 9336(d), the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods. (U.C.C. 9336(f)(2).) If both security interests are unperfected, the rule of U.C.C. 9322(a)(3) (supra, §114) applies. (Uniform Commercial Code Comment 5.)

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2. Special Rules of Priority.

g. Priority of Security Interests Perfected by Incorrect Financing.

4 Witkin Sum. Cal. Law STPP § 135

[§ 135] Priority of Security Interests Perfected by Incorrect Financing.

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in U.C.C. 9516(b)(5) (*supra*, §89) that is incorrect at the time the financing statement is filed, the security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance on the incorrect information. (U.C.C. 9338(1).) In addition, a purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of chattel paper, documents, goods, instruments, or a security certificate, receives delivery of the collateral. (U.C.C. 9338(2).)

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U.C.C. 9338(2) was amended in 2006 to refer to tangible chattel paper and tangible documents, rather than chattel paper and documents.



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D. Secured Party's Rights on Disposition of Collateral and in Proceeds.

1. General Rule.

4 Witkin Sum. Cal. Law STPP § 136

[§ 136] General Rule.

(1) *Security Interest Survives Disposition of Collateral.* A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition of the collateral. (U.C.C. 9315(a)(1).) Furthermore, a security interest attaches to any identifiable proceeds of collateral. (U.C.C. 9315(a)(2); see *ITT Commercial Finance Corp. v. Tech Power* (1996) 43 C.A.4th 1551, 1556, 51 C.R.2d 344 [creditor with perfected security interest in debtor's inventory also had security interest in identifiable proceeds from sale of inventory]; *Bank of California v. Thornton-Blue Pac.* (1997) 53 C.A.4th 841, 846, 62 C.R.2d 90 [same].) In these cases, the secured party may repossess the collateral from the transferee or, in an appropriate case, maintain an action for conversion. The secured party may claim both any proceeds and the original collateral but, of course, may have only one satisfaction. (Assembly Committee Comment 2.)

(2) *Commingled Proceeds.* Proceeds that are goods and that are commingled with other property are identifiable proceeds to the extent provided by U.C.C. 9336 (supra, §§46, 60, 104, 134). (U.C.C. 9315(b)(1).) If the commingled proceeds are not goods, they are identifiable proceeds to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than Division 9 with respect to commingled property of the type involved. (U.C.C. 9315(b)(2); see *Chrysler Credit Corp. v. Superior Court* (1993) 17 C.A.4th 1303, 1314, 22 C.R.2d 37, 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §11 [secured party was unable to meet its burden of proving that portion of commingled funds was "identifiable proceeds" of sale of collateral].)

(3) *Effect of Insolvency Proceedings.* "Except as otherwise provided by the Bankruptcy Code, the debtor's entering into bankruptcy does not affect a secured party's right to proceeds." (Assembly Committee Comment 8 to revised U.C.C. 9315.)

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D. Secured Party's Rights on Disposition of Collateral and in Proceeds.
 2. Exceptions.

4 Witkin Sum. Cal. Law STPP § 137

[§ 137] Exceptions.

(1) *Disposition Authorized.* The general rule does not apply, and a security interest or agricultural lien does not continue in collateral, if the secured party authorized the disposition free of the security interest or lien, in the agreement that contains the security agreement or otherwise. Thus, in many cases, a purchaser or other transferee of collateral will take free of a security interest, and the secured party's only right will be to proceeds. (U.C.C. 9315(a)(1); Assembly Committee Comment 2; see *37 A.L.R.4th* 787 [what constitutes secured party's authorization to transfer collateral free of lien; construing former Unif.Com.C. §9-306(2) (predecessor to U.C.C. 9315(a)(1))].)

"[W]hen a security agreement expressly prohibits the disposition of collateral without the written consent of the secured party, in order for a court to find an authorization ... there must either be actual prior or subsequent consent in writing by the secured creditor manifesting a purpose to authorize the disposition free of the security interest. Mere acquiescence is insufficient." "While we interpret 'or otherwise' ... to permit an implied agreement, we believe that such an implied agreement should be found with extreme hesitancy and should generally be limited to the situation of a prior course of dealing with the debtor permitting disposition." (*Central Calif. Equipment Co. v. Dolk Tractor Co. (1978)* 78 C.A.3d 855, 862, 144 C.R. 367 [trial judge properly found no authorization; construing former U.C.C. 9306(2)]; see *Producers Cotton Oil Co. v. Amstar Corp. (1988)* 197 C.A.3d 638, 646, 242 C.R. 914 [citing *Central Calif. Equipment Co. v. Dolk Tractor Co.*]; *Gordon v. Hamm (1998)* 63 C.A.4th 1324, 1331, 74 C.R.2d 631 [secured party lender never authorized subsequent sale of motor home free and clear of its lien; thus, buyers of motor home from dealer, to which original owners had entrusted motor home for resale, took motor home subject to secured party's lien].)

(2) *Exceptions From Division 9.* U.C.C. 9315(a) applies except as otherwise provided in Division 9. (U.C.C. 9315(a).)

Division 9 contains several provisions under which a transferee takes free of a security interest or agricultural lien. The following are examples listed in Assembly Committee Comment 2 to U.C.C. 9315:

(a) U.C.C. 9317 (*supra*, §105 et seq.), which states when transferees take free of unperfected security interests.

(b) U.C.C. 9320 and 9321 (*supra*, §§112, 113), which state when purchasers and lessees of goods take free of a security interest, even though perfected and even though the disposition was not authorized.

(c) U.C.C. 9321 (supra, §113), which states when licensees of general intangibles take free of a security interest, even though perfected and even though the disposition was not authorized.

(d) U.C.C. 9330 (supra, §130), which states when purchasers of chattel paper and instruments take free of a security interest, even though perfected and even though the disposition was not authorized.

(e) U.C.C. 9331 (supra, §143), which states when purchasers of negotiable instruments, negotiable documents, and securities take free of a security interest, even though perfected and even though the disposition was not authorized.

(f) U.C.C. 9332 (supra, §127), which enables most transferees (including nonpurchasers) of funds from a deposit account and most transferees of money to take free of a perfected security interest in the deposit account or money.

(3) *Exception for Entrusting Secured Party.* U.C.C. 9315(a) does not apply to the extent that U.C.C. 2403(2) provides otherwise. (U.C.C. 9315(a).) Thus, the general rule that a security interest survives disposition does not apply if the secured party entrusts goods collateral to a merchant who deals in goods of that kind and the merchant sells the collateral to a buyer in ordinary course of business. U.C.C. 2403(2) gives the merchant the power to transfer all the secured party's rights to the buyer, even if the sale is wrongful as against the secured party. Hence, under U.C.C. 9315(a)(1), an entrusting secured party runs the same risk as any other entruster. (Assembly Committee Comment 2.)

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E. Priority of Security Interests in Goods Covered by Certificate of Title.

4 Witkin Sum. Cal. Law STPP § 138

[§ 138] Priority of Security Interests in Goods Covered by Certificate of Title.

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, California issues a certificate of title that does not show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate, a buyer of the goods may take free of the security interest. To do so, the buyer must give value and receive delivery of the goods after issuance of the certificate and without knowledge of the security interest. Moreover, the buyer cannot be a person in the business of selling goods of that kind. (U.C.C. 9337(1).) The security interest is subordinate to a conflicting security interest in the goods that attaches, and is perfected under U.C.C. 9311(b) (*supra*, §66), after issuance of the certificate and without the conflicting secured party's knowledge of the security interest. (U.C.C. 9337(2).)

Thus, U.C.C. 9337 affords protection to certain good-faith purchasers for value who are likely to have relied on a "clean" certificate of title, i.e., one that neither shows that the goods are subject to a particular security interest nor contains a statement that they may be subject to security interests not shown on the certificate. (Uniform Commercial Code Comment 2.)

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F. Priority of Possessory Lien.

4 Witkin Sum. Cal. Law STPP § 139

[§ 139] Priority of Possessory Lien.

Under U.C.C. 9333(a), a possessory lien is an interest, other than a security interest or an agricultural lien, that secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business, that is created by statute or rule of law in favor of the person, and the effectiveness of which depends on the person's possession of the goods. A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise. (U.C.C. 9333(b); see *69 A.L.R.3d 1162* [priorities between previously perfected security interest and repairman's lien on motor vehicle].) If the statute creating the possessory lien is silent as to its priority relative to a security interest, U.C.C. 9333 provides a "rule of interpretation that the possessory lien takes priority, even if the statute has been construed judicially to make the possessory lien subordinate." (Uniform Commercial Code Comment 2.)

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G. Priority of Security Interest in Future Advances.

1. Competing Security Interests.

4 Witkin Sum. Cal. Law STPP § 140

[§ 140] Competing Security Interests.

(1) *General Rule.* A security agreement may provide that collateral secures future advances. (See U.C.C. 9204(c), supra, §58; Assembly Committee Comment 2 to U.C.C. 9323.) For purposes of determining the priority of a perfected security interest under U.C.C. 9322(a)(1) (supra, §114), perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that satisfies both of the following conditions:

(a) It is made while the security interest is perfected either under U.C.C. 9309 when it attaches (U.C.C. 9323(a)(1)(A)) or temporarily under U.C.C. 9312(e), 9312(f), or 9312(g) (U.C.C. 9323(a)(1)(B)).

(b) It is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under U.C.C. 9309 or under U.C.C. 9312(e), 9312(f), or 9312(g). (U.C.C. 9323(a)(2).)

(2) *Purpose of Rule.* Under a "proper reading" of the first-to-file-or-perfect rule of U.C.C. 9322(a)(1), "it is abundantly clear that the time when an advance is made plays no role in determining priorities among conflicting security interests except when a financing statement was not filed and the advance is the giving of value as the last step for attachment and perfection. Thus, a secured party takes subject to all advances secured by a competing security interest having priority under [U.C.C. 9322(a)(1)]. This result generally obtains regardless of how the competing security interest is perfected and regardless of whether the advances are made 'pursuant to commitment' " (see U.C.C. 9102). U.C.C. 9323(a) "states the only other instance when the time of an advance figures in the priority scheme in [U.C.C. 9322]: when the security interest is perfected only automatically under [U.C.C. 9309] or temporarily under [U.C.C. 9312(e), 9312(f), or 9312(g)], and the advance is not made pursuant to a commitment entered into while the security interest was perfected by another method. Thus, an advance has priority from the date it is made only in the rare case in which it is made without commitment and while the security interest is perfected only temporarily under [U.C.C. 9312.]" (Assembly Committee Comment 3.)

(3) *Exception.* U.C.C. 9323(a) does not apply to a security interest held by a secured party who is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor. (U.C.C. 9323(c).)

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G. Priority of Security Interest in Future Advances.

2. Competing Lien Creditors.

4 Witkin Sum. Cal. Law STPP § 141

[§ 141] Competing Lien Creditors.

A security interest is subordinate to the rights of a person who becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless the advance is made without knowledge of the lien (U.C.C. 9323(b)(1)) or pursuant to a commitment entered into without knowledge of the lien (U.C.C. 9323(b)(2)). (See *Estate of Cook (1976) 64 C.A.3d 852, 866*, footnote 3, *135 C.R. 96* [substantially similar former U.C.C. 9301(4)].) U.C.C. 9323(b) does not apply to a security interest held by a secured party who is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor. (U.C.C. 9323(c).)

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G. Priority of Security Interest in Future Advances.

3. Competing Buyers and Lessees.

4 *Witkin Sum. Cal. Law STPP § 142*

[§ 142] Competing Buyers and Lessees.

(1) *Competing Buyers.* A buyer of goods, other than a buyer in the ordinary course of business, takes free of a security interest to the extent that it secures advances made after the earlier of the following:

- (a) The time the secured party acquires knowledge of the buyer's purchase. (U.C.C. 9323(d)(1).)
- (b) Forty-five days after the purchase. (U.C.C. 9323(d)(2).)

However, U.C.C. 9323(d) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the 45-day period. (U.C.C. 9323(e).) U.C.C. 9323(d) and (e) replace former U.C.C. 9307(3), with no change in meaning. (Assembly Committee Comment 6; see 35 *A.L.R.4th 390* [construction of former Unif.Com.C. §9-307(3)].)

(2) *Competing Lessees.* A lessee of goods, other than a lessee in the ordinary course of business, takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of either of the following:

- (a) The time the secured party acquires knowledge of the lease. (U.C.C. 9323(f)(1).)
- (b) Forty-five days after the lease contract becomes enforceable. (U.C.C. 9323(f)(2).)

However, U.C.C. 9323(f) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the 45-day period. (U.C.C. 9323(g).)

(3) *Buyers and Lessees in Ordinary Course.* "Of course, a buyer in ordinary course who takes free of the security interest under [U.C.C. 9320 (supra, §111)] and a lessee in ordinary course who takes free under [U.C.C. 9321 (supra, §112)] are not subject to any future advances." (Assembly Committee Comment 6 to U.C.C. 9323.)

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H. Priority of Rights or Interests Under Other Divisions.

4 Witkin Sum. Cal. Law STPP § 143

[§ 143] Priority of Rights or Interests Under Other Divisions.

(1) *Rights Acquired by Purchasers.* Division 9 does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Division 3, Division 7, and Division 8. (U.C.C. 9331(a).) The rights to which U.C.C. 9331(a) refers are set forth in U.C.C. 3305 and 3306, 4 *Summary* (10th), *Negotiable Instruments*, §31 et seq. (holder in due course), U.C.C. 7502, 4 *Summary* (10th), *Sales*, §139 (holder to whom a negotiable document of title has been duly negotiated), and U.C.C. 8303, 9 *Summary* (10th), *Corporations*, §140 (protected purchaser). (Uniform Commercial Code Comment 3.)

(2) *Financial Assets and Security Entitlements.* Division 9 does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under Division 8. (U.C.C. 9331(b).) U.C.C. 9331(b) is new to the 2001 revision of Division 9 and it provides explicit protection for those who deal with financial assets and security entitlements and who are immunized from liability under Division 8 (see, e.g., U.C.C. 8502, 8503(e), 8510, 8511, 9 *Summary* (10th), *Corporations*, §§147, 148). U.C.C. 9331(b) does not change the law. (Uniform Commercial Code Comment 4.)

(3) *Filing Is Not Notice.* Filing under Division 9 does not constitute notice of a claim or defense to the holders, purchasers, or persons described in U.C.C. 9331(a) and (b). (U.C.C. 9331(c).)

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I. Possible Restitution Rights of Unsecured Creditor.

4 Witkin Sum. Cal. Law STPP § 144

[§ 144] Possible Restitution Rights of Unsecured Creditor.

In *Knox v. Phoenix Leasing (1994) 29 C.A.4th 1357, 35 C.R.2d 141*, plaintiff unsecured creditor sold 200 wine barrels to the debtor. Four months later, defendant secured creditor undertook to provide financing for the expansion of the debtor's business. This agreement was secured by a security agreement covering all equipment whether presently owned or later acquired by the debtor, such as the barrels, which arrived in two shipments. The first shipment was paid for by defendant, after the bill had first been sent to the debtor. The second shipment was not paid for. Approximately 2 months after the second shipment, the debtor was declared in default of its financing agreement with defendant, and the barrels were included in defendant's subsequent liquidation of the debtor's assets. Plaintiff then sued for restitution of the cost of the unpaid-for barrels, and obtained judgment in his favor. *Held*, reversed.

(a) The majority of jurisdictions that have dealt with an unsecured creditor's right to restitution have decided in the negative. However, two jurisdictions, California and Colorado, have decided in the affirmative. (*29 C.A.4th 1361*, citing *Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 C.A.3d 638, 242 C.R. 914*, and Colorado case.) The problem comes in the tension that exists between the rights given to a secured creditor by Article 9 of the Uniform Commercial Code and the rights afforded to an unsecured creditor by equitable considerations. Were the court addressing this question for the first time, it might decide that the predictability of results afforded by Article 9 would predominate, despite an occasional inequitable result. However, as noted before, California has taken the minority position that allows such restitution. The task, therefore, is to determine the circumstances under which this remedy is appropriate. (*29 C.A.4th 1361*.)

(b) Having complied with the provisions governing the perfecting of a security interest, the secured creditor is entitled to something like a presumption in its favor. However, victory for the secured creditor is not assured. Fraud, for example, is not protected, and the Colorado court has held that if the secured creditor initiates or encourages transactions between the unsecured creditor and the debtor, and benefits from these transactions, equitable principles, which are recognized by the Uniform Commercial Code in U.C.C. 1103, control. However, benefit to the collateral, and hence to the secured creditor, is not sufficient by itself to justify restitution, although where the unsecured creditor's action is necessary to preserve the collateral, restitution will often be justified. Because benefit to the collateral is present in nearly every case, this exception, were it allowed, would swallow the rule. It is better in such cases to hold that potential loss of property is a risk of doing business as an unsecured creditor. For much the same reason, mere acquiescence by the secured creditor, in the unsecured creditor's action to improve the collateral, is also not sufficient to justify restitution. The secured creditor should not be required to keep track of the debtor's business dealings and to

warn unsecured creditors of the dangers involved, but should be allowed to remain silent. (29 C.A.4th 1364.)

(c) Here, the transaction between the debtor and plaintiff unsecured creditor had nothing to do with defendant. The contract for the barrels made no reference to defendant, and was executed prior to the debtor's financing agreement with defendant. The barrels were ordered by the debtor, and were shipped to the debtor. It is impossible to say that defendant in any way initiated the sale. The mere fact that defendant paid for the first shipment does not establish that it encouraged the deal. In short, defendant, under these circumstances, had no duty to overcome the failure of the unsecured creditor, a merchant knowledgeable about Article 9, to acquaint himself with public information concerning the relationship between defendant and the debtor. (29 C.A.4th 1367.)

(d) "The trial court's conclusion has an undeniable common sense allure--Knox provided barrels; Phoenix ended up with the barrels; Phoenix should therefore pay Knox for their value. Ordinarily this would be sound reasoning supporting an equitable result. Article 9, however, compels a different conclusion. Phoenix complied with statutory provisions intended to immunize secured creditors from such claims in all but the rarest of cases. As this is not that sort of case, the equitable impulse for restitution must yield to the Legislature's command." (29 C.A.4th 1368.) (See 27 A.L.R.5th 719 [liability of secured creditor, on ground of unjust enrichment, to third party who provided goods, performed services, or somehow benefited collateral].)

In *Atascadero Factory Outlets v. Augustini & Wheeler LLP* (2000) 83 C.A.4th 717, 99 C.R.2d 911, a mall developer borrowed \$ 400,000 from a bank to complete a mall project. The developer then sold the mall and agreed to pay the broker a \$ 250,000 commission. Instead of cash, the mall buyer gave the developer a note that provided that the sales price would be determined after the mall opened, based on a specified formula. The developer assigned the note to the bank as security on the loan and agreed that the bank would receive the first \$ 400,000 on the note and the broker would receive the next \$ 100,000. Two years later, the mall buyer claimed that the payoff amount under the formula was zero. The developer hired a law firm to sue on the note and gave the law firm a lien on the action. After an arbitrator awarded the developer \$ 500,359 on the note, the law firm claimed it should be paid \$ 176,000 before payment to the bank and the broker. The mall buyer interpleaded the award, based on these conflicting claims. The trial court awarded \$ 400,000 to the bank and \$ 100,000 to the broker, leaving nothing for the law firm. The law firm appealed. *Held*, affirmed.

The trial court reasonably concluded that the doctrine of unjust enrichment did not give the law firm's lien priority over the two secured creditors. This is not one of the "exceptional situations" referred to in *Knox*. The bank and the broker perfected their security interests 2 years before the developer gave the law firm a lien on the note proceeds. The law firm knew, or should have known, that its lien was third in time. Although the bank and the broker acquiesced to the collection action on the note, they did not ask the law firm to prosecute the action or offer to pay the litigation costs. (83 C.A.4th 721.) Moreover, the assertion that the law firm provided services essential to create or preserve the collateral is without merit. The note was secured by a deed of trust that encumbered the mall property. The bank also had the option of suing on the personal guarantees of the developer's partners. (83 C.A.4th 722.)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law

VI. PRIORITY

J. Priority Subject to Subordination.

4 Witkin Sum. Cal. Law STPP § 145

[§ 145] Priority Subject to Subordination.

Division 9 does not preclude subordination by agreement by a person entitled to priority. (U.C.C. 9339.) Only the person entitled to priority may make such an agreement. A person's rights cannot be adversely affected by an agreement to which the person is not a party. (Uniform Commercial Code Comment 2.)

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 VII. CHOICE OF LAW FOR PERFECTION AND PRIORITY
 A. Security Interests in General.

4 Witkin Sum. Cal. Law STPP § 146

[§ 146] Security Interests in General.

(1) *General Rule: Debtor's Location.* U.C.C. 9301 determines the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral. U.C.C. 9301(1) states the general rule that, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral. (On determining debtor's location, see U.C.C. 9307, *infra*, §152.) Numerous exceptions to this general rule are set forth in U.C.C. 9301, *infra*, this section, and in U.C.C. 9303 through U.C.C. 9306, *infra*, §148 *et seq.* (See Scoles & Hay 3d, §19.17 *et seq.*; Leflar 3d, §182; *68A Am.Jur.2d* (2003 *ed.*), *Secured Transactions* §465 *et seq.*)

(2) *Exception: Possessory Security Interest.* While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral. (U.C.C. 9301(2).)

(3) *Exception: Negotiable Documents, Goods, Instruments, Money, or Tangible Chattel Paper.* Except as otherwise provided in U.C.C. 9301(4), *infra*, this section, while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral. (U.C.C. 9301(3)(C).)

(4) *Exception: Fixtures.* While fixtures are located in a jurisdiction, the local law of that jurisdiction governs perfection of a security interest in the fixtures by filing a fixture filing (U.C.C. 9301(3)(A)) and the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral (U.C.C. 9301(3)(C)). (See Uniform Commercial Code Comment 5b.)

(5) *Exception: Timber To Be Cut.* While timber to be cut is located in a jurisdiction, the local law of that jurisdiction governs perfection of a security interest in the collateral (U.C.C. 9301(3)(B)) and the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral (U.C.C. 9301(3)(C)). (See Uniform Commercial Code Comment 5c.)

U.C.C. 9301(3)(B) applies only to "timber to be cut," not to timber that has been cut. Consequently, once the timber is cut, the general choice-of-law rule in U.C.C. 9301(1) becomes applicable. To ensure continued perfection, a secured party should file in both the jurisdiction in which the timber to be cut is located and in the state where the debtor is

located. The former filing would be with the office in which a real property mortgage would be filed, and the latter would be a central filing (see U.C.C. 9501, supra, §87). (Uniform Commercial Code Comment 5c.)

(6) *Exception: As-Extracted Collateral.* The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral. (U.C.C. 9301(4).)

West's Key Number Digest, Secured Transactions k.3 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule: Debtor's Location.* See McDougal, American Conflicts Law 5th, §170 (replacing Leflar).

(3) *Exception: Negotiable Documents, Goods, Instruments, Money, or Tangible Chattel Paper.* U.C.C. 9301(3)(C) was amended in 2006 to refer to negotiable tangible documents, rather than negotiable documents.



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VII. CHOICE OF LAW FOR PERFECTION AND PRIORITY
B. Agricultural Liens.

4 Witkin Sum. Cal. Law STPP § 147

[§ 147] Agricultural Liens.

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products. (U.C.C. 9302.) Because no agricultural lien on proceeds arises under Division 9, U.C.C. 9302 does not expressly apply to proceeds of agricultural liens. However, if another statute creates an agricultural lien on proceeds, it may be appropriate for courts to apply the choice-of-law rule in U.C.C. 9302 to determine priority in the proceeds. (Uniform Commercial Code Comment 2.)

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C. Goods Covered by Certificate of Title.

4 Witkin Sum. Cal. Law STPP § 148

[§ 148] Goods Covered by Certificate of Title.

(1) *Choice-of-Law Rule.* The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title. (U.C.C. 9303(c).)

(2) *Determining When Goods Are Covered by Certificate of Title.* Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction. (U.C.C. 9303(b).)

(3) *Scope of Rule.* U.C.C. 9303 applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor. (U.C.C. 9303(a).)

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D. Deposit Accounts.

4 Witkin Sum. Cal. Law STPP § 149

[§ 149] Deposit Accounts.

(1) *Choice-of-Law Rule.* The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank. (U.C.C. 9304(a).)

(2) *Determining Bank's Jurisdiction.* If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of U.C.C. 9301 et seq., Division 9, or the Commercial Code, that jurisdiction is the bank's jurisdiction. (U.C.C. 9304(b)(1).) If U.C.C. 9304(b)(1) does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction. (U.C.C. 9304(b)(2).)

If neither U.C.C. 9304(b)(1) nor 9304(b)(2) applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction. (U.C.C. 9304(b)(3).) If none of the preceding paragraphs applies, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located. (U.C.C. 9304(b)(4).) Where no other paragraph of U.C.C. 9304(b) applies, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located. (U.C.C. 9304(b)(5).)

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 VII. CHOICE OF LAW FOR PERFECTION AND PRIORITY
 E. Investment Property.

4 Witkin Sum. Cal. Law STPP § 150

[§ 150] Investment Property.

(1) *General Rules.* U.C.C. 9305(a) specifies choice-of-law rules for perfection and priority of security interests in investment property. The approach of each of the provisions in U.C.C. 9305(a) is essentially the same. They identify the jurisdiction's law that governs questions of perfection and priority by using the same principles that Division 8 uses to determine other questions concerning that form of investment property. (Uniform Commercial Code Comment 2.)

(a) *Certificated securities.* While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented by the security. (U.C.C. 9305(a)(1).)

(b) *Uncertificated securities.* The local law of the issuer's jurisdiction as specified in U.C.C. 8110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security. (U.C.C. 9305(a)(2).)

(c) *Security entitlements and securities accounts.* The local law of the securities intermediary's jurisdiction as specified in U.C.C. 8110(e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account. (U.C.C. 9305(a)(3).)

(d) *Commodity contracts and commodity accounts.* The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account. (U.C.C. 9305(a)(4).)

The rules for determining a commodity intermediary's jurisdiction are set forth in U.C.C. 9305(b). If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of U.C.C. 9301 et seq., Division 9, or the Commercial Code, that jurisdiction is the commodity intermediary's jurisdiction. (U.C.C. 9305(b)(1).) If U.C.C. 9305(b)(1) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction. (U.C.C. 9305(b)(2).) If neither U.C.C. 9305(b)(1) nor 9305(b)(2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a

particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction. (U.C.C. 9305(b)(3).)

If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located. (U.C.C. 9305(b)(4).) Finally, if none of the other subdivisions in U.C.C. 9305(b) applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located. (U.C.C. 9305(b)(5).)

(2) *Exceptions to General Rules.* The local law of the jurisdiction in which the debtor is located governs all of the following:

(a) Perfection of a security interest in investment property by filing. (U.C.C. 9305(c)(1).)

(b) Automatic perfection of a security interest in investment property created by a broker or securities intermediary (see U.C.C. 9309(10), *supra*, §63). (U.C.C. 9305(c)(2).)

(c) Automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary (see U.C.C. 9309(11), *supra*, §63). (U.C.C. 9305(c)(3).) (On determining jurisdiction in which debtor is located, see *infra*, §152.)

SUPPLEMENT: [This section is current through the latest supplement]



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F. Letter-of-Credit Rights.

4 Witkin Sum. Cal. Law STPP § 151

[§ 151] Letter-of-Credit Rights.

(1) *General Rule.* The local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a state. (U.C.C. 9306(a).) For purposes of U.C.C. 9301 et seq., an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in U.C.C. 5116. (U.C.C. 9306(b).)

(2) *Exception: Supporting Obligations.* U.C.C. 9306 does not apply to a security interest that is perfected only under U.C.C. 9308(d) (*supra*, §65), which provides for perfection of a security interest in supporting obligations for collateral. (U.C.C. 9306(c).)

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 G. Determining Debtor's Location.

4 Witkin Sum. Cal. Law STPP § 152

[§ 152] Determining Debtor's Location.

(1) *General Rules.* A debtor who is an individual is located at the individual's principal residence. (U.C.C. 9307(b)(1).) A debtor that is an organization and has only one place of business is located at its place of business. (U.C.C. 9307(b)(2).) A debtor that is an organization and has more than one place of business is located at its chief executive office. (U.C.C. 9307(b)(3).) "Place of business" means a place where a debtor conducts its affairs. (U.C.C. 9307(a).)

(2) *Exception for Some Non-United States Debtors.* Under the general rules of U.C.C. 9307, a non-United States debtor normally would be located in a foreign jurisdiction and, as a consequence, foreign law would govern perfection. When foreign law affords no public notice of security interests, the general rule yields unacceptable results. Accordingly, U.C.C. 9307(c) provides an exception to the general rules. (Uniform Commercial Code Comment 3.) In particular, U.C.C. 9307(b) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If U.C.C. 9307(b) does not apply, the debtor is located in the District of Columbia. (U.C.C. 9307(c).)

(3) *Registered Organizations.* A registered organization that is organized under the law of a state is located in that state. (U.C.C. 9307(e).) A registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located in any of the following jurisdictions:

(a) In the state that the law of the United States designates, if the law designates a state of location. (U.C.C. 9307(f)(1).)

(b) In the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location. (U.C.C. 9307(f)(2).)

(c) In the District of Columbia, if neither U.C.C. 9307(f)(1) nor 9307(f)(2) applies. (U.C.C. 9307(f)(3).)

However, a branch or agency of a bank that is not organized under the law of the United States or a state is located

in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one state. (U.C.C. 9307(i).)

(4) *Continuity of Location.* A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by U.C.C. 9307(b) and 9307(c). (U.C.C. 9307(d).)

A registered organization continues to be located in the jurisdiction specified by U.C.C. 9307(e) or 9307(f) even if the registered organization's status as such in its jurisdiction of organization is suspended, revoked, forfeited, or lapsed. (U.C.C. 9307(g)(1).) Similarly, the dissolution, winding up, or cancellation of the existence of the registered organization does not change the location. (U.C.C. 9307(g)(2).)

(5) *United States.* The United States is located in the District of Columbia. (U.C.C. 9307(h).)

(6) *Foreign Air Carriers.* A foreign air carrier under the Federal Aviation Act of 1958 (49 U.S.C., §41301 et seq.) is located at the designated office of the agent on which service of process may be made on the carrier's behalf. (U.C.C. 9307(j).)

(7) *Limitation on Rules for Determining Debtor's Location.* U.C.C. 9307 applies only for purposes of U.C.C. 9301 et seq. (U.C.C. 9307(k).)

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 VIII. ADDITIONAL RIGHTS AND DUTIES

A. Secured Parties.

1. Duties of Secured Party Who Possesses Collateral.

4 Witkin Sum. Cal. Law STPP § 153

[§ 153] Duties of Secured Party Who Possesses Collateral.

(1) *Duty of Care.* A secured party must use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed. (U.C.C. 9207(a).) However, U.C.C. 9207(a) does not apply if the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, unless the secured party is entitled under an agreement to charge back uncollected collateral (U.C.C. 9207(d)(1)(A)) or otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral (U.C.C. 9207(d)(1)(B)). (See *Triple A Management Co. v. Frisone* (1999) 69 C.A.4th 520, 540, 81 C.R.2d 669 [U.C.C. 9207 continued common law rule that secured party does not have power to sell, compromise, or otherwise discharge pledged debt instrument, or security for pledged debt, before default, without pledgor's consent; hence, assignee of security interest in deed of trust could not subordinate deed of trust to subsequent lien]; C.E.B., *Secured Transactions* 2d, §3.60 et seq.; 45 A.L.R.3d 255 [duty of pledgee of commercial paper as to its enforcement or collection]; 68 A.L.R.3d 657 [duty of pledgee of stocks, bonds, or similar securities to protect their value during period of pledge, under former Unif.Com.C. §9-207]; 68A Am.Jur.2d (2003 ed.), *Secured Transactions* §487 et seq.)

(2) *Expenses Chargeable to Debtor.* If a secured party has possession of collateral, reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral. (U.C.C. 9207(b)(1).)

(3) *Risk of Loss on Debtor.* If a secured party has possession of collateral, the risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage. (U.C.C. 9207(b)(2).)

(4) *Identifiable and Fungible Collateral.* A secured party who has possession of collateral must keep the collateral identifiable, but fungible collateral may be commingled. (U.C.C. 9207(b)(3).)

(5) *Acceptable Uses of Collateral.* A secured party who has possession of collateral may use or operate the collateral for the purpose of preserving the collateral or its value. (U.C.C. 9207(b)(4)(A).) The secured party may use or operate the collateral as permitted by an order of a court having competent jurisdiction. (U.C.C. 9207(b)(4)(B).) Finally, except in the case of consumer goods, the secured party may use or operate the collateral in the manner and to the extent

agreed by the debtor. (U.C.C. 9207(b)(4)(C).)

(6) *Use of Proceeds and Creation of Additional Security Interest.* A secured party having possession of collateral may hold as additional security any proceeds, except money or funds, received from the collateral. (U.C.C. 9207(c)(1).) The secured party must apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor. (U.C.C. 9207(c)(2); see 45 A.L.R.4th 394 [secured party's duty under former Unif.Com.C. §9-207(2)(c) to reduce secured obligation by increase or profits received from collateral].) Finally, the secured party may create a security interest in the collateral. (U.C.C. 9207(c)(3).)

(7) *Exception for Buyers of Chattel Paper and Other Receivables and for Consignors.* The rights and duties set forth in U.C.C. 9207(b) and 9207(c) do not apply if the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor. (U.C.C. 9207(d)(2).)

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A. Secured Parties.

2. Duties of Secured Party Who Controls Collateral.

4 Witkin Sum. Cal. Law STPP § 154

[§ 154] Duties of Secured Party Who Controls Collateral.

(1) *Use of Proceeds and Creation of Additional Security Interest.* A secured party having control of collateral under U.C.C. 9104, 9105, 9106, or 9107 (supra, §54) may hold as additional security any proceeds, except money or funds, received from the collateral. (U.C.C. 9207(c)(1).) The secured party must apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor. (U.C.C. 9207(c)(2).) Finally, the secured party may create a security interest in the collateral. (U.C.C. 9207(c)(3).) However, none of these rights or duties applies if the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor. (U.C.C. 9207(d)(2).)

(2) *Duty To Relinquish Control of Deposit Account.* Within 10 days after receiving an authenticated demand by the debtor, a secured party having control of a deposit account under U.C.C. 9104(a)(2) must send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party. (U.C.C. 9208(b)(1).) Also within 10 days of a demand, a secured party having control of a deposit account under U.C.C. 9104(a)(3) must either pay the debtor the balance on deposit in the deposit account (U.C.C. 9208(b)(2)(A)) or transfer the balance on deposit into a deposit account in the debtor's name (U.C.C. 9208(b)(2)(B)).

(3) *Duty To Relinquish Control of Electronic Chattel Paper.* A secured party, other than a buyer, having control of electronic chattel paper under U.C.C. 9105 has three duties to fulfill within 10 days after receiving an authenticated demand from the debtor. First, the secured party must communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian. (U.C.C. 9208(b)(3)(A).) Second, if the debtor designates a custodian who is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, the secured party must communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor. (U.C.C. 9208(b)(3)(B).) Finally, the secured party must take appropriate action to enable the debtor or its designated custodian to make copies of, or revisions to, the authoritative copy which add or change an identified assignee of the authoritative copy without the secured party's consent. (U.C.C. 9208(b)(3)(C).)

(4) *Duty To Relinquish Control of Investment Property.* A secured party having control of investment property

under U.C.C. 8106(d)(2) or under U.C.C. 9106(b) must send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party. This must be done within 10 days after receiving an authenticated demand by the debtor. (U.C.C. 9208(b)(4).)

(5) *Duty To Relinquish Control of Letter-of-Credit Right.* A secured party having control of a letter-of-credit right under U.C.C. 9107 must, within 10 days after receiving an authenticated demand by the debtor, send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party. (U.C.C. 9208(b)(5).)

(6) *When Duty To Relinquish Control Applies.* The duties set forth in U.C.C. 9208 apply only when there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value. (U.C.C. 9208(a).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Use of Proceeds and Creation of Additional Security Interest.* U.C.C. 9207(c) was amended in 2006 to add U.C.C. 7106 to the list of relevant statutes.(5a) *(New) Duty To Relinquish Control of Electronic Document.* A secured party having control of an electronic document under U.C.C. 7106 must give control of the electronic document to the debtor or its designated custodian. (U.C.C. 9208(b)(6)(A), added in 2006.) If the debtor designates a custodian that is the one with which the authoritative copy of the electronic document is maintained for the secured party, the secured party must communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor. (U.C.C. 9208(b)(6)(B), added in 2006.) Finally, the secured party must take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy, adding or changing an identified assignee of the authoritative copy without the secured party's consent. (U.C.C. 9208(b)(6)(C), added in 2006.)



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VIII. ADDITIONAL RIGHTS AND DUTIES

A. Secured Parties.

3. Duties of Secured Party When Account Debtor Has Been Notified of Assignment.

4 Witkin Sum. Cal. Law STPP § 155

[§ 155] Duties of Secured Party When Account Debtor Has Been Notified of Assignment.

(1) *Duty To Free Up Collateral.* Within 10 days after receiving an authenticated demand by the debtor, a secured party must send to an account debtor that has received notification of an assignment to the secured party as assignee under U.C.C. 9406(a) (infra, §163) an authenticated record that releases the account debtor from any further obligation to the secured party. (U.C.C. 9209(b).)

(2) *Applicability of Duty.* U.C.C. 9209 applies only if there is no outstanding secured obligation (U.C.C. 9209(a)(1)) and the secured party is not committed to make advances, incur obligations, or otherwise give value (U.C.C. 9209(a)(2)). It does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible. (U.C.C. 9209(c).)

SUPPLEMENT: [This section is current through the latest supplement]



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 VIII. ADDITIONAL RIGHTS AND DUTIES

A. Secured Parties.

4. Secured Party's Duty To Account.

4 Witkin Sum. Cal. Law STPP § 156

[§ 156] Secured Party's Duty To Account.

(1) *Permitted Types of Requests for Information.* U.C.C. 9210(a) contemplates that a debtor may request three types of information by submitting three types of authenticated requests to the secured party. (Uniform Commercial Code Comment 4.) First, the debtor may request that the recipient provide an accounting of the unpaid obligations secured by collateral. (U.C.C. 9210(a)(2).) Second, the debtor may submit a request regarding a list of collateral, asking that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation. (U.C.C. 9210(a)(3).) Finally, there is a request regarding a statement of account, which is a request that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date. (U.C.C. 9210(a)(4).) For each type of request, the debtor must reasonably identify the transaction or relationship that is the subject of the request. (U.C.C. 9210(a)(2), (a)(3), (a)(4).)

(2) *Response to Requests Generally.* A secured party must comply with a request for an accounting by authenticating and sending an accounting to the debtor within 14 days after receipt of the request. (U.C.C. 9210(b)(1).) Similarly, a secured party must comply with a request regarding a list of collateral or a request regarding a statement of account by authenticating and sending an approval or correction to the debtor within 14 days after receipt of the request. (U.C.C. 9210(b)(2).) These provisions do not apply when the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor. (U.C.C. 9210(b).)

A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor an authenticated record including a statement to that effect within 14 days after receipt. (U.C.C. 9210(c).)

(3) *Response Following Assignment.* A debtor may be unaware that a creditor with whom it has dealt has assigned its security interest or the secured obligation. Accordingly, U.C.C. 9210(d) and 9210(e) impose on recipients of requests under U.C.C. 9210 the duty to inform the debtor that they claim no interest in the collateral or secured obligation, and to identify a known assignee or successor. (Uniform Commercial Code Comment 5.)

In particular, a person who receives a request regarding a list of collateral, claims no interest in the collateral when he or she receives the request, and claimed an interest in the collateral at an earlier time must send the debtor an authenticated record that disclaims any interest in the collateral. (U.C.C. 9210(d)(1).) In addition, the record must

provide the name and mailing address of any assignee of or successor to the recipient's interest in the collateral, if known to the recipient. (U.C.C. 9210(d)(2).) Similarly, a person who receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when he or she receives the request, and claimed an interest in the obligations at an earlier time must send the debtor an authenticated record that disclaims any interest in the obligations (U.C.C. 9210(e)(1)) and provides the name and mailing address of any assignee of or successor to the recipient's interest in the obligations, if known to the recipient (U.C.C. 9210(e)(2)). A response to a request under U.C.C. 9210(d) or 9210(e) is due 14 days following receipt. (U.C.C. 9210(d), 9210(e).)

(4) *Charge for Response.* A debtor is entitled without charge to one response to a request under U.C.C. 9210 during any 6-month period. The secured party may charge up to \$ 25 for each additional response. (U.C.C. 9210(f).)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Secured Parties.
5. No Liability for Debtor's Acts or Omissions.

4 Witkin Sum. Cal. Law STPP § 157

[§ 157] No Liability for Debtor's Acts or Omissions.

The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions. (U.C.C. 9402.)

SUPPLEMENT: [This section is current through the latest supplement]



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VIII. ADDITIONAL RIGHTS AND DUTIES
B. Third Parties.
1. In General.

4 Witkin Sum. Cal. Law STPP § 158

[§ 158] In General.

(1) *Scope of Statutory Coverage.* U.C.C. 9401 et seq. deal with several issues affecting third parties, meaning parties other than the debtor and the secured party. These issues are not addressed in U.C.C. 9317 et seq., which deal with priorities. U.C.C. 9401 et seq. primarily address the rights and duties of account debtors and other persons obligated on collateral who are not, themselves, parties to a secured transaction. (Uniform Commercial Code Comment 2 to U.C.C. 9401; see C.E.B., Secured Transactions 2d, §4.82 et seq.; on possible restitution rights for unsecured creditors, see supra, §144; on priority of federal tax lien under Federal Tax Lien Act, see *Gold Coast Leasing Co. v. California Carrots* (1979) 93 C.A.3d 274, 277, 279, 155 C.R. 511; 81 Harv. L. Rev. 1369 [effect of Federal Tax Lien Act of 1966 on priority concepts of U.C.C.]; on Uniform Federal Lien Registration Act, see 4 *Summary* (10th), *Security Transactions in Real Property*, §65.)

(2) *Choice-of-Law Issues.* U.C.C. 9301 et seq. (supra, §146 et seq.) do not determine which jurisdiction's law governs the matters addressed in U.C.C. 9401 et seq., because these matters do not relate to perfection, the effect of perfection or nonperfection, or priority. (Uniform Commercial Code Comment 3.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Third Parties.

2. Alienability of Debtor's Rights.

4 Witkin Sum. Cal. Law STPP § 159

[§ 159] Alienability of Debtor's Rights.

(1) *General Rule.* Whether a debtor's rights in collateral may be voluntarily or involuntarily transferred usually is governed by law other than Division 9. (U.C.C. 9401(a).) Thus, property is not necessarily transferable by virtue of its inclusion within the scope of Division 9. (Uniform Commercial Code Comment 4.)

(2) *Exceptions.* An agreement between the debtor and secured party that prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect. (U.C.C. 9401(b).) Thus, U.C.C. 9401(b) is an exception to the general rule in U.C.C. 9401(a). It makes clear that in secured transactions under Division 9, the debtor has rights in collateral, whether legal title or equitable, that it can transfer and that its creditors can reach. (Uniform Commercial Code Comment 5.)

U.C.C. 9401(a) is also subject to U.C.C. 9406 (infra, §§163, 164), 9407 (infra, §165), 9408 (infra, §166), and 9409 (infra, §167).

SUPPLEMENT: [This section is current through the latest supplement]



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B. Third Parties.

3. Rights and Duties Arising Out of Assignment.

a. Agreement Not To Assert Claims and Defenses Against Assignee.

4 Witkin Sum. Cal. Law STPP § 160

[§ 160] Agreement Not To Assert Claims and Defenses Against Assignee.

(1) *Conditions for Enforceability.* An account debtor and an assignor may agree that the account debtor will not assert against an assignee a claim or defense that the account debtor may have against the assignor. These agreements are typical in installment sale agreements and leases. (Uniform Commercial Code Comment 2 to U.C.C. 9403.) Such an agreement is enforceable by an assignee who takes an assignment under the following conditions:

(a) For value. (U.C.C. 9403(b)(1).) "Value" has the meaning provided in U.C.C. 3303(a) (4 *Summary* (10th), *Negotiable Instruments*, §29). (U.C.C. 9403(a).)

(b) In good faith. (U.C.C. 9403(b)(2).)

(c) Without notice of a claim of a property or possessory right to the property assigned. (U.C.C. 9403(b)(3).)

(d) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under U.C.C. 3305(a) (4 *Summary* (10th), *Negotiable Instruments*, §31). (U.C.C. 9403(b)(4); see *Equico Lessors v. Mines* (1978) 84 C.A.3d 374, 376, 148 C.R. 554 [defense of failure of consideration cannot be set up against assignee; construing former U.C.C. 9206, predecessor to U.C.C. 9403].)

U.C.C. 9403 is designed to put the assignee in a position that is no better and no worse than that of a holder in due course of a negotiable instrument under Division 3. (Uniform Commercial Code Comment 3.) Therefore, U.C.C. 9403(b) does not apply to defenses that could be asserted against a holder in due course of a negotiable instrument under U.C.C. 3305(b) (4 *Summary* (10th), *Negotiable Instruments*, §31). (U.C.C. 9403(c).)

(2) *Consumer Transactions: Waiver-of-Defense Clauses Ineffective.* In a consumer transaction, if (a) a record evidences the account debtor's obligation, (b) law other than Division 9 requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and (c) the record does not include the required statement, then the record has the same effect as if it did include the statement. (U.C.C. 9403(d)(1).) Moreover, the account debtor may assert against an assignee those claims and defenses that would have been available if the record included the required statement. (U.C.C. 9403(d)(2).)

U.C.C. 9403(d) applies to rights evidenced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. Part 433 (the "Holder-in-Due-Course Regulations"). Under U.C.C. 9403(d), "an assignee of such a record takes subject to the consumer account debtor's claims and defenses to the same extent as it would have if the writing had contained the required notice. Thus, subsection (d) effectively renders waiver-of-defense clauses ineffective in the transactions with consumers to which it applies." (Uniform Commercial Code Comment 5.)

Furthermore, U.C.C. 9403 is subject to law other than Division 9 that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. (U.C.C. 9403(e).)

(3) *Agreements That Are Enforceable Despite Lack of Compliance With U.C.C. 9403.* Except as otherwise provided in U.C.C. 9403(d), U.C.C. 9403 does not displace law other than Division 9 that gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee. (U.C.C. 9403(f).) In other words, as Uniform Commercial Code Comment 6 points out, U.C.C. 9403 does not displace any of the following:

(a) Other law that gives effect to a nonconsumer account debtor's agreement not to assert defenses against an assignee, even if the agreement would not qualify under U.C.C. 9403(b).

(b) Other law to the extent that the other law permits an assignee, who takes an assignment with notice of a claim of a property or possessory right, a defense, or a claim in recoupment, to enforce an account debtor's agreement not to assert claims and defenses against the assignor.

(c) An assignee's right to assert that an account debtor is estopped from asserting a claim or defense.

(d) Other law with respect to waivers of potential future claims and defenses that are the subject of an agreement between the account debtor and the assignee.

(e) U.C.C. 1107, concerning waiver of a breach that allegedly already has occurred.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Conditions for Enforceability.* In *Wells Fargo Bank Minnesota v. B.C.B.U. (2006) 143 C.A.4th 493, 49 C.R.3d 324*, defendant nursing home operator entered into negotiations to lease computer equipment from C. While the parties were still negotiating, C sent lease documents to defendant for signature, assuring defendant that it was common practice to execute, but not date, documents in advance, and that C would hold the documents until a deal was reached. Defendant signed and returned the documents, which included an equipment lease, an acceptance certificate describing the leased equipment and stating that defendant received and accepted the equipment unconditionally, and the personal guaranty of the lease by defendant's president. Additional language stated that the lease was assignable, and that defendant would not assert against an assignee any defense it might have against C. The lease was first assigned to a third party, and later, it was assigned to plaintiff bank. Defendant and C were unable to come to terms, and more than a month after the assignment to plaintiff, defendant and C rescinded the lease. No equipment was ever delivered to or accepted by defendant. Two years later, plaintiff sued defendant for breach of the lease and for declaratory relief establishing the enforceability of the lease and the guaranty. Defendant raised several affirmative defenses, including cancellation of the lease and failure of consideration. The trial judge found the waiver of defenses clause to be enforceable under U.C.C. 9403, and thus ruled that plaintiff took the assignment free of these defenses. *Held*, affirmed.

(a) U.C.C. 10407, which provides that lease promises do not become irrevocable until the goods are accepted, and that only then may the promises be enforced by an assignee, appears to conflict with U.C.C. 9403. U.C.C. 9403 provides that an assignee who meets its requirements may enforce a waiver of defenses clause and is subject only to defenses that are good against a holder in due course of a negotiable instrument. The Comments to U.C.C. 9403 indicate that this provision governs even if another law would prevent an assignee from enforcing a waiver of defenses clause.

Here, the lease was within the scope of U.C.C. 9403(b). It was an agreement between defendant and the assignor, C, not to assert against an assignee such as plaintiff any defenses the defendant would have had against the assignor. Plaintiff met all of the requirements of U.C.C. 9403: it took the assignment for value, in good faith, without notice of a claim or right to the property assigned, and without notice of a defense that could be asserted against a person entitled to enforce a negotiable instrument under U.C.C. 3305(a) (see 4 *Summary* (10th), *Negotiable Instruments*, §31). (143 C.A.4th 499, 501.)

(b) Thus, U.C.C. 10407 and U.C.C. 9403 may be seen as consistent. U.C.C. 10407 governs relations between parties to a finance lease prior to acceptance of the goods. However, once the lessee accepts the goods, or executes documents stating that the lessee has accepted the goods, the lessee's rights against an assignee who effectively qualifies as a holder in due course are governed by U.C.C. 9403. Assignees who do not so qualify have recourse only to U.C.C. 10407. (143 C.A.4th 501.)

(c) There are sound policy reasons for having U.C.C. 9403 govern a dispute between an assignee with holder in due course status and an account debtor. "Enforcing a waiver of defenses, save for those that would be good against a holder in due course of a negotiable instrument, promotes the transfer of accounts by allowing a purchaser to rely on the face of the documents. Thus, the lessee, like the maker of a negotiable instrument, bears the risk of putting into the stream of commerce documents that appear regular on their face but have underlying flaws." (143 C.A.4th 501.)

(d) None of the defenses that would be available under U.C.C. 3305 against one who has acquired holder in due course status such as plaintiff, i.e., infancy, duress, lack of legal capacity, illegality of the transaction, fraud in the inducement, and discharge in insolvency proceedings, applies here. Thus, none of the defenses defendant raised, including failure of consideration, no meeting of the minds, material alteration that would void the lease, or cancellation of the lease, would be effective against plaintiff. (143 C.A.4th 503, 504.)

(e) Enforcing the waiver of defenses is the only just result in this situation. Plaintiff had no way of knowing that the lease and guaranty were not what they appeared to be. As between the two innocent parties, defendant is the one that had the ability to protect itself and prevent the loss simply by refusing to sign in advance. By signing documents that reflected a completed transaction when it was still negotiating for a deal that ultimately fell through, defendant took a substantial risk. Further, defendant's president ignored a printed warning on the key acceptance certificate, right next to the signature line, that told him not to sign "until you have actually received all of the equipment and are completely satisfied with it." (143 C.A.4th 502, 503.) (3) *Agreements That Are Enforceable Despite Lack of Compliance With U.C.C. 9403.* (e) U.C.C. 1107: U.C.C. 1107 was renumbered U.C.C. 1306 in 2006.



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B. Third Parties.

3. Rights and Duties Arising Out of Assignment.

b. Claims and Defenses Against Assignee in Absence of Agreement.

4 Witkin Sum. Cal. Law STPP § 161

[§ 161] Claims and Defenses Against Assignee in Absence of Agreement.

(1) *General Rule.* Absent an enforceable agreement by the account debtor not to assert claims and defenses against an assignee, the assignee generally takes an assignment subject to the account debtor's defenses and claims. The rights of an assignee are subject to all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract. (U.C.C. 9404(a)(1).) Thus, if the account debtor's defenses on an assigned claim arise from the transaction that gave rise to the contract with the assignor, it makes no difference whether the defense or claim accrues before or after the account debtor is notified of the assignment. (Uniform Commercial Code Comment 2.) If the account debtor's defenses or claims against the assignor did not arise from the transaction that gave rise to the contract, the assignee takes subject only if the defenses or claims accrued before the account debtor received notification of the assignment authenticated by the assignor or the assignee. (U.C.C. 9404(a)(2); Uniform Commercial Code Comment 2.)

(2) *Limitation on Affirmative Claims.* The claim of an account debtor against an assignor may be asserted against an assignee under U.C.C. 9404(a) only to reduce the amount the account debtor owes. (U.C.C. 9404(b).) Thus, the account debtor generally does not have the right to an affirmative recovery from the assignee. (Uniform Commercial Code Comment 3.)

(3) *Exceptions for Consumer Account Debtors.* U.C.C. 9404 is subject to law other than Division 9 that establishes different rules for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. (U.C.C. 9404(c).) Furthermore, if a record in a consumer transaction evidences the account debtor's obligation, and law other than Division 9 requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include the required statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record did include the statement. (U.C.C. 9404(d).)

U.C.C. 9404(d) "applies to rights evidenced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. Part 433 (the 'Holder-in-Due-Course Regulations'). Under subsection (d), a consumer account debtor has the same right to an affirmative recovery from an assignee of such a

record as the consumer would have had against the assignee had the record contained the required notice." (Uniform Commercial Code Comment 4; see C.E.B., Secured Transactions 2d, §7.71.)

(4) *Exception: Health Care Insurance Receivables.* U.C.C. 9404 does not apply to an assignment of a health care insurance receivable. (U.C.C. 9404(e).) The obligation of an insurer with respect to a health care insurance receivable is governed by other law. (Uniform Commercial Code Comment 5.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Rights and Duties Arising Out of Assignment.
 c. Modification of Assigned Contract.

4 Witkin Sum. Cal. Law STPP § 162

[§ 162] Modification of Assigned Contract.

(1) *When Modifications Are Binding.* The ability of account debtors and assignors to modify assigned contracts can be important, especially in the case of government contracts and complex contractual arrangements, such as construction contracts, with respect to which modifications are customary. (Uniform Commercial Code Comment 2 to U.C.C. 9405(a).) In general, a modification of or substitution for an assigned contract is effective against an assignee. (U.C.C. 9405(a).) U.C.C. 9405(a) protects the assignee, however, in three ways:

(a) The modification or substitution must be made in good faith.

(b) The assignee acquires corresponding rights under the modified or substituted contract.

(c) The assignment may provide that the modification or substitution is a breach of contract by the assignor. (Uniform Commercial Code Comment 2.)

U.C.C. 9405(a) applies only to the extent that the right to full or partial payment under an assigned contract has not been fully earned by performance. (U.C.C. 9405(b)(1).) Alternatively, it applies when the right to full or partial payment has been fully earned by performance, but the account debtor has not received notification of the assignment under U.C.C. 9406(a) (*infra*, §163). (U.C.C. 9405(b)(2).)

(2) *Exception: Consumer Account Debtors.* U.C.C. 9405 is subject to law other than Division 9 that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. (U.C.C. 9405(c).)

(3) *Exception: Health Care Insurance Receivables.* U.C.C. 9405 does not apply to an assignment of a health care insurance receivable. (U.C.C. 9405(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Rights and Duties Arising Out of Assignment.
 d. Discharge of Account Debtor.

4 Witkin Sum. Cal. Law STPP § 163

[§ 163] Discharge of Account Debtor.

(1) *Account Debtor's Right To Pay Assignor Until Notification.* In general, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor. (U.C.C. 9406(a).) This provision is subject to law other than Division 9 that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. (U.C.C. 9406(a), (h).) It does not apply to an assignment of a health care insurance receivable. (U.C.C. 9406(i).)

(2) *Effectiveness of Notification.* Notification is ineffective under U.C.C. 9406(a) if it does not reasonably identify the rights assigned. (U.C.C. 9406(b)(1).) "A reasonable identification need not identify the right to payment with specificity, but what is reasonable also is not left to the arbitrary decision of the account debtor. If an account debtor has doubt as to the adequacy of a notification, it may not be safe in disregarding the notification unless it notifies the assignee with reasonable promptness as to the respects in which the account debtor considers the notification defective." (Uniform Commercial Code Comment 3; see *Kirby v. Palos Verdes Escrow Co.* (1986) 183 C.A.3d 57, 63, 227 C.R. 785 [assignor finance corporation's recordation of note, deed of trust securing note, and assignment of note and deed of trust was insufficient under former U.C.C. 9318(3) (now U.C.C. 9406) to obligate agent of payor of note to pay assignee]; *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 C.4th 705, 117 C.R.2d 541, 41 P.3d 548, 12 Summary (10th), *Real Property*, §305 [disapproving *Kirby v. Palos Verdes Escrow Co.* to extent it holds that transactions by strangers to escrow can supersede and amend instructions given by parties to escrow]; 100 A.L.R.3d 1218 [construction and operation of former Unif.Com.C. 9-318(3)].)

Notification is ineffective to the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than Division 9. (U.C.C. 9406(b)(2).) "Payment intangibles are substantially less fungible than accounts and chattel paper. In some (e.g., commercial bank loans), account debtors customarily and legitimately expect that they will not be required to pay any person other than the financial institution that has advanced funds." (Uniform Commercial Code Comment 3.)

Finally, at the option of an account debtor, notification is not effective under U.C.C. 9406(a) if the notification instructs the account debtor to make less than the full amount of an installment or other periodic payment to the assignee. (U.C.C. 9406(b)(3).) This limitation applies even if only a portion of the account, chattel paper, or general intangible has been assigned to that assignee (U.C.C. 9406(b)(3)(A)), a portion has been assigned to another assignee (U.C.C. 9406(b)(3)(B)), or the account debtor knows that the assignment to that assignee is limited (U.C.C. 9406(b)(3)(C)). An account debtor may not waive or vary its option under U.C.C. 9406(b)(3). (U.C.C. 9406(g).)

Uniform Commercial Code Comment 3 explains: "It has become common in financing transactions to assign interests in a single obligation to more than one assignee. Requiring an account debtor that owes a single obligation to make multiple payments to multiple assignees would be unnecessarily burdensome. Thus, under subsection (b)(3), an account debtor that is notified to pay an assignee less than the full amount of any installment or other periodic payment has the option to treat the notification as ineffective, ignore the notice, and discharge the assigned obligation by paying the assignor. Some account debtors may not realize that the law affords them the right to ignore certain notices of assignment with impunity. By making the notification ineffective at the account debtor's option, subsection (b)(3) permits an account debtor to pay the assignee in accordance with the notice and thereby to satisfy its obligation *pro tanto*."

The notification provisions in U.C.C. 9406(b), including those governing the account debtor's ability to waive certain notification, are subject to law other than Division 9 that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. (U.C.C. 9406(b), 9406(g), 9406(h).)

(3) *Proof of Assignment*. An account debtor who doubts whether the right to payment has been assigned may avail itself of the procedures in U.C.C. 9406(c). (Uniform Commercial Code Comment 2.) If the account debtor requests, an assignee must "seasonably" furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under U.C.C. 9406(a). (U.C.C. 9406(c).) This provision is subject to law other than Division 9 that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. (U.C.C. 9406(c), (h).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Effectiveness of Notification*. See 35 A.L.R.6th 437 [construction and application of Unif.Com.C. §9-406 and former Unif.Com.C. §9-318(3); superseding 100 A.L.R.3d 1218, text, p. 720].



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e. Ineffectiveness of Restrictions on Assignment.

1. Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes.

4 Witkin Sum. Cal. Law STPP § 164

[§ 164] Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes.

(1) *Contractual Restrictions.* A term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note. (U.C.C. 9406(d)(1).) Similarly, a term is ineffective to the extent that it provides that the assignment, transfer, creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note. (U.C.C. 9406(d)(2).)

However, U.C.C. 9406(d) does not apply to the sale of a payment intangible or promissory note. (U.C.C. 9406(d), (e).) Moreover, it is subject to law other than Division 9 that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. (U.C.C. 9406(d), (h).) It is also subject to U.C.C. 9407 (infra, §165) and U.C.C. 10303 (13 *Summary* (10th), *Personal Property*, §208). (U.C.C. 9406(d).)

(2) *Legal Restrictions.* U.C.C. 9406(f) codifies the principle of free assignability for accounts and chattel paper. (Uniform Commercial Code Comment 6.) In particular, a rule of law, statute, or regulation, that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that it prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account or chattel paper. (U.C.C. 9406(f)(1).) It is ineffective to the extent that it provides that the assignment, transfer, creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper. (U.C.C. 9406(f)(2).)

Like U.C.C. 9406(d), U.C.C. 9406(f) is subject to law other than Division 9 that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household

purposes. (U.C.C. 9406(f), (h).) It is also subject to U.C.C. 9407 (infra, §165) and U.C.C. 10303 (13 *Summary* (10th), *Personal Property*, §208). (U.C.C. 9406(f).) Moreover, U.C.C. 9406(f) does not apply to an assignment of a health care insurance receivable. (U.C.C. 9406(f), 9406(i); on contractual and legal restrictions on assignment of health care insurance receivable, see U.C.C. 9408, infra, §166.) Finally, U.C.C. 9406(f) does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a claim or right to receive compensation for injuries or sickness as described in 26 *U.S.C.*, §104(a)(1) or (a)(2) or a claim or right to receive benefits under a special needs trust as described in 42 *U.S.C.*, §1396p(d)(4), to the extent that U.C.C. 9406(f) is inconsistent with those laws. (U.C.C. 9406(j).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Legal Restrictions.* (New) *California State Lottery Act's restrictions on assignment prevail over U.C.C. 9406(f):* *Govt.C. 8880.325*, which prohibits the assignment of a lottery prize except under specified circumstances, prevails over the conflicting provisions of U.C.C. 9406(f), which codifies the principle of free assignability for accounts (defined as including lottery winnings) and chattel paper. There is a strong presumption against interpreting two conflicting statutes in a manner that impliedly repeals one of them. Thus, the rule that the later enacted statute prevails will not be applied. Instead, the statutes can be harmonized by interpreting *Govt.C. 8880.325* as providing a specific exception to the broad, general provisions of U.C.C. 9406(f). (*Stone Street Capital, LLC v. California State Lottery Com. (2008) 165 C.A.4th 109, 118, 124, 125, 80 C.R.3d 326*; on interpreting conflicting statutes generally, see 7 *Summary* (10th), *Constitutional Law*, §117.)



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2. Leasehold Interest or Lessor's Residual Interest.

4 Witkin Sum. Cal. Law STPP § 165

[§ 165] Leasehold Interest or Lessor's Residual Interest.

(1) *General Rule.* A term in a lease agreement that prohibits, restricts, or requires the consent of a party to the lease to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, an interest of a party under the lease contract or in the lessor's residual interest in the goods is generally ineffective. (U.C.C. 9407(a)(1).) The same is true of a lease term that provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease. (U.C.C. 9407(a)(2).)

(2) *Exceptions for Certain Transfers and Delegations.* Except as otherwise provided in U.C.C. 10303(g) (13 *Summary* (10th), *Personal Property*, §208), a term described in U.C.C. 9407(a)(2) is effective to the extent that the lessee transfers the lessee's right of possession or use of the goods in violation of the term (U.C.C. 9407(b)(1)) or that either party delegates material performance of the lease contract in violation of the term (U.C.C. 9407(b)(2)). (See Uniform Commercial Code Comment 3.) However, the creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee under U.C.C. 10303(d), unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor. (U.C.C. 9407(c); on U.C.C. 10303(d), see 13 *Summary* (10th), *Personal Property*, §208.)

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3. Promissory Notes, Health Care Insurance Receivables, and Certain General Intangibles.

4 Witkin Sum. Cal. Law STPP § 166

[§ 166] Promissory Notes, Health Care Insurance Receivables, and Certain General Intangibles.

(1) *Contractual Restrictions Ineffective.* U.C.C. 9408(a) renders ineffective certain terms in a promissory note or in an agreement, including a contract, permit, license, or franchise, between an account debtor and a debtor that relates to a health care insurance receivable or a general intangible. The ineffective terms are those that prohibit, restrict, or require the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or the creation, attachment, or perfection of a security interest in, the promissory note, health care insurance receivable, or general intangible. Such terms are ineffective to the extent that they would impair the creation, attachment, or perfection of a security interest (U.C.C. 9408(a)(1)) or provide that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible (U.C.C. 9408(a)(2)).

(2) *Legal Restrictions Ineffective.* U.C.C. 9408(c) makes ineffective an attempt to restrict the assignment of a general intangible, health care insurance receivable, or promissory note when the restriction appears in a rule of law, including a statute or governmental rule or regulation. In particular, a rule of law, statute, or regulation, that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or the creation of a security interest in, a promissory note, health care insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective. It is ineffective to the extent that it would impair the creation, attachment, or perfection of a security interest (U.C.C. 9408(c)(1)) or that it provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible (U.C.C. 9408(c)(2)).

U.C.C. 9408(c) does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a claim or right to receive compensation for injuries or sickness as described in 26 U.S.C., §104(a)(1) or (a)(2) or a claim or right to receive benefits under a special needs trust as described in 42 U.S.C., §1396p(d)(4), to the extent that U.C.C. 9408(c) is inconsistent with those laws. (U.C.C. 9408(e).)

(3) *Purpose of Statutory Rule.* The result in U.C.C. 9408(a) and 9408(c) "allows the creation, attachment, and perfection of a security interest in a general intangible, such as an agreement for the nonexclusive license of software, as well as sales of certain receivables, such as a health-care-insurance receivable (which is an 'account'), payment intangible, or promissory note, without giving rise to a default or breach by the assignor or from triggering a remedy of the account debtor or person obligated on a promissory note. This enhances the ability of certain debtors to obtain credit." (Uniform Commercial Code Comment 2.)

(4) *Scope of Statutory Rule.* U.C.C. 9408(a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note. (U.C.C. 9408(b).) U.C.C. 9408(c) deals with all security interests in payment intangibles or promissory notes, whether or not arising out of a sale. (Uniform Commercial Code Comment 4.)

U.C.C. 9408(a) does not render ineffective any term, and U.C.C. 9408(c) does not render ineffective any law, statute or regulation, that restricts outright sales of general intangibles other than payment intangibles. They deal only with restrictions on security interests. The only sales of general intangibles that create security interests are sales of payment intangibles. (Uniform Commercial Code Comment 4.)

(5) *Protection for Account Debtor or Obligated Person.* U.C.C. 9408(d) protects the other party--the account debtor on a general intangible or the person obligated on a promissory note--from adverse effects arising from the security interest. It leaves the account debtor's or obligated person's rights and obligations unaffected in all material respects if a restriction rendered ineffective by U.C.C. 9408(a) or 9408(c) would be effective under law other than Division 9. (Uniform Commercial Code Comment 2.)

To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor that relates to a health care insurance receivable or general intangible or a rule of law, statute, or regulation described in U.C.C. 9408(c) would be effective under law other than Division 9 but is ineffective under U.C.C. 9408(a) or 9408(c), the creation, attachment, or perfection of a security interest in the promissory note, health care insurance receivable, or general intangible is subject to all of the following rules:

(a) It is not enforceable against the person obligated on the promissory note or the account debtor. (U.C.C. 9408(d)(1).)

(b) It does not impose a duty or obligation on the person obligated on the promissory note or the account debtor. (U.C.C. 9408(d)(2).)

(c) It does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party. (U.C.C. 9408(d)(3).)

(d) It does not entitle the secured party to use or assign the debtor's rights under the promissory note, health care insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health care insurance receivable, or general intangible. (U.C.C. 9408(d)(4).)

(e) It does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor. (U.C.C. 9408(d)(5).)

(f) It does not entitle the secured party to enforce the security interest in the promissory note, health care insurance receivable, or general intangible. (U.C.C. 9408(d)(6).)

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4 Witkin Sum. Cal. Law STPP § 167

[§ 167] Letter-of-Credit Rights.

(1) *Contractual and Legal Restrictions Ineffective.* A term in a letter of credit, or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit, that prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary's assignment of or creation of a security interest in a letter-of-credit right is ineffective to the extent that it would impair the creation, attachment, or perfection of a security interest in the letter-of-credit right (U.C.C. 9409(a)(1)) or provides that the assignment, creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter-of-credit right (U.C.C. 9409(a)(2)).

(2) *Purpose of Statutory Rule.* Under U.C.C. 9102, letter-of-credit rights are a type of supporting obligation. Under U.C.C. 9203 (supra, §50 et seq.) and 9308 (supra, §65), a security interest in a supporting obligation attaches and is perfected automatically if the security interest in the supported obligation attaches and is perfected. The automatic attachment and perfection under Division 9 would be anomalous or misleading if, under other law (such as Division 5), a restriction on transfer or assignment were effective to block attachment and perfection. (Uniform Commercial Code Comment 2 to U.C.C. 9409.)

(3) *Protection for Issuer or Other Parties.* To the extent that a term in a letter of credit is ineffective under U.C.C. 9409(a), but would be effective under law other than Division 9 or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, all of the following rules apply with respect to the creation, attachment, or perfection of a security interest in the letter-of-credit right:

(a) It is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary. (U.C.C. 9409(b)(1).)

(b) It imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary. (U.C.C. 9409(b)(2).)

(c) It does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party. (U.C.C. 9409(b)(3).)

Thus, although restrictions on an assignment of a letter of credit are ineffective to prevent creation, attachment, and perfection of a security interest, U.C.C. 9409(b) protects the issuer and other parties from any adverse effects of the security interest by preserving letter-of-credit law and practice that limits the right of a beneficiary to transfer its right to draw or otherwise demand performance (U.C.C. 5112) and limits the obligation of an issuer or nominated person to recognize a beneficiary's assignment of letter-of-credit proceeds (U.C.C. 5114). The treatment of letter-of-credit rights in U.C.C. 9409, therefore, differs from Division 9's treatment of instruments and investment property. (Uniform Commercial Code Comment 3.)

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4. Rights and Duties of Banks.

a. Right of Recoupment or Setoff.

4 Witkin Sum. Cal. Law STPP § 168

[§ 168] Right of Recoupment or Setoff.

(1) *General Rule Allowing Recoupment or Setoff.* A bank with which a deposit account is maintained may exercise any right of recoupment or setoff against a secured party that holds a security interest in the deposit account. (U.C.C. 9340(a).) U.C.C. 9340 deals with rights of setoff and recoupment that a bank may have under other law. "It does not create a right of set-off or recoupment, nor is it intended to override any limitations or restrictions that other law imposes on the exercise of those rights." (Uniform Commercial Code Comment 2.)

(2) *Preservation of Setoff Right.* The application of Division 9 to a security interest in a deposit account does not affect a right of recoupment or setoff of the secured party as to a deposit account maintained with the secured party. (U.C.C. 9340(b).) This provision makes clear that a bank may hold both a right of setoff against, and a Division 9 security interest in, the same deposit account. By holding a security interest in a deposit account, a bank does not impair any right of setoff it would otherwise enjoy. U.C.C. 9340(b) does not pertain to accounts evidenced by an instrument, such as certain certificates of deposit, which are excluded from the definition of "deposit accounts." (Uniform Commercial Code Comment 3.)

(3) *Exception: Secured Party With Control.* A bank's exercise of a setoff against a deposit account is ineffective against a secured party that holds a security interest in the deposit account that is perfected by control under U.C.C. 9104(a)(3) (supra, §54), if the setoff is based on a claim against the debtor. (U.C.C. 9340(c).) In other words, if the secured party has become the bank's customer, then any setoff exercised by the bank against a debt owed by the debtor, as opposed to a debt owed to the bank by the secured party, is ineffective. The bank may, however, exercise its recoupment rights effectively. This result is consistent with the priority rule in U.C.C. 9327(4) (supra, §127), under which the security interest of a bank in a deposit account is subordinate to that of a secured party who has control under U.C.C. 9104(a)(3). (Uniform Commercial Code Comment 2.)

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b. Rights and Duties With Respect to Deposit Accounts.

4 Witkin Sum. Cal. Law STPP § 169

[§ 169] Rights and Duties With Respect to Deposit Accounts.

(1) *General Rule.* Unless the bank otherwise agrees in an authenticated record, a bank's rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by any of the following:

- (a) The creation, attachment, or perfection of a security interest in the deposit account. (U.C.C. 9341(1).)
- (b) The bank's knowledge of the security interest. (U.C.C. 9341(2).)
- (c) The bank's receipt of instructions from the secured party. (U.C.C. 9341(3).)

(2) *Purpose of Statutory Rule.* U.C.C. 9341 is designed to prevent security interests in deposit accounts from impeding the free flow of funds through the payment system. It leaves the bank's rights and duties with respect to the deposit account and the funds on deposit unaffected by the creation or perfection of a security interest or by the bank's knowledge of the security interest. In addition, it permits the bank to ignore the instructions of the secured party unless the bank had agreed to honor them or unless other law provides to the contrary. A secured party who wishes to deprive the debtor of access to funds on deposit or to appropriate those funds for itself needs to obtain the agreement of the bank, utilize the judicial process, or comply with procedures set forth in other law. (Uniform Commercial Code Comment 2.)

(3) *Exception: No Exercise of Right of Setoff With Regard to Claim Against Debtor.* By its own terms, U.C.C. 9341 is subject to U.C.C. 9340(c) (*supra*, §168), under which a bank's right of setoff may not be exercised against a deposit account in the secured party's name if the right is based on a claim against the debtor. "This result reflects current law in many jurisdictions and does not appear to have unduly disrupted banking practices or the payments system. The more important function of this section, which is not impaired by [U.C.C. 9340], is the bank's right to follow the debtor's (customer's) instructions (e.g., by honoring checks, permitting withdrawals, etc.) until such time as the depository institution is served with judicial process or receives instructions with respect to the funds on deposit from a secured party who has control over the deposit account." (Uniform Commercial Code Comment 3.)

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c. Right To Refuse To Enter into or Disclose Existence of Control Agreement.

4 Witkin Sum. Cal. Law STPP § 170

[§ 170] Right To Refuse To Enter into or Disclose Existence of Control Agreement.

Division 9 does not require a bank to enter into an agreement of the kind described in U.C.C. 9104(a)(2) (*supra*, §54), even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer. (U.C.C. 9342.)

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 A. General Provisions.
 1. Rights After Default.

4 Witkin Sum. Cal. Law STPP § 171

[§ 171] Rights After Default.

(1) *Secured Party's Right to Judicial Enforcement.* After default, a secured party has the rights provided in U.C.C. 9601 et seq. and, except as otherwise provided in U.C.C. 9602, those rights provided by agreement of the parties. (U.C.C. 9601(a).) A secured party may do both of the following:

(a) Reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure. (U.C.C. 9601(a)(1).)

(b) If the collateral is documents, proceed either as to the documents or as to the goods they cover. (U.C.C. 9601(a)(2).) (See *Resolution Trust Corp. v. Winslow (1992) 9 C.A.4th 1799, 1813, 12 C.R.2d 510* [agreement assigning stock as security for loan created security interest enforceable under Division 9; thus, ordering conveyance of stock to secured party following default was improper specific performance decree]; C.E.B., *Secured Transactions* 2d, §5.8 et seq.; Cal. Civil Practice, 4 Business Litigation, §46:101 et seq.; Cal. Transactions Forms, 5 Business Transactions §30:122 et seq.)

(2) *Relation Back of Lien.* If a secured party has reduced its claim to judgment, the lien of any levy that may be made on the collateral by virtue of an execution based on the judgment relates back to the earliest of any of the following:

- (a) The date of perfection of the security interest or agricultural lien in the collateral. (U.C.C. 9601(e)(1).)
- (b) The date of filing a financing statement covering the collateral. (U.C.C. 9601(e)(2).)
- (c) Any date specified in a statute under which the agricultural lien was created. (U.C.C. 9601(e)(3).)

U.C.C. 9601(e) generally follows former U.C.C. 9501(5). "It makes clear that any judicial lien that the secured party may acquire against the collateral effectively is a continuation of the original security interest (if perfected) and not the acquisition of a new interest or a transfer of property on account of a preexisting obligation. Under former Section 9-501(5), the judicial lien was stated to relate back to the date of perfection of the security interest. Subsection (e), however, provides that the lien relates back to the earlier of the date of filing or the date of perfection. This provides a secured party who enforces a security interest by judicial process with the benefit of the 'first-to-file-or-perfect'

priority rule" of U.C.C. 9322(a)(1) (supra, §114 et seq.). (Uniform Commercial Code Comment 6.)

(3) *Rights of Secured Party in Possession of Collateral.* A secured party in possession of collateral or control of collateral under U.C.C. 9104, 9105, 9106, or 9107 has the rights and duties provided in U.C.C. 9207 (supra, §§153, 154). (U.C.C. 9601(b).)

(4) *Rights of Certain Sellers, Buyers, or Lessees of Goods.* A security interest arising under U.C.C. 2401 or 2505 (reservation of security interest by seller of goods; see 4 *Summary* (10th), *Sales*, §131), under U.C.C. 2711(3) (buyer's security interest in rightfully rejected goods; see 3 *Summary* (10th), *Sales*, §163), or under U.C.C. 10508(e) (lessee's security interest in rightfully rejected goods; see U.C.C. 10508(e), 13 *Summary* (10th), *Personal Property*, §214) is subject to Division 9. However, until the debtor obtains possession of the goods, the rights of the secured party after default by the debtor are governed by Division 2 (U.C.C. 2101 et seq.) or Division 10 (U.C.C. 10101 et seq.). (U.C.C. 9110(3).)

(5) *Cumulative Remedies.* The rights under U.C.C. 9601(a) and 9601(b) are cumulative and may be exercised simultaneously. (U.C.C. 9601(c); see *Brunzell Const. Co. of Nevada v. Smith* (1988) 200 C.A.3d 617, 623, 246 C.R. 182 [creditor may pursue alternative remedies until obligation is satisfied].) Permitting the simultaneous exercise of remedies under U.C.C. 9601(c) "does not override any non-UCC law, including the law of tort and statutes regulating collection of debts, under which the simultaneous exercise of remedies in a particular case constitutes abusive behavior or harassment giving rise to liability." (Uniform Commercial Code Comment 5.)

(6) *Execution Sales.* A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of U.C.C. 9601. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of Division 9. (U.C.C. 9601(f).) Thus, the limitations under U.C.C. 9610 (infra, §179) on the right of a secured party to purchase collateral do not apply. (Uniform Commercial Code Comment 8.)

(7) *Consignments and Sales of Receivables.* Except as otherwise provided in U.C.C. 9607(c) (infra, §176), U.C.C. 9601 et seq. imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes. (U.C.C. 9601(g).) "Although denominated 'secured parties,' these buyers own the entire interest in the property sold and so may enforce their rights without regard to the seller ('debtor') or the seller's creditors. Likewise, a true consignor may enforce its ownership interest under other law without regard to the duties that [U.C.C. 9601 et seq.] imposes on secured parties. Note, however, that [U.C.C. 9615 (infra, §185)] governs cases in which a consignee's secured party (other than a consignor) is enforcing a security interest that is senior to the security interest (i.e., ownership interest) of a true consignor." (Uniform Commercial Code Comment 9.)

(8) *Rights Regarding Accessions.* After default, subject to U.C.C. 9601 et seq., a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole. (U.C.C. 9335(e).) A secured party that removes an accession from other goods under U.C.C. 9335(e) must promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse. (U.C.C. 9335(f).)

(9) *Debtor's Rights After Default.* Except as otherwise provided in U.C.C. 9601(g) and in U.C.C. 9605 (infra, §174), after default, a debtor and an obligor have the rights provided in U.C.C. 9601 et seq. and by agreement of the parties. (U.C.C. 9601(d).)

(10) *When Remedies Arise.* The parties' rights under U.C.C. 9601(a) arise "after default." As did former U.C.C. 9501, Division 9 leaves to the agreement of the parties the circumstances giving rise to a default. Division 9 does not

determine whether a secured party's postdefault conduct can constitute a waiver of default in the face of an agreement stating that such conduct will not constitute a waiver. Rather, it continues to leave to the parties' agreement, as supplemented by law other than Division 9, the determination whether a default has occurred or has been waived. (Uniform Commercial Code Comment 3.)

For purposes of U.C.C. 9601 et seq., a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created. (U.C.C. 9606.)

West's Key Number Digest, Secured Transactions k.221 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Rights of Secured Party in Possession of Collateral*. U.C.C. 9601(b) was amended in 2006 to add U.C.C. 7106 to the list of relevant statutes.



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CHAPTER VII - Secured Transactions in Personal Property

Witkin Summary of California Law
 IX. DEFAULT AND ENFORCEMENT
 A. General Provisions.
 2. Waiver and Variance of Rights and Duties.

4 Witkin Sum. Cal. Law STPP § 172

[§ 172] Waiver and Variance of Rights and Duties.

(1) *No Waiver Permitted.* Except as otherwise provided in U.C.C. 9624 (infra, §§180, 193, 196), to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following sections:

(a) U.C.C. 9207(b)(4)(C) (supra, §153), which deals with use and operation of the collateral by the secured party. (U.C.C. 9602(1).)

(b) U.C.C. 9210 (supra, §156), which deals with requests for an accounting and requests concerning a list of collateral and statement of account. (U.C.C. 9602(2).)

(c) U.C.C. 9607(c) (infra, §176), which deals with collection and enforcement of collateral. (U.C.C. 9602(3).)

(d) U.C.C. 9608(a) (infra, §177) and U.C.C. 9615(c) (infra, §185) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition. (U.C.C. 9602(4).)

(e) U.C.C. 9608(a) (infra, §177) and U.C.C. 9615(d) (infra, §186) to the extent that they require accounting for or payment of surplus proceeds of collateral. (U.C.C. 9602(5).)

(f) U.C.C. 9609 (infra, §178) to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace. (U.C.C. 9602(6).)

(g) U.C.C. 9610(b) (infra, §179), U.C.C. 9611 (infra, §180), U.C.C. 9613 (infra, §182), and U.C.C. 9614 (infra, §183), which deal with disposition of collateral. (U.C.C. 9602(7); see *Barber v. LeRoy* (1974) 40 C.A.3d 336, 344, 115 C.R. 272 [provision in security agreement waiving public sale violated former U.C.C. 9501(3) (now U.C.C. 9602)]; *Brunzell Const. Co. of Nevada v. Smith* (1988) 200 C.A.3d 617, 622, 246 C.R. 182 [debtor's waiver of rights with regard to disposition of collateral by secured party *after default*].)

(h) U.C.C. 9615(f) (infra, §186), which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor. (U.C.C. 9602(8).)

(i) U.C.C. 9616 (infra, §187), which deals with explanation of the calculation of a surplus or deficiency. (U.C.C. 9602(9).)

(j) U.C.C. 9620 (infra, §192), U.C.C. 9621 (infra, §194), and U.C.C. 9622 (infra, §195), which deal with acceptance of collateral in satisfaction of obligation. (U.C.C. 9602(10).)

(k) U.C.C. 9623 (infra, §196), which deals with redemption of collateral. (U.C.C. 9602(11).)

(l) U.C.C. 9624 (infra, §§180, 193, 196), which deals with permissible waivers. (U.C.C. 9602(12).)

(m) U.C.C. 9625 (infra, §197) and U.C.C. 9626 (infra, §198), which deal with the existence of a deficiency and with the secured party's liability for failure to comply with Division 9. (U.C.C. 9602(13).)

Moreover, no renunciation or modification by the debtor of any of his or her rights under U.C.C. 9601 et seq. as to consumer goods is valid or enforceable, unless the renunciation or modification is in consideration of a waiver by the secured party of any right to a deficiency on the debt. (U.C.C. 9629.) (See C.E.B., Secured Transactions 2d, §5.66.)

(2) *Waiver by Obligor.* The restrictions on waiver contained in U.C.C. 9602 apply to obligors as well as debtors. This resolves a question under former Division 9 as to whether secondary obligors, assuming that they were debtors for purposes of former U.C.C. 9501 et seq., were permitted to waive, under the law of suretyship, rights and duties under former U.C.C. 9501 et seq. (Uniform Commercial Code Comment 4 to U.C.C. 9602; on secondary obligor's waiver of right to notification before disposition of collateral, see infra, §181.)

(3) *Agreement on Standards Concerning Rights and Duties.* The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in U.C.C. 9602 if the standards are not manifestly unreasonable. (U.C.C. 9603(a).) However, U.C.C. 9603(a) does not apply to the duty under U.C.C. 9609 to refrain from breaching the peace. (U.C.C. 9603(b).)

In considering whether a standard is "manifestly reasonable," the court may consider the sophistication and relative bargaining power of the parties. However, the parties' agreement may not eliminate or reduce the obligation of the party disposing of the collateral to act in a commercially reasonable manner. A nonwaivable item under U.C.C. 9602 cannot be waived through a definition of standard under U.C.C. 9603. (Assembly Committee Comment 3.)

SUPPLEMENT: [This section is current through the latest supplement]



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 IX. DEFAULT AND ENFORCEMENT

A. General Provisions.

3. Where Security Agreement Covers Real Property or Fixtures.

4 Witkin Sum. Cal. Law STPP § 173

[§ 173] Where Security Agreement Covers Real Property or Fixtures.

(1) *Secured Party's Options.* If an obligation secured by a security interest in personal property or fixtures is also secured by an interest or an estate in real property, U.C.C. 9604(a), which, according to Assembly Committee Comment 2, is substantively identical to former U.C.C. 9501(4), permits the secured party to do any of the following:

(a) Proceed, in any sequence, in accordance with the secured party's rights and remedies in respect of real property as to the real property security, and in accordance with U.C.C. 9601 et seq. as to the personal property or fixtures. (U.C.C. 9604(a)(1)(A).)

(b) Proceed in any sequence, as to both, some, or all of the real property and some or all of the personal property or fixtures in accordance with the secured party's rights and remedies in respect of the real property, by including the portion of the personal property or fixtures selected by the secured party in the judicial or nonjudicial foreclosure of the real property in accordance with the procedures applicable to real property. (U.C.C. 9604(a)(1)(B).) The secured party is not deemed to have elected irrevocably to proceed as to both real property and personal property or fixtures as provided in U.C.C. 9604(a)(1)(B) with respect to any particular property, unless and until that particular property actually has been disposed of pursuant to a unified sale (judicial or nonjudicial) conducted in accordance with the procedures applicable to real property, and then only as to the property so sold. (U.C.C. 9604(a)(1)(B).)

(c) Proceed, in any sequence, as to part of the personal property or fixtures as provided in 9604(a)(1)(A), and as to other of the personal property or fixtures as provided in 9604(a)(1)(B). (U.C.C. 9604(a)(1)(C).)

In *Aspen Enterprises v. Bodge* (1995) 37 C.A.4th 1811, 44 C.R.2d 763, plaintiff, a tire wholesaler, sold a retail tire outlet to defendant, and took a promissory note from defendant as part of the sale. The note was secured by the tire store's tire inventory and by unrelated real property. After defendant defaulted on the note, plaintiff filed an action for breach of the note, and obtained an ex parte writ of possession. Plaintiff's complaint was subsequently amended to include a cause of action for judicial foreclosure against the real property. Acting under the writ of possession, plaintiff seized the tire inventory, which was eventually commingled with plaintiff's inventory. Defendant contended that the action for judicial foreclosure against the real property was an action for a deficiency judgment, which was barred either by plaintiff's failure to conduct a sale or failure to give notice of sale of the repossessed tires, as required by former U.C.C. 9504 (now U.C.C. 9611, infra, §180). Acting on defendant's motion for nonsuit, which was based on plaintiff's

opening statement, the trial judge entered judgment for defendant. *Held*, reversed.

(a) *U.C.C. applicable.*

(1) In a proceeding involving mixed collateral, i.e., collateral that consists of both real and personal property, plaintiff contended that it chose the second option permitted by former U.C.C. 9501 (now U.C.C. 9604(a)(1)(B)), i.e., of proceeding in any sequence against some or all of the real and personal property in accordance with procedures applicable to real property. Therefore, its proceedings were governed by real property law, instead of by the Uniform Commercial Code. This contention is without merit. The legislative history of this statute suggests that the second option applies only when the collateral is closely related to the real property, such as a hotel, which consists of elements of real and personal property that fit together. Obviously, plaintiff's mixed inventory, consisting of tires and residential real property not related to the tire business, was not the type of closely related inventory contemplated by former U.C.C. 9501. (37 C.A.4th 1818.)

(2) Moreover, because a sale of repossessed collateral must be conducted in a commercially reasonable manner (former U.C.C. 9504(3), now U.C.C. 9610, *infra*, §179), the uniform sale option could not be used. As a matter of common sense, buyers of real property would be uninterested in the tires, and vice versa. Hence, selling them together was not commercially reasonable. (37 C.A.4th 1819.)

(3) The fact that an actual *sale* is contemplated by former U.C.C. 9501 (now U.C.C. 9604(a)(1)(B)), instead of a mere unified *complaint*, encompassing both real and personal property, is seen from the statutory language, which specifically talks in terms of an actual sale. Here, however, plaintiff cannot be deemed to have elected the unified sale option, because it would not be commercially reasonable to do so. Hence, the Uniform Commercial Code, and not the real property law applicable to unified sales, is the proper law in this case. (37 C.A.4th 1819.)

(b) *Notice of sale, and sale itself, were sufficient.*

(1) In accordance with former U.C.C. 9207(2)(d) (now U.C.C. 9207(b)(3), *supra*, §153), the repossessed tires were inventoried and, as fungible items, were commingled with plaintiff's general inventory, which presumably resulted in the tires' being sold in the ordinary course of business. This constituted a "sale" of the collateral for which a notice must be given. Here, defendant was credited with the market value of the sale of the tires and was given notice of the credit. Such notice was sufficient, because it allowed the creditor to be present and to demand a separate sale of the tires if he thought there was collusion involved. This could be done because the tires, although commingled, were inventoried. As such, this procedure was a commercially reasonable and practical way of disposing of the collateral. The debtor received credit for the market value, while the secured party avoided the expense of conducting a separate sale of the collateral. (37 C.A.4th 1822.)

(2) The trial judge gave inconsistent reasons for granting nonsuit. On the one hand, he said that the notice of sale, which implies that there was an actual sale, was insufficient. On the other hand, he claimed that there was no sale. Implicit in this statement is a finding of an implied election by plaintiff to retain the collateral in satisfaction of the debt. The judgment cannot be based on such contradictory findings. (37 C.A.4th 1821.)

(c) *There is a recognized market for the new tires.*

(1) Former U.C.C. 9504(3) (now U.C.C. 9611(d), *infra*, §180) provides that no notice of sale need be given if the collateral is of a type customarily sold on a recognized market. Assuming that plaintiff disposed of the tires without giving defendant notice, the trial judge erred in granting nonsuit against plaintiff on that ground, because the facts asserted by plaintiff support a finding there was a "recognized market" for new tires. (37 C.A.4th 1823.)

(2) A recognized market is one where the items sold are interchangeable, there is no haggling involved, and the prices of currently competitive items are available by quotation. It is quite clear that stocks and bonds meet this test (citing *Canadian Commercial Bank v. Ascher Findley Co.* (1991) 229 C.A.3d 1139, 280 C.R. 521), while used cars do

not. Out-of-state cases are split on whether cattle meet the test. The question whether new tires comply with this standard is one of fact. In its opening statement, plaintiff created an issue as to whether tires are interchangeable, are sold without haggling, and are regulated by price lists which are regularly published. This issue should not have been decided by nonsuit. (37 C.A.4th 1825.)

(d) *Retention of collateral.* Assuming that plaintiff retained the collateral, there is no indication that it elected to retain the collateral in satisfaction of the debt. Under federal case law, there are three points of view on whether a secured party has elected to retain the collateral in satisfaction of the debt. Under the first viewpoint, an election will not be implied; it must be made by written notice to the debtor. Under the other two points of view, an election will be implied from either the duration of the retention or from an intent to accept the collateral in satisfaction of the debt, respectively. California has not decided which viewpoint to accept, but under any of the three, it would be error to conclude that plaintiff, based on its opening statement, elected to retain tires worth about \$ 7,000 in full satisfaction of a debt in an amount exceeding \$ 103,000. First, there was no evidence that plaintiff gave notice of such an election to defendant. Second, whether plaintiff's delay in conducting the sale was commercially unreasonable was a question of fact. Third, there was nothing in plaintiff's opening statement from which it could be inferred that plaintiff elected to take the tires as satisfaction of the debt. In fact, plaintiff's statement said exactly the opposite. (37 C.A.4th 1827.)

(2) *Proceeds From Disposition of Collateral.* If the secured party realizes proceeds from the disposition of collateral that is personal property or fixtures:

(a) The disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing does not operate to cure a nonmonetary default. (U.C.C. 9604(a)(4)(A).)

(b) The disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing does not operate to cure a monetary default (although application of the proceeds satisfies the secured obligation to the extent of those proceeds) so as to affect the secured party's rights and remedies under U.C.C. 9601 et seq. with respect to any remaining personal property or fixtures collateral. (U.C.C. 9604(a)(4)(B).)

(c) The secured party must apply all proceeds realized from the disposition of collateral to the secured obligation in accordance with the parties' agreement and applicable law. (U.C.C. 9604(a)(4)(C).) (For further discussion of mixed collateral situations, see 75 Cal. L. Rev. 185 [analyzing former U.C.C. 9501(4)]; 36 U.C.L.A. L. Rev. 1 [same]; 22 U.S.F. L. Rev. 425 [same]; 4 Summary (10th), *Security Transactions in Real Property*, §136.)

SUPPLEMENT: [This section is current through the latest supplement]



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IX. DEFAULT AND ENFORCEMENT

A. General Provisions.

4. Unknown Debtor or Secondary Obligor.

4 Witkin Sum. Cal. Law STPP § 174

[§ 174] Unknown Debtor or Secondary Obligor.

A secured party does not owe a duty based on its status as secured party to a person that is a debtor or obligor, unless the secured party knows that the person is a debtor or obligor (U.C.C. 9605(1)(A)), the identity of the person (U.C.C. 9605(1)(B)), and how to communicate with the person (U.C.C. 9605(1)(C)). A secured party does not owe a duty based on its status as secured party to a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows that the person is a debtor (U.C.C. 9605(2)(A)) and the identity of the person (U.C.C. 9605(2)(B)).

Assembly Committee Comment 2 explains that "a secured party may be unaware that the original debtor has sold the collateral subject to the security interest and that the new owner has become the debtor. If so, the secured party owes no duty to the new owner (debtor) or to a secured party who has filed a financing statement against the new owner. This section should be read in conjunction with the exculpatory provisions in [U.C.C. 9628 (infra, §202)]. This section does not permit a secured party to ignore information, for example, a changed address of the debtor, and then assert that it had no duty because it did not know how to communicate with that debtor."

SUPPLEMENT: [This section is current through the latest supplement]



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 IX. DEFAULT AND ENFORCEMENT
 B. Primary Methods of Enforcement.
 1. Collection and Enforcement.
 a. Collection From Persons Obligated on Collateral.

4 Witkin Sum. Cal. Law STPP § 175

[§ 175] Collection From Persons Obligated on Collateral.

(1) *Collection Options.* After default, or before if the debtor agrees, a secured party may do all of the following:

(a) Notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party. (U.C.C. 9607(a)(1).)

(b) Take any proceeds to which the secured party is entitled under U.C.C. 9315. (U.C.C. 9607(a)(2).)

(c) Enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral. (U.C.C. 9607(a)(3).)

(d) If it holds a security interest in a deposit account perfected by control under U.C.C. 9104(a)(1), apply the balance of the deposit account to the obligation secured by the deposit account. (U.C.C. 9607(a)(4).)

(e) If it holds a security interest in a deposit account perfected by control under U.C.C. 9104(a)(2) or (a)(3), instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party. (U.C.C. 9607(a)(5).)

(2) *Purpose of Statutory Rule.* Collateral consisting of rights to payment is not only the most liquid asset of a typical debtor's business, but also is property that may be collected without any interruption of the debtor's business. This situation is far different from that in which collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore, problems of valuation and identification, present with collateral that is tangible personal property, frequently are not as serious in the case of rights to payment and other intangible collateral. Consequently, U.C.C. 9607, like former U.C.C. 9502, recognizes that financing through assignments of intangibles lacks many of the complexities that arise after default in other types of financing. U.C.C. 9607 allows the assignee to liquidate collateral by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "nonnotification" financing). (Uniform

Commercial Code Comment 2.)

(3) *Scope of Rule.* The scope of U.C.C. 9607 is broader than that of former U.C.C. 9502. It applies not only to collections from account debtors and obligors on instruments, but also to enforcement more generally against all persons obligated on collateral. It explicitly provides for the secured party's enforcement of the debtor's rights in respect of the account debtor's (and other third parties') obligations and for the secured party's enforcement of supporting obligations with respect to those obligations. The rights of a secured party under U.C.C. 9607(a) include the right to enforce claims that the debtor may enjoy against others. For example, the claims might include a breach-of-warranty claim arising out of a defect in equipment that is collateral or a secured party's action for an injunction against infringement of a patent that is collateral. (Uniform Commercial Code Comment 3.)

U.C.C. 9607 sets forth the rights of secured parties *after default*, but it also applies to their rights even if a default has not occurred, as long as the debtor has so agreed. (U.C.C. 9607(a).) It is not unusual for debtors to agree that secured parties are entitled to collect and enforce rights against account debtors before default. (Uniform Commercial Code Comment 4.)

(4) *Rights Against Mortgagor of Real Property.* If necessary to enable a secured party to exercise, under U.C.C. 9607(a)(3), the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage. (U.C.C. 9607(b)(1).) The secured party may also record its sworn affidavit in recordable form stating that a default has occurred (U.C.C. 9607(b)(2)(A)) and that the secured party is entitled to enforce the mortgage nonjudicially (U.C.C. 9607(b)(2)(B)).

U.C.C. 9607(b) "addresses the situation in which the collateral consists of a mortgage note (or other obligation secured by a mortgage on real property). After the debtor's (mortgagee's) default, the secured party (assignee) may wish to proceed with a nonjudicial foreclosure of the mortgage securing the note but may be unable to do so because it has not become the assignee of record. The assignee/secured party may not have taken a recordable assignment at the commencement of the transaction (perhaps the mortgage note in question was one of hundreds assigned to the secured party as collateral). Having defaulted, the mortgagee may be unwilling to sign a recordable assignment. This section enables the secured party (assignee) to become the assignee of record by recording in the applicable real-property records the security agreement and an affidavit certifying default. Of course, the secured party's rights derive from those of its debtor. Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose." (Uniform Commercial Code Comment 8.)

(5) *Collections by Junior Secured Party.* A secured party who holds a security interest in a right to payment may exercise the right to collect and enforce under this section, even if the security interest is subordinate to a conflicting security interest in the same right to payment. Whether the junior secured party has priority in the collected proceeds depends on whether the junior secured party qualifies for priority as a purchaser of an instrument (e.g., the account debtor's check) under U.C.C. 9330(d) (supra, §130), as a holder in due course of an instrument under U.C.C. 3305 and 9331(a) (supra, §143), or as a transferee of money under U.C.C. 9332(a) (supra, §127). (Uniform Commercial Code Comment 5.)

(6) *Relationship to Rights and Duties of Persons Obligated on Collateral.* The secured party's rights, as between it and the debtor, to collect from and enforce collateral against account debtors and others obligated on collateral under U.C.C. 9607(a) are subject to U.C.C. 9341, 9401 et seq., and other applicable law. (Uniform Commercial Code Comment 6.) U.C.C. 9607 does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party. (U.C.C. 9607(e).)

For example, the secured party may be unable to exercise the debtor's rights under an instrument if the debtor is in possession of the instrument, or under a nontransferable letter of credit if the debtor is the beneficiary. Unless a secured

party has control over a letter-of-credit right and is entitled to receive payment or performance from the issuer or a nominated person under Division 5, its remedies with respect to the letter-of-credit right may be limited to the recovery of any identifiable proceeds from the debtor. U.C.C. 9607 establishes only the baseline rights of the secured party vis-a'-vis the debtor; the secured party is entitled to enforce and collect after default or earlier if so agreed. (Uniform Commercial Code Comment 6.)

SUPPLEMENT: [This section is current through the latest supplement]



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 1. Collection and Enforcement.
 b. Commercial Reasonableness Required.

4 Witkin Sum. Cal. Law STPP § 176

[§ 176] Commercial Reasonableness Required.

(1) *Standard of Reasonableness.* A secured party must proceed in a commercially reasonable manner in exercising its collection and enforcement rights under U.C.C. 9607(a). (U.C.C. 9607(c); Uniform Commercial Code Comment 9; see *Western Decor & Furnishings Industries v. Bank of America* (1979) 91 C.A.3d 293, 304, 154 C.R. 287 [bank acted in commercially reasonable manner under former U.C.C. 9502(2) (now U.C.C. 9607(c)) in collecting from account debtors, even though plaintiff was indebted to bank for only \$ 60,000, bank notified accounts receivable with face value of \$ 183,000, and bank refused to notify plaintiff of success of collection efforts]; *California Wholesale Material Supply v. Norm Wilson & Sons* (2002) 96 C.A.4th 598, 606, 117 C.R.2d 390, 7 Cal. Proc. (4th), Judgment, Supp., §175B [following *Western Decor & Furnishings Industries v. Bank of America*; no distinction exists between assignee of debtor's accounts receivable and holder of security interest in those accounts receivable]; on determining whether conduct was commercially reasonable, see U.C.C. 9627, infra, §201.) Commercial reasonableness is required only if the secured party undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral (U.C.C. 9607(c)(1)) and it is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor (U.C.C. 9607(c)(2)).

Uniform Commercial Code Comment 9 explains: U.C.C. 9607(c) does not apply "if, as is characteristic of most sales of accounts, chattel paper, payment intangibles, and promissory notes, the secured party (buyer) has no right of recourse against the debtor (seller) or a secondary obligor. However, if the secured party does have a right of recourse, the commercial-reasonableness standard applies to collection and enforcement even though the assignment to the secured party was a 'true' sale. The obligation to proceed in a commercially reasonable manner arises because the collection process affects the extent of the seller's recourse liability, not because the seller retains an interest in the sold collateral (the seller does not)."

(2) *Consequences of Failure To Observe Standard.* The secured party's failure to observe the standard of commercial reasonableness could render it liable to an aggrieved person under U.C.C. 9625 (infra, §197), and the secured party's recovery of a deficiency would be subject to U.C.C. 9626 (infra, §198). (Uniform Commercial Code Comment 9.)

(3) *Attorneys' Fees and Legal Expenses.* A secured party may deduct from the collections made pursuant to U.C.C.

9607(c) reasonable expenses of collection and enforcement, including reasonable attorneys' fees and legal expenses incurred by the secured party. (U.C.C. 9607(d).) The phrase "reasonable attorneys' fees and legal expenses" includes only those fees and expenses incurred in proceeding against account debtors or other third parties. The secured party also may incur other attorneys' fees and legal expenses in proceeding against the debtor or obligor. Whether the secured party has a right to recover those fees and expenses depends on whether the debtor or obligor has agreed to pay them. (Uniform Commercial Code Comment 10.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Standard of Reasonableness.*

California Wholesale Material Supply case:

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §191.



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 c. Application of Proceeds.

4 Witkin Sum. Cal. Law STPP § 177

[§ 177] Application of Proceeds.

(1) *Cash Proceeds.* If a security interest or agricultural lien secures payment or performance of an obligation, a secured party must apply or pay over for application the cash proceeds of collection or enforcement under U.C.C. 9607 in the following order to:

(a) The reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorneys' fees and legal expenses incurred by the secured party. (U.C.C. 9608(a)(1)(A).)

(b) The satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made. (U.C.C. 9608(a)(1)(B).)

(c) The satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed. (U.C.C. 9608(a)(1)(C).)

If requested by a secured party, a holder of a subordinate security interest or other lien must furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under U.C.C. 9608(a)(1)(C). (U.C.C. 9608(a)(2).)

(2) *Noncash Proceeds.* A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under U.C.C. 9607 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds must do so in a commercially reasonable manner. (U.C.C. 9608(a)(3).)

Assembly Committee Comment 4 provides the following example: "An enforcing secured party receives a promissory note from an account debtor who is unable to pay an account when it is due. The secured party accepts the note in exchange for extending the date on which the account debtor's obligation is due. The secured party may wish to credit its debtor (the assignor) with the principal amount of the note upon receipt of the note, but probably will prefer to credit the debtor only as and when the note is paid. Under subsection (a)(3), the secured party is under no duty to apply

the note or its value to the outstanding obligation unless its failure to do so would be commercially unreasonable. If the secured party does apply the note to the outstanding obligation, however, it must do so in a commercially reasonable manner. The parties may provide for the method of application of noncash proceeds by agreement, if the method is not manifestly unreasonable." (See U.C.C. 9603, *supra*, §172.)

(3) *Surplus and Deficiency*. A secured party must account to and pay a debtor for any surplus, and except as otherwise provided in U.C.C. 9626(b) (*infra*, §200), the obligor is liable for any deficiency. (U.C.C. 9608(a)(4).) However, if the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency. *C.C.P. 701.040(b)* (8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §132), relating to the payment of proceeds, applies only if the security agreement provides that the debtor is entitled to any surplus. (U.C.C. 9608(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Surplus and Deficiency*.

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §141.



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a. Secured Party's Right To Take Possession After Default.

4 Witkin Sum. Cal. Law STPP § 178

[§ 178] Secured Party's Right To Take Possession After Default.

(1) *Statutory Authorization.* After default, a secured party may take possession of the collateral. (U.C.C. 9609(a)(1); see *Clark Equipment Co. v. Mastelotto* (1978) 87 C.A.3d 88, 94, 150 C.R. 797 [secured party rightfully held machine sent to it for repairs, where debtor was delinquent in lease payments; construing former U.C.C. 9503]; *In re Marriage of Braendle* (1996) 46 C.A.4th 1037, 1045, 54 C.R.2d 397 [although wife was entitled to *possession* of stock awarded to her in marital dissolution judgment, as against later judgment creditor, transfer of *ownership* rights to her was improper]; C.E.B., Secured Transactions 2d, §5.19 et seq.; 25 A.L.R.5th 696 [right of secured party to take possession of collateral on default]; 68A Am.Jur.2d (2003 ed.), *Secured Transactions* §546 et seq.)

Alternatively, the secured party may, without removal of the collateral, render it unusable and dispose of it on a debtor's premises under U.C.C. 9610 (infra, §179). (U.C.C. 9609(a)(2).) In the case of some collateral, such as heavy equipment, physical removal from the debtor's plant and storage of the collateral pending disposition may be impractical or unduly expensive. Thus, U.C.C. 9609 follows former U.C.C. 9503 by providing that, in lieu of removal, the secured party may render equipment unusable or may dispose of collateral on the debtor's premises. Unlike the former section, however, this section explicitly conditions these rights on the debtor's default. (Uniform Commercial Code Comment 6.)

The self-help repossession provision does not involve state action and hence is not an unconstitutional denial of due process. (*Kipp v. Cozens* (1974) 40 C.A.3d 709, 714, 115 C.R. 423 [construing former U.C.C. 9503]; see 75 A.L.R.3d 1061 [validity, under state law, of self-help repossession of goods under former Unif.Com.C. §9-503].)

(2) *Use of Judicial Process.* A secured party may proceed under U.C.C. 9609(a) pursuant to judicial process. (U.C.C. 9609(b)(1).) Alternatively, the party may proceed without judicial process, if it proceeds without breach of the peace. (U.C.C. 9609(b)(2).) Although former U.C.C. 9503 placed the same condition on a secured party's right to take possession of collateral, U.C.C. 9609(b) extends the condition to the right provided in U.C.C. 9609(a)(2) as well. Like former U.C.C. 9503, U.C.C. 9609 does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. (Uniform Commercial Code Comment 3.)

(3) *Conversion by Licensed Repossessor.* Repossession effected by an unlawful entry is a conversion (see 5

Summary (10th), *Torts*, §710), and the secured party who engages a licensed reposessor may be liable for the reposessor's acts. (*Henderson v. Security Nat. Bank* (1977) 72 C.A.3d 764, 771, 140 C.R. 388; see 18 *Santa Clara L. Rev.* 1091 [*Henderson*]; 42 *Proof of Facts* 3d 355 [liability of creditor and repossession agent for wrongful repossession]; on conduct of business by licensed repossessors, see *B. & P.C. 7507* et seq.; on regulation of licensed repossessors generally, see *B. & P.C. 7500* et seq., 4 *Summary* (10th), *Sales*, §§285, 286.)

(4) *Debtor's Agreement To Assemble Collateral*. After default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place designated by the secured party. The place must be reasonably convenient to both parties. This remedy is also available before default if the debtor has agreed to it. (U.C.C. 9609(c); Uniform Commercial Code Comment 7.)

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4 Witkin Sum. Cal. Law STPP § 179

[§ 179] Disposition of Collateral After Default.

(1) *Statutory Authorization.* After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing. (U.C.C. 9610(a); see *68A Am.Jur.2d (2003 ed.)*, *Secured Transactions* §580 et seq.)

(2) *Commercial Reasonableness Required.* Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms. (U.C.C. 9610(b); on determining whether conduct was commercially reasonable, see U.C.C. 9627, *infra*, §201.)

Although the term is not defined, as used in Division 9, a "public disposition" is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale or other disposition and that the public must have access to the disposition. (Assembly Committee Comment 7.) U.C.C. 9610 encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned. (Assembly Committee Comment 2.) (See *60 A.L.R.4th 1012* [what is "public" or "private" sale under former Article 9].)

(3) *Purchase of Collateral by Secured Party.* A secured party may purchase collateral at a public disposition. (U.C.C. 9610(c)(1).) A secured party may purchase collateral at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations. (U.C.C. 9610(c)(2).) A "recognized market" is "one in which the items sold are fungible and prices are not subject to individual negotiation. For example, the New York Stock Exchange is a recognized market. A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions." (Assembly Committee Comment 9.)

(4) *Warranties.* A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of

the kind subject to the contract. (U.C.C. 9610(d).)

A secured party may disclaim or modify warranties under U.C.C. 9610(d) in a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition. (U.C.C. 9610(e)(1).) Alternatively, the party may disclaim or modify warranties by communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties. (U.C.C. 9610(e)(2).) A record is sufficient to disclaim warranties under U.C.C. 9610(e) if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import. (U.C.C. 9610(f).)

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c. Notification Before Disposition of Collateral.

1. In General.

4 Witkin Sum. Cal. Law STPP § 180

[§ 180] In General.

(1) *Reasonable Notification Required.* A secured party that disposes of collateral under U.C.C. 9610 (supra, §179) must send to the persons specified in U.C.C. 9611(c), infra, §181, a reasonable authenticated notification of disposition. (U.C.C. 9611(b); see *Ford & Vlahos v. ITT Commercial Finance Corp.* (1994) 8 C.4th 1220, 1227, 36 C.R.2d 464, 885 P.2d 877, infra, §184 [notice is not necessarily equivalent to commercially reasonable presale advertising]; *Buran Equipment Co. v. H. & C. Inv. Co.* (1983) 142 C.A.3d 338, 343, 190 C.R. 878 [former U.C.C. 9504(3) (now U.C.C. 9611) did not require, as condition to deficiency judgment, repossession of collateral before private sale or before giving of notice of sale]; 35 Proof of Facts 2d 517 [sufficiency of notice of secured party's proposed distribution of collateral under former Unif.Com.C. §9-504(3)]; 9 A.L.R.4th 552 [loss or modification of right to notice under former Unif.Com.C. §9-504(3)]; Cal. Transactions Forms, 5 Business Transactions §30:134 et seq.)

(2) *Exceptions from Requirement.* U.C.C. 9611(b) does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market. (U.C.C. 9611(d); see *Earl of Loveless v. Gabele* (1991) 2 C.A.4th 27, 35, 2 C.R.2d 829 [formal notice not required where debtor waived right after default, and where collateral threatened to decline speedily in value]; 11 A.L.R.4th 1060 [nature of collateral that secured party may sell or otherwise dispose of without giving notice to debtor].) The exemption for collateral "of a type customarily sold on a recognized market" refers to collateral such as stocks and bonds, which are widely traded on exchanges and for which daily price quotations are available. (*Canadian Commercial Bank v. Ascher Findley Co.* (1991) 229 C.A.3d 1139, 1159, 280 C.R. 521 [fact that auction company kept computerized account of oil rig sale prices, or that auction catalogues were available, was insufficient to establish that rig was sold on recognized market]; see *Hersch v. Citizens Savings & Loan Assn.* (1983) 146 C.A.3d 1002, 1011, 194 C.R. 628 [sale of bonds through regular market channels cannot be attacked on grounds of commercial unreasonableness]; *Aspen Enterprises v. Bodge* (1995) 37 C.A.4th 1811, 1823, 1825, 44 C.R.2d 763, supra, §173 [question of fact as to whether new tires were collateral of type customarily sold on recognized market]; 4 Southwestern U. L. Rev. 330 [suggesting that provision permitting sale without notice where collateral is of type customarily sold on recognized market is unconstitutional].)

(3) *Notification Date.* The notification date, for purposes of U.C.C. 9611, is either the date on which the secured party sends to the debtor and any secondary obligor an authenticated notification of disposition or the date on which the

debtor and any secondary obligor waive the right to notification, whichever is earlier. (U.C.C. 9611(a).)

(4) *"Safe Harbor" for Notifying Competing Secured Parties.* Uniform Commercial Code Comment 4 explains the notification duty set forth in U.C.C. 9611(c)(3)(B): "Many of the problems arising from dispositions of collateral encumbered by multiple security interests can be ameliorated or solved by informing all secured parties of an intended disposition and affording them the opportunity to work with one another. To this end, subsection (c)(3)(B) expands the duties of the foreclosing secured party to include the duty to notify (and the corresponding burden of searching the files to discover) certain competing secured parties."

U.C.C. 9611(e) provides a "safe harbor" that takes into account the delays that may be attendant to receiving information from the public filing offices. (Uniform Commercial Code Comment 4.) A secured party complies with the requirement for notification prescribed in U.C.C. 9611(c)(3)(B) if it satisfies both of the following conditions:

(a) Not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in U.C.C. 9611(c)(3)(B). (U.C.C. 9611(e)(1).)

(b) Before the notification date, the secured party either did not receive a response to the request for information (U.C.C. 9611(e)(2)(A)) or received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral (U.C.C. 9611(e)(2)(B)).

Thus, if U.C.C. 9611(e) applies, a secured party who is entitled to notification under U.C.C. 9611(c)(3)(B) has no remedy against a foreclosing secured party who does not send the notification. The foreclosing secured party has complied with the notification requirement. U.C.C. 9611(e) has no effect on the requirements of the other paragraphs of U.C.C. 9611(c). (Uniform Commercial Code Comment 4.)

(5) *Timeliness of Notification.* Whether a notification is sent within a reasonable time is a question of fact. (U.C.C. 9612(a).) However, in a transaction other than a consumer transaction, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition. (U.C.C. 9612(b).)

The 10-day notice period in U.C.C. 9612(b) is intended to be a "safe harbor" and not a minimum requirement. The requirements that the notification must be sent after default and in a commercially reasonable manner "prevent a secured party from taking advantage of the 'safe harbor' by, for example, giving the debtor a notification at the time of the original extension of credit or sending the notice by surface mail to a debtor overseas." (Uniform Commercial Code Comment 3.)

(6) *Waiver of Right to Notification.* A debtor or secondary obligor may waive the right to notification of disposition of collateral under U.C.C. 9611 only by an agreement to that effect entered into and authenticated after default. (U.C.C. 9624(a); see *Cerritos Valley Bank v. Stirling* (2000) 81 C.A.4th 1108, 1116, 97 C.R.2d 432 [postdefault waiver of right to notice must be in signed writing; guarantor did not waive right to notice by failing to request notice in series of correspondence between guarantor's attorney and secured party's attorney; construing former Division 9].)

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2. Recipients of Notice.

4 Witkin Sum. Cal. Law STPP § 181

[§ 181] Recipients of Notice.

(1) *Debtor and Secondary Obligor.* The secured party must send an authenticated notification of disposition to the debtor (U.C.C. 9611(c)(1)) and any secondary obligor (U.C.C. 9611(c)(2)). (U.C.C. 9611(b).) U.C.C. 9611(b) and (c) resolve an uncertainty under former Division 9 by providing that secondary obligors (sureties) are entitled to receive notification of an intended disposition of collateral, regardless of who created the security interest in the collateral. If the surety created the security interest, it would be the debtor. If it did not, it would be a secondary obligor. New Division 9 also resolves the question of the secondary obligor's ability to waive, pre-default, the right to notification; it provides, in U.C.C. 9602 (supra, §172), that waiver generally is not permitted. (Uniform Commercial Code Comment 3 to U.C.C. 9611.) (On former uncertainty about need to notify guarantors, see *Rutan v. Summit Sports* (1985) 173 C.A.3d 965, 973, 219 C.R. 381 [creditor's failure to give debtor notice of sale of collateral securing promissory note did not bar deficiency judgment against guarantor of note]; *Connolly v. Bank of Sonoma County* (1986) 184 C.A.3d 1119, 1124, 229 C.R. 396 [failure to give notice to guarantors precluded recovery of deficiency from them; declining to follow *Rutan*]; *C.I.T. Corp. v. Anwright Corp.* (1987) 191 C.A.3d 1420, 1425, 237 C.R. 108 [guarantor was "debtor" whose predefault waiver of right to notice of sale was ineffective; following *Connolly v. Bank of Sonoma County*]; *American Nat. Bank v. Perma-Tile Roof Co.* (1988) 200 C.A.3d 889, 894, 246 C.R. 381 [same]; *Cerritos Valley Bank v. Stirling* (2000) 81 C.A.4th 1108, 1114, 97 C.R.2d 432 [same; citing *C.I.T. Corp. v. Anwright Corp.*]; *Canadian Commercial Bank v. Ascher Findley Co.* (1991) 229 C.A.3d 1139, 1153, 280 C.R. 521 [following *Connolly, C.I.T. Corp.*, and *Perma-Tile Roof Co.*]; *Earl of Loveless v. Gabele* (1991) 2 C.A.4th 27, 33, 35, 2 C.R.2d 829 [secured party was entitled to deficiency judgment against guarantor, despite failing to formally notify guarantor of sale, where guarantor had waived right to notice after default]; *Hollander v. California Mfg. Enterprises* (1996) 44 C.A.4th 561, 566, 51 C.R.2d 694 [failure to comply with notice requirements under former U.C.C. 9504 precluded deficiency judgment against guarantor]; 5 A.L.R.4th 1291 [construction of term "debtor" in former Unif.Com.C. §9-504(3)].)

(2) *Other Recipients.* In addition, if the collateral is other than consumer goods, notification must be sent to the following persons:

(a) Any other person from whom the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral. (U.C.C. 9611(c)(3)(A).)

(b) Any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement. (U.C.C. 9611(c)(3)(B).) The financing statement must have identified the collateral (U.C.C. 9611(c)(3)(B)(i)), have been indexed under the debtor's name as of that date (U.C.C. 9611(c)(3)(B)(ii)), and have been filed in the office in which to file a financing statement against the debtor covering the collateral as of that date (U.C.C. 9611(c)(3)(B)(iii)).

(c) Any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in U.C.C. 9311(a) (supra, §66). (U.C.C. 9611(c)(3)(C).)

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3. Contents of Notification Generally.

4 Witkin Sum. Cal. Law STPP § 182

[§ 182] Contents of Notification Generally.

(1) *Applicability of Section.* U.C.C. 9613 sets forth the rules that govern the contents of notification, except in a consumer-goods transaction. (See Cal. Transactions Forms, 5 Business Transactions §30:145; on contents of notification in consumer-goods transaction, see U.C.C. 9614, *infra*, §183.)

(2) *Sufficiency as a Matter of Law.* A notification of disposition is sufficient if it:

(a) Describes the debtor and the secured party. (U.C.C. 9613(1)(A).)

(b) Describes the collateral that is the subject of the intended disposition. (U.C.C. 9613(1)(B).)

(c) States the method of intended disposition. (U.C.C. 9613(1)(C).)

(d) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting. (U.C.C. 9613(1)(D).)

(e) States the time and place of a public disposition or the time after which any other disposition is to be made. (U.C.C. 9613(1)(E).)

Thus, except in a consumer-goods transaction, a notification that includes the information listed above is sufficient as a matter of law, unless the parties agree otherwise. Although a secured party may choose to include additional information concerning the transaction or the debtor's rights and obligations, no additional information is required unless the parties agree otherwise. (Uniform Commercial Code Comment 2; see *11 A.L.R.4th 241* [sufficiency of secured party's notification of sale or other intended disposition of collateral].)

In *Union Safe Deposit Bank v. Floyd* (1999) 76 C.A.4th 25, 90 C.R.2d 36, plaintiff bank loaned a general partnership over \$ 240,000 and took a security interest in a helicopter owned by the partnership. The loan went into default and plaintiff repossessed the helicopter. Plaintiff sent a notice of intention to sell the helicopter to the partnership and each partner, including defendant. The notice stated plaintiff's "intent to sell the repossessed motor vehicle at the

expiration of 5 days from the date this notice was mailed ... and 'by private or public sale whichever deems [sic] necessary at redemption address at close of business day.' " Plaintiff eventually sold the helicopter for \$ 80,500 and sued defendant and others for the deficiency. The jury determined that the helicopter had been sold in good faith and in a commercially reasonable manner, and the trial court entered judgment for plaintiff. *Held*, reversed.

The notice arguably suggested either a public or a private sale. (76 C.A.4th 30.) The purpose of the notice requirement is to alert the debtor of the need to take steps to protect his or her interests. California's former U.C.C. 9504(3), which required more specific notice than the "reasonable" notice required by the Uniform Commercial Code, did not permit the creditor to leave the debtor guessing regarding the type of sale contemplated. (76 C.A.4th 31.) If a public sale is intended, notice of the time and place informs the debtor of the deadline for curing the default and, in the alternative, permits the debtor to arrange for someone to be present at the auction to bid up the price. If a private sale is intended, notice of the date after which it will occur provides a minimum deadline for curing the default. The debtor may then continue curative efforts until the collateral is sold and may monitor the creditor's attempts to sell the collateral to assure commercial reasonableness. (76 C.A.4th 32.) Because the notice here failed to specify, either expressly or impliedly, the nature of the intended sale, it was defective under former U.C.C. 9504(3). (76 C.A.4th 29, 32.)

(3) *Sufficiency as a Matter of Fact*. Whether a notification that lacks any of the information specified in U.C.C. 9613(1) is nevertheless sufficient is a question of fact. (U.C.C. 9613(2).)

(4) *Substantial Compliance*. A notification providing substantially the information specified in U.C.C. 9613(1) is sufficient, even if the notification includes information not specified by that paragraph or minor errors that are not seriously misleading. (U.C.C. 9613(3).) A particular phrasing of the notification is not required. (U.C.C. 9613(4).)

(5) *"Safe Harbor" Forms*. U.C.C. 9613(5) sets forth a form of notification that, when completed, provides sufficient information in a transaction other than a consumer-goods transaction. The form appearing in U.C.C. 9614(3) (*infra*, §183), when completed, also provides sufficient information. (U.C.C. 9613(5).)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Notification Before Disposition of Collateral.

4. Contents of Notification in Consumer-Goods Transactions.

4 Witkin Sum. Cal. Law STPP § 183

[§ 183] Contents of Notification in Consumer-Goods Transactions.

(1) *Applicability of Section.* U.C.C. 9614 sets forth the rules that govern the contents of notification in a consumer-goods transaction. (See Cal. Transactions Forms, 5 Business Transactions §30:146; on contents of notification in other transactions, see *supra*, §182.)

(2) *Requirements.* A notification of disposition must provide all of the following information:

(a) The information specified in U.C.C. 9613(1) (*supra*, §182). (U.C.C. 9614(1)(A).)

(b) A description of any liability for a deficiency of the person to which the notification is sent. (U.C.C. 9614(1)(B).)

(c) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under U.C.C. 9623 (*infra*, §196) is available. (U.C.C. 9614(1)(C).)

(d) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available. (U.C.C. 9614(1)(D).)

A particular phrasing of the notification is not required. (U.C.C. 9614(2).)

(3) *"Safe Harbor" Form.* U.C.C. 9614(3) sets forth a form of notification that, when completed, provides sufficient information. Notification using the "safe harbor" form is sufficient, even if additional information appears at the end of the form (U.C.C. 9614(4)) and even if it includes errors in information not required by U.C.C. 9614(1), unless the error is misleading with respect to rights arising under Division 9 (U.C.C. 9614(5)). If a notification under U.C.C. 9614 is not in the form of U.C.C. 9614(3), law other than Division 9 determines the effect of including information not required by U.C.C. 9614(1). (U.C.C. 9614(6).) (On notification of public disposition of motor vehicle, see U.C.C. 9614(7) and (8).)

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d. Publicity and Advertising Before Disposition.

4 Witkin Sum. Cal. Law STPP § 184

[§ 184] Publicity and Advertising Before Disposition.

In *Ford & Vlahos v. ITT Commercial Finance Corp.* (1994) 8 C.4th 1220, 36 C.R.2d 464, 885 P.2d 877, defendant creditor lent plaintiff debtor money to buy an airplane and acquired a security interest in the airplane. Plaintiff defaulted on the loan and was notified by defendant that it would hold a public sale of the airplane. Defendant advertised the sale's time and place in a newspaper of general circulation. The advertisement omitted information about whom to contact to qualify as a bidder, and a corrected advertisement was placed in another newspaper the day before the sale. Defendant, the sole bidder at the sale, bought the airplane, and then sold it to a third party. Plaintiff sued for improper disposition of the collateral. The trial judge found the airplane's sale to be commercially unreasonable because it was accompanied by insufficient publicity, and thus was the subject of too few bids. The Court of Appeal reversed, reasoning that, because defendant had satisfied the notice requirements of former U.C.C. 9504(3) (now U.C.C. 9611, supra, §180), the publicity and advertising that preceded the sale were commercially reasonable. *Held*, reversed; the sale was commercially unreasonable.

(a) *Notice and publicity are related but separate concepts.* The fact that the notice requirements of former U.C.C. 9504(3) were met does not necessarily mean that the publicity attending a sale of foreclosed collateral was commercially reasonable. (8 C.4th 1227.) A contrary interpretation would nullify former U.C.C. 9507(2) (now U.C.C. 9627(b), infra, §201), which suggests several methods of achieving commercial reasonableness. If a responsible dealer in the type of collateral involved would advertise more extensively than simply placing a legal notice in a type in an obscure newspaper, then fulfilling the notice requirements of former U.C.C. 9504(3) will not suffice. (8 C.4th 1229, 1230.)

(b) *Notice and publicity have different purposes.* One purpose of notice is to alert the debtor and other secured creditors to take steps to protect their interests, possibly including locating bidders for their collateral. The purpose of requiring adequate advertising of a foreclosure sale, on the other hand, is "to force the secured party to ensure the auction is well attended by legitimate bidders, so that the highest commercially reasonable price for the collateral will be obtained." (8 C.4th 1232, 1233.)

(c) *The presale publicity and advertising in this case were inadequate.* Defendant's notice in two newspapers of limited circulation did not provide a forum likely to bring bidders and a fair price for the airplane. (8 C.4th 1235.) (See

23 *Pepperdine L. Rev.* 773 [*Ford & Vlahos*].)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

4 Witkin Sum. Cal. Law STPP § 185

[§ 185] In General.

(1) *Cash Proceeds*. A secured party must apply or pay over for application the cash proceeds of disposition under U.C.C. 9610 in the following order to:

(a) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorneys' fees and legal expenses incurred by the secured party. (U.C.C. 9615(a)(1).)

(b) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made. (U.C.C. 9615(a)(2).)

(c) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral and to the satisfaction of any subordinate attachment lien or execution lien under *C.C.P. 701.040(b)* (8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §132). (U.C.C. 9615(a)(3).) However, U.C.C. 9615(a)(3) applies only if (1) the secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds or notice of the levy of attachment or execution before distribution of the proceeds is completed (U.C.C. 9615(a)(3)(A)), and (2) in a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor (U.C.C. 9615(a)(3)(B)).

(d) A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed. (U.C.C. 9615(a)(4).) (See generally C.E.B., *Secured Transactions* 2d, §5.52 et seq.)

If a secured party requests, a holder of a subordinate security interest or other lien must furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under U.C.C. 9615(a)(3). (U.C.C. 9615(b).)

(2) *Cash Proceeds Received by Junior Secured Party*. A secured party that receives cash proceeds of a disposition

in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made takes the cash proceeds free of the security interest or other lien. (U.C.C. 9615(g)(1).) The secured party is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien (U.C.C. 9615(g)(2)) or to account to or pay the holder of the security interest or other lien for any surplus (U.C.C. 9615(g)(3)).

(3) *Noncash Proceeds*. A secured party need not apply or pay over for application noncash proceeds of disposition under U.C.C. 9610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds must do so in a commercially reasonable manner. (U.C.C. 9615(c).)

Assembly Committee Comment 3 provides the following example of the operation of U.C.C. 9615(c): A secured party in the business of selling or financing automobiles takes possession of collateral (an automobile) following its debtor's default. The secured party decides to sell the automobile in a private disposition under U.C.C. 9610 (supra, §179) and sends appropriate notification under U.C.C. 9611 (supra, §180). After undertaking its normal credit investigation and in accordance with its normal credit policies, the secured party sells the automobile on credit, on terms typical of the credit terms normally extended by the secured party in the ordinary course of its business. The automobile stands as collateral for the remaining balance of the price. The noncash proceeds received by the secured party are chattel paper. The secured party may wish to credit its debtor (the assignor) with the principal amount of the chattel paper or may wish to credit the debtor only as and when the payments are made on the chattel paper by the buyer.

Under U.C.C. 9615(c), "the secured party is under no duty to apply the noncash proceeds (here, the chattel paper) or their value to the secured obligation unless its failure to do so would be commercially unreasonable. If a secured party elects to apply the chattel paper to the outstanding obligation, however, it must do so in a commercially reasonable manner. The facts in the example indicate that it would be commercially unreasonable for the secured party to fail to apply the value of the chattel paper to the original debtor's secured obligation. Unlike the example in Comment 4 to [U.C.C. 9608 (supra, §177)], the noncash proceeds received in this example are of the type that the secured party regularly generates in the ordinary course of its financing business in nonforeclosure transactions. The original debtor should not be exposed to delay or uncertainty in this situation. Of course, there will be many situations that fall between the examples presented in the Comment to [U.C.C. 9608] and in this Comment." Division 9 leaves their resolution to the court based on the facts of each case. (Assembly Committee Comment 3.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Cash Proceeds*.

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §141.



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2. Right to Surplus and Liability for Deficiency.

4 Witkin Sum. Cal. Law STPP § 186

[§ 186] Right to Surplus and Liability for Deficiency.

(1) *General Rule.* If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by U.C.C. 9615(a) and permitted by U.C.C. 9615(c) (see supra, §185), both of the following apply:

(a) Unless U.C.C. 9615(a)(4) (supra, §185) requires the secured party to apply or pay over cash proceeds to a consignor, the secured party must account to and pay a debtor for any surplus except as provided in *C.C.P. 701.040* (8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §132). (U.C.C. 9615(d)(1).)

(b) Subject to U.C.C. 9626(b) (infra, §200), the obligor is liable for any deficiency. (U.C.C. 9615(d)(2).) (See C.E.B., *Secured Transactions* 2d, §5.58 et seq.; *72 A.L.R.4th 1128* [value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency].)

(2) *Special Rule for Receivables.* If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus (U.C.C. 9615(e)(1)(A)) and the obligor is not liable for any deficiency (U.C.C. 9615(e)(1)(B)). Moreover, *C.C.P. 701.040(b)*, relating to the payment of proceeds and the liability of the secured party, applies only if the security agreement provides that the debtor is entitled to any surplus. (U.C.C. 9615(e)(2).)

(3) *Certain "Low-Price" Dispositions.* U.C.C. 9615(f) provides a special method for calculating a deficiency or surplus when the secured party, a person related to the secured party (defined in U.C.C. 9102), or a secondary obligor acquires the collateral at a foreclosure disposition. It recognizes that when the foreclosing secured party or a related party is the transferee of the collateral, the secured party sometimes lacks the incentive to maximize the proceeds of disposition. As a consequence, the disposition may comply with the procedural requirements of Division 9 (for example, it is conducted in a commercially reasonable manner following reasonable notice), but nevertheless fetch a low price. (Assembly Committee Comment 6.)

U.C.C. 9615(f) adjusts for this lack of incentive. The surplus or deficiency following a disposition is calculated

based on the amount of proceeds that would have been realized in a disposition complying with U.C.C. 9601 et seq. to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if both of the following apply:

(a) The transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor. (U.C.C. 9615(f)(1).)

(b) The amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought. (U.C.C. 9615(f)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.*

Cross-Reference: 8 *Cal. Proc. (5th), Enforcement of Judgment*, §141.



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4 Witkin Sum. Cal. Law STPP § 187

[§ 187] Informing Debtor or Consumer Obligor of Surplus or Deficiency.

(1) *Duty To Inform.* In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under U.C.C. 9615 (supra, §186), the secured party must send an explanation to the debtor or consumer obligor, as applicable, after the disposition and in accordance with both of the following:

(a) Before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency. (U.C.C. 9616(b)(1)(A).)

(b) Within 14 days after receipt of a request. (U.C.C. 9616(b)(1)(B).)

Alternatively, in the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, the secured party may send to the consumer obligor a record waiving the secured party's right to a deficiency. (U.C.C. 9616(b)(2).) (On liability for noncompliance, see U.C.C. 9625, *infra*, §197.)

(2) *"Explanation" Defined.* For the purposes of U.C.C. 9616, an "explanation" means a writing that:

(a) States the amount of the surplus or deficiency (U.C.C. 9616(a)(1)(A));

(b) Provides an explanation in accordance with U.C.C. 9616(c) (*infra*, this section) of how the secured party calculated the surplus or deficiency (U.C.C. 9616(a)(1)(B));

(c) States, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency (U.C.C. 9616(a)(1)(C)); and

(d) Provides a telephone number or mailing address from which additional information concerning the transaction is available (U.C.C. 9616(a)(1)(D)).

A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of U.C.C. 9616(a) is sufficient, even if it includes minor errors that are not seriously misleading. (U.C.C.

9616(d.)

(3) *"Request" Defined.* For the purposes of U.C.C. 9616, a "request" means a record that is:

- (a) Authenticated by a debtor or consumer obligor (U.C.C. 9616(a)(2)(A));
- (b) Requesting that the recipient provide an explanation (U.C.C. 9616(a)(2)(B)); and
- (c) Sent after disposition of the collateral under U.C.C. 9610 (supra, §179) (U.C.C. 9616(a)(2)(C)).

(4) *How To Explain Calculation of Surplus or Deficiency.* To comply with U.C.C. 9616(a)(1)(B), a writing must provide the following information in the following order:

(a) The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date. (U.C.C. 9616(c)(1).) The specified date must be not more than 35 days before the secured party takes or receives possession, if the secured party takes or receives possession of the collateral after default (U.C.C. 9616(c)(1)(A)), or not more than 35 days before the disposition, if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral (U.C.C. 9616(c)(1)(B)).

(b) The amount of proceeds of the disposition. (U.C.C. 9616(c)(2).)

(c) The aggregate amount of the obligations after deducting the amount of proceeds. (U.C.C. 9616(c)(3).)

(d) The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorneys' fees secured by the collateral which are known to the secured party and relate to the current disposition. (U.C.C. 9616(c)(4).)

(e) The amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in U.C.C. 9616(c)(1). (U.C.C. 9616(c)(5).)

(f) The amount of the surplus or deficiency. (U.C.C. 9616(c)(6).)

(5) *Charge for Request.* A debtor or consumer obligor is entitled without charge to one response to a request under U.C.C. 9616 during any 6-month period in which the secured party did not send to the debtor or consumer obligor an explanation under U.C.C. 9616(b)(1). The secured party may charge up to \$ 25 for each additional response. (U.C.C. 9616(e).)

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f. Rights of Transferee After Disposition.

4 Witkin Sum. Cal. Law STPP § 188

[§ 188] Rights of Transferee After Disposition.

(1) *Good-Faith Transferee.* A secured party's disposition of collateral after default transfers to a transferee for value all of the debtor's rights in the collateral. (U.C.C. 9617(a)(1).) The disposition also discharges the security interest under which the disposition is made (U.C.C. 9617(a)(2)) and discharges any subordinate security interest or other subordinate lien (U.C.C. 9617(a)(3)). A transferee that acts in good faith takes free of the rights and interests described in U.C.C. 9617(a), even if the secured party fails to comply with Division 9 or the requirements of a judicial proceeding. (U.C.C. 9617(b).)

(2) *Nonqualifying Transferee.* If a transferee does not take free of the rights and interests described in U.C.C. 9617(a), the transferee takes the collateral subject to the debtor's rights in the collateral (U.C.C. 9617(c)(1)), the security interest or agricultural lien under which the disposition is made (U.C.C. 9617(c)(2)), and any other security interest or other lien (U.C.C. 9617(c)(3)).

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4 Witkin Sum. Cal. Law STPP § 189

[§ 189] Obtaining Record or Legal Title.

(1) *Need for Clear Title.* Potential buyers of collateral that is covered by a certificate of title, such as an automobile, or is subject to a registration system, such as a copyright, typically require as a condition of their purchase that the certificate or registry reflect their ownership. In many cases, this condition can be met only with the consent of the record owner. If the record owner is the debtor and, as may be the case after the default, the debtor refuses to cooperate, the secured party may have great difficulty disposing of the collateral. U.C.C. 9619(b) provides a simple mechanism for obtaining record or legal title, for use primarily when other law does not provide one. (Uniform Commercial Code Comment 2.)

(2) *Transfer Statement.* A transfer statement is a record authenticated by a secured party stating:

(a) That the debtor has defaulted in connection with an obligation secured by specified collateral. (U.C.C. 9619(a)(1).)

(b) That the secured party has exercised its postdefault remedies with respect to the collateral. (U.C.C. 9619(a)(2).)

(c) That, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral. (U.C.C. 9619(a)(3).)

(d) The name and mailing address of the secured party, debtor, and transferee. (U.C.C. 9619(a)(4).)

(3) *Use of Transfer Statement To Obtain Clear Title.* A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate of title system covering the collateral. (U.C.C. 9619(b).) If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office must accept the transfer statement (U.C.C. 9619(b)(1)), promptly amend its records to reflect the transfer (U.C.C. 9619(b)(2)), and, if applicable, issue a new appropriate certificate of title in the transferee's name (U.C.C. 9619(b)(3)).

A transfer of the record or legal title to collateral to a secured party under U.C.C. 9619(b) or otherwise is not of itself a disposition of collateral under Division 9 and does not of itself relieve the secured party of its duties under

Division 9. (U.C.C. 9619(c).) A secured party who has obtained record or legal title retains its duties with respect to enforcement of its security interest, and the debtor retains its rights as well. (Uniform Commercial Code Comment 2.)

(4) *Title-Clearing Systems Under Other Law.* Applicable non-U.C.C. law (for example, a certificate-of-title statute or federal registry rules) may provide a means by which the secured party may obtain or transfer record or legal title for the purpose of a disposition of the property under Division 9. The mechanism provided by U.C.C. 9619 is in addition to any title-clearing provision under law other than Division 9. (Uniform Commercial Code Comment 3.)

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 h. Distinction: Assignment of Secured Obligations.

4 Witkin Sum. Cal. Law STPP § 190

[§ 190] Distinction: Assignment of Secured Obligations.

(1) *Rights and Duties of Secondary Obligor.* A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after:

(a) The secondary obligor receives an assignment of a secured obligation from the secured party (U.C.C. 9618(a)(1));

(b) The secondary obligor receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party (U.C.C. 9618(a)(2)); or

(c) The secondary obligor is subrogated to the rights of a secured party with respect to collateral (U.C.C. 9618(a)(3)).

(2) *Effect of Assignment.* An assignment, transfer, or subrogation described in U.C.C. 9618(a) is *not* a disposition of collateral under U.C.C. 9610 (supra, §179). (U.C.C. 9618(b)(1).) It relieves the secured party of further duties under Division 9. (U.C.C. 9618(b)(2).)

(3) *Scope of Statute.* Under U.C.C. 9618, assignments of secured obligations and other transactions, regardless of form, that function like assignments of secured obligations are not dispositions to which U.C.C. 9601 et seq. apply. Rather, they constitute assignments of rights and, occasionally, delegations of duties. Application of U.C.C. 9618 may require an investigation into the agreement of the parties, which may not be reflected in the words of the repurchase agreement (for example, when the agreement requires a recourse party to "purchase the collateral" but contemplates that the purchaser will then conduct a Division 9 foreclosure disposition). (Uniform Commercial Code Comment 2.)

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a. Improvement Over Former Statute.

4 Witkin Sum. Cal. Law STPP § 191

[§ 191] Improvement Over Former Statute.

U.C.C. 9620 et seq. deal with strict foreclosure, a procedure by which the secured party acquires the debtor's interest in the collateral without the need for a sale or other disposition under U.C.C. 9610 (supra, §179). (See *68A Am.Jur.2d (2003 ed.)*, *Secured Transactions* §659.) Although these provisions derive from former U.C.C. 9505, "they have been entirely reorganized and substantially rewritten. The more straightforward approach taken in [revised Article 9] eliminates the fiction that the secured party always will present a 'proposal' for the retention of collateral and the debtor will have a fixed period to respond. By eliminating the need (but preserving the possibility) for proceeding in that fashion, [U.C.C. 9620] eliminates much of the awkwardness of former [U.C.C. 9505]. It reflects the belief that strict foreclosures should be encouraged and often will produce better results than a disposition for all concerned." (Uniform Commercial Code Comment 2 to U.C.C. 9620.)

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b. Conditions to Effective Acceptance.

4 Witkin Sum. Cal. Law STPP § 192

[§ 192] Conditions to Effective Acceptance.

(1) *In General.* A secured party may accept collateral in full or partial satisfaction of the obligation it secures only if all of the following conditions are satisfied:

(a) The debtor consents to the acceptance under U.C.C. 9620(c), *infra*, this section. (U.C.C. 9620(a)(1).)

(b) The secured party does not receive, within the time set forth in U.C.C. 9620(d), a notification of objection to the proposal authenticated either by a person to which the secured party was required to send a proposal under U.C.C. 9621 (*infra*, §194) (U.C.C. 9620(a)(2)(A)) or by any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal (U.C.C. 9620(a)(2)(B)).

(c) If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance. (U.C.C. 9620(a)(3).)

(d) U.C.C. 9620(e) (*infra*, §193) does not require the secured party to dispose of the collateral or the debtor waives the requirement under U.C.C. 9624 (*infra*, §193). (U.C.C. 9620(a)(4).) (See C.E.B., *Secured Transactions* 2d, §5.62.)

(2) *Secured Party's Consent Necessary.* A purported or apparent acceptance of collateral under U.C.C. 9620 is ineffective unless the conditions of U.C.C. 9620(a) are met (U.C.C. 9620(b)(2)) *and* the secured party consents to the acceptance in an authenticated record or sends a proposal to the debtor (U.C.C. 9620(b)(1)).

U.C.C. 9620(b) ensures that the debtor cannot unilaterally cause an acceptance of collateral by providing that acceptance does not occur unless the secured party consents to the acceptance as prescribed. "For this reason, a mere delay in collection or disposition of collateral does not constitute a 'constructive' strict foreclosure. Instead, delay is a factor relating to whether the secured party acted in a commercially reasonable manner" for purposes of U.C.C. 9607 (*supra*, §176) or U.C.C. 9610 (*supra*, §179). A debtor's voluntary surrender of collateral to a secured party and the secured party's acceptance of possession of the collateral does not, of itself, necessarily raise an implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation under U.C.C. 9620. (Uniform Commercial Code Comment 5.)

(3) *Debtor's Consent.* A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default. (U.C.C. 9620(c)(1).) A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default or the secured party does all of the following:

(a) Sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained. (U.C.C. 9620(c)(2)(A).)

(b) In the proposal, proposes to accept collateral in full satisfaction of the obligation it secures. (U.C.C. 9620(c)(2)(B).)

(c) Does not receive a notification of objection authenticated by the debtor within 20 days after the proposal is sent. (U.C.C. 9620(c)(2)(C).)

(4) *Objection to Proposal.* To be effective under U.C.C. 9620(a)(2), a notification of objection by a person to whom the proposal was sent under U.C.C. 9621 must be received by the secured party within 20 days after notification was sent to that person. (U.C.C. 9620(d)(1).) In other cases, the secured party must receive the notification of objection within 20 days after the last notification was sent under U.C.C. 9621 (U.C.C. 9620(d)(2)(A)) or, if a notification was not sent, before the debtor consents to the acceptance under U.C.C. 9620(c) (U.C.C. 9620(d)(2)(B)).

(5) *Good Faith Requirement.* Uniform Commercial Code Comment 11 explains that a proposal and acceptance made under U.C.C. 9620 in bad faith would not be effective. "For example, a secured party's proposal to accept marketable securities worth \$ 1,000 in full satisfaction of indebtedness in the amount of \$ 100, made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith. On the other hand, in the normal case, proposals and acceptances should be not second-guessed on the basis of the 'value' of the collateral involved. Disputes about valuation or even a clear excess of collateral value over the amount of obligations satisfied do not necessarily demonstrate the absence of good faith."

(6) *No Possession Requirement.* U.C.C. 9620 eliminates the requirement in former U.C.C. 9505 that the secured party be "in possession" of collateral. It clarifies that intangible collateral, which cannot be possessed, may be subject to a strict foreclosure under U.C.C. 9620. However, under U.C.C. 9620(a)(3), if the collateral is consumer goods, acceptance does not occur unless the debtor is not in possession. (Uniform Commercial Code Comment 7.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Primary Methods of Enforcement.

3. Acceptance of Collateral in Satisfaction: Strict Foreclosure.

c. Special Conditions in Consumer Cases.

4 Witkin Sum. Cal. Law STPP § 193

[§ 193] Special Conditions in Consumer Cases.

(1) *When Acceptance Is Not Possible.* A secured party that has taken possession of collateral must dispose of the collateral under U.C.C. 9610 (supra, §179) if 60% of the cash price has been paid, in the case of a purchase money security interest in consumer goods (U.C.C. 9620(e)(1)), or if 60% of the principal amount of the obligation secured has been paid, in the case of a nonpurchase money security interest in consumer goods (U.C.C. 9620(e)(2)). Thus, an effective acceptance of collateral cannot occur if U.C.C. 9620(e) requires a disposition, unless the debtor waives this requirement under U.C.C. 9624(b), infra, this section. (Uniform Commercial Code Comment 12.)

(2) *Time for Disposition.* The disposition required by U.C.C. 9620(e) must occur within the time specified in U.C.C. 9620(f). (U.C.C. 9620(e).) U.C.C. 9620(f) requires the secured party to dispose of the collateral within 90 days after taking possession or within any longer period to which the debtor and all secondary obligors have agreed. The agreement to that effect must have been entered into and authenticated after default. (U.C.C. 9620(f)(1), (f)(2).)

(3) *No Acceptance in Partial Satisfaction.* In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures. (U.C.C. 9620(g).) If a secured party attempts an acceptance in partial satisfaction in a consumer transaction, the attempted acceptance is void. (Uniform Commercial Code Comment 12.)

(4) *Waiver of Debtor's Right to Disposition.* A debtor may waive the right to require disposition of collateral under U.C.C. 9620(e) only by an agreement to that effect entered into and authenticated after default. (U.C.C. 9624(b).)

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d. Notification of Proposal To Accept Collateral.

4 Witkin Sum. Cal. Law STPP § 194

[§ 194] Notification of Proposal To Accept Collateral.

(1) *Classes of Competing Claimants Who Must Be Notified.* A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures must send its proposal to the following three classes of competing claimants:

(a) Any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral. (U.C.C. 9621(a)(1); see *Oliver v. Bledsoe* (1992) 5 C.A.4th 998, 1006, 7 C.R.2d 382 [secured party bank in possession of promissory note executed in favor of bank's customer could not retain note in satisfaction of customer's underlying debt under former U.C.C. 9505(2), predecessor to U.C.C. 9621, where bank failed to notify known judgment creditor of customer].)

(b) Any other secured party or lienholder that, 10 days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement. The financing statement must have identified the collateral (U.C.C. 9621(a)(2)(A)), been indexed under the debtor's name as of that date (U.C.C. 9621(a)(2)(B)), and been filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date (U.C.C. 9621(a)(2)(C)).

(c) Any other secured party that, 10 days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in U.C.C. 9311(a) (*supra*, §66). (U.C.C. 9621(a)(3).)

(2) *Notification of Secondary Obligors.* A secured party that desires to accept collateral in partial satisfaction of the obligation it secures must send its proposal to any secondary obligor, in addition to the persons described in U.C.C. 9621(a). (U.C.C. 9621(b).)

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e. Effect of Acceptance.

4 Witkin Sum. Cal. Law STPP § 195

[§ 195] Effect of Acceptance.

A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures discharges the obligation to the extent consented to by the debtor. (U.C.C. 9622(a)(1).) The acceptance transfers to the secured party all of a debtor's rights in the collateral. (U.C.C. 9622(a)(2).) It discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien. (U.C.C. 9622(a)(3).) Finally, it terminates any other subordinate interest. (U.C.C. 9622(a)(4).)

The acceptance to which U.C.C. 9622(a) refers is an effective acceptance. If a purported acceptance is ineffective under U.C.C. 9620 (supra, §192), for example, because the secured party receives a timely objection from a person entitled to notification, then neither U.C.C. 9622(a) nor 9622(b) (infra, this section) applies. (Uniform Commercial Code Comment 2.)

A subordinate interest is discharged or terminated under U.C.C. 9622(a), even if the secured party fails to comply with Division 9. (U.C.C. 9622(b).) Thus, subordinate interests are discharged regardless of whether a proposal was required to be sent or, if required, was sent. However, a secured party's failure to send a proposal or otherwise to comply with Division 9 may subject the secured party to liability under U.C.C. 9625 (infra, §197). (Uniform Commercial Code Comment 2.)

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4 Witkin Sum. Cal. Law STPP § 196

[§ 196] Debtor's Right To Redeem Collateral.

(1) *Prerequisites to Redemption.* A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral. (U.C.C. 9623(a).) To do so, a person must tender both fulfillment of all obligations secured by the collateral (U.C.C. 9623(b)(1)) and the reasonable expenses and attorneys' fees described in U.C.C. 9615(a)(1) (*supra*, §185) (U.C.C. 9623(b)(2)). (See C.E.B., *Secured Transactions* 2d, §5.78; *68A Am.Jur.2d* (2003 *ed.*), *Secured Transactions* §523 *et seq.*)

(2) *When Redemption May Occur.* A redemption may occur at any time before a secured party has done any of the following:

(a) Collected collateral under U.C.C. 9607 (*supra*, §175). (U.C.C. 9623(c)(1).)

(b) Disposed of collateral or entered into a contract for its disposition under U.C.C. 9610 (*supra*, §179). (U.C.C. 9623(c)(2).)

(c) Accepted collateral in full or partial satisfaction of the obligation it secures under U.C.C. 9622 (*supra*, §195). (U.C.C. 9623(c)(3).)

(3) *Redemption of Remaining Collateral Following Partial Enforcement.* Under U.C.C. 9610 (*supra*, §179), a secured party may make successive dispositions of portions of its collateral. These dispositions would not affect the debtor's, another secured party's, or a lienholder's right to redeem the remaining collateral. (Uniform Commercial Code Comment 3 to U.C.C. 9623.)

(4) *Waiver of Right To Redeem.* Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under U.C.C. 9623 only by an agreement to that effect entered into and authenticated after default. (U.C.C. 9624(c).)

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 1. Secured Party's Noncompliance.

4 Witkin Sum. Cal. Law STPP § 197

[§ 197] Secured Party's Noncompliance.

(1) *Injunctive Relief.* If it is established that a secured party is not proceeding in accordance with Division 9, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions. (U.C.C. 9625(a); see C.E.B., Secured Transactions 2d, §5.71.)

(2) *Damages.* In general, a person is liable for damages in the amount of any loss caused by a failure to comply with Division 9. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing. (U.C.C. 9625(b); see C.E.B., Secured Transactions 2d, §5.72.)

(3) *Scope of Statute.* U.C.C. 9625(a) and 9625(b) follow former U.C.C. 9507. The new provisions, however, are not limited to noncompliance with provisions of U.C.C. 9601 et seq. Rather, they apply to noncompliance with any Division 9 provision. The change makes U.C.C. 9625 applicable to noncompliance with U.C.C. 9207 (supra, §153) (duties of secured party in possession of collateral), U.C.C. 9208 (supra, §154) (duties of secured party having control over deposit account), U.C.C. 9209 (supra, §155) (duties of secured party if account debtor has been notified of an assignment), U.C.C. 9210 (supra, §156) (duty to comply with request for accounting, etc.), U.C.C. 9509(a) (supra, §77) (duty to refrain from filing unauthorized financing statement), and U.C.C. 9513(a) or 9513(c) (supra, §103) (duty to provide termination statement). (Assembly Committee Comment 2.) (See *68A Am.Jur.2d (2003 ed.)*, Secured Transactions §686 et seq.)

(4) *Who May Recover Damages.* Except as otherwise provided in U.C.C. 9628 (infra, §202), a person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under U.C.C. 9625(b) for its loss. (U.C.C. 9625(c).) A debtor whose deficiency is eliminated under U.C.C. 9626 (infra, §198) may recover damages for the loss of any surplus. However, in a transaction other than a consumer transaction, a debtor or secondary obligor whose deficiency is eliminated or reduced under U.C.C. 9626 may not otherwise recover under U.C.C. 9625(b) for noncompliance with the provisions of U.C.C. 9601 et seq., relating to collection, enforcement, disposition, or acceptance. (U.C.C. 9625(d).) The last sentence of U.C.C. 9625(d) eliminates the possibility of double recovery or other overcompensation arising out of a reduction or elimination of a deficiency under U.C.C. 9626 in a transaction other than a consumer transaction, based on noncompliance with the provisions of this chapter relating to collection, enforcement, disposition, or acceptance. Assuming no double recovery, a debtor whose deficiency is eliminated under U.C.C. 9626 may pursue a claim for a surplus. (Assembly Committee Comment

3.)

(5) *Supplemental Damages.* In addition to the damages recoverable under U.C.C. 9625(b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover \$ 500 in each case from:

(a) A person who fails to comply with U.C.C. 9208 (supra, §154). (U.C.C. 9625(e)(1).)

(b) A person who fails to comply with U.C.C. 9209 (supra, §155). (U.C.C. 9625(e)(2).)

(c) A person who files a record that the person is not entitled to file under U.C.C. 9509(a) (supra, §77). (U.C.C. 9625(e)(3).)

(d) A person who fails to cause the secured party of record to file or send a termination statement as required by U.C.C. 9513(a) or 9513(c) (supra, §103). (U.C.C. 9625(e)(4).)

(e) A person who fails to comply with U.C.C. 9616(b)(1) (supra, §187) and whose failure is part of a pattern, or consistent with a practice, of noncompliance. (U.C.C. 9625(e)(5).)

(f) A person who fails to comply with U.C.C. 9616(b)(2) (supra, §187). (U.C.C. 9625(e)(6).)

A debtor or consumer obligor may recover damages under U.C.C. 9625(b) and, in addition, \$ 500 in each case from a person who, without reasonable cause, fails to comply with a request under U.C.C. 9210 (supra, §156). A recipient of a request under U.C.C. 9210 who never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request. (U.C.C. 9625(f).)

(6) *Estoppel.* If a secured party fails to comply with a request regarding a list of collateral or a statement of account under U.C.C. 9210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person who is reasonably misled by the failure. (U.C.C. 9625(g).)

SUPPLEMENT: [This section is current through the latest supplement]



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 a. Change From Former Law.

4 Witkin Sum. Cal. Law STPP § 198

[§ 198] Change From Former Law.

(1) *Former Law*. Under former Division 9, a secured party's failure to comply with the procedural requirements of the statute, particularly those having to do with notice before disposition of collateral, precluded recovery of a deficiency. The following cases illustrate this rule:

Bank of America v. Lallana (1998) 19 C.4th 203, 215, 77 C.R.2d 910, 960 P.2d 1133 [bank's failure to comply with notice requirements for public sale precluded its recovery of deficiency judgment].

Atlas Thrift Co. v. Horan (1972) 27 C.A.3d 999, 1007, 104 C.R. 315 [failure to give notice as required by former U.C.C. 9504(3) precluded deficiency judgment]. (See 1 *Pepperdine L. Rev.* 147 [*Atlas Thrift Co.*].)

J. T. Jenkins Co. v. Kennedy (1975) 45 C.A.3d 474, 481, 119 C.R. 578 [failure to give adequate notice].

Barber v. LeRoy (1974) 40 C.A.3d 336, 343, 115 C.R. 272 [private sale conducted by secured party was void and no deficiency could be had].

General Elec. Credit Corp. v. Bo-Mar Const. Co. (1977) 72 C.A.3d 887, 891, 140 C.R. 417 [defective public sale].

Ford Motor Credit Co. v. Price (1985) 163 C.A.3d 745, 751, 210 C.R. 17 [deficiency judgment was barred where public sale was held in county other than county in which notice of sale had been published].

C.I.T. Corp. v. Anwright Corp. (1987) 191 C.A.3d 1420, 1422, 237 C.R. 108 [sale held at location two blocks from noticed address precluded recovery of deficiency judgment; following *Ford Motor Credit Co. v. Price*].

Backes v. Village Corner (1987) 197 C.A.3d 209, 213, 242 C.R. 716 [failure to notify debtors as required by former U.C.C. 9504(3)].

Crocker Nat. Bank v. Emerald (1990) 221 C.A.3d 852, 862, 270 C.R. 699 [sale of collateral in a commercially unreasonable manner].

Union Safe Deposit Bank v. Floyd (1999) 76 C.A.4th 25, 32, 90 C.R.2d 36 [bank's notice was defective in failing to state whether sale would be public or private; bank was precluded from obtaining deficiency judgment].

Some distinctions were made. (See *Security Pac. Nat. Bank v. Geernaert* (1988) 199 C.A.3d 1425, 1431, 245 C.R. 712 [failure of court-appointed receiver, as opposed to secured party, to notify debtor did not bar secured party from obtaining deficiency judgment; sale was under authority of receiver and secured party did not control time or place]; *PWS v. Ban* (1991) 234 C.A.3d 223, 228, 285 C.R. 598 [creditor who repurchased collateral at properly noticed sale following improper sale was entitled to deficiency judgment]; *Clark v. EZN* (1997) 57 C.A.4th 852, 858, 67 C.R.2d 403 [disposition of collateral at unadvertised auction where secured party was sole bidder was not commercially reasonable; however, under former U.C.C. 9504(2)(c), secured party was entitled to deficiency measured by difference between amount owed and what could have been realized had sale been commercially reasonable].)

(2) *Commentary and Criticism of Former Rule.* The rule barring deficiency judgments was the subject of much commentary, some of it critical. (See 34 *Hastings L. J.* 153 [argument against rule]; 40 *U.C.L.A. L. Rev.* 695 [arguing that rule wastes resources]; 42 *U.C.L.A. L. Rev.* 445 [recommendation that foreclosing creditor be designated as debtor's agent and fiduciary during disposition of collateral]; 59 *A.L.R.3d* 369 [commercially reasonable disposition; burden of proof]; 10 *A.L.R.4th* 413 [failure to make commercially reasonable disposition of collateral as bar to deficiency judgment].)

(3) *Present Law.* California's new version of Division 9 distinguishes between consumer transactions and transactions other than consumer transactions with regard to deficiency judgments. The rule precluding deficiency judgments where the secured party has failed to comply with specified procedural requirements has been maintained with respect to consumer transactions. (See *infra*, §200.) With respect to other transactions, a rebuttable presumption rule applies. (See *infra*, §199.) In either case, the basic damage remedy under U.C.C. 9625(b) (*supra*, §197) is subject to the special rules in U.C.C. 9626, which addresses situations in which the amount of a deficiency or surplus is in issue, i.e., situations in which the secured party has collected, enforced, disposed of, or accepted the collateral. U.C.C. 9626 contains special rules applicable to a determination of the amount of a deficiency or surplus. Because it affects a person's liability for a deficiency, it is subject to U.C.C. 9628 (*infra*, §202). (Assembly Committee Comment 2; see C.E.B., *Secured Transactions* 2d, §5.73.)

The rules in U.C.C. 9626 apply only to noncompliance in connection with the "collection, enforcement, disposition, or acceptance" under U.C.C. 9601 et seq. For other types of noncompliance with U.C.C. 9601 et seq., the general liability rule of U.C.C. 9625(b) (recovery of actual damages) applies. (Assembly Committee Comment 2.) The Comment offers this example: a repossession that does not comply with U.C.C. 9609 (*supra*, §178) for want of a default. The debtor's remedy is under U.C.C. 9625(b). In a proper case, the secured party also may be liable for conversion under non-U.C.C. law. If the secured party thereafter disposed of the collateral, however, it would violate U.C.C. 9610 (*supra*, §179) at that time, and U.C.C. 9626 would apply.

SUPPLEMENT: [This section is current through the latest supplement]



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 b. Transactions Other Than Consumer Transactions.

4 Witkin Sum. Cal. Law STPP § 199

[§ 199] Transactions Other Than Consumer Transactions.

(1) *Rebuttable Presumption Rule.* In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, a secured party need not prove compliance with the provisions of U.C.C. 9601 et seq. relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue. (U.C.C. 9626(a)(1).) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with U.C.C. 9601 et seq. (U.C.C. 9626(a)(2).)

Except as otherwise provided in U.C.C. 9628 (infra, §202), if the secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of U.C.C. 9601 et seq., the liability of a debtor or a secondary obligor for a deficiency is limited. (U.C.C. 9626(a)(3).) The liability limit is the amount by which the sum of the secured obligation, expenses, and attorneys' fees exceeds the greater of either of the following:

- (a) The proceeds of the collection, enforcement, disposition, or acceptance. (U.C.C. 9626(a)(3)(A).)
- (b) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of U.C.C. 9601 et seq. relating to collection, enforcement, disposition, or acceptance. (U.C.C. 9626(a)(3)(B).)

For purposes of U.C.C. 9626(a)(3)(B), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorneys' fees, unless the secured party proves that the amount is less than that sum. (U.C.C. 9626(a)(4).)

Assembly Committee Comment 3 explains that under the rebuttable presumption rule, the debtor or obligor is to be credited with the greater of the actual proceeds of the disposition or the proceeds that would have been realized had the secured party complied with the relevant provisions. If a deficiency remains, then the secured party is entitled to recover it. However, unless the secured party proves that compliance with the relevant provisions would have yielded a smaller amount, under U.C.C. 9626(a)(4), the amount that a complying collection, enforcement, or disposition would have

yielded is deemed to be equal to the amount of the secured obligation, together with expenses and attorneys' fees. Thus, the secured party may not recover any deficiency unless it meets this burden.

(2) *Burden of Proof When U.C.C. 9615(f) Applies.* If a deficiency or surplus is calculated under U.C.C. 9615(f) (supra, §186), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought. (U.C.C. 9626(a)(5).) Thus, in a nonconsumer transaction, U.C.C. 9626(a)(5) imposes on a debtor or obligor the burden of proving that the proceeds of a disposition are so low that, under U.C.C. 9615(f), the actual proceeds should not serve as the basis upon which a deficiency or surplus is calculated. Were the burden placed on the secured party, then debtors might be encouraged to challenge the price received in every disposition to the secured party, a person related to the secured party, or a secondary obligor. (Assembly Committee Comment 4.)

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 c. Consumer Transactions.

4 Witkin Sum. Cal. Law STPP § 200

[§ 200] Consumer Transactions.

(1) *Burden of Proof of Compliance.* Special rules apply to an action arising out of a consumer transaction in which a deficiency or a surplus is an issue. First, a secured party has the burden of proving compliance with the provisions of U.C.C. 9601 et seq. relating to collection, enforcement, disposition, and acceptance, whether or not the debtor or a secondary obligor places the secured party's compliance in issue. (U.C.C. 9626(b)(1)(A).) If a deficiency or surplus is calculated under U.C.C. 9615(f) (supra, §186), the secured party has the burden of establishing that the amount of proceeds of the disposition is not significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought. (U.C.C. 9626(b)(1)(B).)

(2) *Prerequisites To Holding Debtor or Secondary Obligor Liable for Deficiency.* The debtor or any secondary obligor is liable for a deficiency only if all of the following conditions are met:

(a) It is not otherwise agreed or otherwise provided in the Retail Installment Sales Act (C.C. 1801 et seq., 4 *Summary* (10th), *Sales*, §263 et seq.), and, in particular, C.C. 1812.5 (4 *Summary* (10th), *Sales*, §285) or any other statute. (U.C.C. 9626(b)(2)(A).)

(b) The debtor and obligor were given notice, in accordance with U.C.C. 9611 (supra, §180), U.C.C. 9612 (supra, §180), and U.C.C. 9613 (supra, §182), or U.C.C. 9614 (supra, §183), as applicable, of the disposition of the collateral. (U.C.C. 9626(b)(2)(B).)

(c) The collection, enforcement, disposition, and acceptance by the secured party were conducted in good faith and in a commercially reasonable manner. (U.C.C. 9626(b)(2)(C); on determining whether conduct was commercially reasonable, see *infra*, §201.)

On entry of a final judgment that the debtor or obligor is not liable for a deficiency by reason of U.C.C. 9626(b)(2) or 9615(f), the secured party may neither obtain a deficiency judgment nor retain a security interest in any other collateral of the debtor or obligor that secured the indebtedness for which the debtor or obligor is no longer liable. (U.C.C. 9626(b)(3).)

(3) *Debtor's Remedies.* If, subsequent to a disposition that does not satisfy one or more of the conditions set forth in U.C.C. 9626(b)(2), or subsequent to a disposition that is subject to U.C.C. 9615(f), the secured party disposes, pursuant to U.C.C. 9626, of other collateral securing the same indebtedness, the debtor or obligor may, to the extent he or she is no longer liable for a deficiency judgment by reason of U.C.C. 9626(b)(2) or 9615(f), recover the proceeds realized from the subsequent dispositions, as well as any damages to which the debtor may be entitled if the subsequent disposition is itself noncomplying or otherwise wrongful. (U.C.C. 9626(b)(4).)

Nothing in U.C.C. 9626 deprives the debtor of any right to recover damages from the secured party under U.C.C. 9625(b), or to offset any such damages against a claim by the secured party for a deficiency, or of a right or remedy to which the debtor may be entitled under another law. A debtor or obligor in a consumer transaction must not have any damages owed to it reduced by the amount of a deficiency that would have resulted had the disposition of the collateral by the secured party been conducted in conformity with Division 9. (U.C.C. 9626(b)(5).)

(4) *Debtor's Right to Surplus.* The secured party must account to the debtor for any surplus, except as provided in C.C.P. 701.040 (8 Cal. Proc. (4th), *Enforcement of Judgment*, §132). (U.C.C. 9626(b)(6).)

(5) *Difference Between California and Uniform Act.* U.C.C. 9626(b) varies greatly from subsection (b) of *Section 9-626 of the Uniform Commercial Code*. The uniform version provides: "The limitation of the rules in subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches." (See 11 Anderson 3d (1999 Rev. ed.), [Rev] §9-626.)

Uniform Commercial Code Comment 4 to the uniform version explains the approaches taken under the former law: "Courts construing former Section 9-507 disagreed about the consequences of a secured party's failure to comply with the requirements of former Part 5. Three general approaches emerged. Some courts have held that a noncomplying secured party may not recover a deficiency (the 'absolute bar' rule). A few courts held that the debtor can offset against a claim to a deficiency all damages recoverable under former Section 9-507 resulting from the secured party's noncompliance (the "offset" rule). A plurality of courts considering the issue held that the noncomplying secured party is barred from recovering a deficiency unless it overcomes a rebuttable presumption that compliance with former Part 5 would have yielded an amount sufficient to satisfy the secured debt. In addition to the nonuniformity resulting from court decisions, some States enacted special rules governing the availability of deficiencies."

The uniform version has been called the "consumer compromise," because it represents a compromise between consumer credit advocates who feared enactment of the "absolute bar" rule and consumer advocates who feared that the option of the "rebuttable presumption" rule would encourage judicial reversals in jurisdictions where the courts had previously applied the "absolute bar" rule. (For history and discussion of "consumer compromise," see Rapson, *Default and Enforcement of Security Interests Under Revised Article 9*, 41 UCC Bulletin, July 2000.) California's version of U.C.C. 9626(b) has been characterized as applying the "absolute bar" rule with regard to consumer transactions. (See Weise, *An Introduction to Revised UCC Article 9*, C.E.B., 22 California Business Law Reporter (July 2000); on rebuttable presumption rule for nonconsumer transactions, see *supra*, §199.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Debtor's Right to Surplus.*

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §141.

(5) *Difference Between California and Uniform Act.* See 11 Lawrence's Anderson 3d (2007 ed.), [Rev] §9-626 (replacing 11 Anderson 3d (1999 Rev. ed.), [Rev] §9-626).



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CHAPTER VII - Secured Transactions in Personal Property

Witkin Summary of California Law
 IX. DEFAULT AND ENFORCEMENT
 D. Remedies for Noncompliance With Division 9.
 3. Commercial Reasonableness.

4 Witkin Sum. Cal. Law STPP § 201

[§ 201] Commercial Reasonableness.

(1) *Relationship of Price to Commercial Reasonableness.* The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner. (U.C.C. 9627(a).) While not itself sufficient to establish a violation of U.C.C. 9601 et seq., "a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable." (Uniform Commercial Code Comment 2; see *Clark Equipment Co. v. Mastelotto* (1978) 87 C.A.3d 88, 96, 97, 150 C.R. 797 [sale of tractor shovel in public place, during business hours, on adequate notice, and in manner common to industry was "commercially reasonable" although plaintiff was sole bidder, sale price was \$ 49,500, and expert testimony was that shovel was worth \$ 75,000; plaintiff, who purchased shovel for resale, properly bid wholesale price]; C.E.B., *Secured Transactions* 2d, §5.43; 68A *Am.Jur.2d* (2003 ed.), *Secured Transactions* §709 et seq.)

(2) *Commercially Reasonable Dispositions.* A disposition of collateral is made in a commercially reasonable manner if the disposition satisfies any of the following conditions:

(a) It is made in the usual manner on any recognized market. (U.C.C. 9627(b)(1).)

(b) It is made at the price current in any recognized market at the time of the disposition. (U.C.C. 9627(b)(2).)

(c) It is made otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. (U.C.C. 9627(b)(3).)

None of the specific methods of disposition specified in U.C.C. 9627(b) is required or exclusive. (Uniform Commercial Code Comment 3; see 59 *A.L.R.3d* 369 [burden of proof as to "commercially reasonable" disposition of collateral]; 7 *A.L.R.4th* 308 [what is "commercially reasonable" disposition]; 4 *Proof of Facts* 2d 1 [secured party's failure to sell collateral in commercially reasonable manner].)

(3) *Advance Approval.* A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved in a judicial proceeding (U.C.C. 9627(c)(1)), by a bona fide creditors' committee (U.C.C. 9627(c)(2)), by

a representative of creditors (U.C.C. 9627(c)(3)), or by an assignee for the benefit of creditors (U.C.C. 9627(c)(4)). Approval under U.C.C. 9627(c) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable. (U.C.C. 9627(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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 4. Limitation on Secured Party's Liability.

4 Witkin Sum. Cal. Law STPP § 202

[§ 202] Limitation on Secured Party's Liability.

(1) *Noncompliance With Division 9.* Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person, the secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with Division 9. (U.C.C. 9628(a)(1).) Moreover, when the secured party is without that knowledge, the secured party's failure to comply with Division 9 does not affect the person's liability for a deficiency. (U.C.C. 9628(a)(2).)

(2) *Status as Secured Party.* A secured party is not liable because of its status as secured party to a person that is a debtor or obligor, unless the secured party knows that the person is a debtor or obligor (U.C.C. 9628(b)(1)(A)), the identity of the person (U.C.C. 9628(b)(1)(B)), and how to communicate with the person (U.C.C. 9628(b)(1)(C)). Moreover, a secured party is not liable because of its status as secured party to a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows that the person is a debtor (U.C.C. 9628(b)(2)(A)) and the identity of the person (U.C.C. 9628(b)(2)(B)).

(3) *Belief That Transaction Is Not Consumer Transaction.* A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer-goods transaction or a consumer transaction or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on either of the following representations:

(a) A debtor's representation concerning the purpose for which collateral was to be used, acquired, or held. (U.C.C. 9628(c)(1).)

(b) An obligor's representation concerning the purpose for which a secured obligation was incurred. (U.C.C. 9628(c)(2).)

(4) *Single Liability for Damages.* A secured party is not liable under U.C.C. 9625(c)(2) more than once with respect to any one secured obligation. (U.C.C. 9628(d).)

SUPPLEMENT: [This section is current through the latest supplement]