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NOTES BEARING INTEREST

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The Chair's Comments

A Word from
Stephen M. Lynch

We held our annual meeting and Business Law Institute this year on February 18 and 19. For the second consecutive year, our annual meeting was held in conjunction with the annual meetings of the Corporate Counsel Section and the International Law & Practice Section. I'd like to thank our course planners, Jason Hensley, Tracey Leroy and Russell Robinson, as well as the chair of our CLE Committee, Chris Capel, for all of their efforts in pulling this together. I would also like to thank the chairs of the Corporate Counsel



Stephen M. Lynch

See COMMENTS page 2

Inside This Issue:

- 9 Preventing and Responding to Corporate Crime: New Focus for Compliance and Ethics Programs – “Direct Reporting,” “Responding Appropriately,” and Dealing with Whistleblowers

Traps for the Unwary in the Perfection of Security Interests in Quirky Collateral

by Stephen F. Later

Introduction

The Uniform Commercial Code¹ (the “UCC”) generally governs the creation and perfection of security interests in collateral. The UCC is, however, subject to preemption or otherwise superseded by statutes, regulations, and treaties of the United States as well as certain state statutes applicable to the creation, priority or enforcement of security interests in specific collateral.² This article will examine the creation and perfection of security interests in certain collateral that implicate traps for the unwary.

Aircraft

The Federal Aviation Act of 1958³ (the “Act”) prompted the establishment of a civil aviation registry maintained by the Federal Aviation Administration (the “FAA”). The civil aviation registry governs the recordation of security interests in (a) an aircraft registered with the FAA,⁴ (b) a specifically identified aircraft engine with at least 550 rated takeoff horsepower or its equivalent, (c) a specifically identified aircraft propeller capable of absorbing at least 750 rated takeoff shaft horsepower, (d) an aircraft engine, propeller, or appliance maintained for installation or use in an aircraft, aircraft engine, or propeller, by or for a United States air carrier, and (e) spare parts maintained by or for a United States air carrier.⁵

Article 9 of the UCC is inapplicable to the extent that it is preempted by a federal

statute, regulation or treaty.⁶ Therefore, for engines and propellers that meet the applicable threshold ratings, all instruments executed for security purposes are required to be recorded in the civil aviation registry.⁷ The failure to record a conveyance, lease or security instrument in the civil aviation registry indeed invalidates the conveyance, lease or security instrument with respect to third parties without notice thereof.⁸ However, if the collateral fails to meet the minimum qualifications of the federal registration system, security interests in the collateral are perfected under the UCC.

The Act requires interests in aircraft to be recorded in the civil aviation registry “before the rights of innocent third parties can be affected.”⁹ Therefore, although state law governs those matters that are not preempted by federal law¹⁰ including the priority of instruments that are, in fact, recorded pursuant to the Act,¹¹ “all interests [in an aircraft] must be federally recorded before they can obtain whatever priority to which they are entitled under state law.”¹² The Act provides that security interests recorded in the civil aviation registry are perfected upon recordation¹³ and that an unrecorded security interest is not enforceable against the debtor and those with actual notice thereof.¹⁴

The FAA promulgated a rule¹⁵ as of Oct. 1, 2010 that, in a departure from the prior issuance of non-expiring registrations,

See QUIRKY COLLATERAL page 3

imposes periodic re-registration requirements for aircraft. Therefore, since (a) registration notices are sent to aircraft owners rather than secured parties and (b) an unregistered aircraft will be grounded and thus not only diminished in value but a challenge to repossess, this rule poses serious concerns for secured lenders. It is recommended that secured lenders insert provisions in their security agreements to monitor registration status and to grant powers of attorney to the secured lender to facilitate the re-registration if the owner fails to do so on a timely basis.

The laws of North Carolina, like those of most states, provide that “[a]ny person who has expended labor, skill, or materials on an aircraft or has furnished storage for an aircraft at the request of its owner has a perfected lien on the aircraft beginning on the date the expenditure of labor, skill, or materials or the storage commenced, for the contract price for the expenditure of labor, skill, or materials or for the storage, or, in the absence of a contract price, for the reasonable worth of the expenditure of labor, skill, or materials, or of the storage”¹⁶ The “aircraft” also includes any “engine, part, component, or accessory, whether affixed to or separate from the aircraft.”¹⁷ The North Carolina statute further provides that the lien “shall have priority over perfected and unperfected security interests.”¹⁸ North Carolina law requires the lien to be filed in the office of the clerk of court in the county in which the labor or materials were expended and, yet, the Act requires registration, too, in the civil aviation registry.¹⁹

The UCC provides that 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.”²⁰ In the context of the Act, however, it appears that the majority view is that security interests recorded in the civil aviation registry are indeed subordinate to possessory liens.²¹

The International Registry of Mobile Assets (the “International Registry”) was established in 2006 under the Cape Town Convention regime (“Cape Town”) and layers an additional registration system upon the civil aviation registry for “international interests” in certain aircraft and engines.²² International interests include security interests, leasehold interests, and “title reservation agreements” (conditional sale agreements).²³ The International Registry operates, unlike the civil aviation registry, as a pure race sys-

tem. Therefore, notwithstanding actual knowledge, the first party to register a valid interest enjoys priority over all competing interests thereunder. Further, Cape Town permits recordation of “prospective international interests” to perfect interest in an eligible aircraft or engine prior to consummation of the covered transaction and thus permits pre-closing perfection of security interests with priority that relates back to the date of the recordation of the prospective interest.

Capital Calls

The capital call agreement is, in essence, the contractual obligation of a fund investor to provide capital to the fund, which may constitute debt, equity or a hybrid thereof, under specified circumstances. The right of the fund to receipt of the capital is a valuable asset that can be pledged as credit support. The capital call constitutes a general intangible²⁴ (and, within the context thereof, a payment intangible)²⁵ and, therefore, the fund creditors can perfect a security interest therein only by filing a UCC financing statement.²⁶

The secured creditor is thus advised, since the investor is likely to be an “account debtor”²⁷ of the fund, to require the fund agreement to include a notification to the investor (to be authenticated by the fund, as assignor of a payment intangible, and the secured creditor, as assignee of a payment intangible) that the investor obligation under the capital call agreement is assigned to, and that payment is to be made to, the secured creditor. The UCC provides that, 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.”²⁸ Indeed, in some cases, lenders will require, as a condition of the extension of credit to an investment fund, that the fund execute and deliver its capital call notices at closing so that the creditor can, in the event of default, send out the capital call notices and demand payment thereof.

Certificates of Deposit

The threshold inquiries in the perfection of a security interest in a certificate of deposit are (a) whether the certificate of deposit is certificated or uncertificated and (b), if certificated, whether it is negotiable or non-negotiable. The certificate of deposit is uncertificated if the obligation of the issuer

to pay thereunder is unwritten, in which event, as a “demand, time, savings, passbook, or similar account maintained with a bank... [not] evidenced by an instrument,” it constitutes a “deposit account.”²⁹ The perfection of a security interest in a deposit account requires control thereof by the secured party,³⁰ and its perfection is limited to the period of control.³¹

The secured party possesses control of an uncertificated certificate of deposit as a deposit account if (a) the secured party is the bank at which the deposit account is maintained, which affords the bank automatic perfection without any form of public notice to any actual or potential creditor of the debtor,³² (b) the bank agrees, in an authenticated record (customarily a deposit account control agreement) executed by the bank, the debtor, and the secured party that the bank will comply, without further consent by the debtor, with the instructions of the secured party related to disposition of the funds therein³³ or (c) if the secured party becomes the bank’s customer with respect to the deposit account.³⁴

The establishment of control under N.C. Gen. Stat. § 25-9-104(a)(2) requires not that the account control agreement limit the rights of the debtor to the use of the funds held in the deposit account but, rather, that the bank will comply with the secured party’s instructions as to dispositions of the account funds.³⁵ Of course, the withdrawal of funds from the deposit account, upon maturity of the certificate of deposit or otherwise, will reduce the amount of collateral, so the prudent secured party will establish limitations upon the withdrawal of funds from the deposit account.³⁶ Further, if perfection is undertaken pursuant to the identification of the secured party as the bank customer under N.C. Gen. Stat. § 25-9-104(a)(3), it is imperative that the ownership of the deposit account by the secured creditor be clear and unambiguous.

Article 9 offers broad protections to depositary banks and provides that, unless the secured creditor is the customer of the depositary bank,³⁷ the security interest of a creditor in a deposit account, but not in an instrument,³⁸ is subordinate to the bank’s common law rights of recoupment and set-off³⁹ against the secured party.⁴⁰ Therefore, for a secured party that is a depositary bank, rights of set-off and recoupment are valuable

See QUIRKY COLLATERAL *page 4*

tools, but, as a security interest extends to the proceeds of a deposit account,⁴¹ these rights are often insufficient protection. Further, for a secured party that is not a depository bank, it is critical to become the “customer” of the bank⁴² for purposes of the deposit account or to obtain the agreement of the bank to waive or subordinate its rights of recoupment and set-off.⁴³

The perfection of security interest in a certificated certificate of deposit requires an assessment whether the certificate of deposit is negotiable or non-negotiable. The Article 9 definition of an “instrument” includes “a negotiable instrument” and “any other writing that evidences a right to the payment of a monetary obligation... and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment,”⁴⁴ and deposit accounts evidenced by “instruments” are excluded from the definition of “deposit accounts” under Article 9.⁴⁵

The certificated certificate of deposit, if it is negotiable, thus constitutes an “instrument” pursuant to which the secured lender can perfect its security interest through possession⁴⁶ or filing.⁴⁷ However, as perfection by filing remains subject to the claims of certain parties in possession of the instrument, possession remains the preferred method of perfection.⁴⁸ Further, if new value is given under an authenticated security agreement, the secured lender will also benefit from automatic perfection for twenty days from the attachment of its security interest.⁴⁹

The certificated certificate of deposit, if it is non-negotiable, also constitutes an “instrument” if it “is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment,” and a security interest therein is thus perfected through possession or filing. Finally, in the case of the non-negotiable certificate of deposit that is not “instrument,” it qualifies as a deposit account, and, therefore, the security interest therein is perfected by control.⁵⁰

Copyrights

Copyrights, like patents and trademarks, are, despite the absence of specific references thereto in Article 9, included within the scope of “intellectual property” and thus constitute general intangibles for purposes of

the UCC.⁵¹ The Copyright Act of 1976⁵² preempts state law related to a “transfer of copyright ownership or other document pertaining to a copyright” and provides for recordation in the Copyright Office.⁵³ However, the definition of a “transfer of copyright ownership” includes “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright.”⁵⁴ There is, further, a general consensus, but not a universally binding precedent, that the UCC is inapplicable to perfection of security interests in registered copyrights and that the Copyright Office is thus the sole location for filing to perfect a security interest in these copyrights.⁵⁵ Further, regardless of registration, an author possesses protected rights under law, and the proper perfection of security interests in unregistered copyrights is less clear and reflects a division of opinion.⁵⁶ The prudent secured creditor is thus advised to require registration and recordation at the Copyright Office in addition to filing under the UCC for any unregistered rights.

Domain Names

The Internet domain name is a critical asset of businesses from retailers to financial institutions and, therefore, essential collateral for their secured lenders. However, as domain names emerged years ago to meet the demands of engineers, not lenders, it is important to assess the nature of available rights in domain names. The control of domain names is split between registries that monitor the relationship between a domain name and its related numerical Internet Protocol (“IP”) address and offer this information to other computers on the Internet and registrars that distribute domain names and monitor their ownership. The registration of a domain name, in effect, confers rights to associate the registered domain name and the IP address of its registrant’s computer.

Some courts have concluded that a domain name is a form of intangible personal property⁵⁷ and other courts have found a conditional contractual right in the agreement between the registrant and the registrar for exclusive association of the domain name for the term of the registration.⁵⁸ Further, the Anticybersquatting Consumer

Protection Act⁵⁹ authorizes in rem civil actions against domain names, and, indeed, cases heard thereunder support the characterization of domain names as a form of intangible property for purposes thereof.⁶⁰ Further, N.C. Gen. Stat. § 25-9-408 preempts most contractual and legal restrictions upon assignment to the extent that the provisions would impair the creation, attachment or perfection of a security interest.

However, there is a consensus that domain names are “general intangibles,” and security interests therein are thus perfected under Article 9 through duly filed financing statements.⁶¹ In fact, several courts drew analogies between domain names and telephone numbers, and security interests in the rights of telephone number subscribers are perfected as general intangibles.⁶² It is important, of course, that the collateral description in the security agreement and financing statement include the essential elements of the collateral value of the domain name including the domain name and all related (a) goodwill, (b) intellectual property, (c) accounts, accounts receivable, general intangibles, instruments, and payment intangibles arising from the use of the domain, and, of course, (d) proceeds (an after-acquired collateral clause is important in the context of domain names as with other forms of property).

Membership and Partnership Interests

The UCC generally characterizes interests in limited liability companies and partnerships (general and limited) as general intangibles rather than, subject to certain exceptions, securities.⁶³ However, the UCC permits an issuer to opt into Article 8, pursuant to which the interest will indeed constitute a “security” for purposes of the UCC, and this election offers significant advantages to creditors with security interests in membership interests and partnership interests.⁶⁴

The protected purchaser provisions of Article 8, which extend to secured creditors, provide that the purchaser of a security acquires its interest therein “free of any adverse claim” under certain circumstances.⁶⁵ However, in the event that the protected purchaser is a secured creditor, prior perfected security interests in a security will be subordinated rather than cut off⁶⁶ but will

indeed be discharged by subsequent foreclosure of the security interest and sale of the security to a protected purchaser.⁶⁷ The UCC offers no comparable provisions applicable to a security interest in a general intangible. The Article 8 opt in also insures that, in the case of a certificated membership or partnership interest, the certificate will not unexpectedly be deemed to be an instrument.⁶⁸

The UCC requires perfection of a security interest in a general intangible by filing a financing statement⁶⁹ with the priorities of conflicting security interests governed on a first-to-file basis.⁷⁰ However, although protected purchaser status is limited to perfection by control, a security interest in an uncertificated security can nonetheless be perfected by filing⁷¹ or by control,⁷² and a certificated security can, additionally, be perfected by delivery to a qualified third party⁷³ as well as by filing⁷⁴ or by control.⁷⁵ The priorities of conflicting security interests in a security perfected by filing are governed by the first-to-file rules whereas a security interest perfected by control or delivery enjoys priority, despite prior knowledge thereof by the secured party, over prior competing security interests perfected by filing.⁷⁶

The certification of securities subject to a security interest is, with certain reservations, optimal from the perspective of the secured creditor. As opposed to perfection by filing, perfection by control or delivery precludes control or delivery on behalf of another secured creditor, and, therefore, certificated securities can eliminate certain risks of contested priorities and potential protected purchasers. As perfection by delivery of the certificate to a third party requires the secured party to rely upon representations of the debtor and the third party related to its priority under the control priority rule,⁷⁷ perfection by control is preferable, and it is easily achieved through possession with an effective indorsement.⁷⁸

However, perfection by control of certificated securities is not without risk, as loss, destruction or theft of a certificate in possession of the secured creditor is, if coupled with the indorsement executed in blank, in effect, a bearer instrument. The loss, destruction or theft of a certificate can (a), in the absence of secondary perfection by filing of a financing statement, result in a loss of perfection, (b) lead to the acquisition of the certificate by a protected purchaser, (c) expose the secured creditor to claims of the debtor for failure to use “reasonable care in the cus-

tody and preservation” of collateral in its possession,⁷⁹ and (d) potentially substantial replacement costs.⁸⁰

The acquisition of control of an uncertificated security, absent re-registration in the name of the secured party, presents challenges due to the likely liability-related resistance of the issuer to participation in a control agreement and, due to the first-to-obtain-control rule of Article 9⁸¹ and the requisite reliance of the secured creditor upon representations of the debtor and the issuer related to acquisition of control and thus to its priority

It is further advisable that, in light of the aforementioned issues, secured creditors ensure that their debtors are contractually obligated, in the security agreement or otherwise, to prohibit acts that jeopardize their security interests including, for example, conversion of an entity to another form of entity, certification of uncertificated securities or an opt out of Article 8.⁸² Of course, an unanticipated opt in, too, presents risks related to priorities, protected purchasers, and defective collateral descriptions, so the inclusion of comparable prohibitions is appropriate. The prudent secured creditor will thus further consider proxy appointments and issuer agreements related to Article 8 issues.

The perfection-related options raise choice of law issues and, in the case of (a) possession of a certificated security, the law applicable to the location of the certificate governs,⁸³ (b) control of an uncertificated security, the law applicable to the “issuer’s jurisdiction” controls,⁸⁴ and (c) filing, the law applicable to the jurisdiction of the debtor’s location governs.⁸⁵ It is also important to note, especially in the context of limited liability companies, the variation amongst state acts in the applicable terms due to the importance of an accurate collateral description and, of course, to ensure that the secured creditor or purchaser indeed succeeds to all economic and contractual rights in the event of foreclosure.⁸⁶

Patents

The Patent Act⁸⁷ is silent on security interests in patents, but, due to the 1891 decision by the Supreme Court in the **Waterman** case,⁸⁸ security interests in patents are customarily filed at the United States Patent and Trademark Office (the “USPTO”). **Waterman** predated the UCC by decades, however, and courts are split as

to perfection under the UCC. The general consensus is that the filing of a financing statement pursuant to the UCC for the patent as a general intangible is sufficient,⁸⁹ but prudent secured lenders also record security interests at the USPTO as recordation at the USPTO provides notice to potential bona fide purchasers or mortgagees of patents.⁹⁰

Promissory Notes

Article 9 permits the perfection of promissory notes by possession⁹¹ or by filing a financing statement.⁹² However, as perfection by filing remains subject to the claims of certain parties in possession of the instrument, possession is the preferred method of perfection.⁹³

Trademarks

The general rule is that the Lanham Act⁹⁴ provisions related to trademark assignments do not, in the case of security interests in trademarks, preempt the applicable UCC filing requirements as general intangibles under Article 9.⁹⁵ There are, further, issues related to naked licenses or assignments in gross pursuant to which transfers of trademarks require transfer of related business goodwill⁹⁶ and, therefore, the security interest needs to extend to the goodwill as well as to the trademark.⁹⁷ However, although recording at the USPTO is not sufficient to perfect the security interest, it is common practice to review USPTO records to assess possible trademark security interest. The USPTO filing thus provides notice to third parties, including subsequent lenders and purchasers, of the security interests. ■

Later practices with Robbins May & Rich in Pinehurst.

End Notes

1. Chapter 25 of the North Carolina General Statutes.
2. N.C. Gen. Stat. § 25-9-109(c), (d).
3. 49 U.S.C. § 1301 et seq.
4. 49 U.S.C. § 44102(a)(1) provides that “[a]n aircraft may be registered under section 44103 of this title only when the aircraft is (1) not registered under the laws of a foreign country and is owned by (A) a citizen of the United States, (B) an individual citizen of a foreign country lawfully admitted for permanent residence in the United States, or (C) a

See QUIRKY COLLATERAL page 6

Quirky Collateral *from page 5*

corporation not a citizen of the United States when the corporation is organized and doing business under the laws of the United States or a State, and the aircraft is based and primarily used in the United States.”

5. 49 U.S.C. § 44107(a)(2).

6. N.C. Gen. Stat. § 25-9-109(c)(1); see also N.C. Gen. Stat. § 25-9-311(a)(1).

7. Further, in the case of engines, propellers, appliances, and spare parts maintained by or on behalf of a FAA-certified air carrier, all instruments executed for security purposes are also required to be recorded in the federal registration system.

8. 49 U.S.C. § 44108(a).

9. **Philko Aviation, Inc. v. Shacket**, 462 U.S. 406, 409-10, 103 S. Ct. 2476, 2478 (1983).

10. **Haynes v. General Elec. Credit Corp.**, 432 F. Supp. 763 (W.D. Va. 1977), *aff'd*, 582 F.2d 869 (4th Cir. 1978).

11. **South Shore Bank v. Tony Mat, Inc.**, 712 F.2d 896 (3d Cir. 1983); **Western State Bank v. Grumman Credit Corp.**, 564 F. Supp. 9 (D. Mont. 1982), *aff'd*, 701 F.2d 187 (9th Cir. 1983).

12. **Philko Aviation, Inc. v. Shacket**, 462 U.S. 406, 413, 103 S. Ct. 2476, 2480 (1983).

13. 49 U.S.C. § 44108(b).

14. 49 U.S.C. § 44108(a).

15. 75 Fed. Reg. at 41969 (July 20, 2010).

16. N.C. Gen. Stat. § 44A-255.

17. N.C. Gen. Stat. § 44A-250(1).

18. N.C. Gen. Stat. § 44A-270.

19. *See* **Danning v. Pacific Propeller, Inc. (In re Holiday Airlines Corp.)**, 620 F.2d 731, 735 (9th Cir.), cert. denied, 449 U.S. 900 (1980) (“We cannot accept an argument that artisans’ liens are not within the ambit of the Act”); **Southern Air Transport, Inc. v. Northwings Accessories Corp. (In re Southern Air Transport, Inc.)**, 255 B.R. 715, 721 (Bankr. S.D. Ohio 2000) (holding that mechanics’ liens against aircraft are required to be filed under the Act); **Aero Support Systems, Inc. v. FDIC**, 726 F. Supp. 651, 653 (N.D. Texas 1989); **South Shore Bank v. International Jet Interiors, Inc.**, 721 F. Supp. 29, 32-33 (E.D. N.Y. 1989). *But see* **In re S. Air Transp., Inc.**, 511 F.3d 526, 530 (6th Cir. 2007) (holding, under prior North Carolina statute that included no clerk of court or other filing requirement for mechanics’ liens, that

“where a state law does not require, or even provide for, the filing of an instrument in order for a possessory artisan’s lien against an aircraft to be perfected, the failure to file an instrument evidencing the lien with the FAA registry does not invalidate the lien”).

20. N.C. Gen. Stat. § 25-9-333(b). N.C. Gen. Stat. § 25-9-333(a) defines a “possessory lien” as, *inter alia*, “an interest, other than a security interest..., which 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.”

21. *See, e.g., In re Southern Air Transport, Inc.*, 511 F.3d 526, 531 (6th Cir. 2007) (holding that possession is an effective form of notice of encumbrance and that, although the Act provided for filing of liens in the civil aviation registry, preemption was not intended to reach state law related to perfection of mechanics’ liens under North Carolina law). *Compare Stanziale v. Whitney (In re Tower Air, Inc.)*, 319 B.R. 88 (Bankr. D. Del. 2004) (concluding that a nonconsensual, common law, possessory lien on an aircraft engine had been perfected through continuous possession of the aircraft engine rather than through a filing with the civil aviation registry pursuant to 49 U.S.C. 55 44107(a)(i) and 44107(a)(z)) *with Southern Air Transport, Inc. v. Northwings Accessories Corp., Inc. (In re Southern Air Transport, Inc.)*, 255 B.R. 715,722 (Bankr. S.D. Ohio 2000) (“This Court concludes that it was the intent of Congress, and the Administrator of the FAA, to preempt state laws that would recognize the validity of unrecorded liens against spare aircraft parts, whether arising by agreement or by statute, as against innocent transferees or lien holders who have recorded with the FAA.”) and **Continental Radio Co. v. Continental Bank & Trust Co.**, 369 S.W.2d 359 (Tex. App. 1963) (holding that the Act preempts mechanics’ liens created pursuant to state law).

22. The Convention is applicable to (a) aircraft certificated for at least eight seats including crew or goods in excess of 6,062 pounds, (b) helicopters certificated for at least five seats including crew or goods in excess of 990 pounds, (c) piston and turbo-prop engines with at least 550 rated takeoff shaft horsepower, and (d) jet engines with 1,750 pounds of thrust.

23. Cape Town Convention on International Interests in Mobile Equipment, arts. 2, 7.

24. N.C. Gen. Stat. § 25-9-102(a)(42).

25. N.C. Gen. Stat. § 25-9-102(a)(61) (defining a payment intangible as a “general intangible under which the account debtor’s principal obligation is a monetary obligation”).

26. N.C. Gen. Stat. § 25-9-310(a).

27. N.C. Gen. Stat. § 25-9-102(a)(3).

28. N.C. Gen. Stat. § 25-9-406(a).

29. N.C. Gen. Stat. § 25-9-102(a)(29).

30. N.C. Gen. Stat. § 25-9-312(b)(1); N.C. Gen. Stat. § 25-9-314(a).

31. N.C. Gen. Stat. § 25-9-314(b).

32. N.C. Gen. Stat. § 25-9-104(a)(1).

33. N.C. Gen. Stat. § 25-9-104(a)(2).

34. N.C. Gen. Stat. § 25-9-104(a)(3).

35. N.C. Gen. Stat. § 25-9-104(b).

36. The security interest in the certificate of deposit and the proceeds thereof is jeopardized by transfer in the event that the proceeds of the certificate of deposit are (a) commingled in another deposit account or (b) deposited into a deposit account that is not “controlled” by the secured party due to exposure to a claim of the issuing bank or a perfected security interest in favor of a third party in the subsequent deposit account.

37. N.C. Gen. Stat. § 25-9-340(c). The limitations of N.C. Gen. Stat. § 25-9-340(c) are restricted to the right of setoff, however, and the bank remains entitled to exercise its recoupment rights against the secured creditor that is its customer under N.C. Gen. Stat. § 25-9-104(a)(3). N.C. Gen. Stat. § 25-9-340 cmt. 2.

38. N.C. Gen. Stat. § 25-9-340 cmt. 3.

39. The principal distinction between setoff and recoupment turns on whether the underlying debts arose out of one or separate transactions. The right of setoff is asserted to reduce or extinguish a claim against a debtor in the event that the debt and claim arise from different transactions, albeit it in the same respective rights and capacities, whereas the right of recoupment is asserted to abate or reduce a demand a claim against a debtor in the event that the debt and claim arise from the same contract or transaction. *See Roberts v. First-Citizens Bank and Trust Co.*, 124 N.C.App. 713, 717, 478 S.E.2d 809, 812 (1996) (holding that “the common law right of setoff allows banks, as debtors of their general depositors, to setoff against the

deposits any matured debts the depositors owe them”).

40. N.C. Gen. Stat. § 25-9-340; see also N.C. Gen. Stat. § 25-9-340 cmt. 2 (noting that “...a bank may hold both a right of set-off against, and an Article 9 security interest in, the same deposit account.”); N.C. Gen. Stat. § 25-9-340(b) (providing that “the application of this article to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured party.”); N.C. Gen. Stat. § 25-9-340 cmt. 3 (noting that, “[b]y holding a security interest in a deposit account, a bank does not impair any right of set-off it would otherwise enjoy”).

41. N.C. Gen. Stat. § 25-9-203(f).

42. See N.C. Gen. Stat. § 25-9-327(1) (providing that “[a] security interest held by a secured party having control of the deposit account under G.S. 25-9-104 has priority over a conflicting security interest held by a secured party that does not have control”).

43. N.C. Gen. Stat. § 25-9-339; **State ex rel Eure v. Lawrence**, 93 N.C.App. 446, 450-451, 378 S.E.2d 207, 209-210 (1989) (recognizing the possibility of waiver of the right of setoff).

44. N.C. Gen. Stat. § 25-9-102(a)(47).

45. N.C. Gen. Stat. § 25-9-102(a)(29).

46. N.C. Gen. Stat. § 25-9-313(a).

47. N.C. Gen. Stat. § 25-9-312(a).

48. See N.C. Gen. Stat. § 25-9-330(d) (providing that “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”); N.C. Gen. Stat. § 25-9-331 (providing, inter alia, that certain holders of negotiable instruments... take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, and 8 and that filing under Article 9 does not constitute notice of a claim or defense thereagainst).

49. N.C. Gen. Stat. § 25-9-312(e).

50. See N.C. Gen. Stat. § 25-9-102 cmt. 12.

51. N.C. Gen. Stat. § 25-9-102 cmt. 5(d).

52. 17 U.S.C. §§ 101 et seq.

53. 17 U.S.C. § 205.

54. 17 U.S.C. § 101. A secured creditor, in the case of a security interest in intellectu-

al property, best describes the intellectual property with particularity and includes, as collateral, all “now existing and hereafter acquired or created” intellectual property as well as all associated rights including, for example, proceeds and income, rights to sue for infringement, goodwill, contract rights, license rights, distribution rights, and foreign rights.

55. *E.g.*, **National Peregrine, Inc. v. Capitol Fed. Sav. & Loan Ass’n (In re Peregrine Entertainment Ltd.)**, 116 B.R. 194 (C.D. Cal. 1990).

56. The Copyright Act provides that constructive notice from federal recordation is ineffective unless “registration has been made for the work.” 11 U.S.C. § 205. *Compare World Aerotechnology Corp. v. Silicon Valley Bank (In re World Auxiliary Power Co.)*, 303 F.3d 1120 (9th Cir. 2002) (holding that a security interest in unregistered copyrights was properly perfected pursuant to Article 9 because (a) the Copyright Office will not accept a “transfer of copyright ownership,” (b) extension of **Peregrine** would thus require registration of copyrights as a prerequisite to perfection of a security interest therein, and (c) the unwarranted implication of requiring registration as a condition of perfection is that Congress intended to make unregistered copyrights practically useless as collateral) *with AEG Acquisition Corp.* 127 B.R. 34 (Bankr. C.D. Cal 1991), *aff’d* 161 B.R. 50 (9th Cir. BAP 1993); **In re Avalon**, 209 B.R. 517 (Bankr. D. Ariz. 1997) (holding that perfection required filing at the Copyright Office and registration was thus a prerequisite to perfection).

57. *E.g.*, **CRS Recovery, Inc. v. Laxton**, 600 F.3d 1138 (9th Cir. 2010).

58. *E.g.*, **Dorer v. Arel**, 60 F.Supp. 2d 558 (E.D.Va. 1999).

59. 15 U.S.C. § 1125(d).

60. *E.g.*, **Porsche Cars N. Am., Inc. v. Porsche.com**, 51 F. Supp. 2d 707 (E.D. Va. 1999), *vacated and remanded*, 215 F.3d 1320 (4th Cir. 2000), *aff’d*, 55 U.S.P.Q.2d 1158 (4th Cir. 2000), *rev’d and remanded*, 302 F.3d 248 (4th Cir. 2002).

61. N.C. Gen. Stat. § 25-9-310.

62. *See, e.g.*, **Dorer v. Arel**, 60 F.Supp. 2d 558, 561 (E.D.Va. 1999).

63. N.C. Gen. Stat. § 25-8-103(c) states that “[a]n interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets... or it is an investment

company security.” N.C. Gen. Stat. § 25-8-102(a)(15)(iii)(B) includes, within the definition of securities, an obligation of an issuer that is “a medium for investment and by its terms expressly provides that it is a security governed by this Article.”

64. N.C. Gen. Stat. § 25-8-103(d). The effect of the opt in is limited to the UCC and is specifically inapplicable for purposes of any other law, regulation or rule. N.C. Gen. Stat. § 25-8-102(d). Nonetheless, although limited to the UCC, Article 8, inter alia, provides that certain issuer-imposed restrictions on transfer of securities are ineffective against transferees without knowledge thereof, N.C. Gen. Stat. § 25-8-204, and negates certain anti-assignment provisions of applicable to general intangibles but not securities in N.C. Gen. Stat. § 25-9-406 and N.C. Gen. Stat. § 25-9-408.

65. N.C. Gen. Stat. § 25-8-303(b). N.C. Gen. Stat. § 25-8-303 defines a “protected purchaser” as the purchaser of a certificated or uncertificated security, or an interest therein, who (a) gives value, (b) is without notice of any adverse claim to the security, and (c) obtains control, rather than possession, of the certificated or uncertificated security. The UCC definitions provide that a “purchaser” includes a secured party, see N.C. Gen. Stat. § 25-1-201(29), (30), “value” includes an immediately-available extension of credit, see N.C. Gen. Stat. § 25-1-201 cmt. 44, “notice of an adverse claim” additionally incorporates a “willful blindness” test, N.C. Gen. Stat. § 25-8-105; see N.C. Gen. Stat. § 25-8-105 cmt. 4, and “control” is achieved pursuant to N.C. Gen. Stat. § 25-8-106. The achievement of protected purchaser status requires the issuer to opt in prior to the execution of the security agreement so, although executed at closing, the loan documents are best predicated upon the prior execution of the opt in.

66. N.C. Gen. Stat. § 25-9-331 cmt. 2 (“Whether a holder or purchaser referred to in this section takes free or is senior to a security interest depends on whether the purchaser is a buyer of the collateral or takes a security interest in it.”).

67. N.C. Gen. Stat. § 25-9-617(a)(3).

68. N.C. Gen. Stat. § 25-9-102(a)(47).

69. N.C. Gen. Stat. § 25-9-310(a).

70. N.C. Gen. Stat. § 25-9-322(d).

71. N.C. Gen. Stat. § 25-9-310(a).

72. N.C. Gen. Stat. § 25-8-106(c).

73. N.C. Gen. Stat. § 25-8-301; N.C.

Quirky Collateral from page 7

Gen. Stat. § 25-9-313(a), (e). See also N.C. Gen. Stat. § 25-9-312(g) (providing for temporary twenty-day perfection upon delivery to debtor for ultimate “sale or exchange” or for “[p]resentation, collection, enforcement, renewal, or registration of transfer”).

74. N.C. Gen. Stat. § 25-9-310.

75. N.C. Gen. Stat. § 25-8-106(a), (b).

76. See N.C. Gen. Stat. § 25-9-328 cmt. 8.

77. N.C. Gen. Stat. § 25-9-328.

78. N.C. Gen. Stat. § 25-8-106(b)(1).

79. N.C. Gen. Stat. § 25-9-207(a).

80. See N.C. Gen. Stat. § 25-8-405.

81. N.C. Gen. Stat. § 25-9-328.

82. For example, (a) perfection of a security interest in a general intangible is limited to filing and perfection by control will thus be rendered ineffective and (b) a collateral description, whether in a security agreement or a financing statement, that refers to a security will be ineffective against a general intangible in the event of an opt out.

83. N.C. Gen. Stat. § 25-9-305(a)(1).

84. N.C. Gen. Stat. § 25-9-305(a)(2); see also N.C. Gen. Stat. § 25-8-110(d) (defining

“issuer’s jurisdiction” as “the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer....”).

85. N.C. Gen. Stat. § 25-9-301(1); N.C. Gen. Stat. § 25-9-305(c)(1); see also N.C. Gen. Stat. § 25-9-307(b) (general rules for determining a debtor’s location).

86. For example, whereas the North Carolina Limited Liability Company Act defines “membership interests” to include the full basket of economic and contractual rights, N.C. Gen. Stat. § 57C-1-03(15), the term is not used in the Delaware Limited Liability Company Act, which refers to “limited liability company interests” and, yet, restricts their scope to certain economic rights, Del. Code tit 6, § 18-101(8)).

87. 35 U.S.C. §§ 261 et seq.

88. *Waterman v. McKenzie*, 138 U.S. 252 (1891); see 35 U.S.C. § 261.

89. See *In re Cybernetic Services, Inc.*, 252 F.3d 1039 (9th Cir. 2001), cert. denied, 534 U.S. 1130 (2002) (holding that the Patent Act is limited to assignments of full

legal title and thus does not preempt the UCC due to its silence on “security interests”); see also *In re Pasteurized Eggs Corp.*, 296 B.R. 283 (Bankr. D. N.H. 2003) (holding that filing with the Patent and Trademark Office failed to perfect a security interest in the patent since the Patent Act is silent on security interests); *City Bank and Trust Co. v. Otto Fabric, Inc.*, 83 B.R. 780, 782-83 (D. Kan. 1988) (holding that Patent Act preemption is a partial preemption and permits state filing to protect security interests); *In re Transportation Design & Tech., Inc.*, 48 B.R. 635, 639-40 (Bankr. S.D. Cal 1985) (holding that the Patent Act is limited to transactions that transfer title).

90. See also note 54.

91. N.C. Gen. Stat. § 25-9-313(a).

92. N.C. Gen. Stat. § 25-9-312(a).

93. See N.C. Gen. Stat. § 25-9-330(d) (providing that “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”); N.C. Gen. Stat. § 25-9-331 (providing, inter alia, that filing a financing statement is insufficient notice to preclude a subsequent purchaser from status as a holder in due course free from other claims pursuant to N.C. Gen. Stat. § 25-9-306).

94. 15 U.S.C. §§ 1060 et seq.

95. *City Bank and Trust Co. v. Otto Fabric, Inc.*, 83 B.R. 780 (D. Kan. 1988); *In re TR-3 Industries*, 41 B.R. 128 (Bankr. C.D. Cal. 1984); *In the Matter of Roman Cleanser Co.*, 802 F.2d 207 (6th Cir. 1986).

96. 15 U.S.C. § 1060 (1988). See *Green River Bottling Co. v. Green River Corp.*, 997 F.2d 359, 362 (7th Cir. 1993) (“A trademark cannot be sold ‘in gross,’ that is, separately from the essential assets used to make the product or service that the trademark identifies.”); *In the Matter of Roman Cleanser Co.*, 802 F.2d 207, 209, (6th Cir. 1986) (holding that the sale of the mark together with the related formulas and customer lists, but exclusive of the related manufacturing equipment, was sufficient).

97. *Marshak v. Green*, 746 F.2d 927, 931, 223 (2d Cir. 1984); see also note 54.

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