

Presenting a live 90-minute webinar with interactive Q&A

UCC Recent Developments: Practical Implications for Lenders' Security Interests

Best Practices to Protect Client Confidences and Advertise Legal Services

THURSDAY, DECEMBER 20, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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UCC Recent Developments

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Introduction

- Effect of the UCC on the transfer and enforcement of real estate notes
- Treatment of LLPs under Article 9 choice of law rules
- Effect of anti-assignment terms on security interests in partnership and LLP interests
- Recent case law
- 2010 Amendments to Article 9

PEB Report on mortgage notes

- Issues covered by the PEB Report
- PETE issues
- Creation of rights in the mortgage
- Mortgage follows the note
- Foreclosure on mortgage if not record owner of mortgage

Related issues

- Comparable rules where Article 3 does not apply
- Agency law
- Real estate law

Scope of PEB Report

- What the Report covers
- What the Report does not cover

PETE

- Applies only to ‘negotiable’ notes (UCC Article 3)
- Usually, PETE is ‘holder’ of note
 - Possession
 - Note indorsed to person in possession or indorsed or in blank

Creation of effective right in the note

- Applies to negotiable and non-negotiable instruments (Article 9)
 - Applies to sales and security interest to secure an obligation
- Requires:
 - Value
 - Transferor has ‘rights’ or ‘power’ to transfer rights in the note
 - Security agreement
 - Authenticated, or
 - Other security agreement plus possession

Mortgage follows the not

- Applies to negotiable and non-negotiable instruments (Article 9)
 - Applies to sales and security interest to secure an obligation
- Follows real estate law in general
 - Applies to deeds of trust
- ‘Automatic’ attachment (UCC § 9-203(g))
- ‘Automatic’ perfection (UCC § 9-308(e))

Enforcement without assignment of mortgage

- Assignment of mortgage not necessary to create or perfect a security interest in underlying mortgage
- Secured party may record instrument in real estate records to facilitate enforcement of mortgage if necessary on default of mortgagor
- Clarifying amendment in 2010 amendments to Article 9

PETE for non-negotiable notes

- Article 3 does not apply
- Some rules in common law of contracts apply
 - May vary by state
- Some rules in UCC Article 9 apply

HDC

- Secured party (whether buyer or lender) may also qualify as Article 3 holder in due course (negotiable instruments only)
- HDC requirements:
 - Possession by secured party
 - Indorsement to secured party or in blank
 - Secured party gives value
 - Secured party in good faith
 - No notice of claim to instrument or defenses

Real estate law

- UCC rules apply to the extent relevant to real estate law
 - *E.g.*, real estate law may turn on who ‘owns’ the note and the mortgage
- Real estate law provides other rules
 - *E.g.*, procedures for foreclosure

Agency law

- UCC generally recognizes use of agency law (UCC § 1-103(b))
- UCC Articles 3 and 9 repeatedly refer to application of agency law
- Restatement (Third) of Agency refers to application of agency law to UCC issues
- Particularly relevant where questions of secured party's 'possession' matter

PEB Report on LLPs and Article 9 ‘location’ rules

- General rule for ‘organizations’
- General rule for ‘registered organizations’
- Treatment of partnership as ‘organization’

Status of LLP as ‘general partnership’

- LLP not formed or organized by filing of public organic record
- LLP therefore an ‘organization’ but not a ‘registered organization’

Assignment of LLP and Partnership interests

- 9-406 and 9-408's application to interests in unincorporated business organizations
- Transfers restrictions on interests in limited liability company and partnership interests
 - Arising by contract
 - Arising by statute
- Policy tension between financing rights to payment vs. “pick your partner” principle
 - DE and other states enacting non-uniform provisions to exempt out interests in unincorporated business organizations
- Reason for PEB commentary
- Status of commentary

Terminology

- Agreement
- Economic rights
- Governance rights
- Owner
- Ownership interest
- Transfer
- Transfer restriction

Scope of §§ 9-406 and 9-408

- Characterization
 - Is the interest “investment property”?
 - Opt-in available under 8-103(c)
 - If opt-in, 9-406 and 9-408 do not apply at all
 - Is the interest a “payment intangible”?
 - Economic rights
 - Is the interest a “general intangible” which is not a payment intangible?
 - Entire interest, i.e., economic rights plus governance rights

Scope of §§ 9-406 and 9-408

- Transaction
 - Is the transaction a security interest that secures an obligation?
 - § 9-406 applies if the collateral is a payment intangible
 - § 9-408 applies if the collateral is a general intangible that is not a payment intangible
 - Is the transaction a sale of economic rights
 - § 9-408 applies to a sale of a payment intangible
 - Is the interest a sale of “general intangible” which is not a payment intangible?
 - Article 9 does not apply at all

Scope of §§ 9-406 and 9-408

- Transaction
 - Is the transaction a gift?
 - Article 9 does not apply at all
 - Is the transaction a transfer by operation of law?
 - Article 9 does not apply at all

Account debtor

- §§ 9-406 and 9-408 override a transfer restriction between the debtor and the account debtor
- Who is the account debtor?
 - The company/partnership
 - But not the other owners

§ 9-406

- Applies to a security interest that secures an obligation if the collateral is a payment intangible
 - SP is granted a security interest in Debtor's economic rights in Debtor's LLC interest to secure a loan
 - Contractual transfer restriction is overridden with respect to the LLC
 - 2010 amendments clarification
 - Contractual transfer restriction is not overridden with respect to the other owners
 - Legal restriction not overridden
 - 9-406(f) does not apply to a payment intangible

§ 9-408 -security interest securing an obligation

- Applies to a security interest that secures an obligation if the collateral is a general intangible that is not a payment intangible
 - SP is granted a security interest in Debtor's entire LLC interest to secure a loan
 - Contractual and legal transfer restrictions are overridden with respect to the LLC *short of enforcement*
 - LLC is not required to recognize SP
 - Contractual and legal transfer restriction are not overridden with respect to the other owners

§ 9-408 -sale of a payment intangible

- Applies to a security interest that is a sale of a payment intangible
 - Debtor sells Debtor's economic interest in an LLC interest to Buyer
 - Contractual and legal transfer restrictions are overridden with respect to the LLC *short of enforcement*
 - LLC is not required to recognize Buyer
 - Contractual and legal transfer restrictions are not overridden with respect to the other owners

Recent decisions

- Issues presented
- Transactional suggestions to deal with the cases

Drafting, Negotiating, Strategy

- *In re Milller*, 2012 WL 3589426
(C.D. Ill. 2012)
- *In re Green*, ____ B.R. ____
(Bkrtcy. N.M. 2012)
- Get the debtor's name right on
the financing statement

Collateral description

- *In re Michelle R Brown*, 2012 WL 4208777 (Bkrtcy. D. Kan. 2012)
- *Monticello Banking Company v. Flener*, Lexis 132300 (6th Cir. 2011)
- Describe your collateral accurately
 - Security agreement
 - Financing statement

Commercial tort claims

- *In re American Cartage, Inc.*,
656 F3rd 82 (1st Circ. 2011)
- Describe those commercial tort claims in the security agreement

Federal preemption

- *In re Tracy Broadcasting* 2012 WL 4874485 (10th Cir. 2012)
- Beware of federal preemption

Foreign collateral

- *Danka & Hackett v. Del Monte*, 228 Ariz. 533, 269 P.3d 709 (App. 2012) (review denied May 31, 2012).
- Don't forget the foreign collateral

2010 Amendments to Article 9

- Status of state enactments
- Effect if not all states are effective on July 1, 2013
 - Massachusetts Business Trusts
 - Possible change in ‘location’

New filing forms

UCC FINANCING STATEMENT
 FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. E-MAIL CONTACT AT FILER (optional)

C. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME: Provide only 200 Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the individual Debtor's name will not fit in line 1a, leave all of item 1 blank, check here and provide the individual Debtor information in item 1c of the Financing Statement Addendum (Form UCC1A).

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

1c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

2. DEBTOR'S NAME: Provide only 200 Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the individual Debtor's name will not fit in line 2a, leave all of item 2 blank, check here and provide the individual Debtor information in item 2c of the Financing Statement Addendum (Form UCC1A).

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

2c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

3. SECURED PARTY'S NAME (or NAME of ASSIGNEE of ASSIGNOR (SECURED PARTY): Provide only 200 Secured Party name (3a or 3b).

3a. ORGANIZATION'S NAME

OR

3b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

4. COLLATERAL: This financing statement covers the following collateral:

5. Check 200 if applicable and check 200 one box: Collateral is held in a Trust (see UCC1A item 17 and instructions) being administered by a Decedent's Personal Representative

6a. Check 200 if applicable and check 200 one box: Public Finance Transactions Manufacturing/Leasing Transaction A Debtor is a Transferee UCC Agriculture Lien Non-UCC Filing

7. ALTERNATIVE DESIGNATION (if assigned): Lessor/Lessee Consignee/Consignor Seller/Buyer Bailee/Bailor Licensee/Licensee

8. OPTIONAL FILER REFERENCE DATA:

UCC FINANCING STATEMENT (Form UCC1) (Rev. 04/2011)

Transition rules

- UCC §§ 9-801 et seq.
- Proposed effective date July 1, 2013
- Things to do:
 - Update individual names
 - Update trust names
 - Reconsider business trusts
 - Watch for new forms

UCC Recent Developments

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