

Chapter 4

The Basics

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§ 4:1 Introduction

It is important that documentation touch all of the bases. Too often, an essential element is overlooked. This chapter presents a basic overview of the scheme of Article 9 secured transactions, from which everything else in the book flows.

The parties to a pre-Revision Article 9 transaction were the *secured party* and the *debtor*. In a financing transaction, the secured party was the lender, seller, or other person in whose favor there was a security interest.¹ The debtor was the person who owed payment or performance of the secured obligation, and, if not the obligor, the owner of the collateral.² Since Article 9 also covers the sale of accounts and chattel paper, in that context “secured party” was the purchaser and seller.³

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1. Prior U.C.C. § 9-105(m).
 2. Prior U.C.C. § 9-105(d).
 3. Prior U.C.C. § 9-105(m), (d).

Article 9 has always created confusion by designing as the “debtor” both the person who owes payment and the owner of any collateral for the obligation.⁴ The Revision limits “debtor” to a person who has an ownership interest in the collateral, a seller in covered sales of intangibles, and a consignor.⁵ The person who owes the obligation is the *obligor*.⁶ The definition of *secured party* is slightly expanded to cover purchasers of items in sales not formerly covered by Article 9.⁷

A *security interest* is “an interest in personal property or fixtures that secures payment or performance of an obligation.”⁸ It is created by a *security agreement*, “an agreement which creates or provides for a security interest.”⁹

When a security interest becomes enforceable against the debtor with respect to the collateral, it has “attached.”¹⁰ Attachment has three elements:

- (1) agreement has been reached;
- (2) value has been given; and
- (3) the debtor has rights in the collateral.¹¹

§ 4:2 Agreement

Under the former statute, the debtor must have signed an agreement that contains a description of the collateral, the only

4. See section 9:1, *infra*.

5. U.C.C. § 9-102(a)(28).

6. U.C.C. § 9-102(a)(59).

7. U.C.C. § 9-102(a)(73).

8. Prior U.C.C. § 1-201(37). The Article 1 definition was changed in some particulars by the Revision.

9. U.C.C. § 9-102(a)(74); Prior U.C.C. § 9-105(1). See *Quisenberry v. Am. State Bank (In re Quisenberry)*, 295 B.R. 855 (Bankr. N.D. Tex. 2003). For a discussion of the extent to which an agreement must create or provide for the security interest, see cases *infra* at chapter 5. The pre-Revision definition ended with the additional language, “regardless of the label or form of the transaction.” One would have thought that nearly half a century of operation under Article 9 would have made it common knowledge that a reservation of title, absent a security agreement, would fail, but some are still attempting to use that technique. See, e.g., *Meade v. Richardson Fuel, Inc.*, 166 S.W.3d 55 (Ky. Ct. App. 2005). Consent of the owner of the collateral to the grant of a security interest must be demonstrated. *Res. Fin. Co. v. Cynergy Data LLC*, 966 N.Y.S.2d 24 (N.Y. App. Div. 1st Dep’t 2013).

10. U.C.C. § 9-203(a) (the Revision adds “unless an agreement expressly postpones the time of attachment”); Prior U.C.C. § 9-203(2).

11. U.C.C. § 9-203(b); Prior U.C.C. § 9-203(1).

exception being when the collateral was in the possession of the secured party.¹²

It is not possible to circumvent the technical requirements of Article 9 by asserting an equitable lien or the like.¹³

The mere fact of possession does not imply an oral security agreement;¹⁴ the intent of the parties to create an oral security agreement must be clear. This requirement is found in the pre-Revision cases¹⁵ and in the text of section 9-102(a)(7) of the Revision.

The basic criteria to determine the existence of an oral security agreement are that the burden of proof is on the proponent; the language used evidenced a definite intent on the part of both of the parties; and exclusive possession of the collateral passed to the creditor contemporaneous with the oral agreement.¹⁶

In some cases (historically those where the originator of a credit was a dealer contemplating sale of the obligation to a lender), forms state that the secured party's signature—its authorization under the Revision—is a condition prerequisite to effectiveness. The few cases

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12. Prior U.C.C. § 9-203(1)(a); First Nat'l Bank v. Alba (*In re Alba*), 429 B.R. 353, 358 (Bankr. N.D. Ga. 2008); Vt. Indus. Dev. Auth. v. Setze, 600 A.2d 302 (Vt. 1991). As to signatures, see cases *infra* at chapter 18. As to collateral descriptions, see materials *infra* at chapters 14 through 16. An intention to grant a security interest, absent the writing, will not suffice. *In re Miller*, 320 B.R. 911 (Bankr. E.D. Mo. 2005); Reuter v. Citizens & N. Bank, 599 A.2d 673 (Pa. Super. Ct. 1991). An issue that continually arises at the trial level but is seldom found in reported decisions involves whether possession of a certificate of title to a vehicle is the equivalent of possession of the vehicle for perfection purposes. It is not. *See, e.g., Laurel Motors, Inc. v. Airways Transp. Grp.*, 672 N.E.2d 785 (Ill. App. Ct. 1996). The requirement for possession is strictly construed and actual possession is essential. *Farm Credit Serv. v. First State Bank*, 575 N.W.2d 250 (S.D. 1998).
 13. *See Webster v. Lazin (In re Millennium Prods., Inc.)*, 48 U.C.C. Rep. Serv. 2d 368 (Bankr. D.D.C. 2002); *Wild W. World, LLC v. Larsen Int'l Inc. (In re Wild W. World, LLC)*, 2008 WL 4642266 (Bankr. D. Kan. Oct. 17, 2008).
 14. *Grossmann v. Saunders*, 376 S.E.2d 66 (Va. 1989); *In re Lewis*, 70 B.R. 699 (D. Kan. 1987); *First Nat'l Bank v. Quintana*, 733 P.2d 858 (N.M. 1987).
 15. *Expeditors Int'l v. Official Creditors Comm. (In re CFLC, Inc.)*, 166 F.3d 1012 (9th Cir. 1998); *In re Hryniewicz*, 222 B.R. 14 (D. Conn. 1998); *Burlesci v. Petersen*, 80 Cal. Rptr. 2d 704 (Cal. Ct. App. 1998); *Skiles v. Sec. State Bank*, 494 N.W.2d 355 (Neb. Ct. App. 1992); *In re Airwest Int'l*, 70 B.R. 914 (D. Haw. 1987).
 16. *Dzikowski v. Steoppelwerth (In re Boca Arena, Inc.)*, 237 B.R. 221 (S.D. Fla. 1999), quoting *Rubin v. Reorganized Church (In re Chuning)*, 70 B.R. 98 (W.D. Mo. 1987).

that have addressed the question have held that the absence of the secured party's signature/authorization is not necessarily fatal.¹⁷

To accommodate electronic security documentation, the Revision no longer calls for a writing. Instead, the requirement is that the debtor has *authenticated* a security agreement that provides a description of the collateral, the new term encompassing both written and other forms.¹⁸

It is important, once an agreement is found, to determine the outer parameters of that agreement. For example, it must be clear what obligations are secured¹⁹ and what collateral has been tendered to secure those obligations.²⁰

§ 4:3 Value

Value has a broad definition, which specifically includes commitments to lend and acquisition as security for or satisfaction of a pre-existing claim.²¹

§ 4:4 Rights in the Collateral

The U.C.C. does not define "rights in the collateral," and other law, state and federal, must be consulted to determine the scope of the

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17. *In re Vic Supply Co.*, 227 F.3d 928 (7th Cir. 2000); *Liquidating Grantor's Trust v. Finova Capital Corp. (In re Proteva, Inc.)*, 390 B.R. 584, 595–96 (N.D. Ill. 2002).
 18. "Authenticate" means: (A) to sign; or (B) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record. U.C.C. § 9-102(a)(7). "Record," a broader term than "writing," means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form. U.C.C. § 9-102(a)(70). In the absence of a security agreement, a "naked" financing statement is not authorized. *Scotto Rest. Grp., LLC v. Mission Valley Bank (In re Scotto Rest. Grp., LLC)*, 2012 WL 3070351 (Bankr. W.D.N.C. July 30, 2012).
 19. *In re Watson*, 286 B.R. 594 (D.N.J. 2002); *In re Immerfall*, 216 B.R. 269 (D. Minn. 1998).
 20. See THOMAS S. HEMMENDINGER, HILLMAN ON COMMERCIAL LOAN DOCUMENTATION §§ 10:1–10:4 (PLI 5th ed. 2000 & Supp. 2013).
 21. Prior U.C.C. § 1-201(44). See, e.g., *In re Kline Eng'g, PC*, 232 B.R. 579 (E.D.N.Y. 1999); *Press Prods., Inc. v. Geary*, 30 U.C.C. Rep. Serv. 2d 1214 (Wash. Ct. App. 1996); *Hildebrand v. Res. Bancshares Mortg. Grp. (In re Cohee)*, 178 B.R. 154 (M.D. Tenn. 1995); *Adelvision, LP v. Groff*, 859 F. Supp. 797 (E.D. Pa. 1994); *Harder v. United States*, 22 U.C.C. Rep. Serv. 2d 1165 (D. Mass. 1993). Loans to corporate affiliates of the debtor constitute value to the debtor. *718 Arch St. Assoc., Ltd. v. Blatstein (In re Blatstein)*, 226 B.R. 140 (E.D. Pa. 1998), *rev'd in part but not as to this point*, 192 F.3d 88 (3d Cir. 1999).

phrase.²² The Revision adds an alternative satisfaction of the requirement if the debtor holds “the power to transfer rights in the collateral to a secured party.”²³ This is consistent with the pre-Revision cases holding that “an owner’s permission to use goods as collateral creates rights in the debtor sufficient to give rise to an enforceable security interest.”²⁴

Most of the following cases were decided under the pre-Revision statute but should retain their vitality.

A debtor may have rights in collateral without title or ownership.²⁵ The debtor’s rights may be subject to the rights of others, such as setoff.²⁶ Ordinarily mere possession or the unexercised option to buy goods does not give rights in the collateral,²⁷ but possession by the debtor is not necessary if other rights in the collateral exist.²⁸

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22. Foothill Capital Corp. v. Clare’s Food Mkt., Inc. (*In re* Coupon Clearing Serv., Inc.), 113 F.3d 1091 (9th Cir. 1997).
 23. U.C.C. § 9-203(b)(2). *See* Miller v. Wachovia Bank (*In re* WL Homes LLC), 476 B.R. 830 (D. Del. 2012); Zurita v. SVH-1 Partners, Ltd., 2011 WL 6118573 (Tex. Ct. App. Dec. 8, 2011); Border State Bank v. Bagley Livestock Exch., 690 N.W.2d 326 (Minn. Ct. App. 2004).
 24. Merchs. Bank v. Atchison (*In re* Atchison), 832 F.2d 1236, 1239 (11th Cir. 1987), and cases cited; *see also* Kondik v. Ebner (*In re* Standard Foundry Prods., Inc.), 206 B.R. 475, *reconsideration denied*, 208 B.R. 164 (Bankr. N.D. Ill. 1997); Advanced Turbo Prods., Inc. v. Cong. Fin. Corp. (*In re* Advanced Turbo Prods., Inc.), 126 B.R. 630 (S.D. Fla. 1991); First Nat’l Bank v. Pleasant Hollow Farm, Inc., 532 N.W.2d 60 (S.D. 1995); Merchs. Nat’l Bank v. Halberstadt, 425 N.W.2d 429 (Iowa Ct. App. 1988).
 25. Franklin Bank v. Tindall, 2008 WL 937488 (E.D. Mich. Apr. 7, 2008) (*lessee*); Fleet Capital Corp. v. Sutherland Presses (*In re* Enter. Indus., Inc.), 259 B.R. 163 (N.D. Cal. 2001); *In re* Hunt’s Pier Assocs., 143 B.R. 36 (E.D. Pa. 1992); Merchs. Bank v. Atchison (*In re* Atchison), 832 F.2d 1236 (11th Cir. 1987); First Nat’l Bank v. Feeney, 393 N.W.2d 458 (S.D. 1986); Gen. Motors Acceptance Corp. v. Wash. Trust Co., 386 A.2d 1096 (R.I. 1978).
 26. *See, e.g.*, Iowa Oil Co. v. Citgo Petroleum Corp. (*In re* Iowa Oil Co.), 2004 WL 2326377 (N.D. Iowa Sept. 30, 2004); Conister Trust Ltd. v. Boating Corp. of Am., 47 U.C.C. Rep. Serv. 2d 210 (Tenn. Ct. App. 2002).
 27. Jerke Constr., Inc. v. Home Fed. Sav. Bank, 693 N.W.2d 59 (S.D. 2005); Equip. Fin. Grp. v. Traverse Computer Brokers, 973 F.2d 345 (4th Cir. 1992); *In re* Atl. Marble, Inc., 126 B.R. 463 (E.D. Pa. 1991); Nw. Bank v. First Va. Bank, 585 F. Supp. 425 (W.D. Va. 1984); Pontchartrain State Bank v. Poulson, 684 F.2d 704 (10th Cir. 1982). Mere possession of goods owned by a third party does not give a debtor rights to use the goods as collateral in the absence of consent, estoppel, etc. Bank S., N.A. v. Midstates Grp., Inc., 364 S.E.2d 58 (Ga. Ct. App. 1987). *See also* Zucker v. Hirschl & Adler Galleries, Inc., 648 N.Y.S.2d 521 (N.Y. Sup. Ct. 1996) (no rights in consigned artworks under specific New York law); State Bank v. Wagener, 479 N.W.2d 92 (Minn. Ct. App. 1992); Barton v. United States (*In re* Barton), 132 B.R. 23 (W.D. Ark. 1991).
 28. Kunkel v. Sprague Nat’l Bank, 128 F.3d 636 (8th Cir. 1997).

A broker does not have rights in the goods offered for sale.²⁹ But possession with contingent rights of ownership³⁰ or voidable title³¹ has been held adequate.³² The test has been said to be the extent to which possession is supplemented by control factors.³³ A partner may not have a sufficient interest in partnership assets to pledge them for a personal debt.³⁴ A corporation or limited liability company has no interest in an asset owned by its shareholders.³⁵

When the seller retains possession, and the buyer has only the “special property” that arises on identification to the contract under section 2-401(a), the buyer does not have an interest in the goods sufficient to support a security interest of his creditor.³⁶ The related issue of whether the debtor has rights in the collateral is directly related to the issue of the debtor’s identity, discussed in chapter 9.

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29. A. Lassberg & Co. v. Atl. Cotton Co., 352 S.E.2d 501 (S.C. Ct. App. 1986).
30. Trust Co. Bank v. Gloucester Corp., 643 N.E.2d 16 (Mass. 1994); Wawak v. Affiliated Food Stores, Inc., 812 S.W.2d 679 (Ark. 1991); Weaver v. Ford Motor Credit Co. (*In re McFarland*), 131 B.R. 627 (E.D. Tenn. 1990), *aff’d*, 943 F.2d 53 (6th Cir. 1991); Kendrick v. Headwaters Prod. Credit Ass’n, 523 A.2d 395 (Pa. Super. Ct.), *appeal denied*, 530 A.2d 867 (Pa. 1987); N. Supply Co. v. Allco Fin. Serv., 728 P.2d 912 (Or. Ct. App. 1986); First Sec. Bank v. Woolf, 726 P.2d 792 (Idaho Ct. App. 1986); Bischoff v. Thomasson, 400 So. 2d 359 (Ala. 1981); K.N.C. Wholesale, Inc. v. AWMCO, Inc., 128 Cal. Rptr. 345 (Cal. Ct. App. 1976).
31. Beebe v. MacMillan Petroleum (Ark.), Inc. (*In re MacMillan Petroleum (Ark.), Inc.*), 115 B.R. 175 (W.D. Ark. 1990); Foley v. Prod. Credit Ass’n, 753 S.W.2d 876 (Ky. Ct. App. 1988); First-Citizens Bank & Trust Co. v. Academic Archives, Inc., 179 S.E.2d 850 (N.C. Ct. App.), *cert. denied*, 181 S.E.2d 601 (N.C. 1971).
32. See material on government retention of title at section 3:11.1[H], *supra*. It has been held that a debtor has no rights in crops until planted. Siemers v. AG Servs., Inc. (*In re Siemers*), 249 B.R. 205 (D. Neb. 2000).
33. Am. Nat’l Bank v. Joy (*In re Joy*), 169 B.R. 931 (D. Neb. 1994). The decision has been criticized. Steven O. Weise, *U.C.C. Article 9: Personal Property Secured Transactions*, 50 Bus. Law. 1553, 1560 (1995). See also First Nat’l Bank v. Pleasant Hollow Farm, Inc., 532 N.W.2d 60 (S.D. 1995).
34. Peoples Bank v. Bryan Bros. Cattle Co., 504 F.3d 549, 554 (5th Cir. 2007); Farmers State Bank & Trust Co. v. Mikesell, 554 N.E.2d 900 (Ohio Ct. App. 1988).
35. Peoples Bank v. Bryan Bros. Cattle Co., 504 F.3d 549, 554 (5th Cir. 2007); Gasser v. Infanti Int’l, Inc., 353 F. Supp. 2d 342 (E.D.N.Y. 2005); Rice v. Fas Fax Corp. (*In re Hot Shots Burgers & Fries, Inc.*), 169 B.R. 920 (E.D. Ark. 1994).
36. Crocker Nat’l Bank v. Ideco Div., Dresser Indus., 839 F.2d 1104, 1109 (5th Cir. 1988); Kenetics Tech. Int’l Corp. v. Fourth Nat’l Bank, 705 F.2d 396 (10th Cir. 1983).

Under the older statute, it was held that a third-party owner of property could authorize the debtor to offer it as collateral to a secured party.³⁷ This created interesting issues as to the identity of the person who must sign the financing statement and security agreement. One court required the signature of the actual owner;³⁸ another said that the proper signatory was the person having the rights in the collateral.³⁹ Perhaps similar issues will be raised as to authentication under the Revision.⁴⁰

§ 4:5 Validity

The attached security interest is valid as between the parties,⁴¹ has priority over a general creditor,⁴² but, unless perfected, is subject to the rights of many others acquiring interests in the property.⁴³

§ 4:6 Perfection

To acquire rights valid against third parties, it is necessary that the security interest be perfected. The available methods of perfection depend upon the nature of the collateral—that is, the U.C.C. classification into which it falls.⁴⁴

The place of perfection will be controlled by the location of the debtor.⁴⁵ If the debtor's location subsequently changes to another

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- 37. See cases at note 24, *supra*.
 - 38. *Nw. Bank v. First Va. Bank*, 585 F. Supp. 425 (W.D. Va. 1984).
 - 39. *Small Bus. Admin. v. Guar. Bank & Trust Co.* (*In re Whatley*), 874 F.2d 997 (5th Cir. 1989).
 - 40. See U.C.C. § 9-509(b).
 - 41. U.C.C. § 9-201(a). Thus, a defective financing statement does not affect the validity of the security interest between the parties. *Whitmore & Arnold, Inc. v. Lucquet*, 353 S.E.2d 764 (Va. 1987); *Supplies & Servs., Inc. v. Nacco Indus., Inc.* (*In re Supplies & Servs., Inc.*), 461 B.R. 699, 707 (B.A.P. 1st Cir. 2011) (quoting text).
 - 42. *S.E.L. Maduro (Fla.), Inc. v. Strachan Shipping Co.*, 800 F.2d 1572 (11th Cir. 1986).
 - 43. U.C.C. §§ 9-310, 9-311. Failure of a secured party to perfect, or loss of perfection by failure to continue a financing statement, does not affect attachment and the consequent validity between the parties. *Provident Hosp. & Training Ass'n v. GMAC Mortg. Co.* (*In re Provident Hosp. & Training Ass'n*), 79 B.R. 374 (N.D. Ill. 1987).
 - 44. See chapter 14.
 - 45. U.C.C. § 9-301(1); Prior § 9-103(1)(b). Filing with an Indian tribe is not an exception to the usual filing location rule. *In re DeCora*, 387 B.R. 230 (Bankr. W.D. Wis. 2008).

jurisdiction, perfection will continue (absent filing in the new jurisdiction) for only four months.⁴⁶

§ 4:6.1 Perfection Under the Revision

The following chart enumerates the various types of collateral under the Revision and the methods available for perfection of security interests in those types. Also included in the chart are certain non-Code interests that are mentioned in the Revision and generally excepted from its perfection provisions.

One small point on perfection by possession, a permissible technique under both versions of the Code:⁴⁷ As noted below, third-party possession, pre-Revision, must be by an agent not under the control of the debtor. A “dual agent” fails the test.⁴⁸ Under the Revision it is possible for a dual agent to act as the agent of the secured party for perfection purposes.⁴⁹

Type of Collateral	How to Perfect
Accounts	Filing ⁵⁰
Assignment for the Benefit of Creditors	Automatic ⁵¹
Beneficial Interest in Decedent’s Estate	Automatic ⁵²

46. U.C.C. § 9-316(a)(2); Prior § 9-103(3)(e). The effect of a bankruptcy filing on this period is the subject of conflicting decisions. *See, e.g.,* Expeditors Int’l v. Liquidating Trust (*In re* Schwinn Cycling & Fitness, Inc.), 313 B.R. 473 (D. Colo. 2004); Whitaker v. CIT Grp./Equip. Fin., Inc. (*In re* Crowell), 304 B.R. 255 (W.D.N.C. 2004).

47. Constructive possession is included. *Farm Credit of Nw. Fla., ACA v. Easom Peanut Co.*, 2011 WL 4057786, at *4 (Ga. Ct. App. 2011).

48. *See* text at section 4:6.1, note 94, *infra*.

49. U.C.C. § 9-313, cmt. 3. Of course, the fact that the flat statement of the rule is in a comment rather than the statutory text may give room for some judicial flexibility.

50. U.C.C. § 9-310(a). “An assignment of accounts or payment intangibles which 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” is automatically perfected. U.C.C. § 9-309(2). For an application of this rule, see *St. Paul Mercury Ins. Co. v. Merchs. & Marine Bank*, 882 So. 2d 766 (Miss. 2004).

51. U.C.C. § 9-309(12).

52. U.C.C. § 9-309(13).

Type of Collateral	How to Perfect
Certificate of Title Laws, Goods Subject to	Certificate of title ⁵³ unless held as inventory ⁵⁴
Certificated Securities	Temporary automatic; ⁵⁵ possession; ⁵⁶ filing ⁵⁷

53. U.C.C. § 9-311(a)(2). “The relevant provisions, sections 310 and 311 of Article 9, establish a rule, an exception to that rule, and an exception to the exception. The rule is that a financing statement must be filed . . . to perfect a security interest in property; the exception to the rule is that a financing statement need not be filed to perfect a security interest if the collateral is subject to a state certificate-of-title statute; and the exception to the exception is that a financing statement must be filed if the collateral . . . is held as inventory by a seller of goods of that kind.” *Arthur Glick Truck Sales, Inc. v. Sutphen E. Corp.*, 914 F. Supp. 2d 529, 539 (S.D.N.Y. 2012) (footnote omitted). *See CIT Grp./Equip. Fin., Inc. v. M&S Grading, Inc. (In re M&S Grading, Inc.)*, 457 F.3d 898 (8th Cir. 2006); *CT&T EV Sales, Inc. v. 2AM Grp., LLC*, 2012 WL 1576761 (D.S.C. May 2, 2012); *Farmer v. LaSalle Bank (In re Morgan)*, 291 B.R. 795 (Bankr. E.D. Tenn. 2003). Some states authorize the filing of a “notice of security interest” (NOSI) to perfect an interest prior to the issuance of the certificate of title. If the title certificate fails to include the lien, perfection ceases. *Morris v. Hicks (In re Hicks)*, 491 F.3d 1136 (10th Cir. 2007). A snowmobile has been held not to be a motor vehicle and is a consumer good subject to automatic perfection for a purchase money security interest. *In re Lance*, 59 U.C.C. Rep. Serv. 2d 632 (Bankr. W.D. Mo. 2006). A security interest in a certificated motor vehicle ceases to be perfected when the interest is released in error. *In re Lortz*, 344 B.R. 579 (Bankr. C.D. Ill. 2006). The U.C.C. rules that affect errors in the debtor’s name, discussed in chapter 9 *infra*, do not apply to errors on the certificate of title. *Gugino v. GMAC (In re Laursen)*, 391 B.R. 47 (Bankr. D. Idaho 2008). Mere possession of the certificate of title does not perfect a security interest in the vehicle. *State v. Pressley*, 100 So. 3d 1058 (Ala. Ct. Civ. App. 2012). Minor defects in certificate will not invalidate perfection. *In re Klein*, 486 B.R. 853 (Bankr. E.D. Mich. 2012).
54. The exception applies when the inventory is “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. § 9-311(d). A car rental company that has no license to sell vehicles and that disposes of its fleet by wholesale auction at the end of their useful life is not in the business of selling goods of that kind. *Union Planters Bank v. Peninsula Bank*, 897 So. 2d 499 (Fla. Dist. Ct. App. 2005). *See also* U.C.C. § 9-311 cmt. 4.
55. To the extent of new value, U.C.C. § 9-312(e), or when made available to the debtor under U.C.C. § 9-312(g).
56. U.C.C. § 9-313(a); § 8-301.
57. U.C.C. § 9-312(a).

Type of Collateral	How to Perfect
Chattel Paper	Possession (tangible); ⁵⁸ control (electronic); ⁵⁹ filing (either) ⁶⁰
Commodity Contract/Account	Automatic ⁶¹
Consignments	Filing ⁶² and notice to seniors ⁶³
Consumer PMSIs	Automatic ⁶⁴
Deposit Accounts	Control ⁶⁵
Documents	Possession ⁶⁶
Fixtures	Fixture filing ⁶⁷
General Intangibles	Filing ⁶⁸

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58. U.C.C. § 9-313(a); *FDIC v. Kipperman* (*In re Commercial Money Ctr., Inc.*), 392 B.R. 814 (B.A.P. 9th Cir. 2008).
59. U.C.C. § 9-314(b).
60. U.C.C. § 9-312(a).
61. Created by a commodity intermediary. U.C.C. § 9-309(11).
62. U.C.C. § 9-310(a).
63. U.C.C. § 9-324(b).
64. U.C.C. § 9-309(1). Excepted are titled vehicles and other goods subject to supervening statutes. *See* U.C.C. § 9-311. Filing is necessary to protect against a sale to another consumer. *See* U.C.C. § 9-320(b).
65. U.C.C. § 9-314(b)(1). *Fifth Third Bank v. U.S. Dep't of Agric.-Rural Dev.*, 2013 WL 1787151 (W.D. Mich. Apr. 26, 2013); *E53 Fed. Credit Union v. Perez* (*In re Perez*), 440 B.R. 634, 638 (Bankr. D.N.J. 2010) (nonnegotiable and non-transferable certificate of deposit); *In re Verus Inv. Mgmt., LLC*, 344 B.R. 536 (Bankr. N.D. Ohio 2006) (certificate of deposit); *Counciler v. Ecenbarger, Inc.*, 834 N.E.2d 1018 (Ind. Ct. App. 2005). Control is lacking where a certificate of deposit is in the hands of a third-party custodian. *Flener v. Alexander* (*In re Alexander*), 429 B.R. 876, 879 (Bankr. W.D. Ky. 2010). For the rights of a secured party who has not obtained control, *see* *David Forestry Prods., Inc. v. Downeast Power Co.*, 12 A.3d 1180 (Me. 2011). Control lost when funds transferred out of account and are not identifiable proceeds. *In re Milton Abeles, LLC*, 2013 WL 5304014 (Bankr. E.D.N.Y. Sept. 20, 2013).
66. U.C.C. § 9-313(a).
67. U.C.C. § 9-102(a)(40).
68. U.C.C. § 9-310(a). A Pennsylvania liquor license is a general intangible, not subject to perfection by possession. *City of Harrisburg v. Kanoff* (*In re Kanoff*), 408 B.R. 53, 59 (Bankr. M.D. Pa. 2009).

Type of Collateral	How to Perfect
Goods	Filing; ⁶⁹ possession ⁷⁰
Healthcare Insurance Receivable	Automatic if to the provider; ⁷¹ filing ⁷²
Instruments	Temporary automatic; ⁷³ possession; ⁷⁴ filing ⁷⁵
Inventory	Filing; ⁷⁶ possession ⁷⁷
Investment Property	Automatic; ⁷⁸ control; ⁷⁹ filing ⁸⁰
Letter-of-Credit Rights	Control ⁸¹
Lien Securing Right to Payment	Automatic ⁸²

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69. Except goods subject to other statutes and treaties, such as certificate of title laws. *See* U.C.C. § 9-311.
70. U.C.C. § 9-313(a). *See* *Bank of Neb. v. Rose (In re Rose)*, 2010 WL 1740635 (Bankr. D. Neb. 2010) (coins); *In re Phillips-Camper*, 359 B.R. 659 (Bankr. N.D. Ohio 2007) (same). *See* U.C.C. § 9-312(d), (f) when goods are in the possession of a bailee that has issued a nonnegotiable document.
71. U.C.C. § 9-309(5).
72. U.C.C. § 9-310(a).
73. To the extent of new value, U.C.C. § 9-312(e), or when made available to the debtor under U.C.C. § 9-312(g).
74. U.C.C. § 9-313(a).
75. U.C.C. § 9-312(a). *Everhome Mortg. Co. v. Robey*, 136 P.3d 1066 (Okla. Civ. App. 2006).
76. U.C.C. § 9-310(a). *See In re Hurst*, 308 B.R. 298 (Bankr. S.D. Ohio 2004) (motor vehicle inventory). There may be issues as to whether particular vehicles are held as inventory or not. *See, e.g., In re Skagit Pac. Corp.*, 316 B.R. 330 (B.A.P. 9th Cir. 2004).
77. U.C.C. § 9-313.
78. If created by broker or securities intermediary. U.C.C. § 9-309(10).
79. U.C.C. § 9-314(c).
80. U.C.C. § 9-312(a).
81. U.C.C. § 9-314(b)(2). *See Floyd v. Am. Block Roland Niles Int'l, Inc. (In re Cooper Mfg. Co.)*, 344 B.R. 496 (Bankr. S.D. Tex. 2006), distinguishing assignment of the proceeds of a letter of credit from the grant of a security interest in those proceeds.
82. If the security interest in the collateral was perfected. U.C.C. § 9-308(e). *See also* U.C.C. § 9-203(g).

Type of Collateral	How to Perfect
Manufactured Home	Certificate of title (if applicable), ⁸³ otherwise filing ⁸⁴
Money	Possession ⁸⁵
Negotiable Instruments	Temporary automatic; ⁸⁶ possession; ⁸⁷ filing ⁸⁸
Proceeds	Automatic ⁸⁹
Supporting Obligations ⁹⁰	Automatic ⁹¹

Possession may be through an authorized agent of the secured party, but the bailee must not be under the control of the debtor.⁹² It has been held that possession is not interrupted by a police seizure of the

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83. U.C.C. § 9-311(a)(2); *In re Starks*, 2011 WL 248521 (Bankr. E.D. Ky. Jan. 24, 2011); *Nazar v. Stuewe (In re Stuewe)*, 2011 WL 2173694 (Bankr. D. Kan. June 2, 2011). The certificate must be filed in the place provided by state law to be valid. *Vanderbilt Mortg. & Fin., Inc. v. Westenhoefer*, 716 F.3d 957 (6th Cir. 2013).
84. U.C.C. § 9-515(b). Effective period is thirty years.
85. U.C.C. § 9-312(a)(3); *United States v. Cox*, 2008 WL 2397615 (W.D.N.C. June 10, 2008); *In re Wright Grp., Inc.*, 443 B.R. 795, 804 (Bankr. N.D. Ind. 2011).
86. To the extent of new value. U.C.C. § 9-312(e).
87. U.C.C. §§ 9-313, 9-312(a). For the application of this provision where a note is secured by a real estate mortgage, see *Provident Bank v. Cmty. Home Mortg. Corp.*, 498 F. Supp. 2d 558 (E.D.N.Y. 2007).
88. U.C.C. § 9-310(a).
89. If the security interest in the original collateral was perfected. U.C.C. §§ 9-315(c), 9-203(f).
90. "A letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property." U.C.C. § 9-102(a)(78).
91. If supported obligation is perfected. U.C.C. §§ 9-203(f), 9-308(d).
92. *See, e.g., Davis v. Brand Mgmt. Grp., Inc. (In re Brand Mgmt. Grp., Inc.)*, 218 B.R. 241 (N.D. Ga. 1997) (debtor's attorney); *Lowe v. Sheinfeld, Maley & Kay, PC (In re Saunders)*, 155 B.R. 405 (W.D. Tex. 1993); *Marlow v. Rollins Cotton Co. (In re Julien Co.)*, 168 B.R. 647 (W.D. Tenn. 1994) (subagent). *See Joel F. Brown, Perfection and Priority of Security Interests in Goods Held by Third-Party Bailees*, 119 BANKING L.J. 115 (2002).

property.⁹³ A termination statement filed in error will terminate perfection and cannot be undone.⁹⁴

§ 4:6.2 Perfection Before the Revision

The perfection scheme prior to the Revision was somewhat easier to deal with than that which succeeded it:

Type of Collateral	How to Perfect
Accounts	Filing
Certificated Securities	Possession ⁹⁵
Goods	Filing/possession ⁹⁶
Consumer PMSIs ⁹⁷	Automatic
Fixtures	Filing

93. Nat'l Pawn Brokers Unlimited v. Osterman, Inc., 500 N.W.2d 407 (Wis. Ct. App. 1993).

94. Ward v. Bank of Granite (*In re* Hickory Printing Grp., Inc.), 479 B.R. 388 (Bankr. W.D.N.C. 2012).

95. Prior U.C.C. § 9-115(4)(b). *See* McFarland v. Brier, 850 A.2d 965 (R.I. 2004) (certificate of deposit).

96. In the case of a motor vehicle required to be registered, perfection was by notation on the certificate of title only. Prior U.C.C. § 9-302(3)(b). Possession of the certificate without the notation is a nullity. *See, e.g.,* Bradley v. K&E Invs., Inc., 847 S.W.2d 915 (Mo. Ct. App. 1993). The same is true of mere retention of the manufacturer's certificate of origin. *Laurel Motors, Inc. v. Airways Transp. Grp., Inc.*, 672 N.E.2d 785 (Ill. App. Ct. 1996). *But see In re* Jones, 206 B.R. 569 (M.D. Ala. 1997), which involved the "constructive pledge" of automobiles to a pawnbroker where the debtors retained possession of the vehicles.

97. This provision did not apply to motor vehicles required to be titled.

Type of Collateral	How to Perfect
Documents	Possession ⁹⁸
Chattel Paper	Filing/possession ⁹⁹
General Intangibles	Filing ¹⁰⁰
Inventory	Filing/possession ¹⁰¹
Investment Property	Possession/filing/control ¹⁰²
Letter of Credit Proceeds	Possession of the letter of credit ¹⁰³
Money	Possession
Instruments	Filing/possession ¹⁰⁴

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98. See *Marlow v. Rollins Cotton Co. (In re Julien Co.)*, 146 F.3d 420 (6th Cir. 1998) (possession by bailee).
99. A purchaser of chattel paper who took possession in the ordinary course of business and without knowledge of the security interest had priority over the holder of a security interest in the chattel paper perfected only by filing. Prior U.C.C. § 9-308(a). This principle has been taken over and expanded to other forms of collateral under the Revision. See section 19:3.3, *infra*.
100. For perfection of security interests in book-entry U.S. Treasury securities, see 31 C.F.R. § 306.118.
101. When the inventory consists of motor vehicles, perfection was by filing and not by notation on the certificate of title. Prior U.C.C. § 9-302(3)(b). Prior U.C.C. § 9-115(4).
102. Prior U.C.C. §§ 9-304 and 9-305 (via Prior U.C.C. §§ 9-104(m) and 9-106) if the Article 5 revisions were adopted.
104. Prior U.C.C. §§ 9-302(1)(b), 9-305. See *Omega Envtl., Inc. v. Valley Bank*, 219 F.3d 984 (9th Cir. 2000).