CERTAIN NON-UCC AND UCC "GOTCHAS"

FOR THE UNWARY SECURED LENDER

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INTRODUCTION

Article 9 of the Uniform Commercial Code (the "UCC")\(^1\) governs security interests in certain personal property and to the extent provided therein, fixtures. Despite the breadth of its coverage, however, the UCC does not apply to the extent that a statute, regulation or treaty of the United States preempts the UCC or to the extent that another state statute expressly governs the creation, perfection, priority or enforcement of a security interest in the specified collateral.\(^2\) The initial question is whether Article 9 of the UCC applies to the category of collateral. The second question is, if Article 9 does apply, whether some other applicable law preempts, to some extent, the UCC or provides additional rules related to the perfection, priority and enforcement of rights in such collateral.

A secured lender must be aware of various collateral traps or "gotchas" with respect to certain non-UCC collateral and certain types of UCC collateral. The purpose of this paper is to identify and briefly discuss certain categories of UCC and non-UCC collateral and to summarize the documentation and diligence that are necessary for a secured lender to obtain and perfect a security interest in such collateral. While this paper is not intended to be an exhaustive summary of each non-uniform type of collateral discussed herein, it hopefully will provide a roadmap for avoiding the collateral "gotchas" with respect to each such category of collateral.

The author appreciates the assistance of her colleague, Seth A. Finck, in the preparation of these materials.

\(^1\) U.C.C. § 9-101 et. seq.

\(^2\) U.C.C. § 9-109(c).
I. Certificates of Deposit

If a secured lender intends to take a security interest in a certificate of deposit, the secured lender first must determine whether the certificate of deposit is certificated or uncertificated. If the certificate of deposit is certificated, the secured lender then must determine whether it is negotiable or non-negotiable. The answers to these questions will govern how the certificate of deposit is categorized under the UCC and the applicable perfection rules.

A. Characterization of the Certificate of Deposit and Related Perfection Rules

If there is no writing evidencing a bank's obligation to pay, then the certificate of deposit is uncertificated. An uncertificated certificate of deposit constitutes a deposit account under Revised Article 9. A "deposit account" under Revised Article 9 is defined to mean "a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument."3 Deposit accounts were excluded under pre-Revised Article 9 as direct collateral,4 although certificates of deposit were exempted from the definition of deposit accounts.5 Under pre-Revised Article 9, uncertificated certificates of deposit were treated as general intangibles and perfected by the filing of a UCC-1 financing statement.6

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3 U.C.C. § 9-102(a)(29).
4 Pre-Revised U.C.C. § 9-104(l).
5 Pre-Revised U.C.C. § 9-105(1)(e).
If the certificate of deposit qualifies as a deposit account, then, with limited exceptions, a security interest in such deposit account only may be perfected by control. A secured party has control if (1) the secured party is the bank with which the deposit account is maintained; (2) 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 funds in the deposit account without further consent by the debtor; or (3) the secured party becomes the bank's customer with respect to the deposit account.

If a certificate of deposit is certificated, it may still fall under the purview of Revised Article 9 as an instrument. If the certificate of deposit is negotiable, the certificate of deposit is an instrument, and the secured lender may perfect its security interest through possession or filing. Furthermore, assuming that new value is given under an authenticated security agreement, the secured lender will enjoy the benefits of automatic perfection for a period of 20 days from the time its security interest attaches.

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7 U.C.C. § 9-104(a).


9 U.C.C. § 3-104.

10 U.C.C. § 9-313(a).

11 U.C.C. § 9-312(a).

12 U.C.C. § 9-312(e).
If a certificated certificate of deposit is non-negotiable, it may still be an instrument under the UCC if it is of "a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment." In such a situation, the perfection requirements for instruments described above would apply. If a certificated certificate of deposit is non-negotiable but not an instrument, however, it may qualify as a deposit account under the UCC, in which case perfection must be obtained through control unless the applicable state has adopted a non-uniform provision of Revised Article 9 and has characterized it as an instrument.

B. Other Applicable Laws

1. Article 3

Article 3 of the UCC applies to negotiable instruments, and if the certificated certificate of deposit is a negotiable instrument, Article 3 may apply in addition to Article 9. Section 3-102(b) of the UCC provides, however, that if there is a conflict between the provisions of Article 3 and Articles 4 or 9, Articles 4 and 9 control.

Article 3 defines a certificate of deposit as "an instrument containing an acknowledgement by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money." It defines an instrument as a negotiable instrument but provides that if the certificate states that it is not negotiable

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16 U.C.C. § 3-104(i).
or is not an instrument governed by Article 3, then it is not within the purview of Article 3.\textsuperscript{17} The predecessor to Article 3, in contrast, did not exclude non-negotiable certificates of deposit from its coverage.\textsuperscript{18}

2. **Right of Setoff**

The bank issuing the certificate of deposit may have a common law right of setoff. The secured lender that takes a certificated certificate of deposit that is negotiable may qualify as a holder in due course and thereby prevail over the issuing bank if the secured lender took the certificate of deposit for value, in good faith, and without notice of the issuing bank's claim.\textsuperscript{19} If the certificate of deposit is non-negotiable, however, then the lender may be subject to the issuing bank's setoff rights. The secured lender may want, in any event, to make sure that the issuing bank waives its right of setoff in the certificate of deposit.

C. **Proceeds**

Once the certificate of deposit matures, the proceeds of such certificate of deposit may be transferred to another account at the issuing bank or another institution. If this transfer occurs, then the secured lender's lien in the certificate of deposit and the proceeds thereof may be at risk. If the proceeds of the certificate of deposit are commingled in another account or if the secured lender has not perfected its security interest in the deposit account in which the proceeds are deposited by control, then the secured lender's priority position in the certificate of deposit and the proceeds thereof

\textsuperscript{17} U.C.C. § 3-104(d).

\textsuperscript{18} Pre-Revised U.C.C. § 3-104(3).

\textsuperscript{19} U.C.C. § 3-302(a).
may be subject to a claim of the issuing bank or a perfected security interest in favor of another person in the other deposit account.

II. Maritime Vessels

1. Governing Law

Chapter 313 of Title 46 of the United States Code ("Chapter 313"), also referred to as the Commercial Instruments and Maritime Lien Act ("CIMLA"), governs the creation of security interests in vessels as well as their priority in relation to other maritime liens. Chapter 313 covers mortgages on vessels that have been documented as United States flag vessels pursuant to Chapter 121 of Title 46 of the United States Code. While not defined by Chapter 313, under Title 1 of the United States Code, a "vessel" is defined to include "every description of water-craft or other artificial contrivance used or capable of being used as a means of transportation on water."

Chapter 313 applies only to the security interest in the vessel itself, and not to ancillary items of collateral. A secured lender must execute a separate security agreement, governed by the UCC or other applicable law, to create a security interest in such ancillary collateral, including insurance proceeds and earnings. Furthermore, property considered essential for the navigation of the vessel will be considered a part of

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20 46 U.S.C. § 31301 et seq.
22 1 U.S.C. § 3.
the vessel and subject to the mortgage under Chapter 313, whereas property that may be easily removed will not be considered part of the vessel.23

2. General Requirements

A sale, conveyance, mortgage, assignment or related instrument of a vessel is valid against third parties, without actual notice, only if such document is recorded with the Secretary of Transportation.24 To be eligible for recording, the mortgage must identify the vessel.25 Furthermore, the mortgage must be signed on by or on behalf of the mortgagor,26 include the name and address of the mortgagor and the mortgagee,27 and state the amount of the mortgage.28 If there are multiple mortgagors or multiple mortgagees, the mortgage must state the individual interest in the vessel held by each mortgagor29 and the individual interest in the vessel mortgaged to each mortgagee.30

23 Kesselring v. F/T Artic Hero, 30 F.3d 1123, 1125-26 (9th Cir. 1994).


3. Preferred Mortgages

There is a distinction between a lien on a vessel and a "preferred mortgage." To qualify as a preferred mortgage under the CIMLA, the mortgage must satisfy each of the following elements: (1) it must cover the whole of the vessel, (2) it must be filed in substantial compliance with the requirements of 46 U.S.C. § 31321, and (3) the vessel covered by the mortgage must be documented pursuant to Chapter 131, or an application for documentation must have been filed and be pending. Title 46, Part 67 of the Code of Federal Regulations sets forth the requirements for obtaining a certificate of documentation. The National Vessel Documentation Center in Falling Waters, West Virginia (the "NVDC") is the filing office for documenting vessels and recording preferred mortgages and related documents. A certificate of documentation may be issued only if the vessel is (1) wholly owned by one or more individuals or entities listed in 46 U.S.C. § 12103(b), (2) at least 5 net tons, and (3) not documented under the laws of a foreign country. Whereas an individual is an eligible owner if he is a citizen of the United States, a corporation is an eligible owner where it is incorporated under the laws of the United States or a state, its chief executive officer and the chairman of its

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31 See Provencher v. Binion & Sims, P.C., 401 F. Supp2d 740, 742 (S.D. Tex. 2005) ("While all preferred mortgages are liens, every lien on a vessel is not a preferred mortgage").

32 See United States v. Crusader, 366 F.3d 391, 392-95 (5th Cir. 2004) (Concluding that preferred mortgage was valid that was recorded after vessel was documented even though vessel construction was not complete at the time of recording of the preferred mortgage).


board are citizens of the United States, and no more of its directors are non-citizens than a minority of the number necessary to constitute a quorum.\textsuperscript{35}

If an instrument is filed with the NVDC while an application for documentation is pending, and the application is rejected, the office must notify all parties named in the instrument of the rejection, and after 90 days, it may terminate the filing and return the instrument.\textsuperscript{36} To avoid any disruption to its security interest in this situation, the secured lender should have the mortgagor grant it a limited power of attorney so that it may correct any errors in the application of documentation.

4. \textbf{Priority}

A preferred mortgage will have maritime lien status, and upon the sale of the vessel in an \textit{in rem} proceeding, such preferred mortgage will have priority over all other claims against the vessel other than expenses and costs incurred in the sale and preferred maritime liens.\textsuperscript{37} Preferred maritime liens include liens arising before a preferred mortgage is filed with the NVDC, as well as liens arising out of maritime torts and for wages of the crew of the vessel.\textsuperscript{38} In addition, Chapter 313 grants maritime lien status to the claims of any person providing necessaries (such as fuel and repairs) to a

\textsuperscript{35} 46 U.S.C. § 12103(b)(4).

\textsuperscript{36} 46 U.S.C. § 31321(c).

\textsuperscript{37} 46 U.S.C. § 31326(b)(1).

vessel on the order of the owner of the vessel or a person authorized by such owner39 but such lien may not have priority over a preferred mortgage.40 With regard to the possible existence of maritime liens, the loan documentation should permit such liens to continue for no more than 30 days, and should provide that the mortgagor will notify the secured lender of the commencement of any enforcement proceeding concerning a maritime lien.

5. Insurance

The secured lender should ensure that the mortgage contains precise covenants regarding insurance coverage. This includes insurance covering the hull of the vessel and the machinery essential for the operation of the vessel. The mortgagor should have coverage against the claims of third parties for damages suffered, including collision. Where a vessel is to be in port for an extended period of time, it may be prudent to require the mortgagor to obtain port risk insurance. With regard to perfecting a security interest in the proceeds of such insurance, because neither Chapter 313 nor the UCC provides a secured lender with a mechanism of obtaining an interest in such insurance coverage, the secured lender must safeguard its rights in such collateral through other applicable law.

6. Earnings of a Vessel

A secured lender may desire to take a security interest in the earnings of a vessel, including any earnings derived from a contract or charter. Similar to insurance


40 Muma, 322 B.R. at 559.
proceeds, the secured lender will need to resort to a separate agreement to obtain an interest in such earnings. Such an agreement typically takes the form of an assignment, and the borrower will assign to the secured lender all of its right, title and interest in and to the charter party, including the right of the borrower to perform the contract or charter. The charterer's consent is required for this type of assignment, and absent such consent, the charterer is not required to accept performance from the assignee. Another common type of assignment is the "moneys due and to become due" assignment, which is similar to the "all right, title and interest assignment," except that the former does not contain a provision granting the assignee the right to perform the contract or charter.

A security interest in the earnings of a vessel is included within Article 9's definition of "account," which covers "a right to payment of a monetary obligation, whether or not earned by performance . . . (vi) for the use or hire of a vessel under a charter or other contract."\(^4\) Therefore, pursuant to UCC § 9-310, the interest in such account may be perfected through the filing of a financing statement. Because UCC § 9-406 allows an account debtor to pay the assignor until the account debtor receives notification of the assignment and notice that payment is to be made to the assignee, the secured lender should send prompt notice to the charterer of any assignment.

\(^4\) U.C.C. § 9-102(a)(11).
III. AIRCRAFT FINANCING

1. The Interplay between Federal and State Law

Aircraft financing requires a secured lender to rely heavily on both federal and state law. Under the Federal Aviation Act of 1958 (the "Act"), the Administrator of the Federal Aviation Administration has established a system for recording conveyances that affect an interest in civil aircraft of the United States. A "civil aircraft of the United States" means an aircraft registered with the Secretary of Transportation. Interests in civil aircraft that have never been registered with the Secretary of Transportation or that have been de-registered are not governed by the Act. Section 9-311 of the UCC recognizes that the filing of a financing statement is "not necessary or effective" to perfect the security interest in such property that is subject to such federal preemption. The failure to record a conveyance, lease or instrument executed for security purposes in the federal system of registration will invalidate the same with respect to third parties without notice of the existence of the conveyance, lease or instrument.

Despite the existence of the federal registration system, however, state law plays an important role in aircraft financing. While federal law may govern with respect to the rights of innocent third parties and a transfer of any interest in civil aircraft, state

42 49 U.S.C. § 1301 et seq.


45 U.C.C. § 9-311 (Official Comment 2).

law governs the validity of the conveyance of such interests and the priority of certain types of liens in the aircraft and aircraft related collateral.47

For example, pursuant to UCC § 9-320(a), a buyer in the ordinary course of business⁴⁸ that buys from a person engaged in the business of selling goods of that kind takes free of any security interest in such goods created by the seller. Although there is a split among the courts as to whether the Act preempts this provision of the UCC, the majority view is that there is no preemption by the Act.⁴⁹ There is a similar split among the courts with respect to the applicability of UCC § 9-333(b), which states that a "possessory lien⁵₀ on goods has priority over a security interest in the goods unless the

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⁴⁷ In re Southern Air Transport, Inc., 511 F.3d 526 (6th Cir. 2007) (Concluding that the holder of statutory artisan lien was not required to file such lien with the FAA to be effective when applicable state law did not require any filing for such possessory lien to be perfected).

⁴⁸ A "buyer in the ordinary course of business" means "a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind." U.C.C. § 1-201(9).

⁴⁹ Compare Sanders v. M.D. Aircraft Sales, Inc., 575 F.2d 1086, 1089 (3d Cir. 1978) (concluding, pursuant to state law, that a buyer in the ordinary course of business had priority in a dispute over an airplane with a secured lender that had recorded its security agreement with the FAA) with Dowell v. Beech Acceptance Corp., 3 Cal. 3d 544, 550, 476 P.2d 401 (1970) ("[The federal registration system] provides a comprehensive system of recordation the purpose of which is to bring order to the field of aircraft titles and to protect the holders of substantial property interests in aircraft. Neither of those purposes is served if we apply state law in a manner virtually ignoring the existence of the federal system.").

⁵₀ Pursuant to U.C.C. § 9-333(a), a "possessory lien" means "an interest, other than a security interest or an agricultural lien (1) which secured 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, (2) which is created by statute or rule of law in favor of the person, and (3) whose effectiveness depends on the person's possession of the goods."
The majority view is that the UCC applies and that the possessory lien will have priority over a prior security interest recorded with the Federal Aviation Administration (the "FAA").

2. Related Aircraft Collateral

The federal registration system also may apply to certain collateral related to the aircraft. With regards to leases and instruments executed for security purposes, the registration system applies to:

(A) a specifically identified aircraft engine having at least 550 rated takeoff horsepower or its equivalent;

(B) a specifically identified aircraft propeller capable of absorbing at least 750 rated takeoff shaft horsepower;

(C) an aircraft engine, propeller, or appliance maintained for installation or use in an aircraft, aircraft engine, or propeller, by or for an air carrier holding a certificate issued under section 44705 of Title 49; and

(D) spare parts maintained by or for an air carrier holding a certificate issued under section 44705 of Title 49.

See, e.g., Southern Air Transport, 511 F.3d at 531. Compare Stanziale v. Whitney (In re Tower Air, Inc.), 319 B.R. 88 (Bankr. D. Del. 2004) (concluding that a non-consensual, common law, possessory lien on an aircraft engine was perfected by the defendant through its continuous possession of the aircraft engine, rather than through a filing with the national registration system pursuant to 49 U.S.C. §§ 44107(a)(1) and 44107(a)(2)) 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) (FAA preempts state law artisan's lien).
To the extent that the collateral is an engine or a propeller that meets the threshold rating standards in the first two categories, any instrument executed for security purposes must be recorded in the federal registration system. To the extent that the collateral includes engines, propellers, appliances, or spare parts maintained by or on behalf of an air carrier certified by the FAA, any instrument executed for security purposes must be recorded in the federal registration system.53 Where the federal statute's qualifications are not satisfied, a filing with the federal registration system is not required, and the provisions of the UCC govern. Where the UCC governs, the generally applicable provisions relative to the perfection of security interests in goods will apply, including with regard to the necessity for filing financing statements and the locations for filing financing statements.

IV. AGRICULTURAL COLLATERAL

1. Security Interests in Agricultural Collateral

A secured lender that intends to take a lien on agricultural collateral may follow many of the same rules under the UCC for the attachment and perfection of its security interests in such collateral. The borrower may execute a security agreement in favor of the lender that adequately describes the agricultural collateral and grants a security interest to the secured lender, where value is given by the secured lender and the

52 49 U.S.C. § 44107(a)(2). See In re Ozark Airlines, Inc., 2007 WL 43742 (Bankr. N.D. Okla. 2007) (U.C.C. filing was ineffective to perfect security interest in spare parts that met the requirements for federal filing under the Act).

53 See In re Avcentral, Inc., 289 B.R. 170 (D. Kan. 2003) (Filing of lien in federal registration system was sufficient to perfect lien on aircraft even though future intended use of aircraft involved dismantling and sale of its parts; U.C.C. filing was not sufficient to perfect security interest in the aircraft or its parts).
borrower has rights in the agricultural collateral. Furthermore, perfection of such a security interest may be obtained by the filing of a financing statement or, where practical, the secured lender’s taking possession of the agricultural collateral.

2. **Farm Products Exception and The Food Security Act of 1985**

There are, however, different federal and state rules that may apply to certain categories of farm products and that may preempt the general provisions of the UCC that are otherwise applicable to agricultural collateral. Some of these special rules are discussed below and are important for the secured lender to understand since they may constitute secret liens in collateral.

Under the UCC, "farm products" are defined as "goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are: (A) crops grown, growing, or to be grown, including: (i) crops produced on trees, vines, and bushes; and (ii) aquatic goods produced in aquacultural operations; (B) livestock, born or unborn, including aquatic goods produced in aquacultural operations; (C) supplies used or produced in a farming operation; or (D) products of

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54 U.C.C. § 9-203(b).

55 U.C.C. § 9-310.

56 U.C.C. § 9-313. Section 9-109 of the U.C.C. provides that Revised Article 9 now covers agricultural liens in addition to consensual security interests in agricultural collateral. Section 9-102(a)(5) of the U.C.C. defines an agricultural lien as "an interest, other than a security interest, in farm products (A) which secures payment or performance of an obligation for: (i) goods or services furnished in connection with a debtor's farming operation; or (ii) rent on real property leased by a debtor in connection with its farming operations; (B) which is created by statute in favor of a person that: (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operations; or (ii) leased real property to a debtor in connection with the debtor's farming operations; and (C) whose effectiveness does not depend on the person's possession of the personal property."
Based on this definition, goods that are farm products in the hands of a debtor engaged in a farming operation will no longer be farm products once they are transferred to a party that is not engaged in farming operations.

One stark contrast between the UCC's treatment of buyers of farm products and buyers of inventory can be seen in UCC § 9-320(a). The general rule under the UCC is that a buyer in the ordinary course of business takes free of a prior perfected security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence. This rule does not apply, however, to "a person buying farm products from a person engaged in farming operations." This farm products exception prompted Congress to take action in the form of The Food Security Act of 1985, which effectively negates UCC § 9-320(a) with respect to farm products. Under 7 U.S.C. § 1631(d), unless certain notice requirements are fulfilled, "a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of (emphasis added) a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest." The Food Security Act's definition of a "buyer in the ordinary course of business" does not include a good faith or knowledge element.

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57 U.C.C. § 9-102(a)(34).

58 U.C.C. § 9-320(a).

59 In the adoption of Revised Article 9, some states adopted non-uniform provisions of U.C.C. § 9-320(a) that negated the farm products exception too. See Cal. Code § 9-320(a).

60 7 U.S.C. § 1631(c)(1).
A buyer of farm products will take subject to a security interest created by its seller if, within one year before the sale of the farm products, the buyer has received from the secured lender of the seller written notice of the security interest.61 This notice must contain the names and addresses of the secured lender and the debtor, as well as, where applicable, the debtor's social security number or Internal Revenue Service tax identification number.62 In addition, the secured lender must include "a description of the farm products subject to the security interest created by the debtor, including the amount of such products where applicable, crop year, county or parish, and a reasonable description of the property."63

Some states have central filing systems, certified by the Secretary of Agriculture, that record the notices, which are indexed by types of farm products, debtors' names, social security numbers, taxpayer numbers, counties and crop years.64 In these states, buyers of farm products may register with the central filing system so as to receive notices of security interests in the farm products that the buyer regularly purchases. Therefore, if the secured lender's borrower is a buyer of farm products in a central filing state, the loan agreement should require the borrower to register with the state's central filing system to receive periodic notices of security interests in the products it typically buys. Otherwise, the borrower's failure to register will likely result in the purchase of

64 Fin Ag, Inc. v. Hufnagle, Inc., 720 N.W.2d 579 (Minn. 2006).
farms products that are subject to the liens and security interests of those parties that have properly filed notices of their interests.

3. **Perishable Agricultural Commodities Act**

A secured lender that has perishable agricultural commodities as collateral must also be aware of the Perishable Agricultural Commodities Act ("PACA"). "Perishable agricultural commodities" is defined by PACA to mean fresh fruit and vegetables, including those items frozen or packed in ice. PACA imposes a statutory trust for the benefit of unpaid sellers of fresh fruits and vegetables. A seller includes not only growers of fresh fruits and vegetables but also any seller in the chain of commerce for such goods that is unpaid. The trust obligation arising under a PACA trust becomes prior to and superior to any lien or security interest in inventory held by the buyer's secured lender. The PACA trust is a "non-segregated floating trust" that exists until full payment is made and comprises the perishable agricultural commodities, the foods or products derived from the perishable agricultural commodities and the receivables or proceeds thereof. Because the trustee of a PACA trust (usually the buyer's corporate officers or director) has a fiduciary duty to preserve the trust assets until the suppliers

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65 7 U.S.C. § 499a et seq.


67 7 U.S.C. § 499e(c)(2).


69 7 C.F.R. § 46.46(b); Movsovitz, 447 F. Supp. 2d at 462-63.
are paid in full,\textsuperscript{70} a secured lender faces the likely scenario that it will not be able to recover from the proceeds of its borrower's perishable agricultural commodities until all suppliers are first paid in full. This type of lien is a secret lien for the unwary secured lender since it is outside the UCC but it can have a priming effect on the lien of the secured lender in collateral held by its debtor if the debtor is in the chain of goods.

4. Packers and Stockyards Act

A similar form of statutory trust, although more limited in scope than the PACA trust, exists with regard to unpaid cash sellers of livestock and live poultry. Under the Packers and Stockyards Act of 1921 ("PASA"),\textsuperscript{71} all livestock purchased by a packer, and all inventories of, receivables or proceeds from meat, meat food products, or livestock products derived therefrom, is subject to a statutory trust in favor of the unpaid supplier until such supplier is paid in full.\textsuperscript{72} A packer is defined as "any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing meat or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce."\textsuperscript{73} A similar provision of PASA, referred to as the Poultry Producers Financial Protection Act of 1987, covers suppliers of live poultry although the trust does not extend to others within the chain of goods.

\textsuperscript{70} Id. at 163.

\textsuperscript{71} 7 U.S.C. § 181 et seq.

\textsuperscript{72} 7 U.S.C. § 196(b).

\textsuperscript{73} 7. U.S.C. § 191.
other than a live poultry dealer. As a result, the secured lender that finances a packer or supplier of live poultry should make sure that it reserves the payables owing to the unpaid cash sellers and monitors the payments to such sellers.

V. COPYRIGHTS

Whereas the filing of a financing statement against general intangibles may be sufficient to perfect a secured lender's security interest in certain intellectual property such as patents and trademarks, the filing of a financing statement will be insufficient to perfect a secured lender's security interest in a borrower's registered copyright. Under federal law, a "transfer of copyright ownership" means "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, whether or not it is limited in time or place of effect, but not including a nonexclusive license." Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the United States Copyright Office (the "Copyright Office"). So long as it specifically identifies the work to which it pertains and the work has been registered, the

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74 7 U.S.C. § 197(b).

75 See In re: Phoenix Systems & Components, 2007 Bankr. LEXIS 603 (February 23, 2007) (Filing of a U.C.C. against general intangibles is sufficient to perfect a security interest in patents).


recording of a document with the Copyright Office gives constructive notice to the third parties of the facts stated in the document.\textsuperscript{78}

As between conflicting transfers, "the one executed first prevails if it is recorded, in the manner required to give constructive notice under [17 U.S.C. § 205(c)], within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer."\textsuperscript{79} If the prior transfer does not satisfy these conditions, the later transfer will prevail if it was recorded in the manner provided by 17 U.S.C. § 205(c), and if it was taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the prior transfer.\textsuperscript{80} Therefore, with regard to a borrower's copyright registered with the Copyright Office, a secured lender must perfect its security interest in such copyright by recording the transfer of such interest with the Copyright Office. As for when a transfer is recorded, there is case law that supports the argument that a recording occurs when the transfer is submitted to the Copyright Office, rather than when the Copyright Office actually records the transfer in its records.\textsuperscript{81}

It should be noted, however, that with regard to a borrower's unregistered copyright, a filing with the Copyright Office is not required for perfection, as there is no

\textsuperscript{78} 17 U.S.C. § 205(c).

\textsuperscript{79} 17 U.S.C. § 205(d).

\textsuperscript{80} Id.

\textsuperscript{81} Edward Thompson Co. v. American Law Book Co., 119 F. 217, 220 (C.C.N.Y. 1902) ("It may be admitted that the title is in law recorded when received for record, and that the date of the recording is the time when it is so received, rather than that when it is actually written in the record book.").
way for the secured lender to preserve priority in a copyright that is not registered with the Copyright Office.\textsuperscript{82} In such a scenario, an unregistered copyright qualifies as a "general intangible." Therefore, if a secured lender's borrower has unregistered copyrights, the secured lender must perfect its interest in such collateral constituting general intangibles pursuant to the UCC.\textsuperscript{83}

A secured lender also must remember that a copyright owner's registration of a copyright is permissive, not mandatory.\textsuperscript{84} As a result, a secured lender dealing with a borrower that has unregistered copyrights runs the risk that the borrower may subsequently register the copyrights with the Copyright Office without notifying the secured lender. To guard against this scenario, a secured lender should require the borrower to covenant that it will provide notice to the secured lender before it registers any copyright with the Copyright Office.

VI. MOTOR VEHICLES

Perfecting an interest in a borrower's motor vehicle requires a secured lender to refer to the applicable state's certificate of title act. Generally, a certificate of title act will require that every owner of a motor vehicle apply for a certificate of title.\textsuperscript{85} A secured lender that desires to perfect its security interest in a borrower's motor vehicle

\textsuperscript{82} Aerocon Eng'g, Inc. v. Silicon Valley Bank (In re World Aux. Power Co.), 303 F.3d 1120, 1129-30 (9th Cir. 2002).

\textsuperscript{83} Id. at 1130.

\textsuperscript{84} See 17 U.S.C. § 205(a) ("Any transfer of copyright ownership . . . may be recorded in the Copyright Office.") (emphasis added).

\textsuperscript{85} See, e.g., O.C.G.A. § 40-3-20(a) ("All 1963 model vehicles and all successive model vehicles thereafter shall have a certificate of title.").
must ensure that its interest is noted on the motor vehicle's certificate of title. Some states provide a secured lender with perfection that will relate back to the date on which the security interest first attached. A secured lender should be aware, however, that while some states consider perfection to occur on the date when the required documents are delivered to the proper authorities regardless of whether a title is ever issued, some states will not consider an interest perfected unless such interest is noted on the certificate of title. If a secured lender is subject to the latter requirement, it must take steps to ensure that its security interest is noted on the certificate of title in question.

86 See O.C.G.A. § 40-3-50(b)(1) (stating that a security interest is perfected by delivery to the appropriate commissioner or county tag agent the required fee and the existing certificate of title and an application for a certificate of title containing the name and address of the holder of the security interest); General Fin. Corp. v. Hester, 141 Ga. App. 28, 29, 232 S.E.2d 375 (1977) ("As a result of the adoption of the Uniform Commercial Code, the only way to perfect a security interest in motor vehicles is by filing under the Motor Vehicle Certificate of Title Act."); In re Hicks, 491 F.3d 1136, (10th Cir. 2007) (filing of a notice of security interest alone was not sufficient to perfect creditor's lien on vehicle when subsequent certificate of title was issued without the notation of the creditor's lien).

87 See O.C.G.A. § 40-3-50(b)(2) (stating that a security interest is perfected when it is created if the initial delivery of the application or notice to the commissioner or local tag agent is completed within 20 days thereafter, regardless of any subsequent rejection of the application or notice for errors; otherwise, the security interest is perfected as of the date of the delivery to the commissioner or local tag agent).

88 See, e.g., Id.

89 See, e.g., Tenn. Code Ann. § 55-3-126(b)(3)(A) ("Notwithstanding any other law to the contrary, a second or other junior security interest or lien in a vehicle of the type for which a certificate of title is required shall not be considered perfected unless and until such lien or security interest is physically noted on the certificate of title for such vehicle.").