Nothing in these materials is intended as legal advice. If you need legal assistance, consult with or secure the services of a competent and professional lawyer who is licensed to practice law in the relevant jurisdiction(s).
# Table of Contents

**Sales of Goods**
1. Parol Evidence and Conditions Precedent ................................................................. 1  
2. Choosing Law for Goods-Information Transactions .................................................... 2  
3. Disclaiming Damages ................................................................................................. 3  

**Commercial Paper**
3. Make Sure the Allonge is Really Affixed .................................................................. 4  

**Letters of Credit**
4. Letter of Credit Tips .................................................................................................... 5  

**Security Agreements**
5. Avoiding Double – Possibly Conflicting – Grants of a Security Interest ................... 6  
6. Avoid the Phrase “Purchase-Money” in the Grant of the Interest ............................... 7  
7. Defining Secured Liabilities ...................................................................................... 8  
8. Providing for Attorneys Fees .................................................................................... 9  
9. Describing the Collateral .......................................................................................... 10  
10. Security Interests in Computer Games ...................................................................... 11  
11. The Relevance of Choice of Law to Article 9’s Anti-Assignment Rules .................... 12  
12. Terms Relating to Certain, Specific Collateral ....................................................... 14  
13. Insuring the Collateral ............................................................................................. 17  
14. Give Borrowers Time to Comply ............................................................................ 18  
15. Defining Default ..................................................................................................... 19  
16. Special Provisions on Remedies ............................................................................ 20  
17. Right to Disable Collateral Other Than Equipment .............................................. 22  
18. Permission to Temporarily Take Noncollateral ..................................................... 23  
19. Limiting the Duty to Send Notification .................................................................. 24  
20. Limiting the Length of Notification of Disposition ............................................. 25  
21. Providing for How to Conduct a Disposition .......................................................... 26  

**Perfecting and Maintaining Perfection**
22. Getting Authorization to Prefile a Financing Statement .......................................... 27  
23. Getting Authorization to File a Protective Financing Statement ............................. 29  
24. Include in the Security Agreement a Waiver of Claims for Unauthorized Filings .... 30  
25. Filing Continuation Statements ............................................................................. 31  
26. Disclaim the Duty to File Continuation Statements ............................................ 32  
27. Filing Against Non-U.S. Debtors ............................................................................. 33  

**Ensuring Priority**
28. Searching for Federal Tax Liens ............................................................................ 34  
29. A Caveat about Credit Card Receivables ............................................................... 39
Commercial Lending
30. Execute a Confidentiality Agreement .................................................................................. 43
31. Have Guarantors Enter into a Contribution Agreement ...................................................... 43
32. Have Guarantors Waive Fraudulent Inducement Claims .................................................... 48
33. Disclose Representation of Others Adverse to Your Client’s Adversary ............................ 49
34. Do Not Ignore Key Boilerplate in Intercreditor and Control Agreements ......................... 50

Litigation Strategies
35. Don’t Win the Battle but Lose the War .................................................................................. 51
Parol Evidence and Conditions Precedent

The parol evidence rule covers prior asserted understandings and asserted contemporary oral understandings, but decisions hold that it does not preclude a condition precedent as no contract has yet been formed to protect. However, there is no reason that a merger clause cannot protect against an asserted condition precedent as well as bolster the operation of the parol evidence rule. Thus, consider:

This agreement signed by both parties and so initialed by both parties in the margin opposite this paragraph constitutes a final record expression of all the terms of this agreement and is a complete and exclusive statement of those terms. No conditions precedent to this agreement exist.

Fred Miller
fmiller@ou.edu
Choosing Law for Goods-Information Transactions

In my state there is inadequate case law and no statutory law concerning the scope of Article 2 (and 2A) in relation to transactions covering both goods and information. I also strongly believe the resolution of this issue in UCITA is appropriate. Thus, consider in an appropriate case:

The parties agree that this transaction involves both goods and information, and that the transaction has as a material purpose access to and use of the information involved. Accordingly, they agree that the application of Article 2 of the Uniform Commercial Code, as enacted in the jurisdiction whose law is chosen by them to govern this transaction, to the entire transaction is inappropriate, and further stipulate that their choice of law agreement shall be interpreted, to the extent of the information included in this transaction, to apply the Uniform Computer Information Transactions Act, as finally promulgated by the National Conference of Commissioners on Uniform State Laws, to determine their rights and duties even though not enacted in the jurisdiction whose law is otherwise chosen.

Fred Miller
fmiller@ou.edu
Disclaiming Damages

Article 2 authorizes aggrieved buyers to recover both incidental and consequential damages from sellers who have breached. See §§ 2-712(2), 2-713(1), 2-714(3). Amended Article 2 does the same for aggrieved sellers seeking recourse from breaching buyers, although the pre-amended version, which is still in effect, authorizes only incidental damages. See §§ 2-706(1), 2-708(1).

Parties frequently disclaim liability for consequential damages but rarely bother to disclaim liability for incidental damages, presumably in the belief that incidental damages are likely to be nominal while consequential damages could be extensive. However, the difference between them is not their amount, it relates to how they arise. Incidental damages include the costs associated with inspection, receipt, care, and custody of the goods, as well as in effecting cover. Consequential damages could be just about anything else, but are limited by traditional principles of contract law, such as foreseeability. See §§ 2-710, 2-715.

In one somewhat dated but nevertheless eye-opening case, the court was faced with an agreement that had disclaimed “consequential” but not “incidental” damages. Noting that the Code defines the latter to include the cost of storing the goods, the court ruled that the buyer was liable for storage costs. Because the case involved fuel for a nuclear reactor, the “incidental” damages for which the buyer was liable were $293,000,000! See Commonwealth Edison Co. v. Allied Chemical Nuclear Products, Inc., 684 F. Supp. 1429 (N.D. Ill 1988).

Note, the court in this case implicitly imbued a term in the parties’ private agreement with the meaning ascribed to it by the Code. That may not be totally justified. After all, when the UCC defines a term it generally does so for the purposes of interpreting the Code itself, not other laws or private agreements. See § 1-201 (“in this Act”); § 2-103(1) (“[i]n this Article . . . “). But cf. §§ 2-319, 2-320, 2-321 (defining shipment and delivery terms used in agreements). Nevertheless, other courts do the same, see, e.g., Wellman Coal Co. v. Powell Constr. Co., 600 F. Supp. 1042, 1047 n.1 (D. Va. 1984) (also using the UCC definition of “consequential damages” to interpret an agreement). Accordingly, when drafting agreements, lawyers should assume that the Code’s definitions will apply to any Code terms used in the agreement unless the agreement contains its own definition.

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
Make Sure the Allonge is Really Affixed

Always make sure that when one takes an allonge (an assignment of an endorsement of a promissory note separate from the note) that the allonge is so affixed to the original note as to become a part thereof. See § 3-304(2). Otherwise the lender or factor who is taking the promissory note as security or purchasing the note may be subject to whatever defenses the maker has because the lender or purchaser is not a holder in due course for failure to have a proper endorsement. “Affixed” probably includes staples but does not include paperclips. See Southwestern Resolution Corp. v. Watson, 964 S.W.2d 262 (Texas 1997); Adams v. Madison Realty & Development, 853 F.2d 163 (3d Cir. 1988); Pribus v. Bush, 173 Cal. Rptr. 747 (Cal. Ct. App. 1981).

George A. Hisert
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA  94111
(415) 393-2577
george.hisert@bingham.com
Letter of Credit Tips

1. When representing a beneficiary in a situation where the applicant is to keep a letter of credit outstanding for an extended period of time, do not rely solely on an agreement from the applicant that it will do so. Instead use a properly drafted evergreen letter of credit requiring the issuer to give notice of nonrenewal and allowing the beneficiary to draw without the normal documentation upon receipt of any notice of nonrenewal. See New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc., 2002 U.S. Dist. LEXIS 1202.

2. In taking a standby letter of credit as backup for payments under an underlying contract, be aware of the In re Powerine problem. See In re Powerine Oil Company, 59 F.3d 969 (9th Cir. 1995). The letter of credit should extend for at least the preference period plus 30 days beyond the last scheduled payment in the underlying contract and should permit a drawing merely on the basis of a certificate that the applicant has filed a petition in bankruptcy.

3. In representing a beneficiary of a letter of credit, be very wary of accepting a letter of credit which requires presentation of the original letter of credit as a condition to a draw. Many letters of credit have been lost in the World Trade Center, floods, fires, earthquakes and other unnatural disasters. Issuers of letters of credit are under no obligation to replace a letter of credit if the original is lost or destroyed and are under no obligation to accept a copy of a letter of credit in lieu of the original.

4. In representing a beneficiary, do not accept a letter of credit which requires any documentation which needs to be subsequently provided by the applicant. This only gives the applicant veto power over the beneficiary’s ability to draw.

George A. Hisert
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2577
george.hisert@bingham.com
Avoiding Double – Possibly Conflicting – Grants of a Security Interest

In the secured transactions involving real estate, it is very frequent that a security interest in the personal property will be granted twice to the same secured party, under the law of two different jurisdictions. While we have not been able to come up with a scenario where this is harmful in actuality because the provisions of the two state laws are uniform in the important respects relating to the grant of the security interest, there is a theoretical possibility of differing scope and all the sorts of things a creative lawyer could make about that.

Here is how it happens. The real property is in state X, and the deed of trust/mortgage is governed by the law of the state of New York. The loan documents, other than the mortgage, are governed by the law of New York. Both the mortgage (governed by the law of the state of X) and the loan agreement (governed by the law of New York) purport to grant to the lender a security interest in the same personal property. Unless a correction is made, these two grants are made under the law of two different states.

This just feels like a bad idea to me, so we always try to make it a point to fix it in some fashion. Options are to have only one grant (tough sell -- everyone wants to see the provisions where they are used to seeing them), to fix the choice of law provision in the mortgage to carve out the UCC grant and make it uniform (but then you still have two grants in two documents), or to both fix the choice of law for the UCC in the mortgage and try to cross reference the two grants to make it clear that it is the same security interest, just in two different documents (awkward and confusing).

I’m sure others have some suggestions on the hazards and cures of this issue. I have no great insight on how to fix it, but the dual grants just never seemed to be the best idea, for either side.

P.S – If you aren’t careful, in a deed of trust state, the security interest in the deed of trust could actually be granted to the Trustee for the benefit of the lender, and not to the lender. In this case, the name grantee is different, but the beneficial holder is the same. Again, this doesn’t feel like a great idea to me, when it is so easy to avoid.

Karin J.K. Kincaid
Pillsbury Winthrop Shaw Pittman LLP
1650 Tysons Boulevard
McLean, Virginia 22102
(703) 770-7909
Avoid the Phrase “Purchase-Money” in the Grant of the Interest

When taking what you hope will be a purchase-money security interest (“PMSI”), do not include the phrase “purchase-money” in the security agreement’s granting language. Purchase-money status is not a function of the debtor’s intent (or the parties’ intent), it depends on other factors. See 9-103. If the document states that the debtor is granting a PMSI but for some reason the lien would not qualify for purchase-money status, do you have a security interest at all? You should, but it is better to avoid that question and that fight by eliminating the ambiguity.

Dennis J. Kemmer
Vice President and Assistant General Counsel
CIT Group Inc.
denny.kemmer@cit.com
Defining Secured Liabilities

The definition of “Secured Liabilities” needs to be as broad as possible – securing all potential debt now or hereafter owed by borrower to lender, costs and expenses (including lender’s legal fees).

“Secured Liabilities” shall mean and include all loans, advances, debts, liabilities, obligations, covenants and duties owing to the Bank by the Borrower, whether now existing, or hereafter created or arising, including, without limitation: (1) the Revolving Loan, together with all loans, advances and overadvances now or hereafter made thereunder, and all extensions, renewals, refinancings, modifications, amendments, replacements, consolidations and conversions thereof or increases thereto; and (2) all obligations, contingent or otherwise, of Borrower under or related to each Letter of Credit and each other letter of credit now or hereafter issued by Bank for the account of Borrower; and (3) all interest, fees, charges, expenses, attorneys’ fees and other costs and sums now or hereafter payable by the Borrower under the terms of this Agreement, the Revolving Note, or any of the other Loan Documents; and (4) any and all other loans, advances, overdrafts, indebtedness, liabilities and obligations now or hereafter owed by Borrower to Bank, of every kind and nature, howeversoever created, arising or evidenced, and howsoever owned, held or acquired, whether now due or to become due, whether direct or indirect, or absolute or contingent, whether several, joint or joint and several, whether liquidated or unliquidated, whether legal or equitable, whether disputed or undisputed, whether secured or unsecured, or whether arising under this Agreement or any of the other Loan Documents or any other document or instrument, and, advances made by Bank to pay or discharge any other lien, security interest or encumbrance upon the Collateral; and (5) all advances made by Bank to protect the Collateral, and/or Bank’s security interest therein; and (6) all costs, expenses and fees (including reasonable attorneys’ fees) incurred by Bank pursuant to the terms of this Agreement or any of the other Loan Documents, or in connection with (i) the drafting and preparation of this Agreement and the other Loan Documents, (ii) the enforcement and defense of this Agreement and any other Loan Documents, or the relationships and security interests created hereunder or thereunder, (iii) the collection of the Liabilities and any other obligation or indebtedness secured hereby, and (iv) the sale or other disposition of the Collateral, or any portion thereof.

Bennett L. Cohen
Cohen, Salk & Huvard, P.C.
630 Dundee Road, Suite 120
Northbrook, Illinois 60062
(847) 480-7800
(847) 480-7882 (fax)
bcoden@cshlegal.com
Providing for Attorneys Fees

Article 9 permits secured creditors to recover any attorney fees incurred in collection if the security agreement so provides. See §§ 9-608(a)(1)(A), 9-615(a)(1). Even in bankruptcy, secured creditors are entitled to charge the collateral for the any attorney’s fees or other costs of collection to the extent the security agreement so provides. See § 506(b). Occasionally, though, the attorney’s fees provision in the security agreement is not sufficiently broad to bankruptcy litigation expenses.

For example, in In re Connelly, 238 B.R. 75 (9th Cir. BAP 1999), the agreement provided:

In any action or proceeding brought to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable costs and expenses thereof, including attorneys’ fees, as may be determined by the court.

The court denied attorney’s fees in a successful preference defense because it concluded that such an action was not one to enforce or interpret the agreement. See also In re LCO Enterprises, Inc., 180 B.R. 567 (9th Cir. BAP 1995) (landlord not entitled to attorneys fees in successful preference defense because action was not one to enforce or based on the lease). In contrast, in Pitney Bowes, Inc. v. Manufacturers Bank, 1997 WL 289680 (D. Conn. 1997), an indemnity clause broadly covered:

any and all liabilities, obligations, . . . claims, actions, suits, costs, expenses, and disbursements (including, without limitation, reasonable legal fees and expenses) of any kind and nature whatsoever . . . in any way relating to or arising out of this Lease or any document contemplated hereby.

The court ruled that this covered a preference action to recover lease payments. See also In re Moran, 188 B.R. 492 (Bankr. E.D.N.Y. 1995) (provision of mortgage providing that mortgagee would be entitled to reasonable attorney fees for “any litigation to prosecute or defend the rights and lien created by this mortgage,” was broad enough to permit recovery of legal fees incurred by mortgagee in defending trustee’s action to avoid mortgage as preferential transfer).

The security agreement should therefore include a clause broad enough to cover all bankruptcy litigation expenses. Here is an example of such a clause:

The Secured Obligation shall include all costs of collection, including reasonable attorneys fees. For this purpose, “costs of collection” shall include the costs, including reasonable attorney’s fees, associated with defending, protecting or enforcing the Secured Party’s rights in any bankruptcy proceeding, including the cost of litigating the dischargeability of all or any portion of the Secured Obligation, the cost of litigating the amount, validity, or secured status of Secured Party’s claim, the cost of litigating the avoidability of any allegedly preferential or fraudulent transfer, the cost of any litigation concerning conformation of a plan of reorganization, and the cost of litigating the applicability of or seeking relief from the automatic stay.

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
Describing the Collateral

It is very important to describe the collateral with sufficient breadth and accuracy to encompass whatever value the secured party desires to reach. In this respect it is important to note that while the definitions comprising Article 9’s classification scheme technically apply only to the Code itself, and need not be relevant to interpreting a private agreement, many courts have concluded that they create a sort of usage of trade for secured transactions and regularly use the Code’s definitions to interpret security agreements. Because of this, it is vital to understand the limits of those definitions.

For example, the right to repayment of a loan may be a general intangible, it may be reified in an instrument, or may constitute a component of chattel paper. However, it cannot be an account. § 9-102(a)(2)(vi). A debtor whose business involves the provision of services in barter transactions has neither “inventory” nor “accounts.” Instead, the obligations of the debtor’s customers would be “general intangibles.”

In some cases, what appears to be a single obligation may in fact be more than type of collateral. For example, a debtor who sells goods at the retail level typically charges customers for the sales price, shipping charges, and sales tax. The sales price would certainly be proceeds of “inventory,” and shipping charges are likely to be as well. See Johnson Transportation Serv. v. Jimmy Grizzard Sales, Inc., 164 Cal. App. 3d 583, 210 Cal. Rptr. 433 (1985). The sales tax may not be. See In re Koppinger, 113 B.R. 588 (Bankr. D.N.D. 1990) (actually ruling such amounts were not “accounts”). Indeed, the debtor may not even have property rights in the amounts due for sale taxes.

On the other hand, when assets are divided and collateralized separately, the classification may change. Thus, a lessor of goods who assigns not the entire written lease but only the rights to payment may be assigning payment intangibles rather than chattel paper. See § 9-102 comment 5d. But see In re Commercial Money Center, Inc., 2005 WL 1365055 (Bank. S.D. Cal. 2005) (right to payment under equipment leases is chattel paper, not payment intangibles, and thus sale of such rights requires filing for perfection).

Finally, the security agreement should also make sure that if the collateral is likely to become an accession, the security interest will attach to the other goods. See § 9-336 comment 5. For example, if the collateral is a motor vehicle, the security interest should include replacement tires and any subsequently installed accessories, such as a CD player.

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
Security Interests in Computer Games

There still is a lot of confusion about what is software and what is goods. The most common mistake is to assume that cartridges of video games are inventory under Article 9.

The confusion stems in part from the definitions in Article 9. The definition of “goods” in § 9-102(a)(44) excludes “general intangibles” but the definition of “general intangibles” in § 9-102(a)(42) excludes “goods.” Thus, there’s really no ordering principle to follow in deciding in the first instance whether something is goods or general intangibles. In contrast, other Article 9 collateral classifications avoid such mutual exclusions. See, e.g., § 9-102(a)(2) (excluding instruments from qualifying as accounts); § 9-102(a)(48) (excluding farm products from qualifying as inventory).

Nevertheless, the definition of goods expressly excludes “a computer program embedded in goods that consist solely of the medium in which the program is embedded.” The cartridges are just the medium in which the video game programs are contained. The video game programs themselves are actually software. Consequently, and counter-intuitively, a supply of video games, whether held by the manufacturer, distributor, or retailer – cannot be goods. They are general intangibles.

Edwin E. Smith
Bingham McCutchen
150 Federal Street
Boston, MA 02110-1726
The Relevance of Choice of Law to Article 9’s Anti-Assignment Rules

Revised Article 9 performs a wonderful bit of alchemy. It transforms many nonassignable rights into assignable rights: thereby allowing the owner to convey a security interest in them. See §§ 9-406 through 9-409. In particular, it trumps many contractual and legal restrictions that prohibit assignment and overrides many contractual and legal rules that would make granting a security interest an event of default.

These anti-assignment rules do not convert non-property into property; one still cannot take a security interest in things that do not qualify as property of the debtor. See In re Chris-Don, Inc., 367 F. Supp. 2d 696 (D.N.J. 2005) (NJ liquor license is not property an no security interest may attach to one). Moreover, the secured party may be left with no ready means of enforcing its lien against an uncooperative account debtor. See § 9-408(d), comment 2. Nevertheless, the anti-assignment rules do permit a security interest to attach to rights of the debtor and thus potentially come ahead of the debtor’s bankruptcy trustee. See § 9-408 comment 7.

However, not all states have enacted the uniform text of revised Article 9’s anti-assignment rules. For example, New York has enacted only those rules that trump contractual restrictions on assignment, not the rules that trump legal restrictions on assignment. See N.Y. Uniform Commercial Code §§ 9-406, 9-408 (McKinney) (omitting uniform § 9-406(f) and § 9-408(c)). Delaware has excepted from its version assignments of any interest in a partnership or limited liability company. See Del. Stat. tit 6, §§ 9-406(i)(5), 9-408(e)(4). The conventional wisdom is that these variations apply whenever the underlying right or interest is governed by or created under that state’s law. That may not be true, however. Consider the following two scenarios.

1. Debtor A, a Washington corporation, acquires an interest in a Delaware LLC. The governing documents of the LLC prohibit assignment of any owner’s LLC interest. Debtor A obtains capital financing from Lender, which is based in California. The loan agreement grants Lender a security interest in all of Debtor A’s general intangibles. It also provides that California law (other than its choice-of-law rules) governs the parties’ rights and obligations.

2. Debtor B, a resident of New Jersey, is a member of a New York professional service LLC. In return for a loan, Debtor B grants a security interest in all her general intangibles to Bank, which is located in New Jersey. The security agreement provides that it is governed by New Jersey law (other than its choice-of-law rules).

One might be tempted to think that Delaware’s non-uniform variation to § 9-408 would prevent Lender’s security interest from attaching to Debtor A’s LLC interest. Similarly, many might believe that New York’s non-uniform § 9-408, combined with N.Y. Limited Liability Company Law § 1211(a) (McKinney) (prohibiting assignment of an interest in a professional service LLC to anyone not otherwise eligible to be a member), prohibits Bank’s security interest from attaching to Debtor B’s interest in her professional service LLC. That view may not be correct.

If the attachment issue arises in litigation, we start of course with the premise that we look to the law of the forum state. Every state has enacted § 9-301, which contains a variety of rules on which state’s law governs perfection and priority. However, comment 2 indicates that the reference to “perfection” in § 9-301 is not intended to cover the predicate issue of attachment. That is left to the rules in Article 1. Those rules, in turn, permit parties to choose the law governing their
transaction as long as the selection bears a reasonable relation to the transaction. *See* pre-revision § 1-105(1). No doubt in both of the scenarios described above such a reasonable relation exists. In scenario 1, the selected jurisdiction is the location of the secured party. In scenario 2, it is the location of the both the debtor and the secured party and, in all probability, the place where the transaction documents were executed.

Thus, the question in each scenario would be whether the law of the chosen jurisdiction permits attachment to the interest in question. It does, as long as the parties’ choice of law is respected. A full analysis of all the conflict-of-law implications is beyond the scope of this brief tip. Nevertheless, this should be enough to demonstrate that the protective measures taken by such states as Delaware and New York may not always achieve the desired objective. Moreover, it suggests that parties wishing to get around these measures may have a means of doing so: make sure to choose some other state’s law to govern the transaction.

Stephen L. Sepinuck  
Gonzaga University School of Law  
ssepinuck@lawschool.gonzaga.edu
Terms Relating to Certain, Specific Collateral

Under revised Article 9, the lender needs to obtain control of deposit accounts (unless the lender is the depositary bank), letter-of-credit rights, and investment property. Also, it is no longer possible to perfect a security interest in goods held by a bailee merely by sending notification to the bailee. For each of these types of property, a special provision is needed.

### Deposit Accounts

For each deposit account that the Borrower at any time opens or maintains, the Borrower shall, at the Bank’s request and option, pursuant to an agreement in form and substance satisfactory to the Bank, either (a) cause the depositary bank to agree to comply at any time with instructions from the Bank to such depositary bank directing the disposition of funds from time to time credited to such deposit account, without further consent of the Borrower, or (b) arrange for the Bank to become the customer of the depositary bank with respect to the deposit account, with the Borrower being permitted, only with the consent of the Bank, to exercise rights to withdraw funds from such deposit account. The Bank agrees with the Borrower that the Bank shall not give any such instructions or withhold any withdrawal rights from the Borrower, unless an uncured Event of Default has occurred and is continuing, or, after giving effect to any withdrawal not otherwise permitted by the Loan Documents, would occur. The provisions of this paragraph shall not apply to (i) any deposit account for which the Borrower, the depositary bank and the Bank have entered into a cash collateral agreement specially negotiated among the Borrower, the depositary bank and the Bank for the specific purpose set forth therein, (ii) deposit accounts for which the Bank is the depositary, and (iii) deposit accounts specially and exclusively used for payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of the Borrower’s salaried employees.

### Letter-of-credit Rights

If the Borrower is at any time a beneficiary under a letter of credit now or hereafter issued in favor of the Borrower, the Borrower shall promptly notify the Bank thereof and, at the request and option of the Bank, the Borrower shall, pursuant to an agreement in form and substance satisfactory to the Bank, either (i) arrange for the issuer and any confirmer of such letter of credit to consent to an assignment to the Bank of the proceeds of any drawing under the letter of credit or (ii) arrange for the Bank to become the transferee beneficiary of the letter of credit, with the Bank agreeing, in each case, that the proceeds of any drawing under the letter of credit are to be applied (x) in the absence of an Event of Default, as Borrower shall direct, or (y) after an Event of Default shall have occurred and be continuing, towards payment of the Liabilities.
Investment Property

If the Borrower shall at any time hold or acquire any certificated securities, the Borrower shall forthwith endorse, assign and deliver the same to the Bank, accompanied by such instruments of transfer or assignment duly executed in blank as the Bank may from time to time specify. If any securities now or hereafter acquired by the Borrower are uncertificated and are issued to the Borrower or its nominee directly by the issuer thereof, the Borrower shall immediately notify the Bank thereof and, at the Bank’s request and option, pursuant to an agreement in form and substance satisfactory to the Bank, either (a) cause the issuer to agree to comply with instructions from the Bank as to such securities, without further consent of the Borrower or such nominee, or (b) arrange for the Bank to become the registered owner of the securities. If any securities, whether certificated or uncertificated, or other investment property now or hereafter acquired by the Borrower are held by the Borrower or its nominee through a securities intermediary or commodity intermediary, the Borrower shall immediately notify the Bank thereof and, at the Bank’s request and option, pursuant to an agreement in form and substance satisfactory to the Bank, either (i) cause such securities intermediary or (as the case may be) commodity intermediary to agree to comply with entitlement orders or other instructions from the Bank to such securities intermediary as to such securities or other investment property, or (as the case may be) to apply any value distributed on account of any commodity contract as directed by the Bank to such commodity intermediary, in each case without further consent of the Borrower or such nominee, or (ii) in the case of financial assets or other investment property held through a securities intermediary, arrange for the Bank to become the entitlement holder with respect to such investment property, with the Borrower being permitted, only with the consent of the Bank, to exercise rights to withdraw or otherwise deal with such investment property. The Bank agrees with the Borrower that the Bank shall not give any such entitlement orders or instructions unless an Event of Default has occurred and is continuing, or would occur after taking into account any action by the Borrower with respect to the bailee.

Collateral in the Possession of a Bailee

If any goods are at any time in the possession of a bailee, the Borrower shall promptly notify the Bank thereof and, if requested by the Bank, shall promptly obtain an acknowledgement from the bailee, in form and substance satisfactory to the Bank, that the bailee holds such Collateral for the benefit of the Bank and shall act upon the instructions of the Bank, without the further consent of the Borrower. The Bank agrees with the Borrower that the Bank shall not give any such instructions unless an Event of Default has occurred and is continuing or would occur after taking into account any action by the Borrower with respect to the bailee.

For slightly different reasons, special provisions are needed with respect to certain other collateral as well:
**Electronic Chattel Paper and Transferable Records**

If the Borrower at any time holds or acquires an interest in any electronic chattel paper or any “transferable record,” as that term is defined in Section 201 of the federal Electronic Signatures in Global and National Commerce Act, or in § 16 of the Uniform Electronic Transactions Act as in effect in any relevant jurisdiction, the Borrower shall promptly notify the Bank thereof and, at the request of the Bank, shall take such action as the Bank may reasonably request to vest in the Bank control, under § 9-105 of the Uniform Commercial Code, of such electronic chattel paper or control under Section 201 of the federal Electronic Signatures in Global and National Commerce Act or, as the case may be, § 16 of the Uniform Electronic Transactions Act, as so in effect in such jurisdiction, of such transferable record. The Bank agrees with the Borrower that the Bank will arrange, pursuant to procedures satisfactory to the Bank and so long as such procedures will not result in the Bank’s loss of control, for the Borrower to make alterations to the electronic chattel paper or transferable record permitted under UCC § 9-105 or, as the case may be, Section 201 of the federal Electronic Signatures in Global and National Commerce Act or § 16 of the Uniform Electronic Transactions Act for a party in control to make without loss of control, unless an Event of Default has occurred and is continuing or would occur after taking into account any action by the Borrower with respect to such electronic chattel paper or transferable record.

**Commercial Tort Claims**

If the Borrower shall at any time hold or acquire a commercial tort claim in excess of $25,000.00, upon the filing of a complaint or counter-claim for such claim, the Borrower shall promptly furnish to the Bank copies of all pleadings made in connection therewith, and shall grant to the Bank in writing, a security interest therein and in the proceeds thereof, all upon the terms of this Agreement, with such writing to be in form and substance satisfactory to the Bank.

**Promissory Notes and Tangible Chattel Paper**

If the Borrower shall at any time hold or acquire any promissory notes or tangible chattel paper, the Borrower shall forthwith endorse, assign and deliver the same to the Bank, accompanied by such instruments of transfer or assignment duly executed in blank as the Bank may from time to time specify.

Bennett L. Cohen  
Cohen, Salk & Huvard, P.C.  
630 Dundee Road, Suite 120  
Northbrook, Illinois 60062  
(847) 480-7800  
(847) 480-7882 (fax)  
bcohen@cshlegal.com
Insuring the Collateral

In some states (such as Illinois), provisions allowing the lender to obtain insurance coverages that the borrower fails to provide, must be conspicuous.


Bennett L. Cohen
Cohen, Salk & Huvar, P.C.
630 Dundee Road, Suite 120
Northbrook, Illinois 60062
(847) 480-7800
(847) 480-7882 (fax)
bcohen@cshlegal.com
Give Borrowers Time to Comply

Borrower’s counsel should request a provision in the Security Agreement (or Credit Agreement) providing loan parties 60 days (or preferably 90 days) after closing to obtain control agreements and such time frame should be extendable in the Administrative Agent’s sole discretion if the borrower is diligently pursuing such agreement. In addition among many other carve outs it is helpful to carve out deposit accounts that have under $______ amount in them. This will permit the borrower to open new accounts throughout the term of the loan without being in default prior to obtaining a control agreement.

Similarly, Borrower’s counsel should seek to include a provision giving the borrower 60 days (or preferably 90 days) after obtaining a new subsidiary to comply with any provisions requiring future subsidiaries to become loan parties. Such compliance generally requires a perfection opinion and this can take more time then expected if the new subsidiary is located in a different jurisdiction (new local counsel needs to obtained) or if in the same jurisdiction as existing loan party existing counsel is on vacation. This time frame should be extendable in Administrative Agent’s sole discretion if the borrower is diligently pursuing such compliance.

Cindy J. Chernuchin
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019-6099
(212) 728-8606
(212) 728-9606 (fax)
cchernuchin@willkie.com
Defining Default

In view of § 9-610 and related provisions, I prefer to include the following in the default provision:

If Bank receives a notice from any other secured party of a proposed disposition of the Collateral or any portion thereof or otherwise learns of any such proposed disposition (whether or not such security interest is permitted by the terms of this Agreement; nothing in this subsection shall be construed to constitute consent by Bank to the creation of any security interest in the Collateral other than the Bank’s security interest); or

Bennett L. Cohen
Cohen, Salk & Huvard, P.C.
630 Dundee Road, Suite 120
Northbrook, Illinois 60062
(847) 480-7800
(847) 480-7882 (fax)
bcohen@cshlegal.com
Special Provisions on Remedies

In addition to having a comprehensive remedy section, I prefer to make sure that some special provisions are added to remedy section:

To the extent that applicable law imposes duties on the Bank to exercise remedies in a commercially reasonable manner, Borrower acknowledges and agrees that it is not commercially unreasonable for the Bank (a) to fail to incur expenses reasonably deemed significant by the Bank to prepare Collateral for disposition or otherwise to complete raw material or work in process into finished goods or other finished products for disposition, (b) to fail to obtain third party consents for access to Collateral to be disposed of, or to obtain or, if not required by other law, to fail to obtain governmental or third party consents for the collection or disposition of Collateral to be collected or disposed of, (c) to fail to exercise collection remedies against account debtors or other persons obligated on Collateral or to remove liens or encumbrances on or any adverse claims against Collateral, (d) to exercise collection remedies against account debtors and other persons obligated on Collateral directly or through the use of collection agencies and other collection specialists, (e) to advertise dispositions of Collateral through publications or media of general circulation, whether or not the Collateral is of a specialized nature, (f) to contact other persons, whether or not in the same business as the Borrower, for expressions of interest in acquiring all or any portion of the Collateral, (g) to hire one or more professional auctioneers to assist in the disposition of Collateral, whether or not the collateral is of a specialized nature, (h) to dispose of Collateral by utilizing Internet sites that provide for the auction of assets of the types included in the Collateral or that have the reasonable capability of doing so, or that match buyers and sellers of assets, (i) to dispose of assets in wholesale rather than retail markets, (j) to disclaim disposition warranties, (k) to purchase insurance or credit enhancements to insure the Bank against risks of loss, collection or disposition of Collateral or to provide to the Bank a guaranteed return from the collection or disposition of Collateral, or (l) to the extent deemed appropriate by the Bank, to obtain the services of other brokers, investment bankers, consultants and other professionals to assist the Bank in the collection or disposition of any of the Collateral. Borrower acknowledges that the purpose of this paragraph is to provide non-exhaustive indications of what actions or omissions by the Bank would not be commercially unreasonable in the Bank’s exercise of remedies against the Collateral and that other actions or omissions by the Bank shall not be deemed commercially unreasonable solely on account of not being indicated in this paragraph. Without limitation upon the foregoing, nothing contained in this paragraph shall be construed to grant any rights to Borrower or to impose any duties on the Bank that would not have been granted or imposed by this Agreement or by applicable law in the absence of this paragraph.
The Bank shall not be required to marshal any present or future collateral security (including but not limited to this Agreement and the Collateral) for, or other assurances of payment of, the Liabilities or any of them or to resort to such collateral security or other assurances of payment in any particular order, and all of its rights hereunder and in respect of such collateral security and other assurances of payment shall be cumulative and in addition to all other rights, however existing or arising. To the extent that it lawfully may, Borrower hereby agrees that it will not invoke any law relating to the marshalling of collateral which might cause delay in or impede the enforcement of the Bank’s rights under this Agreement or under any other instrument creating or evidencing any of the Liabilities or under which any of the Liabilities is outstanding or by which any of the Liabilities is secured or payment thereof is otherwise assured, and, to the extent that it lawfully may, Borrower hereby irrevocably waives the benefits of all such laws.

Bennett L. Cohen
Cohen, Salk & Huvar, P.C.
630 Dundee Road, Suite 120
Northbrook, Illinois 60062
(847) 480-7800
(847) 480-7882 (fax)
bcohen@cshlegal.com
Right to Disable Collateral Other Than Equipment

Section 9-609(a)(2) authorizes the secured party to render “equipment” unusable. It does not authorize the secured party to render other types of collateral – most notably software and consumer goods – unusable. Yet such authorization is often necessary.

The issue arose most famously in 1990 when Logisticon, Inc., a small software firm, shut down Revlon by deactivating the cosmetic giant’s inventory control software at 2:00 am by remote control. Logisticon, Inc. had sold Revlon the computer software and retained a security interest in it. When a contract dispute arose, Revlon refused to make a sizeable installment payment that had become due. Logisticon responded by entering the program through a “back door” and “activating data scrambling viruses that paralyzed Revlon’s shipping operations for three days.” See Esther C. Roditti, *Is Self-Help a Lawful Contract Remedy?*, 21 RUTGERS COMPUTER & TECH. L.J. 431 (1995); Frank & Sons, Inc. v. Information Solutions, Inc., No. 88-C-1474-E, 1988 U.S. Dist. LEXIS 19356 (N.D. Okla. Dec. 23, 1988); American Computer Trust Leasing v. Jack Farrell Implement Co., 763 F. Supp. 1473, 1493 (D. Minn. 1991), aff’d on other grounds, 967 F.2d 1208 (8th Cir.), cert. denied, 506 U.S. 956 (1992); Clayton X-Ray Co. vs. Professional Systems Corp., 812 S.W.2d 565 (Mo. Ct. App. 1991). Revlon referred to Logisticon’s actions as “commercial terrorism.” Logisticon defended its actions as a “repossession of its collateral.” Revlon sued but the case settled before the court had to determine whether the software was “equipment.”

Similarly, some consumer lenders who take a security interest in the consumer’s car further ensure payment by equipping the car with an ignition lock. If they consumer makes the required weekly payment, the consumer id provided with a code to enter into the device. If not, the code is withheld and the consumer is unable to start the car.

While the Code does not authorize such actions, it also does not prohibit the debtor from granting such authorization in the security agreement. Accordingly, the security agreement should include such authorization whenever it may be necessary. Query, though, if some non-UCC state or federal law, such as the Federal Computer Abuse Amendments Act of 1994, Pub. L. 103-322, 108 Stat. 2097 (1994) (codified at 18 U.S.C. § 1030), might limit a software developer’s rights in this regard.

Upon default, and without prior notice, Secured Party shall have the right to disable any or all of the collateral and to render such collateral unusable.

Stephen L. Sepinuck  
Gonzaga University School of Law  
ssepinuck@lawschool.gonzaga.edu
Permission to Temporarily Take Noncollateral

When a secured party repossesses a motor vehicle, the debtor may well have other property inside the car. Such property is rarely part of the collateral. Indeed, attempts to make it such may violate federal regulations. See 16 C.F.R. § 444.2(a)(4) (making it an unfair credit practice to take a nonpossessory, nonpurchase-money security interest in household goods). Taking such property, even during a otherwise proper repossession, may well be tortious. Even if it does not qualify as conversion because the lack of intent to deprive the debtor of its use, it may qualify as trespass to chattels. While debtors will rarely have any damages, the secured party should seek to insulate itself from liability by inserting in the security agreement a clause authorizing it to temporarily take the anything in the collateral.

Upon default, Secured Party shall have the right to repossess the collateral without judicial process. In exercising this right, the Secured Party may also take whatever other property is on, in or attached to the collateral, provided the Secured Party promptly returns it after receiving a reasonable demand therefor.

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
Limiting the Duty to Send Notification

Section 9-611 requires reasonable notification prior to most dispositions of the collateral. In some situations, section 9-616 requires a post-sale explanation of the deficiency for which the debtor is liable prior to any attempt to collect it. Section 9-620 authorizes strict foreclosure following the sending of a proposal. These rules are nonwaivable. See § 9-602(7), (9), (10). Occasionally, however, secured parties have difficulty complying because they do not have the debtor’s current address.

If a notification, proposal, or explanation is sent by certified mail, return receipt requested, the communication may come back with evidence of nondelivery. Although the Code requires merely that the secured party “send” these communications, not that the debtor receive them, see §§ 9-611(b), 9-102(a)(74); cf. § 9-620(a)(2), (c)(2)(C) (both requiring receipt of another type of communication), at least on the context of dispositions, it does require the secured party to send reasonable notification. § 9-611(b). A secured party who fails to make another attempt to notify the debtor after learning that the initial attempt fails may not be acting reasonably. See § 9-611 comment 6 (indicating expressly that whether a second try is necessary is a matter left to the courts). Indeed, there is some authority for the proposition that the secured party does not act reasonably if it conducts a disposition without knowing whether the debtor received notification of the disposition. See R & J of Tennessee, Inc. v. Blankenship-Melton Real Estate, Inc., 166 S.W.3d 195 (Tenn. Ct. App. 2004); Federal Express Credit Union v. Lanier, 2005 WL 2806638 (Tenn. Ct. App. 2005). But cf. In re Marshall, 219 B.R. 687 (Bankr. M.D.N.C. 1997) (notification sent by both certified mail and regular mail to address of mobile home that creditor knew the debtor had already abandoned was reasonable because there was no evidence about what happened to the notification sent regular mail).

Although the duty to send reasonable notification cannot be waived, see § 9-602(7), the security agreement can define what is reasonable as long as it does so in a way that is not “manifestly” unreasonable. See §§ 1-302(b), 9-603(a). Accordingly, the security agreement – and any guaranty – can and should limit the secured party’s with respect to where to send notifications, explanations, and proposals. In essence, it should makes it the debtor’s responsibility to keep the secured party informed of the debtor’s current address.

Debtor directs that the Secured Party send all notices, notifications, explanations, and proposals to [him/her/it] at the following address:

[address]

Debtor may at any time designate in writing a different address for such communications, but until the Secured Party receives such a written designation, Debtor agrees that it is reasonable for the Secured Party to send all such communications to the Debtor only to the address provided above or, if the Debtor has designated in writing a different address, only to the last address so designated.

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
Limiting the Length of Notification of Disposition

Section 9-611 requires reasonable notice of most dispositions of the collateral after default. Section 9-612(b) provides that ten-day’s notice is reasonable in transactions other than consumer transactions. The reasonableness of a shorter notice in a commercial transaction or of any notice in a consumer transaction is a question of fact. See § 9-612(a). However, the parties are free to determine the standards by which the reasonableness of such a notice will be measured, provided the standards are not manifestly unreasonable. See § 1-302(b).

Thus, if fewer than 10 days notification is desired in a nonconsumer transaction or to remove the uncertainty about how much notification is required in a consumer transaction, the security agreement – and any guaranty – should specify how far in advance the notification must be sent. To ensure that this is not manifestly unreasonable, the security agreement should explain why this benefits the debtor.

Because Debtor is responsible for all costs of collection (including all costs associated with repossessing, storing, insuring, and selling the collateral) and interest on the secured obligation, Debtor agrees that it is reasonable for the secured party to act expeditiously in exercising its rights upon default. Accordingly, Debtor agrees that days notice of any foreclosure sale or other disposition of the collateral shall constitute reasonable notice.

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
Providing for How to Conduct a Disposition

Debtors and secondary obligors pursued for a deficiency frequently raise any and every issue they can to avoid liability. The most fertile ground for such an issue is the manner in which the secured party disposed of the collateral. To help protect itself from such allegations that it failed to conduct the disposition in a commercially reasonable manner, see §§ 9-610(b), 9-625, 9-626, the secured party should include in the security agreement – and in any guaranty – a provision declaring any specific, anticipated disposition method reasonable. This is particularly vital when the collateral is stock in a closely-held corporation or some other similarly nonliquid equity investment. See Burns v. Anderson, 123 Fed. App. 543 (4th Cir. 2004) (secured party that purchased thinly traded, pledged stock at a private sale acted in a commercially reasonable manner because it followed the disposition process authorized in the security agreement). But it can also be very helpful when the collateral includes intellectual property, expensive and unique manufacturing equipment, aircraft, or ships. Doing this can even be helpful when the collateral is as commonplace as a consumer’s car, if the secured party anticipates selling it through a dealer’s-only auction.

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
Getting Authorization to Prefile a Financing Statement

The Revised Code allows a secured party to pre-file its UCC financing statement prior to the execution of the security agreement so long as it receives authorization to do so from the borrower. A sample UCC Pre-Authorization Letter appears on the next page.

The use of this type of letter is common practice today and allows many lenders to pre-file its UCC filing and in some cases search through its filing prior to loan disbursement (which is the preferred practice). It also can avoid “late perfection” under the Bankruptcy Code. If the filing is delayed and for whatever reason not filed within ten (10) days of loan disbursement, and the borrower goes bankrupt within 90 days after such late perfection, the lender’s security interest in the borrower’s collateral can be challenged as a voidable preference.

Bennett L. Cohen
Cohen, Salk & Huvard, P.C.
630 Dundee Road, Suite 120
Northbrook, Illinois 60062
(847) 480-7800
(847) 480-7882 (fax)
bcohen@cshlegal.com
[BANK LETTERHEAD]

[Date]

Attn: 
President

Re: Proposed Loan(s) by ____________________ Bank (the “Lender”) to ____________________ (“Borrower”)

Gentlemen:

This letter, when signed by Borrower below, will constitute Borrower’s authorization to the Lender to pre-file UCC financing statements against Borrower covering all of Borrower’s present and future personal property, assets and fixtures in ______________ and in such other offices as deemed necessary by Lender. The Lender agrees to terminate these filings promptly should the proposed loan(s) not fund for any reason. The Borrower and Lender agree that a facsimile of this signed authorization letter may be relied upon by Lender as an original.

_________________________ Bank

By: _______________________
Title: _______________________

Acknowledged and Agreed To:

_________________________

By: _______________________
Title: President
Getting Authorization to File a Protective Financing Statement

Protection financing statements need the debtor’s authorization in an authenticated record if the transaction falls outside of Article 9. For example, if a true lessor files a protective financing statement against its lessee, the lessor cannot rely upon the ipso facto authorization in § 9-509(b)(1) since the transaction is outside of the scope of Article 9. The authorization to file the protective financing statement should ideally be a term of the lease itself. Without the authorization, the lessor who goes ahead and files the protective financing statement may have to pay the $500 fine but may also have Article 9 or tort exposure to the lessee for screwing up the lessee’s credit with an unauthorized financing statement.

Edwin E. Smith
Bingham McCutchen
150 Federal Street
Boston, MA 02110-1726
Include in the Security Agreement a Waiver of Claims for Unauthorized Filings

In the security agreement, consider adding a clause that waives any and all of the debtor’s claims as against the secured party based upon a pre-security agreement filed financing statement against that debtor, in the event the secured party did not get pre filing authorization in an authenticated record or the collateral description exceeds the collateral description in the security agreement (or another record that authorizes the filing). While the debtor’s waiver would not affect the rights of other parties, it would, perhaps, prevent claims about disparagement of title or other wrongful interference with the debtor’s rights when the relationship between the debtor and secured party gets rocky.

Linda J. Rusch
Frederick N. and Barbara T. Curley
Visiting Professor in Commercial Law
Gonzaga University School of Law
P.O. Box 3528
Spokane, WA 99220-3528
(509) 323-3769
(509) 323-5840 (fax)
Email: Lrusch@lawschool.gonzaga.edu
Filing Continuation Statements

Be careful when filing an amendment to a UCC financing statement, particularly those intended to qualify as a continuation. Amendments are required to identify the initial financing statement’s file number. § 9-512(a). If an amendment accepted by the filing office misstates the original filing number by one digit or transposes digits, it may be ineffective as a continuation statement, causing the original UCC to lapse. There appears to be no savings provision in the UCC that applies to it (such as the “not seriously misleading” standard of § 9-506(a)) and it is difficult to prevent such errors from occurring.

Beyond this, it does not appear that filing offices check for these errors. Under old Article 9, continuations were subject to scrutiny by filing officers so errors such as these were likely to cause rejection and could therefore be corrected. But that was under old law. I know of at least one recent instance in New Jersey where the filing office accepted the mistaken amendment that was a continuation, even though, because of the error, the filer of the amendment was not the secured party of record with respect to the referenced initial financing statement. Moreover, it is far from clear whether a filing office would be authorized to reject such a mistaken amendment. The responsibility of the filing office comes down to how you interpret § 9-516(b)(3)(B)(i) and § 9-520(a). Collectively, they provide that the filing office is supposed to reject an amendment that “does not identify the initial financing statement as required by Section 9-512,” which in turn requires the initial financing statement’s file number. So, does the reference to “the” initial financing statement require the filing office to see that the statements match up in some way, or merely that the amendment includes a file number? Given the general approach in 9-516(b) – filings with omissions are to be rejected but filings with errors are not to be – filing offices may well not be permitted to reject filings for these types of errors.

Chester P. Lustgarten
Associate Counsel
Rosenthal & Rosenthal, Inc.
CLustgarten@Rosenfact.com
(212) 356-0920
(212) 356-0989 (fax)
Disclaim the Duty to File Continuation Statements

Attorneys who represent secured lenders at the loan closing have a duty to either file a UCC continuation statements before the financing statement lapses or inform the client in a timely manner of the need for the client to file such a continuation. Failure to do either constitutes malpractice. *Barnes v. Turner*, 606 S.E.2d 849 (Ga. 2004).

Accordingly, attorneys should, at the closing or immediately thereafter, provide their client with a letter disclaiming the duty to file continuation statements and advising the client of the client’s need to do so. Sample language follows.

Enclosed please find the acknowledgment copies of Uniform Commercial Code financing statements that were prepared and filed by this firm in connection with the above-captioned transaction. As you may know, subject to certain exceptions, financing statements will generally lapse unless an appropriate continuation statement is filed within the six-month period prior to the fifth anniversary of the filing date. In addition, in the event of certain changes in the name, organizational structure or location of the grantor(s) of the security interest, the effectiveness of such financing statements may lapse unless appropriate amendments or new financing statements are filed within the required time periods. We undertake no duty to continue the financing statements, to notify you of their expiration or to otherwise monitor the grantors. To the extent that you do not have an internal system for monitoring the expiration of financing statements, we can recommend a number of commercial service firms that you can retain to do this for you.

Clare Oliva  
National Corporate Research, Ltd.  
(212) 947-7200
Filing Against Non-U.S. Debtors

There seems to be some confusion regarding the proper place to file a UCC financing statement under revised Article 9 when the debtor is a foreign (non-U.S.) entity. Many seem to think the place to file in this situation would always be Washington, D.C. A careful reading of § 9-307 will reveal that this is not always the case.

Section 9-307(b) states the general rules for the debtor’s location: (i) if the debtor is an individual, the debtor’s location is the debtor’s principal residence; and (ii) if the debtor is an unregistered organization, its location is at its place of business, if it has only one, otherwise it is where its chief executive office is located. Section 9-307(e) then provides that if the debtor is a registered organization, the place to file would be in the formation state.

Per the § 9-102(a) definition of “registered entity,” a non-U.S. entity is not a registered organization and would thus be subject to the general rules of § 9-307(b) described above. However, § 9-307(c) provides a limitation to the general rules of § 9-307(b): if the location described in § 9-307(b) is not a jurisdiction that has an Article 9-type filing/notice system, then the debtor’s location would be Washington, DC.

Example 1: The debtor is a corporation that was formed in France and its chief executive office is in New York. Per § 9-307(b), the place to file would be New York, not Washington, DC. As a precaution, some would file in DC in addition to filing in New York. This may be a good idea because: (1) a searcher may not know where the chief executive offices are located and may search only DC; and (2) the DC filing will also protect the lender if the debtor later moves its chief executive office to a location that does not have an Article 9-type filing/notice system. However, if the creditor filed only in DC, it would not be sufficient to perfect.

Example 2: The debtor is a corporation that was formed in France and its chief executive office is in France. Assuming France does not have a UCC-type filing/notice system, the place to file would be Washington, DC.

Example 3: Debtor is a Canadian corporation with chief executive office in Toronto (Ontario), Canada and assets in New York and California. Following the general rule of § 9-307(b), the place to file would be Canada because that is where the chief executive office is located and Ontario, Canada does operate under a UCC-type filing/notice system. Again, an additional filing in DC may be a good idea. In addition, because Canada’s Personal Property Security Act is more like our “old” Article 9 regarding place to file being where the collateral is located, it may be advisable to also file in NY and CA to address “choice of law” issues.

So, the bottom line is that you can not always assume that the place to file under revised Article 9 for a non-U.S. entity debtor is Washington, DC. You must first determine where the chief executive office is located and whether that location has a UCC-type filing/notice system. You may wish to always file in DC anyway, but don’t assume that is the only place you should file.

Clare Oliva
National Corporate Research, Ltd.
(212) 947-7200
Searching for Federal Tax Liens

Creditors seeking to determine whether a notice of federal tax lien has been filed against a debtor or prospective debtor must take care to search under variations of the debtor’s name. Whereas a filed financing statement is effective against a registered organization only if the filing uses the debtor’s correct registered name or is at least disclosed in a search against the debtor’s registered name, see U.C.C. § 9-506(c), no such exactitude is required of the IRS. The notice must merely “identify the taxpayer.” Treas. Reg. § 301.6323(f)-1(d)(2). Most courts construing this requirement have adopted a “constructive notice” approach, under which a notice is effective if the name of the taxpayer on it is sufficient for a third party searcher to find the notice and understand that it may relate to the taxpayer.1 A recent Sixth Circuit decision appears to continue the approach and reject the approach used in Article 9, at least with respect to common abbreviations. See In re Spearing Tool and Mfg. Co., 302 B.R. 351 (E.D. Mich. 2003), rev’d, 412 F.3d 653, 654 (6th Cir. 2005) (notices effective even though they identified the taxpayer as “Spearing Tool & Mfg. Company Inc.,” which varied from its registered name by using an ampersand in place of “and,” abbreviating “Manufacturing,” and spelling out “Co.”).

Searchers must also be careful about where they search for notices of tax liens. Tax lien notices are to be filed in the state in which the taxpayer’s property is located. Personal property is then deemed located at the residence of the taxpayer. 26 U.S.C. § 6323(f). While the combination of these rules makes the place to file and search for notices of tax liens appear similar to that for most Article 9 financing statements, in fact the office may be different for any or all of the following three reasons: (i) a taxpayer’s residence is not necessarily the same jurisdiction as a debtor’s location; (ii) the relevant office within the state of the taxpayer’s residence may be different from the office in which UCC records are filed; and (iii) notices of tax liens may be kept in a database or indexing system separate from UCC records even if filed within the same office.

For example, for purposes of filing a notice of tax lien, a corporate or partnership taxpayer is deemed to reside where its principal executive office is located. See 26 U.S.C. § 6323(f)(2). This is not necessarily the state where that entity is deemed located for Article 9 purposes. Cf. U.C.C. § 9-301. Within a particular state, the state may have designated an office other than the secretary of state’s office to file notices of tax liens or the state may have failed to designate the office, in which case the designated office is the United States District Court clerk’s office for the judicial district where the property is located. The chart below indicates the place where notices of tax lien are to be filed in each state to be effective against personal property. Even if the office is designated by the state is the same as the office in which UCC financing statements are filed, the office may maintain two different databases, with different search logic, for tax liens and financing statements.

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1 See, e.g., In re Hudgins, 967 F.2d 973 (4th Cir. 1992) (notice recorded against “Hudgins Masonry, Inc.” a corporation whose existence had been terminated for failure to pay certain fees, effective as to the business assets of Michael Hudgins, who continued to do business under the corporate name); Richter’s Loan Co. v. United States, 235 F.2d 753 (5th Cir. 1956) (“Joseph Friedlander” instead of “Joseph Friedlander” was adequate); United States v. Feinstein, 717 F. Supp. 1552 (S.D. Fla. 1989) (notice against “Targon” instead of “Tarragon” was effective). But cf. Haye v. United States, 461 F. Supp. 1168 (D. Cal. 1978) (notice listing the taxpayer as “Manual de Castello” instead of “Manuel de Castillo” was inadequate); Continental Investments v. United States, 142 F. Supp. 542 (W.D. Tenn. 1953) (notice filed in the name of “W.B. Clark, Sr.” instead of “W.R. Clark, Sr.” was not sufficient); United States v. Ruby Luggage Corp., 142 F. Supp. 701 (S.D.N.Y. 1954) (notice filed against “Ruby Luggage Corporation” instead of “S. Ruby Luggage Corporation” was not effective); In re Reid, 182 B.R. 443 (Bankr. E.D. Va. 1995) (notice in the name of “Gary A. Reid, Jr.” instead of “Cary A. Reid, Jr.” was not effective).
Two more caveats about where to search. First, the federal statutes that preempt the UCC filing system in favor of a federal filing, such as those for copyrights and aircraft, do not apply to notices of tax liens. See 26 U.S.C. § 6323(f)(5). A notice of tax lien filed locally, in the applicable state office, will be effective as to the types of property otherwise covered by a central, federal filing system for all types of assignments, including security interests. Second, 26 U.S.C. § 6323(f) does not require the IRS to take any action to file a new notice if the debtor moves or changes its name and the cases are not consistent in deciding whether the IRS has to do anything to maintain the effectiveness of its filing. Thus, searchers should search in the jurisdiction of the debtor’s former residence and under the debtor’s former name, if any.

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
## Locations to Search for a Notice of Federal Tax Lien as to Personal Property

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Where to Search</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Corporations, Partnerships &amp; Trusts</td>
</tr>
<tr>
<td>Alabama</td>
<td>§ 35-11-44</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Alaska</td>
<td>§ 40.19.020</td>
<td>Records of the recording district where taxpayer’s chief executive office is located</td>
</tr>
<tr>
<td>Arizona</td>
<td>§ 33-1031</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Arkansas</td>
<td>§ 18-47-202</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>California</td>
<td>Code Civil Proc. § 2101</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Colorado</td>
<td>§ 38-25-102</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Connecticut</td>
<td>§ 49-32(a)</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Delaware</td>
<td>tit. 25, § 3102</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Florida</td>
<td>§ 713.901(3)</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Georgia</td>
<td>§ 44-14-571</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Hawaii</td>
<td>§ 505-1</td>
<td>Bureau of Conveyances</td>
</tr>
<tr>
<td>Idaho</td>
<td>§ 45-202</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Illinois</td>
<td>770 ILCS 110/2</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Indiana</td>
<td>§ 36-2-11-25</td>
<td>Office of County Recorder of county where property is located</td>
</tr>
<tr>
<td>Iowa</td>
<td>§ 331.609</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Kansas</td>
<td>§ 79-2614</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Kentucky</td>
<td>§ 382.480</td>
<td>Office of County Clerk of county where property is located</td>
</tr>
</tbody>
</table>
## Locations to Search for a Notice of Federal Tax Lien as to Personal Property

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Louisiana</td>
<td>title 52, § 52</td>
<td>With Clerk of Court for any Parish (or Recorder of Mortgages for Orleans Parish) for inclusion in Secretary of State’s master index</td>
</tr>
<tr>
<td>Maine</td>
<td>ch. 33, § 1903(3)</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Maryland</td>
<td>§ 3-401</td>
<td>Office of Circuit Court Clerk of county where taxpayer’s chief executive office is located Office of Circuit Court Clerk of county of taxpayer’s residence</td>
</tr>
<tr>
<td>Michigan</td>
<td>§ 211.663</td>
<td>Secretary of State’s Office                                                     Office of Register of Deeds of county of taxpayer’s residence</td>
</tr>
<tr>
<td>Minnesota</td>
<td>§ 272.481</td>
<td>Secretary of State’s Office                                                     Office of County Recorder of county of taxpayer’s residence</td>
</tr>
<tr>
<td>Missouri</td>
<td>§ 14.010</td>
<td>Office of the Recorder of Deeds of the county where property is located</td>
</tr>
<tr>
<td>Mississippi</td>
<td>§ 85-8-5</td>
<td>Secretary of State’s Office                                                     Office of Chancery Clerk of county of taxpayer’s residence</td>
</tr>
<tr>
<td>Montana</td>
<td>§ 71-3-204</td>
<td>Secretary of State’s Office                                                     Office of Clerk and Recorder of county of taxpayer’s residence</td>
</tr>
<tr>
<td>Nebraska</td>
<td>§ 52-1001</td>
<td>Secretary of State’s Office</td>
</tr>
<tr>
<td>Nevada</td>
<td>§ 108.827</td>
<td>Secretary of State’s Office                                                     Office of County Recorder of county of taxpayer’s residence</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>§ 454-B:2</td>
<td>Secretary of State’s Office                                                     Office of Clerk of Town or City of taxpayer’s residence</td>
</tr>
<tr>
<td>New Jersey</td>
<td>§ 46-16:13</td>
<td>Office of the County Recording Officer of the county where property is located</td>
</tr>
<tr>
<td>New Mexico</td>
<td>§ 48-1-1</td>
<td>Office of the County Clerk of the county of taxpayer’s residence</td>
</tr>
<tr>
<td>New York</td>
<td>McKinney’s ch. 33, § 240</td>
<td>Secretary of State’s Office                                                     Office of Clerk of County of taxpayer’s residence (for King, Queens, New York, and Bronx Counties, use Office of City Register of the City of New York)</td>
</tr>
<tr>
<td>North Carolina</td>
<td>§ 44-68.12</td>
<td>Secretary of State’s Office                                                     Office of Superior Court Clerk of county of taxpayer’s residence</td>
</tr>
</tbody>
</table>
# Locations to Search for a Notice of Federal Tax Lien as to Personal Property

<table>
<thead>
<tr>
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<th>Corporations, Partnerships &amp; Trusts</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>§ 35-29-02</td>
<td>Secretary of State’s Office</td>
<td>Secretary of State’s Office for LLCs, otherwise Office of County Recorder of county of taxpayer’s residence</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>§ 317.09</td>
<td>Office of the County Recorder of the county where property is located</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>tit. 68, § 3403</td>
<td>Office of County Clerk of Oklahoma County</td>
<td>Office of County Clerk of the county of taxpayer’s residence</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>§ 87.806</td>
<td>Secretary of State’s Office</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>tit. 74, § 157-3</td>
<td>Office of the Prothonotary of the county of taxpayer’s residence</td>
<td></td>
<td></td>
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<tr>
<td>Rhode Island</td>
<td>§ 34-34-1</td>
<td>Office of the Recorder of Deeds of the City or Town Clerk</td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>§ 12-57-30</td>
<td>Office of the Register of Deeds of the county where property is located</td>
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<tr>
<td>South Dakota</td>
<td>§ 44-7-2.1</td>
<td>Secretary of State’s Office</td>
<td>Office of Register of Deeds of county of taxpayer’s residence</td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>§ 66-21-201</td>
<td>Office of the Register of Deeds of the county where property is located</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>tit. 3, § 14.002</td>
<td>Secretary of State’s Office</td>
<td>Office of County Clerk of county of taxpayer’s residence</td>
<td></td>
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<tr>
<td>Utah</td>
<td>§ 38-6-1</td>
<td>Office of the County Recorder of the county where property is located</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>tit. 9, § 2051</td>
<td>Office of the Town Clerk of the town where property is located</td>
<td></td>
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</tr>
<tr>
<td>Virginia</td>
<td>§ 55-142.1</td>
<td>Office of the Clerk of the State Corporation Commission</td>
<td>Office of the Clerk of the Circuit Court of the county of taxpayer’s residence</td>
<td></td>
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<tr>
<td>Washington</td>
<td>§ 60.68.015</td>
<td>Department of Licensing</td>
<td></td>
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</tr>
<tr>
<td>West Virginia</td>
<td>§ 38-10A-2</td>
<td>Office of Circuit County Commission of county where taxpayer’s chief executive office is located</td>
<td>Office of Clerk of County Commission of the county of taxpayer’s residence</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>§ 779.97</td>
<td>Department of Financial Institutions</td>
<td>Office of Register of Deeds of county of taxpayer’s residence</td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>§ 29-6-204</td>
<td>Secretary of State’s Office</td>
<td>Office of County Clerk of county of taxpayer’s residence</td>
<td></td>
</tr>
</tbody>
</table>
A Caveat about Credit Card Receivables

With regard to credit card receivables, what I am suggesting based on experience here is that the law and practice with regard to the credit card system is such that a secured party that thinks it has dominion and control of a commercial debtor’s receivables can lose control if the debtor, unbeknownst to the lender, enters into merchant agreement with a credit card processor.

The lender files a UCC1 Financing Statement as to accounts and also takes steps to insure that all account debtors are instructed to make payments on receivables to lender or to a lockbox controlled by lender (i.e., a deposit account subject to an account control agreement).

Now the debtor sets up a credit card account with a processor and/or bank and the stream of collections on receivables has now been diverted and payments on the receivables arising from customers’ use of credit cards are flowing through the processor and go to a bank account that the lender does not know about.

The lender, upon learning of this situation, contacts the debtor and tells the debtor to instruct the credit card processor to pay the lender. The credit card processor refuses to do so unless the lender guarantees all chargebacks or, as the equivalent, unless the account control agreement imposes on the lender the obligation to reimburse the processor for chargebacks, which can come back as much as five months after the initial sale. Is the amount due from the processor to the merchant debtor an account (which would require the processor to honor the lender’s notice to pay under § 9-406(a)) or a general intangible (not subject to § 9-406(a). [I am now reading from my notes on this issue and not going back to the actual Code section]. In any event, as a practical matter, the processor ignores the notice under § 9-406(a).

Also as a practical matter the processor has the equivalent of a secret lien on the merchant debtor’s receivables because it has a first claim to the credit card payments (by reason of its offset rights under the merchant agreement) to secure its advances to the merchant debtor but does file a Financing Statement.

Solution: make language in accounts receivable security agreement clear that in addition to its obligation to instruct all account debtors on receivables to pay lender, security agreement should also specify conditions under which debtor is permitted to sell goods or services to customers who use credit cards.

Chester P. Lustgarten
Associate Counsel
Rosenthal & Rosenthal, Inc.
CLustgarten@Rosenfact.com
(212) 356-0920
(212) 356-0989 (fax)
**Execute a Confidentiality Agreement**

Borrowers are increasingly asking banks and other lenders to enter into a confidentiality agreement, particularly when seeking financing for: (i) a business acquisition or sale; (ii) a management buyout; (iii) the development of a new product or service; (iv) a partnership or joint venture where the parties want secrecy; (v) a start-up and technology based businesses; or (vi) where the financier funds similar or complementary businesses within the same industry. Typically, such potential borrowers want to ensure not only that the information they provide is kept confidential by the potential lender, but that all copies of the information are returned, that they retain the ability to seek an injunction before such information is provided to the government, and a prohibition against the lender poaching its employees.

The lender too has an interest in executing a confidentiality agreement, to specify what its duties are, to limit its liability, to retain the ability to keep copies of certain information in accordance with its record retention policies and applicable law, and to be able to respond to information requests from government agencies.

The recent decision in *Ary Jewelers, LLC. v. IBJTC Business Credit Corp.*, 2006 WL 305755 (D. Mass. 2006), highlights why potential borrowers should seek confidentiality agreements from their potential lenders and why potential lenders should similarly be interested in having such an agreement, albeit with different terms.

A sample confidentiality agreement follows.

Terrance Henderson  
Vice President and Corporate Counsel  
Comerica Bank,  
Dallas, TX  
terrance_f_henderson@hotmail.com  
(214) 969-6668
CONFIDENTIALITY AGREEMENT

Date

Company Address

Name of Recipient:

In order to allow ________________________________ (herein called the “Bank”) to evaluate the Bank’s possible establishment of certain loan and credit facilities (herein called the “Credit Facilities”) for ______________________________, a ____________________ (herein called “Company”), Company has agreed to provide to Bank certain information concerning the properties, operations and financial condition of Company, subject to the Bank’s execution and delivery to Company of this Letter Agreement.

As a condition to Company furnishing such information to the Bank, the Bank agrees, as set forth below, to treat confidentially such information furnished to the Bank by Company, or on Company’s behalf, and identified by Company as being confidential at the time it is made available to the Bank (said information is herein collectively referred to as the “Confidential Information”). For purposes of this Agreement, the term “Confidential Information” shall not include any information which: (a) is or becomes generally available to the public other than as a result of a disclosure by the Bank in violation of this Agreement; (b) was available to the Bank on a nonconfidential basis prior to its disclosure to the Bank by Company, or Company’s director, officers, employees, agents, representatives or controlling persons (such persons are herein collectively referred to as the “Representatives”); (c) became available to the Bank on a non-confidential basis from a person other than Company or its Representatives who was not bound by a confidentiality agreement of which Bank has actual knowledge; or (d) has been expressly approved in writing by Company for release or disclosure.

It is hereby agreed that the Confidential Information will be used by the Bank and its directors, officers, employees, representatives and agents only for the Bank’s consideration of the Credit Facilities, and the Confidential Information will be kept confidential by the Bank and its respective directors, officers, employees, representatives and agents. Bank further agrees not to use the Confidential Information for any purpose other than in connection with evaluation of the Credit Facilities; provided, however, that (a) any such Confidential Information may be disclosed to the Bank’s directors, officers, employees, representatives and agents who need to know or have access to such Confidential Information for the purpose of evaluating the Credit Facilities or in setting forth any proposal which the Bank may wish to make with respect thereto; (b) Bank may make such other disclosures of Confidential Information which Company consents to in writing; (c) Bank shall be permitted to disclose Confidential Information to its respective accountants, auditors, and regulators; and (d) Bank shall be permitted to disclose Confidential Information to such other persons as is otherwise required by law, regulation or legal process, so long as Bank provides Company with prompt written notice of any such requests for disclosure of any Confidential Information, so long as Bank is permitted by law to do so.
If at any time the Bank makes a final decision not to participate in the Credit Facilities, promptly upon Company’s written request to Bank, the Bank will deliver to Company the written Confidential Information furnished to the Bank by Company, or on Company’s behalf, without retaining copies thereof, except those copies within or attached to the Bank’s confidential credit files pertaining to the proposed Credit Facilities. In the case of oral Confidential Information, the Bank will maintain the confidentiality of such material otherwise pursuant to the terms of this letter.

Notwithstanding anything to the contrary set forth herein, the Bank shall in no manner be constrained from engaging in its normal banking relationships with Company.

Bank agrees to exercise the same degree of care and protection in preventing the disclosure of any of the Confidential Information, except as otherwise permitted herein, as Bank ordinarily takes to preserve its own confidential information.

This Agreement shall be governed by and construed in accordance with the laws of the State of Texas.

If Company is in agreement with the foregoing, please indicate such by signing and returning one copy of this letter to the Bank, whereupon this letter will constitute the agreement of the Bank and Company with respect to the subject matter hereof.

Very truly yours,

ACCEPTED AND AGREED: By: ___________________________  
Name, Title

By: ___________________________  
Its: ___________________________  
Dated: ___________________________
Have Guarantors Enter into a Contribution Agreement

When the owners of a corporation or LLC borrower guarantee its debt, they should enter into a reimbursement agreement with the borrower and a contribution agreement among themselves. Although the guarantors have common-law rights of reimbursement from the borrower and of contribution among one another, the agreements can be used to provide additional specificity about issues such as interest on amounts paid by the guarantors, the proportionate share ultimately payable by each guarantor if the borrower is unable to reimburse the guarantors in full, and recovery of attorneys’ fees for litigation over the reimbursement and contribution obligations.

The allocation of relative percentages of ultimate liability among the guarantors in the contribution agreement is especially important. Although guarantors often expect that, if they have to pay on their guaranties, they will be liable among themselves pro rata on the basis of their equity interests in the entity (even though they may be fully liable on a joint and several basis to the creditor). However, the general rule is to the contrary.

In the absence of a contribution agreement providing otherwise, guarantors are generally liable for contribution among themselves on an equal per capita basis and not pro rata according to their ownership interests in the borrower. Restatement (Third) of Suretyship and Guaranty, § 57 (1996); Byrd v. Estate of Nelms, 154 S.W.3d 149 (Tex. App. 2004); Slutsky v. Leftit, 609 N.Y.S.2d 528 (N.Y. City Civ. Ct. 1993); Brill v. Swanson, 674 P.2d 211 (Wash. 1984); Booth v. Friedman, 255 P. 222 (Cal. Ct. App. 1927); Brooke v. Boyd, 141 P. 357 (Wash. 1914). A contribution agreement should address the mechanics of enforcement of contribution obligations, the effect of the insolvency of one or more of the guarantors, the rate of interest on contribution obligations and whether the guarantor enforcing the contribution obligations is entitled to recover attorneys’ fees and other costs incurred in enforcing the agreement. Absent such an agreement, the guarantor seeking contribution may be entitled to interest at the legal rate and may not be entitled to recover attorneys’ fees and costs. See, e.g., Appleford v. Snake River Mining, Milling & Smelting Co., 210 P. 26 (Wash. 1922).

A sample contribution agreement follows.

Brian Hulse
Heller Erman
Brian.Hulse@hellerberman.com
CONTRIBUTION AGREEMENT

This Agreement is made as of the _____ day of _______________, 20____, by and between
____________________________________ (“AAA”), _______________ (“BBB”),
and _______________ (“CCC”).  AAA, BBB, and CCC are referred to collectively as
“Guarantors” and individually as a “Guarantor.”

RECITALS

A. Each Guarantor owns an equity interest in _______________ (“Borrower”).

B. Substantially concurrently with the execution and delivery of this Agreement,
Borrower and ___________ Bank (together with its successors and assigns as holders of the Loan
described below, “Lender”) are entering into a __________ Loan Agreement dated on or about the
date of this Agreement (the “Loan Agreement”), pursuant to which Lender agrees to make certain
advances of money and/or to extend other financial accommodations to or for the benefit of
Borrower (collectively, the “Loan”).

C. As a condition to entering into the Loan Agreement and making the Loan, Lender is
requiring that Guarantors guarantee Borrower’s obligations under the Loan Agreement and related
loan documents pursuant to a guaranty dated on or about the date of this Agreement.  Such
guaranties, whether embodied in one or more than one document, are collectively referred to as the
“Guaranties” and individually as a “Guaranty.”

D. Guarantors are unwilling to sign the Guaranties absent an agreement among them that
all obligations and liabilities associated with the Guaranties are to be borne as provided in this
Agreement.  Accordingly, Guarantors have agreed to enter into this Agreement.

AGREEMENT

For good and valuable consideration, the receipt and sufficiency of which are hereby
acknowledged, Guarantors agree as follows:

1. Proportionate Shares.  If any Guarantor (the “Paying Guarantor”) from time to time
makes any good faith payment in connection with its Guaranty (a “Payment”), each other Guarantor
(the “Contributing Guarantor”) will have an unconditional obligation to pay to the Paying Guarantor
an amount (if any) (the “Required Contribution Amount”) so that after payment of the Required
Contribution Amount all obligations and liabilities under the Guaranties will have been borne by
Guarantors in the following percentages (taking into account any and all prior Payments and
Required Contribution Amounts and with the exception provided in Section 2 of this Agreement):

<table>
<thead>
<tr>
<th>Guarantor</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA</td>
<td>_____%</td>
</tr>
<tr>
<td>BBB</td>
<td>_____%</td>
</tr>
<tr>
<td>CCC</td>
<td>_____%</td>
</tr>
</tbody>
</table>
As to each Guarantor, the percentage specified for such Guarantor above is referred to as such Guarantor’s “Proportionate Share.” Notwithstanding the foregoing, if and to the extent that any Guarantor is insolvent, each of the other Guarantors’ Proportionate Shares will, as among themselves, be adjusted upward proportionately so that the aggregate adjusted Proportionate Shares of such other Guarantors equal one hundred percent; provided, however, that nothing contained in this sentence will relieve any insolvent Guarantor from its full obligations and liabilities under the other provisions of this Agreement. The Contributing Guarantor will pay each Required Contribution Amount to the Paying Guarantor within five days of receipt of a written demand for contribution of the Required Contribution Amount (the “Contribution Demand Notice”) from the Paying Guarantor.

2. Non-Reimbursable Amounts. Notwithstanding anything to the contrary set forth elsewhere in this Agreement, no Guarantor will be entitled to receive contribution payments under this Agreement for any Payment to the extent that such payment results from any unreasonable defense to payment under such Guarantor’s Guaranty, which defense is asserted without the consent or participation of the other Guarantors.

3. Interest. All amounts owing under this Agreement will bear interest from the date accrued until paid (and without regard to the date any Contribution Demand Notice is given so long as the giving of such notice is not unreasonably delayed to the material prejudice of the recipient) at a rate equal to the lesser of (a) ________________ percent (___%) per year, or (b) the highest rate permitted by applicable law.

4. No Limitation on Other Rights. Except to the extent inconsistent with the express terms of this Agreement, the right to contribution provided in this Agreement will be in addition to, and not in limitation of, any other claims, rights or remedies of reimbursement, subrogation, contribution, exoneration or indemnification or similar claims, rights or remedies, whether arising in equity, under contract, by statute, under common law or otherwise.

5. Absolute Obligation. Each Guarantor specifically acknowledges that such Guarantor is obligated to pay such Guarantor’s Proportionate Share regardless of whether:

(a) Its own Guaranty or any other document relating to the Loan is unexecuted, undelivered, released, terminated, invalid, unenforceable or ineffective for any reason or payment thereunder is subject to any defenses, setoffs, claims or similar limitations; or

(b) The relevant Payment or Required Contribution Amount is paid (i) pursuant to order of a court or arbitration panel, (ii) in settlement of a disputed claim, (iii) under an agreement with Lender or any other Guarantor settling or establishing the amount thereof, (iv) in any other manner in good faith.

While each Guarantor will from time to time in good faith attempt to inform the other Guarantors of the status of the Guarantees and any Payment or potential Payment thereon, each Guarantor will be free to litigate, settle or otherwise satisfy or discharge its obligation with respect to the Guarantees in good faith as such Guarantor may from time to time deem appropriate, and any failure by a Guarantor to advise, notify, or consult with any other Guarantor will not be a defense to, or in any way diminish, discharge or derogate from such other Guarantor’s obligation to make the payments required under this Agreement.
No Guarantor’s obligations under this Agreement will be diminished or modified by revocation of such Guarantor’s Guaranty.

6. **No Amendment.** No Guarantor will amend its Guaranty where the effect of such amendment would be to increase the amount for which such Guarantor could be held liable under its Guaranty, without the prior written consent of the other Guarantors.

7. **Recourse to Marital Property.** Each Guarantor who is a married individual acknowledges and agrees that: (a) this Agreement is for the benefit of such Guarantor’s marital community; and (b) the other parties to this Agreement will have recourse to such Guarantor’s community property and to his or her separate property with respect to all amounts owing under this Agreement.

8. **Legal Expenses.** In the event any party brings an action to enforce the provisions of this Agreement, the prevailing party or parties in such action will be entitled to recover from the non-prevailing party or parties all costs and expenses, including but not limited to attorneys’ fees and disbursements, reasonably incurred by the prevailing party or parties in connection with such action including but not limited to those incurred in connection with trial and appellate court proceedings, post-judgment collection proceedings and bankruptcy or other insolvency proceedings.

9. **Governing Law; Jurisdiction and Venue.** This Agreement will be governed by and construed in accordance with the internal laws of the State of ______________. Jurisdiction and venue of any litigation arising out of this Agreement will be exclusively in the Superior Court of ________ County or the United States District Court for the ________ District of __________. Each Guarantor submits to the personal jurisdiction of such courts and waives any argument that either such court is an inconvenient forum.

10. **Binding Effect.** This Agreement will inure to the benefit of Guarantors and their successors, and will be binding upon Guarantors and their successors; provided, however, that each Guarantor’s obligations under this Agreement are personal in nature and may not be delegated.

11. **No Third Party Beneficiaries.** This Agreement is solely for the benefit of Guarantors and their successors. Neither Lender nor any other person or entity will be a beneficiary of any of the provisions of this Agreement, and the parties specifically deny any intention to benefit any third party.

12. **Counterparts, Etc.** This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which when so executed and delivered will be deemed to be an original and all of which when taken together will constitute one and the same Agreement. Delivery of any executed counterpart of a signature page to this Agreement by facsimile or other electronic means will be as effective as delivery of a complete, executed original counterpart of this Agreement.

DATED as of the date first written above.
Address for Notices:

__________________________________________________________

__________________________________________________________

Attention: ______________________________

Address for Notices:

__________________________________________________________

__________________________________________________________

Attention: ______________________________

Address for Notices:

__________________________________________________________

__________________________________________________________

Attention: ______________________________
Have Guarantors Waive Fraudulent Inducement Claims

Fraudulent inducement and fraudulent concealment are familiar defenses to contract performance, including contracts of suretyship and guaranty. If a surety or guarantor is fraudulently induced to enter into a contract of suretyship or guaranty, the surety or guarantor may avoid liability under the contract, unless the surety or guarantor has effectively waived that defense.

Often times, the surety or guarantor signs a contract of suretyship or guaranty that states by its terms that the obligations of the surety or guarantor are “absolute and unconditional” and contains very broad waivers, including a “catch all” waiver that provides that the “surety or guarantor waives, to the fullest extent permitted by applicable law, any rights or defenses that might constitute a legal or equitable discharge or defense of the surety or the guarantor.”

Is this “catch all” waiver effective to waive the contractual defenses of fraudulent inducement and fraudulent concealment? Most courts hold no. The basis for such a holding is that a waiver is a voluntary relinquishment of a known right, and for a waiver to be voluntary, there must be clear and convincing evidence of the party’s intent to waive. Otherwise, there is the risk of an unintentional waiver of a right not specifically contemplated.

As a result, beneficiaries of bonds, guaranties or other suretyship contracts should make sure that the contractual waivers include a specific and detailed waiver of any defenses of fraudulent inducement, fraudulent concealment or other fraud of any kind in connection with the issuance of the surety contract.

Kenneth M. Greene  
Carruthers & Roth, P.A.  
P.O. Box 540  
235 North Edgeworth Street  
Greensboro, NC  27401  
(336) 478-1124  
(336) 478-1115 (fax)  
kmg@crlaw.com
Disclose Representation of Others Adverse to Your Client’s Adversary

Potential Client approaches your litigation department for assistance in bringing a breach of contract action against adversary. You do a conflicts check and learn that your firm has never represented Adversary. In fact, your firm’s only contact with Adversary has been on the opposite side of the table: it represents Adversary’s major secured lender and participated in negotiating and documenting Lender’s transactions with Adversary. Do you have a conflict or is the old adage true that “the enemy of my enemy is my friend”? Well, you may not have a conflict now but you might later. Consider that if Potential Client obtains a judgment against Adversary, Potential Client’s recovery efforts may put it in conflict with Lender’s interest in getting repaid. You may nevertheless be able to represent both Potential Client and Lender, but only with full disclosure. See Victory Lane Productions, LLC v. Paul, Hastings, Janofsky & Walker, LLP, 2006 WL 133458 (S.D. Miss. 2006).

Stephen L. Sepinuck
Gonzaga University School of Law
ssepinuck@lawschool.gonzaga.edu
Do Not Ignore Key Boilerplate in Intercreditor and Control Agreements

I have discovered that lenders ignore protections in intercreditor and control agreements that they would never ignore in an agreement with a borrower – please include a jury waiver provision in those types (intercreditor & control agreements) of documents to save time and money. Also be sure to include an provision allowing for recovery of attorney’s fees.

Michelle M. Suter
Attorney at Law
Commercial Law Group, P.A.
4701 College Blvd., Suite 204
Leawood, KS 66211
(913) 345-8855
(913) 345-8352 (fax)
Don’t Win the Battle but Lose the War

Before taking a position in litigation, discuss with your client how that position may enable the client to win the particular case but, in the long run, operate to the disadvantage of the client or the client’s industry or business. Inside counsel have the responsibility to monitor litigation with that in mind, and outside counsel have the responsibility to either alert the client to the question or to bring it to the attention of inside counsel. Put differently, make sure you don’t win the litigation battle but losing the larger war. All too often that isn’t done.

For example, in *MP Star Financial v. Cleveland State University*, 837 N.E.2d 738 (Ohio 2005), the Ohio Supreme Court ignored the Official Comments and legislative history, misconstrued the term “transfer” in a provision excluding from Article 9 transfers by a governmental unit, and held that a security interest in receivables owed by a governmental entity was excluded from Article 9 coverage with the result that the purchaser of the receivable could not enforce the claim against the governmental unit despite notice having been given. In *Reliance Ins. Co. v. Wells Fargo Bank*, 58 UCC Rep. Serv. 2d 166, 2005 WL 3150174 (Cal. Ct. App. 2005), the court misconstrued “transferee” as used in § 4-207 [and § 3-416], ignored the Official Comments which expressly rejected a case relied upon by the court, and held that a drawer had a claim against the depositary bank (for having accepted) and the payor bank (for having paid) a check with missing indorsements which was governed by the transfer warranty of good title under § 4-207(1)(a). Query whether either decision is in the long-term best interests of the party that won the case.

Donald J. Rapson