

THE PRACTICAL APPLICATION OF UCC ARTICLE 9 GSCFM – 2019



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WHY BOTHER WITH A SECURITY INTEREST?

- Can be a most useful tool for the credit executive
- Not appropriate in all instances
- Adherence to the law is critical

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WHY WOULD A CREDITOR WANT A SECURITY INTEREST?

- **NECESSITY FOR SECURITY**
 - DEBTOR/CUSTOMER FINANCIAL CONDITION**
 - VOLUME OF SALES**
 - NEW CUSTOMER**
 - NEW PRODUCT LAUNCH**

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HOW DOES ONE GET STARTED?

- **PRECISE LEGAL STRUCTURE OF CUSTOMER**
- **RUN A UCC SEARCH**
- **REVIEW CUSTOMER FINANCIALS**
- **NEGOTIATE COLLATERAL TO BE TAKEN**

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CHANGES TO ARTICLE 9

- **VARIOUS REVISIONS MADE TO ARTICLE 9
- JUNE 2010**
 - **Effective Date – July 1, 2013**
 - **As of June, 2014 adopted by 50 states,
District of Columbia & Puerto Rico**
 - **Important for Creditor to keep up with
revisions**

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UCC ARTICLE 9 IMPORTANT TERMS TO KNOW

- **Authenticate**
- **To sign**
 - **To execute or otherwise adopt a symbol,
or encrypt or similarly process a record in
whole or in part, with intent of
authenticating person to identify the
person and adopt or accept a record**

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UCC ARTICLE 9 IMPORTANT TERMS CONT'D

- Name of Debtor
- If the debtor is a registered organization (Corp, LLC, etc) financing statement must provide name of the debtor as indicated on public record of debtor's jurisdiction or organization.
 - Trade name not needed
 - Trade name alone insufficient

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UCC ARTICLE 9 IMPORTANT TERMS CONT'D

- Name of Debtor
 - If the debtor is an individual
 - Sole proprietor
 - Personal guarantor who has granted you a lien on personal property
 - Then FULL LEGAL NAME is required
 - E.g – “Michael D. Larsen” NOT Mike D. Larsen
 - If Debtor has a driver's license, name on most recent driver's license should be used
 - Birth Certificate name may be used if that is what the Debtor currently uses

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ARTICLE 9 REVISIONS

- **UCC §9-102(a)(68) – assures that the debtor’s name on the financing statement is the correct name for purposes of UCC 9**
 - 9-951 provides for surname, first name & additional name or initial
 - Name must be correct as taken from the “Public Organic Record”

UCC ARTICLE 9 REVISIONS

- **“Public Organic Record”**
 - (A) a record consisting of the record initially filed with or issued by a State or the United States to form or organize an organization and any record filed with or issued by the State or the United States which amends or restates the initial record;
 - (B) an organic record of a business trust consisting of the record initially filed with a State and any record filed with the State which amends or restates the initial record, if a statute of the State governing business trusts requires that the record be filed with the State; or
 - (C) a record consisting of legislation enacted by the legislature of a State or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the State or United States which amends or restates the name of the organization.

UCC ARTICLE 9 IMPORTANT TERMS CONT'D

■ Location –Where Financing Statement must be filed

- Individual Debtor located at principal residence
- Organization with one place of business located at its place of business
- Organization with multiple places of business located at its chief executive office
- Registered organization (i.e. Corp/LLC/LLP) located in state of registration

UCC ARTICLE 9 IMPORTANT TERMS CONT'D

- **“Registered organization”** means an organization organized solely under the law of a single State or the United States by the filing of a public organic record with, the issuance of a *public organic record* by, or the enactment of legislation by the State or the United States. The term includes a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust’s organic record be filed with the State.

UCC ARTICLE 9 IMPORTANT TERMS CONT'D

- **Electronic Filing – Intention of Article 9 revisions is that all financing statements are to be electronically filed**
- **Filing Officer**
 - **Generally Secretary of State**
 - **May be a designated office for filings**
 - **N.B. Louisiana still requires filings in parishes**

CONSIGNMENT ISSUES

- **Consignments**
 - **Since the 2001 revisions of UCC Article 9, Consignments treated under Article 9 in addition to Article 2 of the UCC**

CONSIGNMENT DEFINITION

- **Consignments**
- **goods delivered to a merchant for sale**
 - Merchant engaged in selling goods of others**
 - Aggregate value of goods \$1000 or more**
 - Goods are not consumer goods**
 - Transaction does not create a security interest**

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CONSIGNMENTS UNDER UCC ARTICLE 2

- **UCC § 2-401(a): Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to reservation of a security interest.**
- **UCC § 2-326: If goods conforming to contract are subject to return by buyer, the transaction is a “Sale or return” if the goods are delivered primarily for resale and the goods are subject to the claims of buyer’s creditors while in buyer’s possession.**

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PERFECT AND OBTAIN PRIORITY FOR CONSIGNED GOODS

- Enter into a properly written consignment agreement with customer
- Run a UCC search to determine any UCC liens against the goods to be sold under consignment
- File a UCC Financing Statement to perfect the consignment interest.
- Notify each prior secured party of the intended consignment

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SAMPLE NOTIFICATION VERBIAGE FOR CONSIGNMENTS

- PLEASE TAKE NOTICE THAT [Name of Creditor] HAS OR IS ABOUT TO ENTER INTO A CONSIGNMENT AGREEMENT WITH [Name of Customer] COVERING ALL GOODS OF CREDITOR [be specific] SOLD AND DELIVERED TO CUSTOMER. THESE GOODS REMAIN THE PROPERTY OF THE CREDITOR AND TITLE DOES NOT PASS UNTIL THEY HAVE BEEN PURCHASED BY A THIRD PARTY

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SECURITY AGREEMENT ESSENTIAL COMPONENTS

- **Indebtedness must be referenced**
 - Current and future indebtedness
- **Collateral must be defined**
- **“Blanket” coverage**
 - Specific coverage if a PMSI
 - “Now owned or hereafter acquired”
 - Products and/or Proceeds

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS

- **Customer Warranties and Covenants**
- **Default Provisions**
- **General Provisions**
- **Remedies –**

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Customer Warranties and Covenants –

- To pay and perform all of the obligations secured by this agreement according to their terms.
- To defend the title to the collateral granted Secured Party against all persons and against all claims and demands whatsoever, which collateral, except for the security interest granted hereby, is lawfully owned by the Debtor and is now free and clear of any and all liens, security interests, claims, charges, encumbrances, taxes and assessments except as may be set forth in the schedule attached hereto.
- On demand of the secured party to do the following: furnish further assurance of title, execute any written agreement or do any other acts reasonably necessary to effectuate the purposes and provisions of this agreement, execute any instrument or statement required by law or otherwise in order to perfect, continue or terminate the security interest of the Secured Party in the collateral and pay all filing fees in connection therewith.

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Customer Warranties and Covenants

- To retain possession of the collateral during the existence of this agreement and not to sell, exchange, assign, loan, deliver, lease, mortgage or otherwise dispose of same except in the ordinary course of business without the written consent of the Secured Party.
- To keep the collateral at the locations specified in the scheduled annexed and not to remove same (except in the usual course of business for temporary periods) without the prior written consent of the Secured Party
- To keep the collateral free and clear of all liens, charges, encumbrances, taxes and assessments.
- To pay, when due, all taxes, assessments and license fees relating to the collateral.

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Customer Warranties and Covenants

- To keep the collateral, at Debtor's own cost and expense, in good repair and condition and not to misuse, abuse, waste or allow it to deteriorate except for normal wear and tear and to make same available for inspection by the Secured Party at all reasonable times
- To keep the collateral insured against loss by fire (including extended coverage), theft and other hazards as the Secured Party may reasonably require and to obtain collision insurance if applicable. Policies shall be in such form and in an aggregate amount equal to or exceeding the principal balance due under the Promissory Note at the time such policy is issued or renewed and with such companies as the secured Party may approve, such approval not to be unreasonably withheld. Policies shall be obtained from responsible insurers authorized to do business in Texas. Certificates of insurance or policies, payable to the respective parties as their interest may appear, shall be deposited with the Secured Party who is authorized, but under no duty, to obtain such insurance upon failure of the Debtor to do so after written notice to Debtor and a 30 day cure period thereafter. Debtor shall give immediate written notice to the Secured Party and to insurers of loss or damage to the collateral and shall promptly file proofs of loss with insurers. Debtor hereby assigns to the Secured Party all sums which may become payable under such insurance, including return premiums and dividends, as additional security for the indebtedness, but such assignment may only be exercised by Secured Party if Debtor is in default and 30 days have passed since notice of such default was given to Debtor by Secured Party and such default remains substantially uncured. Any other return premiums and/or dividends shall be paid to Debtor.

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Customer Warranties and Covenants

- If this agreement is security for a loan to be used to pay a part or all of the purchase price of the collateral; to use the proceeds of the loan to pay the purchase price, filing fees and insurance premiums. The Secured Party however, may pay the proceeds directly to the seller of the collateral.
- To immediately notify the Secured Party in writing of any change in or discontinuance of Debtor's place or places of business.
- That if the collateral has been attached to or is to be attached to real estate, a description of the real estate and the name and address of the record owner is set forth in the schedule herein; if the said collateral is attached to real estate prior to the perfection of the security interest granted hereby, Debtor will on demand of the Secured Party furnish the latter with a disclaimer or disclaimers, signed by all persons having an interest in the real estate of any interest in the collateral which is prior to Secured Party's interest.

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Default Provisions –

- Failure to pay the principal or any installment of principal on the indebtedness when due and to then cure such failure after 30 days written notice thereof by Secured Party to Debtor..
- Failure by Debtor to comply with or perform any provision of this agreement, after notice and a 30 day cure period.
- False or misleading written material representations or warranties made or given by Debtor in connection with this agreement to Secured Party.
- Subjection of the collateral to levy of execution or other judicial process in an amount greater than \$25,000 which is not released or bonded around by Debtor within 60 days..

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Default Provisions

- Commencement of any insolvency proceeding by or against the Debtor or of any guarantor of or surety for the Debtor's obligations which is not dismissed or otherwise disposed of within 60 days of commencement.
- Any material reduction in the value of the collateral or any act of the Debtor which materially imperils the prospect of full performance or satisfaction of the Debtor's obligations herein based on tangible evidence, such as adverse credit reports or delinquent payments to Secured Party.
- Upon any default of the Debtor and at the option of the Secured Party, the obligations secured by this agreement shall, after written notice thereof by Secured Party to Debtor and the passage of 30 days' time without such default being substantially cured, immediately become due and payable in full and the Secured Party shall have all the rights, remedies and privileges with respect to repossession, retention and sale of the collateral and disposition of the proceeds as are accorded to a Secured Party by the applicable sections of the Uniform Commercial Code as enacted in Texas respecting "Default", in effect as of the date of this Security Agreement.

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Selected General Provisions –

- The Uniform Commercial Code as enacted in the State of Texas shall govern the rights, duties and remedies of the parties and any provisions herein declared invalid under any law shall not invalidate any other provision of this agreement. In addition to its statutory rights, the Secured Party may:
 - require Debtor to assemble the collateral and make it available to the Secured Party at a place to be designated by the Secured Party, reasonably convenient to both parties;
 - unless the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Secured Party will give Debtor reasonable notice of the time and place of any public sale thereof or of the time after which any private sale or any other intended disposition thereof is to be made. The requirements of reasonable notice will be met if such notice is mailed, postage prepaid, to the address of the Debtor shown above, at least three business days before the time of sale or disposition.

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Selected General Provisions

- Debtor consents to any extension of time or payment. If there is more than one Debtor, guarantor or co-maker of this agreement or of notes secured hereby, the obligation of all shall be joint and several.
- All items of collateral shall remain personal property, not become part of the freehold regardless of the manner of affixation and be kept at Debtor's places of business in Houston, Texas, except in the ordinary course of business.
- The Debtor shall remain liable for any deficiency resulting from a commercially reasonable sale of collateral, and Debtor shall pay any such deficiency forthwith on demand and upon presentment of proof of the deficiency amount

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SECURITY AGREEMENTS ESSENTIAL COMPONENTS CONT'D

■ Selected General Provisions -

- The terms, warranties and agreements herein contained shall bind and inure to the benefit of the respective parties hereto, and any legal representatives, successors and assignees.
- Secured Party may assign this agreement only upon written approval of Debtor, which approval shall not be unreasonably withheld and if assigned the assignee shall be entitled, upon notifying the Debtor, to performance of all of Debtor's obligations and agreements hereunder and the assignee shall be entitled to all of the rights and remedies of the Secured Party hereunder.
- The Secured Party is hereby authorized to file a Financing Statement as executed by Debtor. (very important)**

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PURCHASE MONEY SECURITY INTEREST

- **Covers only goods you sell or finance**
 - Includes Products
 - Includes Proceeds
- **Ability to become #1**
- **Notification to Prior secured parties essential**

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PURCHASE MONEY SECURITY INTERESTS

- **UCC search Mandatory**
 - Need to know if prior secured parties have lien on same goods you will be selling**
- **Notification to Prior Secured Parties**
 - Mail**
 - Facsimile Transmission**
 - Electronic Transmission**

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SAMPLE NOTIFICATION VERBIAGE FOR PMSI

- **PLEASE TAKE NOTICE THAT [Name of Creditor] IS ABOUT TO ENTER INTO A PURCHASE MONEY SECURITY INTEREST WITH [Name of Customer] COVERING ALL GOODS OF CREDITOR [be specific] SOLD AND DELIVERED TO CUSTOMER, INCLUDING ALL PRODUCTS AND PROCEEDS THEREOF**

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PURCHASE MONEY SECURITY INTERESTS

- **Necessary Steps**
 - Timing of Notification**
 - Prior Secured Party need not respond**
 - Prepare paperwork**
 - File UCC Financing Statement**

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UCC ARTICLE 9 DOCUMENT CHECKLIST

- **Security Agreement to be prepared**
- **Debtor/customer's name must be accurate**
- **Collateral Schedule must be complete**
- **Document must be signed or authenticated**
- **UCC Financing Statement must be filed**

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