Secured Transactions: Post-Closing Changes
Impacting Perfection and Priority
Navigating Article 9 to Determine the Need to Amend or File a New Financing Statement

WEDNESDAY, AUGUST 1, 2012
1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

Today’s faculty features:
Steven O. Weise, Partner, Proskauer Rose LLP, Los Angeles
Annette C. Moore, Attorney, Sidley Austin LLP, Chicago
Paul Hodnefield, Associate General Counsel, Corporation Service Company, Minneapolis

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Secured Transactions:
Post-Closing Issues Under UCC Article 9

August 1, 2012

Presented by:

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Steven O. Weise
Paul Hodnefield
ANNETTE C. MOORE is an associate in the Chicago office. Her practice focuses on the representation of borrowers, lenders and financial intermediaries in connection with syndicated and structured loans as well as the securitization of a wide variety of assets (through private asset-backed securities offerings and commercial paper conduits), including trade receivables, structured settlements student loans and equipment floorplan loans. In addition, Mrs. Moore has been involved in the structuring of structured investment vehicles.

Ms. Moore spoke at the 2011 ABA Annual Conference on the impact of post-closing events on the priority of a secured party’s security interest in existing and after-acquired collateral. She is active in the Business Law Section of the American Bar Association and currently serves on its Membership Committee.

MEMBERSHIPS & AFFILIATIONS
- American Bar Association - Business Law Section, UCC Committee, Co-Editor of Commercial Law Newsletter
- Chicago Bar Association

EDUCATION
- The University of Chicago Law School (J.D., 2006)
- Emory University (B.A., 2003, magna cum laude, Martin Luther King Jr. Scholar)
Steve Weise practices in all areas of commercial law, which an emphasis on financings. Steve is a member of the Permanent Editorial Board for the Uniform Commercial Code and the current Drafting Committee on Amendments to Uniform Commercial Code Article 9. He was the American Bar Association’s Advisor to the Uniform Commercial Code Article 9 Drafting Committee (1993 – 1999). He is the American Bar Association’s Representative to the UN Commission on International Trade Law’s Working Group on Security Interests and was the Reporter for National Conference of Commissioners on Uniform State Laws – American Law Institute Drafting Committee to Harmonize North American Law with Regard to the Assignment of Receivables in International Trade Convention. He is a member of the U.S. Delegation to the UNIDROIT Model Law on Leasing project.

He is a recent Chair of the Business Law Section of the American Bar Association. Steve is a past chair of its Committee on Personal Property Secured Financing and a past chair of its Committee on Legal Opinions. He is also a member of the New York TriBar Opinion Committee. He was the Reporter for the TriBar Report on UCC Security Interest Opinions and is the Reporter for a pending TriBar project on opinions in connection with secondary sales of securities (UCC Article 8). He is the former chair of the Executive Committee of the Business Law Section of the California State Bar and is the past Chair of its Committee on the Uniform Commercial Code. He is the author of extensive Annual Updates on Commercial Law published by the American Bar Association and the State Bar of California. He also publishes articles on personal property secured transactions in the American Bar Association publication The Business Lawyer and lectures widely on commercial law topics, contract drafting, and legal opinion letters.

**Education:** Yale University (B.A., 1971); University of California, Berkeley, Boalt Hall School of Law (J.D., 1974).
Paul Hodnefield is Associate General Counsel for Corporation Service Company (“CSC”), where he is responsible for advising CSC regarding UCC, real estate, and other public record transactional services. In addition to his duties at CSC, he currently serves as Co-Chair of the ABA Joint Task Force on Filing Office Operations and Search Logic and is a member of the ABA Joint Task Force on Legislative Enactment of Revised Article 9. Paul is a member of the American Bar Association, the Minnesota Bar Association, and a Fellow of the American College of Commercial Finance Lawyers. He has also served as an adjunct instructor at the University of Minnesota law school, where he taught courses on public records and business ethics.
Secured Transactions: Post-Closing Issues Under UCC Article 9*

August 2012
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*Priority not addressed
Index of UCC Article 9 Rules

- Change in Debtor’s Name - §9-506 and §9-507

- Change in Debtor’s Location - §9-316 (revised)

- Asset Transfer - §9-315, §9-316, §9-320 and §9-507

- New Debtor - §9-508 and §9-316 (revised)
Change in Debtor’s Name
(“Pure” Name Change)

Is the change in the debtor’s name seriously misleading? (§ 9-506(b))

- NO
  - Original filing still effective to perfect security interest (§ 9-506(c))

- YES
  - Has a UCC-3 financing statement amendment been filed against debtor to reflect change in debtor’s name within four months after the change?
    - YES
      - Original financing statement is effective to perfect against collateral acquired before, and within four months after, the name change. (§ 9-507(c)(1))
      - UCC-3 amendment is effective to perfect against collateral acquired more than four months after the name change (§ 9-507(c)(2))
    - NO
      - Security interest in collateral acquired more than four months after the name change goes unperfected. (§ 9-507(c)(2))
Change in Debtor’s Location

Has a UCC-1 financing statement been filed against debtor in new jurisdiction within four months of debtor’s relocation? (§ 9-316(a)(2))

- **YES**
  - UCC-1 financing statement is effective to perfect against collateral existing prior to, and acquired after, the debtor’s relocation (§ 9-316(b))

- **NO**
  - Security interest perfected in debtor’s original jurisdiction (a) remains perfected as to debtor’s existing lien creditors and (b) becomes unperfected, and is deemed never to have been perfected, against purchasers for value and new lien creditors (§ 9-316(b))
Asset Transfer

Were the goods transferred from debtor to a BIOCOB (buyer in ordinary course of business)?

- **YES**: BIOCOB takes goods free of secured party’s security interest. (§9-320)
- **NO**: Did the secured party authorize the disposition of the goods free of such secured party’s security interest? (§ 9-315(a)(1))

  - **YES**: Non-BIOCOB takes goods free of secured party’s security interest (§ 9-315(a))
  - **NO**: Is there a financing statement filed by the secured party against the debtor/transferor covering the transferred goods? (§ 9-507(a))

    - **YES**: Is transferee located in same jurisdiction as debtor/transferor?
      - **YES**: Original UCC financing statement is effective to maintain perfection against transferred goods. (§ 9-507(a))
      - **NO**: Secured party’s unperfected security interest survives disposition of goods by debtor/transferor if transferee has knowledge of security interest (§ 9-315(a)(1) and §9-317(b))
    - **NO**: Has a UCC-1 financing statement been filed against transferee in the new jurisdiction within one year of such asset transfer? (§ 9-316(a)(3))

      - **YES**: Security interest perfected in debtor/transferor’s original jurisdiction (a) remains perfected as to debtor/transferor’s existing lien creditors and (b) becomes unperfected, and is deemed never to have been perfected, against purchasers for value and new lien creditors (§ 9-316(b))
      - **NO**: UCC-1 financing statement effective to perfect against transferred goods (§ 9-316(b))
New Debtor
(Conversion of organization type*; mergers)

Is new debtor located in same state as original debtor*?

YES

Is new debtor name seriously misleading? (§ 9-508(b))

NO

Has a UCC-1 financing statement been filed against the new debtor within four months after new debtor becomes bound by original debtor’s security agreement? (§ 9-508(b)(2))

YES

UCC-1 financing statement is effective to perfect security interest against collateral acquired more than four months after the new debtor becomes bound by the security agreement (§ 9-508(b)(2))

NO

Has a UCC-1 financing statement been filed against new debtor in new jurisdiction within one year of such conversion or merger? (§ 9-316(a)(3))

YES

Security interest perfected in debtor’s original jurisdiction (a) remains perfected as to debtor’s existing lien creditors and (b) becomes unperfected, and is deemed never to have been perfected, against purchasers for value and new lien creditors (§ 9-316(b))

NO

Original UCC filing is effective to perfect security interest in original and after-acquired collateral (§ 9-506(c) and (d) and §9-508(a))

NO

Original financing statement effective to perfect security interest against collateral acquired before, and within four months after, the new debtor becomes bound by the security agreement. (§ 9-508(b)(1))

NO

Has a UCC-1 financing statement been filed against new debtor in new jurisdiction within one year of such conversion or merger? (§ 9-316(a)(3))

YES

Security interest perfected in debtor’s original jurisdiction (a) remains perfected as to debtor’s existing lien creditors and (b) becomes unperfected, and is deemed never to have been perfected, against purchasers for value and new lien creditors (§ 9-316(b))

NO

UCC-1 financing statement is effective to perfect against collateral transferred in connection with, and acquired after, such conversion or merger. (§ 9-316(b))

• *Some states treat the conversion of an entity formed under the law of another state as the “same entity”. In those instances, please see the “Change in Debtor’s Location” flow chart.

• *Some states treat the conversion of an entity formed under the law of that state as the “same entity”. In those instances, please see the “Change in Debtor’s Name” flow chart.
UCC Article 9:
Effect of Post-Closing Events on Security Interests Perfected by Filing

August 2012
Steve Weise
sweise@proskauer.com
### Revised Article 9: Effect of Post-Closing Events on Security Interests Perfected by Filing

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<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Existing collateral</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Change in debtor’s name</td>
<td>Yes</td>
<td>Yes 9-507(c)(1)</td>
<td>Yes</td>
<td>Yes, for collateral acquired during 4 months following name change only (unless fixed financing statement)</td>
<td>Yes (for perfected collateral)</td>
<td>Notes</td>
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<tr>
<td>After-acquired collateral</td>
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* All statutory references are to the version of Article 9 that went into effect on July 1, 2001, except for those followed by “(2010)”, which refer to the amendments completed in 2010, which will are expected to go into effect on July 1, 2013.
<table>
<thead>
<tr>
<th>Event</th>
<th>Existing collateral</th>
<th>After-acquired collateral</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Change in ‘location’ of debtor</td>
<td>Attachment Continues?</td>
<td>Yes</td>
<td>Yes, for 4 months only (unless reperfected in new jurisdiction)</td>
</tr>
<tr>
<td></td>
<td>Perfexion Continues?</td>
<td>Yes (for as long as perfected)</td>
<td>Yes, under 2010 amendment, for 4 months (must file new financing statement in new location within 4 months to continue perfection)</td>
</tr>
<tr>
<td></td>
<td>Priority Continues?</td>
<td>Yes</td>
<td>No, unless reperfected in new jurisdiction at the time of the change in location.</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>Yes, under 2010 amendment, for 4 months (must file new financing statement in new location within 4 months to continue perfection)</td>
</tr>
<tr>
<td></td>
<td>Attachment Occurs?</td>
<td></td>
<td>n/a (not perfected) (if perfected in new jurisdiction, priority based on new filing of financing statement)</td>
</tr>
<tr>
<td></td>
<td>Perfection Occurs?</td>
<td></td>
<td>Under the 2010 amendments, filing ‘relates back’ to filing date of original financing statement</td>
</tr>
<tr>
<td></td>
<td>Priority Maintained?</td>
<td></td>
<td>Loss of perfection is retroactive against purchasers and prospective against purchasers and lien creditors. 9–316(b), Comment 3. No specific rule addresses rights of secured party to after-acquired collateral when ‘location’ of debtor changes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>The filing date rule under the 2010 amendments is implicit in the statute.</td>
</tr>
</tbody>
</table>

9-316(a)(2) 9-316(h) (2010)
<table>
<thead>
<tr>
<th>Event</th>
<th>Existing collateral</th>
<th>After-acquired collateral</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Change in location – “reincorporation”</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Transfers of Collateral</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>BIOCOB (buyer in ordinary course of business)</td>
<td>No</td>
<td>n/a</td>
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</tbody>
</table>

‘Reincorporation’ is not a change in location; treated as ‘transfer’ of existing assets and as ‘new debtor’ for after-acquired assets. 9-316, Ex. 4 + 5 See discussions below. Some state laws may allow the ‘conversion’ of an entity formed under the law of another state into an entity under a new state and would treat the entity as the ‘same’ entity. This would be treated as a change in ‘location’ (discussed above).

This section applies only to existing collateral; after-acquired collateral can’t be ‘transferred.’ See discussion of ‘new debtor’ below.

The buyer “takes free” of the security interest created by its seller.
<table>
<thead>
<tr>
<th>Event</th>
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<th>Existing collateral</th>
<th>After-acquired collateral</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not BIOCOC; transferee in same jurisdiction</td>
<td></td>
<td>Yes 9-315(a)(1)</td>
<td>Yes 9-507(a)</td>
<td>Yes, defeat secured party of transferee 9-325(a)</td>
</tr>
<tr>
<td>Not BIOCOC; transferee in new jurisdiction</td>
<td></td>
<td>Yes 9-315(a)(1)</td>
<td>Yes, for 1 year only, unless perfect against transferee in new jurisdiction 9-316(a)(3)</td>
<td>Yes, defeat secured party of transferee (unless lose perfection after one year, see comment to left) 9-325(a)</td>
</tr>
<tr>
<td>‘Reincorporations’ and other mergers</td>
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A search against the transferee will not find the financing statement filed against the transferor. Does not apply to new collateral acquired by transferee.

Loss of perfection is retroactive against purchasers and prospective against purchasers and lien creditors. 9–316(b), Comment 3.

‘Reincorporations’ are a form of merger. The ‘not BIOCOC’ transfer rules (above) apply to existing collateral. The ‘new debtor’ rules (see below) apply to after-acquired collateral. 9-316, Ex. 4 + 5. See discussion below of ‘new debtor’.
<table>
<thead>
<tr>
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<th>Existing collateral</th>
<th>After-acquired collateral</th>
<th>Notes</th>
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<tbody>
<tr>
<td>New debtor</td>
<td>See note</td>
<td>See note</td>
<td>See note</td>
</tr>
<tr>
<td>Event</td>
<td>Existing collateral</td>
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<tr>
<td><strong>Secured party of original debtor – new debtor located in different jurisdiction from original debtor</strong></td>
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<tr>
<td><strong>Existing perfected secured party of new debtor – both original and new debtor located in same jurisdiction</strong></td>
<td>Yes, security interest attaches to collateral transferred from original debtor under after-acquired property clause of new debtor’s secured party’s security agreement with new debtor 9-204</td>
<td>Yes, security interest in collateral transferred from original debtor perfected by financing statement already filed by secured party of new debtor against new debtor 9-308(a)</td>
<td>No, lose to perfected secured party of original debtor as to collateral transferred from original debtor (win as to collateral already owned by new debtor) 9-325(a)</td>
</tr>
<tr>
<td>Event</td>
<td>Existing collateral</td>
<td>After-acquired collateral</td>
<td>Notes</td>
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<tr>
<td>See comment in prior row</td>
<td>See comment in prior row</td>
<td>See comment in prior row; see note for this row</td>
<td>Yes</td>
</tr>
</tbody>
</table>

For existing collateral of the original debtor, the ‘not BIOCOB, new jurisdiction’ attachment, perfection + priority rules (above) for transfers apply to determine the rights of the secured party of the original debtor. 9-316, Comment 2, Ex. 4 + 5; 9-508(c), Comment 5. Existing perfected secured party of new debtor will also have priority over secured party of original debtor as to transferred collateral if secured party of original debtor loses perfection after one year, as discussed above under ‘not BIOCOB, new jurisdiction.’ 9-316(a)(3)
Post-Closing Issues:
Case Law

August 2012
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I. Change in Debtor’s Name

- *In re Lifestyle Home Furnishings, LLC*, 2010 Bankr. LEXIS 111 (Bankr. D. Idaho 2010). When debtor changed its name from “Factory Direct, LLC” to “Lifestyle Home Furnishings, LLC” it rendered the financing statement seriously misleading. The secured party did not file additional financing statements and did not amend the previously filed financing statement to name Lifestyle Home Furnishings, LLC as required by U.C.C. § 9-507(c). As a result the secured party was not perfected as to collateral acquired more than four months after the name change.

- *In re: Propex Inc.*, 415 B.R. 321 (Bankr. E.D. Tenn. 2009). The Committee of Unsecured Creditors failed to allege that debtor’s name change made the secured party’s financing statements seriously misleading under U.C.C. § 9-506(c). Therefore, it was not a constructive fraudulent conveyance when the secured party amended its financing statements to add the new debtor name after the four-month period provided in U.C.C. § 9-507(c).

  Comment: The court noted that a search on the former debtor names of “Propex Fabrics Inc.” and “Propex Fabrics Holdings Inc.” would likely disclose the new names of “Propex Inc.” and “Propex Holdings Inc.,” respectively. That might have been the case under the “reasonably diligent searcher” standard applied to determine sufficiency of debtor names under former Article 9. However, not a single state currently uses standard search logic that would disclose records indexed solely under the new debtor names in these circumstances.

- *Broyhill Furniture Industries, Inc. v. Hudson Furniture Galleries, L.L.C.*, 2008 N.Y. Misc. LEXIS 8290 Slip Op 30636U (N.Y. Sup. Ct. 2008). Senior secured party’s failure to amend its financing statement to reflect the debtor’s name change within four months rendered it unperfected as to collateral acquired more than four months after the name change occurred. The junior secured lender’s actual knowledge of the name change did not relieve the senior secured party’s affirmative duty to re-file or amend its financing statement to remain perfected as to after-acquired collateral under U.C.C. § 9-507(c).
II. Change in Governing Law

- *Farm Credit Services of America, Inc. v. Wilson*, 247 P.3d 1199 (Okla. Civ. App. 2011). Lender’s claim was superior to that of an out-of-state buyer of the collateral from debtor despite the lender’s failure to re-perfect its security interest in the new jurisdiction within one year as required by U.C.C. § 9-316(a)(3). Non-compliance with U.C.C. § 9-316(a)(3) only affected priority over competing security interests. The buyer had constructive notice of the existing superior security interest at the time of purchase and, under U.C.C. § 9-315(a)(1), acquired the machinery subject to lender’s security interest.

- *In re Owen*, 2009 Bankr. LEXIS 3318 (Bankr. D. Idaho 2009). Secured party’s perfection of its security interest under Idaho certificate of title law could not be avoided as a preferential transfer because the security interest was perfected under California certificate of title law and U.C.C. § 9-316(d) and (e) provided for continued perfection following the debtor’s relocation from California to Idaho.

- *In re Lockhart-Johnson*, 2007 Bankr. LEXIS 1096 (Bankr. D. S.D. 2007). Continued perfection of lender’s security interest depends on an unresolved factual issue concerning the date on which the debtor relocated from Minnesota to South Dakota and thereby caused a change in the governing law. The debtor filed for bankruptcy approximately four months after the relocation. The secured party did not file a new financing statement in South Dakota before the debtor filed for bankruptcy. If the debtor became a South Dakota resident more than four months before the bankruptcy filing, the secured party was unperfected under U.C.C. 9-316(a)(2) and the security interest would be subordinate to the Trustee’s strong-arm powers. If the debtor became a resident of South Dakota less than four months before the bankruptcy filing, the secured party remained perfected by virtue of the four-month protection provided by U.C.C. 9-316(a)(2).

- *First National Bank of Picayune v. Pearl River Fabricators, Inc.*, 971 So. 2d 302 (La. 2007). Secured party became unperfected against ultimate buyer of collateral under U.C.C. § 9-316(a)(3) when it failed to timely file a new financing statement in Louisiana within one year after the debtor, a Mississippi corporation, sold the collateral to an Indiana
corporation, which then promptly resold it to a Nevada corporation that physically relocated the collateral to its headquarters in Louisiana.

Comment: All of the parties involved were registered organizations, none of which were organized under Louisiana law. It is unclear how the court determined Louisiana was the proper place to file the new financing statement required by U.C.C. § 9-316(a).

III. Disposition of Collateral

- *In re Reid*, 435 B.R. 810 (Bankr. D. Mass. 2010). Trustee was unable to avoid security interest despite the secured party’s failure to amend its financing statement following transfer of the collateral to the buyer of the debtor’s business. U.C.C. § 9-315(a)(1) provides for the continuation of the security interest upon transfer of the collateral and U.C.C. § 9-507(a) continues the efficacy of the secured creditor’s financing statement in such a situation.

- *Merrill Lynch Business Financial Services, Inc. v. Kupperman*, 2010 U.S. Dist. LEXIS 52785 (D.N.J. 2010). Secured creditor of predecessor business had priority over secured creditor of successor with respect not merely to collateral transferred but also as to collateral acquired after the successor began operations because the security interest granted by the predecessor expressly covered after-acquired collateral. Secured creditor of successor could not be holder in due course of account collections because it was aware of the other security interest. U.C.C. §§ 9-315, 9-325, and 9-507.

- *Capital Solutions, LLC v. Konica Minolta Business Solutions U.S.A., Inc.*, 2010 U.S. Dist. LEXIS 10387 (D. Kan. 2010). A secured party with a perfected security interest in leased equipment had priority over an equipment lessee who purchased the equipment at the end of the lease term, even though the purchase was pursuant to leases entered into before the security interest attached to the equipment. Until the lessee exercised its purchase option, the lessor was the owner of the equipment. U.C.C. §§ 9-315(a)(1) and 9-507(a).

- *In re Jersey Tractor Trailer Training, Inc.*, 580 F.3d 147 (3rd Cir. 2009). The secured party’s failure to stop ongoing sales of debtor’s accounts receivable to a factoring company was not implied authorization of the
disposition that would allow the buyer to take free of the security interest under U.C.C. § 9-315(a)(1). Inaction alone may not lead to a finding of implied authorization.

- Valley Bank and Trust Company v. Holyoke Community Federal Credit Union, 121 P.3d 358 (Colo. Ct. App. 2005). Bank authorized the disposition of the collateral under U.C.C. § 9-315(a)(1) when it turned over vehicle certificates of origin to buyers’ lender without informing the buyers that it was reserving a right to the collateral if the debtor auto dealership did not make the required payments. Moreover, buyers’ lender was a buyer in ordinary course of business from the dealership that would take free of the security interest under U.C.C. § 9-320(a) because the definitions of “purchase” and “purchaser” as set forth in the U.C.C. are sufficiently broad to encompass a lender who takes a security interest in goods as security for its loan.

IV. Buyer in Ordinary Course of Business

- In re Sunbelt Grain WKS, LLC, 427 B.R. 896 (D. Kan. 2010). A prepaying buyer of inventory was not a buyer in ordinary course of business that would have taken free of a perfected security interest in the inventory because the buyer did not take possession of the goods. U.C.C. §§ 9-320(a) and 1-201(b)(9).

- Intermet Corporation v. Financial Federal Credit, Inc., 588 S.E. 2d 810 (Ga. Ct. App. 2003). Buyer of a machine from distributor was not buyer in ordinary course of business because the security interest was created by buyer’s seller as required by U.C.C. § 9-320(a). Lender’s perfected security interest continued in the machine under U.C.C. § 9-315(a).

- Teague v. Taylor (In re: Taylor), 2012 Bankr. LEXIS 2825 (Bankr. E.D. Ky. 2012). Buyer of all-terrain loader could not prove it was a buyer in ordinary course of business under § 9-320(a) where the seller and its owner were users of heavy equipment in the commercial landscaping business, but not in the business of selling heavy equipment.