The purpose of this column is to identify some of the most disconcerting judicial decisions interpreting the Uniform Commercial Code or related commercial laws. The purpose of the column is not to be mean. It is not to get judges recalled, law clerks fired, or litigators disciplined for incompetence. Instead, it is to shine a spotlight on analytical errors, and thereby provide practitioners and judges with reason to disregard the decisions.


This case concerns a security interest in a tort claim and the transition rules of revised Article 9. The court probably reached the correct result but its reasoning was flawed because it overlooked a key provision.

The critical facts are as follows. In 1988, the debtor obtained $22.5 million loan to finance the development of seven hydroelectric plants in upstate New York. In 1997, after a default, modification, assignment of the loan, and a subsequent default, the noteholder accelerated the debt and sought to enforce its security interest. The collateral at issue was a malpractice claim against project engineers, initiated in 1989, for failing to properly measure the property. In 1999, after a jury found the engineers liable, the engineers paid $11.1 million pursuant to a stipulated settlement. The bankruptcy and district courts ruled that the noteholder did not have a security interest in proceeds of the malpractice claim but the Second Circuit reversed.

Looking to § 9-104(k) of the pre-revision version of Article 9, which was in effect when the transaction documents were executed, the circuit court concluded that Article 9 did not initially apply to the claimed security interest. The court then evaluated the claimed security interest under New York common law. The written agreement purported to assign all “rights in action . . . arising from or relating to” the real property. The debtor argued that this language was insufficient because it did not refer to the specific tort claim or even tort claims in general. The circuit rejected this argument, noting that assignments of general types or categories of property are sufficient under New York law.

Then the court considered what effect enactment of revised Article 9 may have had. Although the court did not mention it, this was important because § 9-108(e)(1) provides that a description of collateral only by type is insufficient for a commercial tort claim. However, the court concluded that the common-law security interest in the malpractice claim was saved by revised Article 9’s transition rules. Specifically, § 9-702(b) provides that a common-law lien remains valid.
after the effective date of revised Article 9 if it was validly entered into before the adoption of revised Article 9.

While the court did correctly interpret and apply § 9-702, it failed to note that § 9-702 is expressly subject to other rules in Part 7, see § 9-702(a), and that § 9-703 significantly limits § 9-702. Pursuant to § 9-703(b), a common-law lien that was valid prior to enactment of revised Article 9, but which is governed by revised Article 9 – as the security interest in the malpractice claim was – is effective only for one year unless it becomes enforceable under § 9-203 before the end of that period. Because the agreement failed to describe the malpractice claim other than by type, and thus the description of the claim was inadequate, the security interest in the malpractice claim in fact became invalid on July 1, 2002. See § 9-703 cmt 2., ex. 1 (following this analysis with respect to a security interest in a consumer’s securities account, for which revised Article 9 also requires a description other than by type of collateral).

The court may nevertheless have reached the correct result. Because the court ruled for the noteholder on this issue, it expressly declined to address the noteholder’s other arguments. Among these were that the security interest attached to the proceeds of the malpractice claim after the claim became a judgment, a claim against a bond, a claim under a contract, and a fund in a restricted escrow account. This argument was probably sound. The parties’ original security agreement covered general intangibles and a modification to the agreement added contract rights. Even if the security agreement failed to properly describe the malpractice claim itself – and thus the claim ceased to be collateral one year after Article 9 took effect – the security interest could have attached to the proceeds of the claim, provided that the proceeds were generated prior to the debtor’s bankruptcy and not cut off by § 552 of the Bankruptcy Code.

**In re Marble Cliff Crossing Apartments, LLC, 2012 WL 6758310 (Bankr. S.D. Ohio 2012)**

This case involves a security interest in the equipment comprising a security system installed in an apartment complex. The bankruptcy court ruled that the security interest was perfected because the equipment did not qualify as fixtures. The court’s conclusion was correct but its analysis was unnecessarily complicated because it apparently misunderstood the law relating to perfection.

The facts of the case are fairly straightforward. In 2010 and 2011, Bresco Solutions, LLC sold security cameras and wireless internet access equipment to the debtor and installed the goods in the debtor’s upscale apartment complex in Ohio. Bresco filed UCC financing statements with the Ohio Secretary of State’s office, but not with the county recorder’s office. When the debtor later went into bankruptcy, a party related to the debtor challenged the attachment, perfection, and priority of Bresco’s security interest. For the purposes of this discussion, we focus solely on the perfection issue.
The court began its analysis by looking to § 9-501(a), which provides that a financing statement must be filed in the office designated as the place for filing or recording a mortgage “if . . . the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures.” The court interpreted this to mean that perfection of a security interest in fixtures requires filing at the county level, and only if the goods were not fixtures would perfection be achieved by filing in the Secretary of State’s office. The court then analyzed how the goods had been installed and concluded from those facts that the goods were not fixtures. As a result, Bresco had properly perfected its security interest.

However, the quoted provision of § 9-501 applies only if the filing is a “fixture filing.” Nothing in Article 9 says that a fixture filing is the only way to perfect a security interest in goods that are or are to become fixtures. In fact, quite the opposite is true. A traditional filing in the centralized office of the jurisdiction in which the debtor is located is sufficient to perfect a security interest in fixtures. See § 9-501 cmt. 4. A fixture filing may be preferable because it enables the secured party to have a heightened priority, but it is not needed to perfect. Thus, it should not have mattered whether the goods were fixtures and the court’s statement to the contrary is unfortunate and erroneous.

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