Attachment of Security Interests

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I. Overview

§3.1 The term attachment refers to the steps required to make a security interest enforceable against collateral, and against those claiming an interest in collateral, for the limited purpose of securing an obligation. The attachment or creation of such interests is the subject of Part 2, Subpart 1, of Revised Article 9. See MCL 440.9201–.9206.

In general, the requirements for attachment under Former Article 9 continue to apply under Revised Article 9, with some revisions to account for emerging technologies and the expanded scope of Revised Article 9. For example, borrowing a concept from Article 8, Revised Article 9 imports the notion of “control” as a substitute for possession of collateral, including some collateral which, like electronic chattel paper, cannot be possessed.

In another effort to accommodate electronic commerce, Revised Article 9 replaces the perhaps anachronistic “signed security agreement” with a new creature serving the same function: an “authenticated record.” An authenticated record includes the traditional signed security agreement, but also includes an electronic security agreement stored in computer media that the debtor has “authenticated” electronically. See, e.g., MCL 440.9102(1)(g)(ii). This is another example of some of the primary goals of Revised Article 9—to reduce costs and bring certainty to emerging types of financing transactions.
Attachment of Security Interests §3.3

II. What Law Governs?

A. General Rule of Effectiveness

§3.2 As under Former Article 9, Revised Article 9 generally provides that “a security interest is effective according to its terms between the parties, against purchasers of the collateral, and against creditors,” except as otherwise provided in the Uniform Commercial Code (UCC). MCL 440.9201(1). Part 3 of Revised Article 9 provides exceptions to the general rule in order to advance other commercial policies. For example, Revised Article 9 preserves the well-established protection for lien creditors,1 certain good faith purchasers,2 lessees,3 and buyers in the ordinary course of business,4 among others.

B. Effect of Special Legislation

§3.3 A security transaction subject to Revised Article 9 is also subject to (1) “any applicable rule of law that establishes a different rule for consumers” and (2) a variety of Michigan statutes enumerated in MCL 440.9201(2)(a)–(r). The latter statutes provide special rules for motor vehicles, mobile homes, grain dealers, family farmers, and garage keepers, among others. Because these statutes control in cases in which they conflict with Article 9, practitioners should become familiar with them. See form 3.1 for a list of these statutes and their subject matter.

Motor vehicle financing transactions provide a familiar illustration. A secured party seeking to secure an obligation by creating a security interest in an automobile must ensure that its security interest appears on the certificate of title. See MCL 257.234(4), .238. Complying with Article 9’s attachment and perfection provisions will not suffice. See In re Fleming, 226 BR 3 (Bankr WD Mich 1998). The hegemony of the more specific statutes, however, extends only to the subjects treated in them. See MCL 440.9201(3). Thus, because the Michigan Vehicle Code governs the perfection of security interests in motor vehicles (other than motor vehicles held as inventory), it will govern most transactions creating security interests in particular vehicles. Nevertheless, in enforcing those interests or resolving competing priorities, a court will turn to Revised Article 9. Id. See also In re Thomas, 231 BR 8, 10 (Bankr WD Mich 1999); In re Fleming, 226 BR at 5.

Because certificate of title schemes such as those prescribed in the Michigan Vehicle Code or the Mobile Home Commission Act (MHCA) govern the perfection of security interests in motor vehicles and other titled property, these statutes

1. MCL 440.9317(1)
2. MCL 440.9317(2).
3. MCL 440.9317(3).
4. MCL 440.9320(1).
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will affect most transactions involving security interests in the personality within their ambit.

As noted above, Article 9 cedes some of its authority over transactions involving mobile homes to the MHCA. See MCL 440.9201(2), .9311(1)(b)(iv); see also In re Bencker, 122 BR 506, 511 (Bankr WD Mich 1990) (“The specific provisions of the [MHCA] dictate how legal ownership is transferred, and it governs over the more general provisions of the Uniform Commercial Code.”). The MHCA potentially clashes not only with Revised Article 9, but also with the provisions of Michigan’s real property law. The federal courts—and ultimately the legislature—recently struggled with the nagging questions concerning the method of perfecting security interests in mobile homes in Michigan, given the provisions of Revised Article 9 and the “clash between the [Mobile Home Commission Act, MCL 125.2330d] and Michigan general real property law.” See Boyd v Chase Manhattan Mort Corp (In re Kroskie), 315 F3d 644, 647 (6th Cir 2003).

At issue in Kroskie was whether a properly recorded real estate mortgage perfected a lien on a mobile home that qualified as a fixture under real estate law. The United States Bankruptcy Court and the Sixth Circuit Court of Appeals both held that the provisions of the MHCA, MCL 125.2330d, provide the exclusive means of perfecting a security interest or lien on a mobile home in Michigan. As a result, a bankruptcy trustee succeeded in avoiding the mortgagee’s lien on the mobile home, which the mortgagee attempted to perfect simply by filing a mortgage with the county register of deeds. The court of appeals held that the lien on the mobile home was unperfected (and, therefore, avoidable by a trustee) for failure to comply with the certificate of title provisions of the MHCA.

Evidently in response to the Sixth Circuit’s decision in Kroskie, the legislature amended the MHCA in July, 2003, by adding a new section, MCL 125.2330i, which provides a mechanism, in limited circumstances, for perfecting a lien on a mobile home by complying with the real property laws rather than with the certificate of title provisions of MCL 125.2330d. See 2003 PA 44 (adding MCL 125.2330i to the MHCA). Under the recently amended MHCA, a party asserting a security interest in a mobile home may perfect its lien in the mobile home under real estate law (e.g., by recording a mortgage) if the mobile home is “affixed” to the land and if the owner of the mobile home (who is also the owner of the fee interest in the real property or the lessee under at least a 20-year ground lease) files with the Department of Labor and Economic Growth’s Bureau of Construction Codes & Fire Safety (BCCFS) an affidavit that contains the following information:

- the name and address of the owner
- a description of the mobile home that includes the name of the manufacturer of the mobile home, the year of manufacture, the model, the manufac-