

**Secured Transactions**  
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**Attaching the Security Interest**

- I. **Formalities for Attachment:** All three of the following must be satisfied for a security interest to become binding between a debtor and a secured creditor.
- A. **Value Given:** Essentially, consideration the secured creditor gives to bind the debtor to the security interest. § 9-203(b)(1).
1. § 1-204 defines “**value**” to encompass all forms of consideration that would support an ordinary contract, as well as *past* consideration. The definition rarely excludes anything other than “sham” transactions.
  2. **Future Advance:** Collateral may secure value the secured creditor gives after the security interest has attached. § 9-204(c).
- B. **Debtor has Rights in the Collateral:** A debtor cannot grant a security interest in property in which she has no rights. § 9-203(b)(2). However, that does not mean the debtor must own property.
1. If the debtor owns a limited interest in the asset and grants a security interest in the asset, the security interest will generally attach only to the debtor’s interest.
  2. Some debtors who acquired their limited interest by fraud may be able to grant a **bona fide purchaser** (defined to include a secured creditor) ownership rights the debtor does not have.
- C. **Writing, Possession, Delivery, or Control:** Article 9 gives secured creditors one or more mechanisms for attaching their security interest.
1. **Writing**
    - a. It **must describe the collateral** (and, if the collateral is timber to be cut, describe the land on which it is situated); and
    - b. the **debtor must authenticate** it. § 9-203(b)(3)(A).
      - ◆ “Authenticate” includes symbols, encryption, and similar acts “with the present intent of the authenticating person to ... adopt or accept [the] record.” § 9-102(a)(7).

- ◆ “Record” means information “inscribed on a tangible medium” or “stored in an electronic or other medium and ... retrievable in perceivable form.” § 9-102(a)(69).
- c. A written security agreement **should** also contain
    - i. a description of **primary debt(s)/obligation(s)**,
    - ii. conditions of **default**,
    - iii. the secured creditor’s **rights/remedies** on default, and
    - iv. **other undertakings** by the debtor, such as maintenance, insurance, etc.
  - d. **“Composite Document Rule”**: § 9-203(b)(3)(A) may be satisfied by reading more than one document together.
    - ◆ Courts differ on what evidence they will consider to tie documents together for purposes of § 9-203(b)(3)(A). The best practice is to expressly cross-reference the other document(s) and, if practical, attach them.
2. **Possession**: May be actual or constructive, as long as, if latter, the person in actual possession is not the debtor and is under the secured creditor’s control by operation of law or by agreement. § 9-203(b)(3)(B).
    - ◆ § 9-313 identifies the types of collateral that a secured creditor *must* attach by possession, *may* attach by possession, and *may not* attach by possession.
  3. **Delivery** – only applies to “certificated securities.” § 9-203(b)(3)(C).
  4. **Control**: § 9-203(3)(D) authorizes control of deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, and electronic documents of title.
    - ◆ §§ 9-104 to 9-107 and § 7-106 set forth the means by which a secured creditor takes control of the collateral covered by § 9-203(3)(D).

II. **Time of Attachment**: Because all three formalities must be satisfied for the security interest to attach, the security interest will not attach until the last formality is satisfied. § 9-203(a).

- III. **Describing the Collateral:** If the secured party relies on a security agreement, the collateral description must **reasonably identify** the collateral by
- A. **item** (e.g., “26-ft. Bassmaster fishing boat,” “college ring”), § 9-108(b)(1);
  - B. **category** (e.g., “exercise equipment,” “household pets”), § 9-108(b)(2);
  - C. **type** defined in § 9-102(a) (e.g., “accounts,” “farm products”), § 9-108(b)(3); or
    - ◆ **Exception – Commercial Tort Claim:** A commercial tort claim cannot be sufficiently described solely by type. § 9-108(e)(1).
    - ◆ **Exception – Consumer Transactions:** Consumer goods, a consumer’s security entitlement, a consumer’s securities account, or a consumer’s commodity account cannot be sufficiently described solely by type. § 9-108(e)(2).
    - ◆ However, *non-consumer* security entitlements, securities accounts, and commodity accounts may be described sufficiently by type, § 9-108(d)(1), or by describing the underlying financial asset or commodity contract, § 9-108(d)(2).
  - D. any other means permitting **objective determination** of the collateral, § 9-108(b)(6).
  - E. **Special Case – Investment Property**
    - 1. A security agreement reasonably identifies a security entitlement, securities account, or commodities account by describing the underlying financial asset or commodity account. § 9-108(d)(2).
    - 2. A security agreement reasonably identifies a *non-consumer* security entitlement, securities account, or commodities account if it describes the collateral as a security entitlement, securities account, or commodities account, respectively, or as investment property. § 9-108(d)(1).
  - F. **No “Supergeneric” Descriptions Allowed:** “A description of collateral as ‘all the debtor’s assets’ or ‘all the debtor’s personal property’ or words of similar import does not reasonably identify the collateral.” § 9-108(c).
    - ◆ As we will see later in the course, while such a “supergeneric” description of the collateral in the security agreement is insufficient for the security agreement to attach, a “supergeneric” description of the collateral in a financing statement, filed to give notice to third parties of the secured creditor’s interest in the debtor’s assets, is sufficient. *See* § 9-504(2).

- G. **After-Acquired Property:** Property, of the same description covered by a security interest, that the debtor acquires after the security interest first attaches.
1. Article 9 approves of after-acquired property clauses. *See* § 9-204(a).
  2. Courts typically grant a secured creditor whose interest in accounts or inventory is otherwise attached an attached security interest in after-acquired accounts or inventory because both are assumed to be perpetually in flux. A secured creditor wanting a security interest in other types of after-acquired collateral should include an express after-acquired property clause in the security agreement.
  3. In the absence of an express after-acquired property clause, the secured creditor risks not being able to claim after-acquired property as collateral.
  4. § 9-204(b) prohibits an after-acquired property clause from attaching a security interest to
    - a. an after-acquired commercial tort claim, § 9-204(b)(2); and
    - b. most consumer goods in which the debtor acquired rights more than 10 days after the secured creditor gave value, § 9-204(b)(1).
- H. **“Value Tracing”:** Security interests can be structured so they can continue in collateral other than the original collateral and after-acquired property fitting the description of the original collateral.
1. **Proceeds:** Value the debtor received in exchange for the collateral.
  2. **Offspring:** Biological descendants of the collateral.
  3. **Product:** An asset made by or of the collateral.
  4. **Profit:** Value the collateral generates in excess of the cost of generating it.
  5. **Rent:** Value the debtor received for use of the collateral.
- ◆ **Claiming a Security Interest in Non-Proceeds:** A security interest in collateral automatically attaches to proceeds of that collateral, § 9-203(f); but, a secured creditor wishing to claim a security interest in its collateral’s offspring, product, profit, or rent must expressly include that interest in the security agreement – unless the offspring, product, profit, or rent necessarily falls within the original collateral description.
  - ◆ Whereas after-acquired property originates from another source, proceeds, offspring, product, profit, and rent all derive from the original collateral.