Creating the Security Interest

I. Requisites for Attachment

A. **The Secured Creditor Must Give Value:** Essentially, consideration the secured creditor gives to bind the debtor to the security interest. § 9-203(b)(1).

   1. **“Value”** encompasses all forms of consideration that would support an ordinary contract, as well as past consideration. § 1-204. 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. **The Debtor Must Have 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, the security interest will generally attach only to the extent of 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) more rights than the debtor has in the collateral.

C. **The Secured Creditor Must Satisfy One of the Following Formalities:**

   1. **Security Agreement:** § 9-203(b)(3)(A) requires

      a. debtor or its agent to **authenticate**, using words, symbols, encryption, or similar act “with the present intent [to] adopt or accept,” § 9-102(a)(7),

      b. a **record** “inscribed on a tangible medium” or “stored in [an]other medium and ... retrievable in perceivable form,” § 9-102(a)(69),

      c. that adequately **describes the collateral** (and, if the collateral is timber to be cut, the land on which it is situated).
d. A security agreement **should** also express
   i. the **primary debt(s)/obligation(s)**,
   ii. conditions of **default**,
   iii. the secured creditor’s **rights/remedies** on default, and
   iv. the debtor’s **other undertakings**, such as maintenance, insurance, etc.

e. “**Composite Document Rule**”: More than one document, read together, may satisfy § 9-203(b)(3)(A).
   
   ♦ Courts differ on what evidence they will consider to connect documents 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**: If the parties so agree, the secured creditor **may** attach a security interest in a consumer good, equipment, a farm product, an instrument, inventory, money, tangible chattel paper, or a tangible document (of title) by possessing, or having someone under its control by operation of law or by agreement possess, the collateral. § 9-203(b)(3)(B).
   
   ♦ Notwithstanding the parties’ agreement, a secured creditor **may not** attach a security interest in an account, commercial tort claim, deposit account, electronic chattel paper, electronic document of title, general intangible, investment property, or a letter-of-credit right by actual or constructive possession. **See** § 9-313(a).

3. **Delivery**: If the parties so agree, the secured creditor or its agent **may** attach a security interest in a certificated security (**see** § 8-102(a)(4)) by taking delivery of the certificate. § 9-203(b)(3)(C).

4. **Control**: If the parties so agree, the secured creditor or its agent **may** attach a security interest in a deposit account, electronic chattel paper, an electronic document of title, investment property, or a letter-of-credit right by controlling the collateral. § 9-203(3)(D).

D. **Timing**: All three requisites must be satisfied before the security interest attaches and the secured creditor can enforce it. § 9-203(a). In most transactions, the order in which they are satisfied is inconsequential.
II. **Describing the Collateral:** A secured creditor relying on an authenticated security agreement, must be certain that it **reasonably identifies** the collateral by

A. **item** (e.g., “26-ft. Bassmaster fishing boat,” “UNLV class 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  
   ♦ **Commercial Tort Claim Exception:** A security agreement cannot reasonably identify collateral as “commercial tort claim(s).” § 9-108(e)(1).  
   ♦ **Consumer Goods Exception:** A security agreement does not reasonably identify collateral as “consumer good(s).” § 9-108(e)(2).  
   ♦ **Consumer Investment Property Exception:** If the debtor acquires or holds investment property collateral primarily for personal, family, or household purposes, a security agreement does not reasonably identify collateral as “[debtor]’s commodities account(s),” “[debtor]’s securities account(s),” or “[debtor]’s securities entitlement(s).” § 9-108(e)(2).  
D. any other means permitting a third party to **objectively determine** the collateral (e.g., “all items in the debtor’s storage unit at 101 Elm St.”), § 9-108(b)(6).  
E. **Special Case: Investment Property**  
   1. A security agreement reasonably identifies a commodities account, securities account, or securities entitlement by describing the underlying financial asset or commodity contract. § 9-108(d)(2).  
   2. A security agreement reasonably identifies a *non-consumer’s* commodities account, securities account, or securities entitlement if it describes the collateral as “[debtor]’s commodities account(s),” “[debtor]’s securities account(s),” or “[debtor]’s securities entitlement(s),” 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).  
   ♦ While such a “supergeneric” collateral description in a security agreement prevents attachment because it does not reasonably identify the collateral, a “supergeneric” collateral description in a **financing statement** may sufficiently indicate the collateral to give third parties notice of the secured creditor’s interest in the collateral. 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 allows after-acquired property clauses. *See § 9-204(a).*

2. § 9-204(b) prohibits an after-acquired property clause from attaching 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).

3. Courts typically extend a secured creditor’s attached security interest in accounts to after-acquired accounts or in inventory to after-acquired inventory, even without an express after-acquired property clause in the security agreement, because both are assumed to be perpetually in flux.

4. A creditor failing to expressly describe its collateral in the security agreement to include after-acquired property risks not being able to attach after-acquired property otherwise fitting its collateral description.

H. **Collateral Expansion**: Security interests can be structured to continue in collateral other than the original collateral and after-acquired property fitting the description of the original collateral.

1. **Proceeds**: Value the debtor receives from selling, exchanging, collecting, or otherwise disposing of collateral. § 9-102(a)(64).
   ♦ An attached security interest in collateral **automatically attaches** to its identifiable proceeds. §§ 9-203(f) & 9-315(a)(2).

2. **Offspring**: A biological descendent 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 receives for letting someone use the collateral.

♦ **Claiming a Security Interest in Non-Proceeds**: A creditor wishing to claim a security interest in offspring, product, profit, or rent must express that interest in the security agreement – unless the offspring, product, profit, or rent necessarily falls within the original collateral description.

♦ **The Origins of Collateral Expansion**: Whereas after-acquired property originates from another source, proceeds, offspring, product, profit, and rent all derive from the original collateral.