

community BANKER

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Welcome to the March/April issue of the COMMUNITY BANKERS' ADVISOR.

The ADVISOR is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

YOU ARE ASKING . . .

Q: We were about to repossess a Chevy Suburban parked in the borrower's driveway. However, visible on the dash was an iphone; peering into the back, our guy could also see a flat screen tv in its box and a couple of shopping bags of clothes (which helps explain the delinquency in payments to us). He called for instructions and we said to hold off - we didn't want to be accused of stealing this stuff because it's not our collateral. (The borrower is very litigious.) Thoughts?

A: When a secured party repossesses motor vehicle collateral, the borrower often has other items inside the vehicle; typically, that personal property is *not* part of your collateral. We worry that taking large, visible, expensive personal property along with the vehicle could give your litigious borrower ammunition to claim you were engaging in unfair credit practices. 16 C.F.R. § 444.2(a)(4) says that it's an unfair credit practice for a lender to take from a consumer a non-possessory, non-purchase-money security interest in household goods. Even though you are taking that personal property in the course of a valid repossession, the claim might have some traction. Also, it may or may not be a claim for conversion, or it might be a trespass to chattels. "An actionable claim for trespass to chattels or personal property generally requires dispossession of the property, impairment of the condition, quality or value of the property, loss of use of the property, or



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other harm.” Sagebrush Res., LLC v. Peterson, 2014 ND 3, ¶ 19, 841 N.W.2d 705. Generally, the borrower won’t have any actual damages, but *any* claim is a headache and an expense. You can try to avoid this problem by including in your security agreement a clause permitting you to *temporarily* take possession of any personal property in the secured collateral, *i.e.*,

Permission to Temporarily Take Noncollateral Property

Upon default, Secured Party has the right to repossess the Collateral without judicial process. In exercising this right, Secured Party may also take whatever other property is on, in, affixed to, or attached to the Collateral, provided that Secured Party shall return the noncollateral property within five (5) business days after receiving written demand.

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HOW DO I PERFECT THIS?

Your borrower has different kinds of collateral - his interest in an LLC; the Cessna that he uses to go to Canada for fishing; the inventory of his business. For the times you’ve wondered how to perfect your security interest in these different types of collateral, we’ve prepared a handy-dandy chart to give you an idea where to start.

TYPE OF COLLATERAL	HOW TO PERFECT
<p>ACCOUNTS (The right to receive money; includes credit card receivables, license fees for use of software, right to receive payment for sale, lease, or license of intangible property, health-care insurance receivables)</p>	<p>a. By filing a financing statement. N.D.Cent.Code § 41-09-30(1).</p> <p>b. Step 2 - by control of the account. Obtain a lien on the deposit accounts where the proceeds are deposited when the accounts are paid. The secured lender must have “control” of the deposit account in order to perfect a security interest in the deposit account and the money in that account. N.D.Cent.Code §§ 41-09-32 and 41-09-34.</p> <p>Control exists if: i. the secured lender is the depository bank at which the debtor maintains its deposit account; ii. the secured lender becomes the depository bank’s customer with respect to the deposit account; or iii. the secured lender enters into a deposit account control agreement with the depository bank. A deposit account control agreement is signed by the debtor, the secured lender and the depository bank, and provides that the secured lender will have control of the account by virtue of the depository bank agreeing to take instructions from the lender without obtaining consent from the debtor.</p>
<p>CHATTEL PAPER (A document demonstrating an obligation to pay money <i>and</i> a security interest in or lease of certain goods, <i>i.e.</i> a retail installment sales contract and security agreement covering a car or a weight set. This includes electronic chattel paper (exists only in electronic form), which should be specified as such.)</p>	<p>a. By filing a financing statement. N.D.Cent.Code § 41-09-32(1).</p> <p>b. By possession of tangible chattel paper. N.D.Cent.Code § 41-09-33(1).</p> <p>c. By control of electronic chattel paper. N.D.Cent.Code § 41-09-34(1).</p> <p>For collateral that may be perfected by filing a financing statement or control, perfection by control is more desirable.</p>
<p>COMMERCIAL TORT CLAIMS (A business claim arising in tort, <i>i.e.</i> “The Debtor’s claim arising out of the flood at his factory caused by the alleged negligence of the City.” No personal injury claims!)</p>	<p>By filing a financing statement. N.D.Cent.Code § 41-09-30(1). (The claim/Incident must have already occurred, must be described with specificity. N.D.Cent.Code § 41-09-08(5(a).)</p>

<p>COMMODITY ACCOUNTS (This is an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer. It falls under "Investment Property.")</p>	<p>a. By attachment. N.D.Cent.Code § 41-09-29(10) (A security interest in investment property created by a broker or securities intermediary). Or, b. By filing a financing statement. N.D.Cent.Code § 41-09-32(1). c. By control. N.D.Cent.Code § 41-09-34(1).</p> <p>For collateral that may be perfected by filing a financing statement or control, perfection by control is more desirable.</p>
<p>CERTIFICATE OF DEPOSIT (In North Dakota, a certificate of deposit is not a deposit account nor is it an instrument. N.D.Cent.Code § 41-09-02(1)(ee) and (1)(ww)(ii).)</p>	<p>a. Possession only. N.D.Cent.Code § 41-09-32(2)(c). A security interest in money or a certificated certificate of deposit may be perfected only by the secured party's taking possession under N.D.Cent.Code § 41-09-33.</p>
<p>DEPOSIT ACCOUNTS (This means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or an account evidenced by a certificate of deposit or an instrument.)</p>	<p>By control. N.D.Cent.Code §§ 41-09-32 and 41-09-34. (Obtain a control agreement from your debtor if he has a deposit account in another bank. See discussion in the ACCOUNTS section, above.)</p>
<p>EQUIPMENT (Defined as <u>goods</u> other than inventory, farm products, or consumer goods. Equipment is goods used to carry on the business of the borrower, not items held for sale or lease.)</p>	<p>By filing a financing statement. N.D.Cent.Code § 41-09-30(1).</p> <p>For goods other than goods covered by a certificate of title, possession is also an option to perfect. N.D.Cent. Code § 41-09-33(3) provides a method of perfection by possession when the collateral is possessed by a third person who is not the secured party's agent.</p>
<p>FARM PRODUCTS (A subcategory of <u>goods</u>, and is crops grown, growing, or to be grown, aquatic goods produced in aquacultural operations, livestock, supplies used or produced in a farming operation, or products of crops or livestock in their unmanufactured states.) ("... all farm products, including but not limited to ...")</p>	<p>By filing a financing statement. N.D.Cent.Code § 41-09-30(1).</p> <p>Recall that a CNS filing requires the signature of both the debtor and secured party.</p>
<p>FIXTURES (Defined as <u>goods</u> that have become so related to particular real property that an interest in them arises under real property law.)</p>	<p>By filing in the office in which one records a mortgage on the related real property, if: (1) The collateral is as-extracted collateral or timber to be cut; or (2) The financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or</p> <p>By filing in the office of the recorder in any county in this state or in the office of the secretary of state, in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing. N.D. Cent. Code § 41-09-72. See also N.D. Cent. Code § 41-09-73</p>
<p>GENERAL INTANGIBLES (Defined as personal property, including things in action, other than accounts, certificates of deposit, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.)</p>	<p>By filing a financing statement. N.D. Cent. Code § 41-09-30.</p> <p>A sale of a payment intangible is perfected upon attachment. N.D. Cent. Code, § 41-09-29(3).</p>
<p>GOODS COVERED BY A STATUTE OR TREATY (This includes cars and aircraft.)</p> <p>"GOODS" means all things that are movable when a security interest attaches, and includes (a) Fixtures; (b) Standing timber that is to be cut; (c) The unborn young of animals; (d) Crops grown, growing, or to be grown; (e) Manufactured homes. It also includes certain computer programs defined in N.D.Cent.Code § 41-09-02(1)(tt).</p>	<p>Secured party must comply with the applicable statute or regulation. N.D.Cent.Code § 41-09-31.</p> <p>For aircraft, see the website of the Federal Aviation Administration, which has information and forms for filing a security interest in aircraft and certain aircraft parts: http://www.faa.gov/</p> <p>For motor vehicles not held as inventory, indicate the security interest upon the certificate of title to the vehicle or take possession of the certificate of title. N.D. Cent. Code § 35-01-05.1.</p>

<p>HEALTH CARE INSURANCE RECEIVABLES (This is a subcategory of the category “account”; note that federal law requires that government healthcare accounts, including Medicare and Medicaid, be treated differently from private healthcare insurance receivable accounts in certain ways. Secured lenders must take certain additional steps to protect their collateral <i>or</i> consider limiting the amount of government healthcare accounts that are used as collateral.)</p>	<p>a. By filing a financing statement. N.D.Cent.Code § 41-09-30(1).</p> <p>b. By attachment. N.D. Cent. Code § 41-09-29(5). A security interest created by the <i>assignment</i> of a health care insurance receivable to the provider of the health care goods or services is perfected upon attachment. (Remember, “attachment is the moment when a security interest becomes enforceable against a debtor. For a security interest to attach, the following events must have occurred: i. value must have been given by the secured party; ii. the debtor must have rights in the collateral; and iii. the secured party must have been granted a security interest in the collateral.)</p>
<p>INSTRUMENTS (Means a negotiable instrument or any other writing that evidences a right to payment of money that can be transferred by negotiation (endorsement or assignment). It doesn’t include certificates of deposit, investment property, letters of credit, or writings that evidence a right to payment arising out of the use of a credit card.)</p>	<p>a. By filing a financing statement. N.D.Cent.Code § 41-09-32(1).</p> <p>b. By possession of the instrument(s). N.D.Cent.Code § 41-09-33(1).</p> <p>For collateral that may be perfected by filing a financing statement or control, perfection by control is preferred.</p>
<p>INVENTORY (<u>Goods</u> (but not farm products) held for sale, lease or licensing to the public or the borrower’s customers, including raw materials, and work in process which will become finished inventory or will be consumed in the borrower’s business.)</p>	<p>By filing a financing statement. N.D.Cent.Code § 41-09-30(1).</p>
<p>INVESTMENT PROPERTY (includes certificated securities (paper stock certificates representing the shares of the corporation), uncertificated securities (like the shares/stock of many cooperatives, securities accounts (a mutual fund maintained by a broker or investment service), and securities entitlements (the rights and property interests with respect to a financial asset.))</p>	<p>a. By filing a financing statement. N.D.Cent.Code § 41-09-32(1).</p> <p>b. By control. N.D.Cent.Code § 41-09-34(1) (e.g. if a cooperative doesn’t issue stock certificates, get a control agreement.)</p>
<p>LETTER OF CREDIT RIGHTS</p>	<p>a. By control. N.D.Cent.Code § 41-09-34(1).</p> <p>** Manner: N.D.Cent.Code § 41-09-07, Control of letter-of-credit right. (A secured party has control of a letter-of-credit right to the extent of any right to payment if the issuer has consented to an assignment of proceeds of the letter of credit under § 41-05-14(3) or other applicable law.)</p>
<p>MANUFACTURED HOMES, MOTOR VEHICLES, BOATS</p>	<p>a. By filing a financing statement if held as inventory. N.D.Cent.Code § 41-09-30(1).</p> <p>b. For motor vehicles not held as inventory, indicate the security interest upon the certificate of title to the vehicle or take possession of the certificate of title. N.D. Cent. Code § 35-01-05.1. See N.D.Cent.Code § 41-09-31(1)(b).</p>
<p>MEMBERSHIP INTEREST IN AN LLC OR PARTNERSHIP (This is generally a subcategory of <u>general intangibles</u>; however, the creator of an LLC or partnership interest can cite Article 8 to change these interests into "securities" for purposes of Article 9.)</p>	<p>a. As a general intangible, by filing a financing statement if held as inventory. N.D.Cent.Code § 41-09-30(1).</p> <p>b. If the interest is treated as a security, by i. by filing a financing statement. N.D.Cent.Code § 41-09-30(1); ii. by taking possession of a certificated security. N.D.Cent.Code § 41-09-33(1); or iii. by control of the collateral. N.D.Cent. Code § 41-09-34. (A lender can obtain control of a security by taking possession of a certificated security with an effective indorsement, having the security registered in the lender's name, entering into a control agreement with the issuer of an uncertificated security or other methods set out in N.D.Cent. Code § 41-08-06.</p>

MONEY	Possession only. N.D.Cent.Code § 41-09-32(2)(c). A security interest in money or a certificated certificate of deposit may be perfected only by the secured party's taking possession under section 41-09-33.
NEGOTIABLE DOCUMENTS (This is a subcategory of <u>Instruments</u> .)	<p>a. By filing a financing statement. N.D.Cent.Code § 41-09-32(1).</p> <p>b. By possession. N.D.Cent.Code § 41-09-33(1).</p> <p>c. By control of electronic documents. N.D.Cent.Code § 41-09-34(1).</p>
PROCEEDS	By proper perfection in the original collateral, however that may be accomplished. N.D.Cent.Code § 41-09-34(1).
PROMISSORY NOTE (Sale of a promissory note) (A promissory note is a subcategory of <u>Instruments</u> .)	By attachment. N.D.Cent.Code § 41-09-29(4).
SECURITIES (This is a subcategory of <u>Investment Property</u> . See description above.)	<p>a. Attachment if created by a broker or intermediary. N.D.Cent.Code § 41-09-29(10).</p> <p>b. By filing a financing statement. N.D.Cent.Code § 41-09-32(1).</p> <p>c. By control of investment property. N.D.Cent.Code § 41-09-34(1).</p>
SOFTWARE (This is a subcategory of general intangibles.)	By filing a financing statement. N.D.Cent.Code § 41-09-30(1).

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