

SELLING GENERAL INTANGIBLES
AND
OTHER UNIQUE ASSETS

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I. INTRODUCTION

The adherence of state and federal commercial law to distinct notions of “tangible” and “intangible” property rights has proven problematic in an era where electronic assets are increasingly utilized as collateral in financial arrangements. The inability of creditors to reach intangible assets that are used as collateral in secured transactions is a growing concern. The revision of the Uniform Commercial Code (“UCC”) has attempted to eliminate this problem by expanding the definition of “collateral” to include, among other things, “general intangibles.” *See* U.C.C. § 9-102(3) (2000). This revision, however, only expands the scope of the default provisions of Article 9 to include intangible payment rights and monetary payment obligations. Article 9 still does not provide any foreclosure remedy for a creditor with respect to general intangibles that are not payment rights. *See* Juliet M. Moringiello, *False categories in Commercial Law: The (Ir)relevance of (In)tangibility*, 35 Fla. St. U.L. Rev. 119, 127 (2007). Therefore, if a creditor wishes to transfer a general intangible that is not a payment right, such as a valuable domain name, it will not be able to rely on the default provisions of Article 9 even if it has perfected its interest in the intangible by filing a financing statement. A secured party must then rely on the default provision found in § 9-601(a)(1) which provides, “A secured party... (1) may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by *any available judicial procedure*.” U.C.C. § 9-601(a)(1) (2000). This clause inevitably refers to state law remedies, such as replevin, garnishment or execution, which vary widely from jurisdiction to jurisdiction and often preclude the enforcement of “general intangible” security interests.

Therefore, as part of the foreclosure or other disposition by a secured party of real estate, a secured party with a security interest in personal property should first include a count for

replevin to recover tangible personal property. With respect to general intangibles that are not payment rights, otherwise known as “payment intangibles,” defined in § 9-102 as “a general intangible under which the account debtor’s principal obligation is a monetary obligation,” other avenues must be used to either transfer such property and/or obtain the benefit of a security interest in such property. U.C.C. § 9-102 (2000).

II. STATE LAW – REPLEVIN & UCC STATUTES

The following chart identifies (i) the relevant state replevin statutes; (ii) relevant state Article 9 statutes; (iii) the definition and statutory reference for relevant states of general intangibles; and (iv) the applicability of alternative state remedies in state jurisdictions for the transfer of general intangibles, where available.

State Laws Concerning General Intangibles & Article IX

	Ohio	Pennsylvania	New York
Replevin and Detinue Statute(s)	Ohio Rev. Code Ann. § 2737.01 et seq. (LexisNexis 2009)	Pa. R. C. P. No. 1071 et. seq. (2008)	N.Y. C.L.P.R. LAW § 7101 et. seq. (Consol. 2009)
Uniform Commercial Code Art. IX State Codifications	Ohio Rev. Code Ann. § 1309 et seq. (LexisNexis 2009)	13 Pa. Cons. Stat. § 1101 et. seq. (2008)	N.Y. U.C.C. LAW § 1-101 et. seq. (Consol. 2009)
Definition of “General Intangible”	<input type="checkbox"/> Ohio Rev. Code Ann. § 1309.102 (LexisNexis 2009) <input type="checkbox"/> "General intangible" means any personal property, including things in action, other than accounts, 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. "General intangible" includes payment intangibles and software.	<input type="checkbox"/> 13 Pa. Cons. Stat. § 9102 (2008) <input type="checkbox"/> “General intangible." Any personal property, including things in action, other than accounts, 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.	<input type="checkbox"/> N.Y. U.C.C. LAW § 9-10 (Consol. 2009) <input type="checkbox"/> "General intangible" means any personal property, including things in action, other than accounts, 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.
Applicability of Replevin Statute(s) & Other Judicial Remedies	<input type="checkbox"/> <i>Star Bank v. Matthews</i> , 144 Ohio App. 3d 246 (2d Dist. 2001) (In a replevin action, court granted permanent possession of “all inventory, accounts receivables, equipment, furniture and general intangibles” to a bank.)	<input type="checkbox"/> No use of replevin to recover possession of intangibles <input type="checkbox"/> Pa. R. Civ. P. § 3101 (allows a garnishment action against anyone who has “custody, - possession or control of the debtor’s property.”)	

	New Jersey	Rhode Island	Maine
Replevin and Detinue Statute(s)	N.J. Stat. Ann. § 2B:50-1 et. seq. (2009)	R.I. Gen. Laws § 34-21-1 et. seq. (2009)	Me. R. Civ. P. 64 (2009)
Uniform Commercial Code Art. IX State Codifications	N.J. Stat. Ann. § 12A:1-101 et. seq. (2009)	R.I. Gen. Laws § 6A-1-101 et. seq. (2009)	Me. Rev. Stat. Ann. tit. 12, § 1-101 et. seq. (2008)
Definition of “General Intangible”	<input type="checkbox"/> N.J. Stat. Ann. § 12A:9-102 (2009) <input type="checkbox"/> "General intangible" means any personal property, including things in action, other than accounts, 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.	<input type="checkbox"/> R.I. Gen. Laws § 6A-9-102 (2009) <input type="checkbox"/> "General intangible" means any personal property, including things in action, other than accounts, 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.	<input type="checkbox"/> Me. Rev. Stat. Ann. tit. 12, § 9-1102 (2008) <input type="checkbox"/> "General intangible" means any personal property, including things in action, other than accounts, 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. "General intangible" includes payment intangibles and software.
Applicability of Replevin Statute(s) & Other Judicial Remedies		<input type="checkbox"/> R.I. Gen. Laws § 9-28-1 (2009) (Turnover statute which authorizes a judgment creditor to reach "any equitable estate, any equitable assets, or any choses in action of a debtor.")	

	Virginia	Delaware
Replevin and Detinue Statutes	Va. Code Ann. § 8.01-114 et. seq. (2009)	Del. Code Ann. tit. 10, § 9631 et. seq. (2009)
Uniform Commercial Code Art. IX State Codifications	Va. Code Ann. § 8.1A-101 et. seq. (2009)	Del. Code Ann. tit. 6, § 1-101 et. seq. (2009)
Definition of “General Intangibles”	<p><input type="checkbox"/> Va. Code Ann. § 8.9A-102</p> <p><input type="checkbox"/> "General intangible" means any personal property, including things in action, other than accounts, 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><input type="checkbox"/> Del. Code Ann. tit. 6, § 9-102</p> <p><input type="checkbox"/> "General intangible" means any personal property, including things in action, other than accounts, 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>
Applicability of Replevin Statute(s) & Other Judicial Remedies		<p><input type="checkbox"/> <i>Mai Basic Four, Inc. v. Generic Bus. Solutions, Inc.</i>, No. 9908, 1990 Del. Ch. LEXIS at *4 (Del. Ch. Jan. 16, 1990) (“The law of replevin has long held that only tangible and corporeal objects may be replevied... shares in a corporation, because they are understood to be intangible rights, cannot be the subjects of a replevin action”).</p>

III. ARTICLE 9 AND THE TRANSFER OF INTANGIBLES

The process of repossession of tangible property and intangible payment rights after a debtor's default in order to satisfy the debt owed is fairly straightforward and provided for in §§ 9-609 and 9-607 of the U.C.C.. Pursuant to § 9-609, after default, a secured party may proceed to "take possession of the collateral" either "pursuant to judicial process" or "without judicial process, if it proceeds without breach of the peace." U.C.C. § 9-609(a)-(b). It should be noted, however, that the U.C.C. does not define "possession" nor does any provision limit repossession to tangible assets. Moringiello, *supra* at 126. Commentors and leading authorities in the field generally see this provision as applying only to tangible property. *Id.* However, there are instances in which the court has transferred intangible property rights that are not payment rights as defined by § 9-601(a)(1). For instance, in *Rice v. Miller* the Supreme Court of New York granted a motion for an order of defendant borrower to deliver two patents to the plaintiff creditor pursuant to a general security agreement that included "general intangibles" as collateral. 864 21 Misc. 3d 573 (N.Y. Sup. Ct. 2008). The court held that the agreement reasonably identified the patents as collateral by including the term "general intangibles" and transferred possession of the patents to the plaintiff creditor despite its designation as intangible property. *Id.* at 577.

Alternatively, a creditor may proceed under § 9-607 to recover intangible payment rights by "notify[ing] an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party." U.C.C. § 9-607(a)(1) (2000). Thus, creditors have a straightforward foreclosure remedy to enforce payment rights by forcing 3rd party debtors to reallocate their payments to the creditor. This provision, however, is not broad enough to incorporate all general intangibles that are not payment rights.

IV. INAPPLICABILITY OF REPLEVIN TO ACQUIRE GENERAL INTANGIBLES

By and large, the ability of creditors to gain control of general intangibles through the respective replevin statutes in state jurisdictions has been unsuccessful. The courts have shown extreme reluctance in extending the use of replevin, a common law remedy that allows a creditor to obtain possession of *tangible* property rights, to “general intangibles.” *See Walther v. Central Trust Co*, 70 Ohio App. 3d 26 (2d Dist. 1990) (affirming dismissal of replevin claim on the basis that a depositor’s interest in a bank account does not constitute specific personal property pursuant to O.R.C. 2737.03); *see also Mai Basic Four, Inc. v. Generic Bus. Solutions, Inc.*, No. 9908, 1990 Del. Ch. LEXIS at *4 (Del. Ch. Jan. 16, 1990) (“The law of replevin has long held that only tangible and corporeal objects may be replevied... shares in a corporation, because they are understood to be intangible rights, cannot be the subjects of a replevin action”). However, there are examples where “general intangibles,” when grouped with tangible property rights for collateral on a secured debt, have been successfully incorporated into an action for replevin. *See Star Bank v. Matthews*, 144 Ohio App. 3d 246 (2d Dist. 2001) (In a replevin action, court ordered the bank be granted permanent possession of “all inventory, accounts receivables, equipment, furniture and general intangibles”). Hence, while virtually all jurisdictions prevent the use of replevin to transfer general intangibles alone, some jurisdictions have allowed a creditor to seize general intangibles through replevin when they are incorporated into a broader security agreement that contains tangible property.

V. ALTERNATIVE REMEDIES: “ANY AVAILABLE JUDICIAL PROCEDURE”

In the case that a creditor is unable to use the foreclosure remedy under Article 9, it may still enforce its interest by “any available judicial procedure.” U.C.C. § 9-601(a)(1). Article 9

allows secured creditors to use judicial remedies such as execution and garnishment, however, these remedies may not allow a creditor to acquire general intangibles that are not payment rights. For example, garnishment statutes vary widely in scope, with some allowing a creditor to reach intangibles, such as in Pennsylvania, and others tailoring the statute to tangible property only, such as Virginia. *See, e.g.* Pa. R. Civ. P. § 3101 (2008) (allowing a garnishment action, including intangibles, against anyone who has “possession or control of the debtor’s property”); *but see* Va. Code. Ann. § 8.01-511 (2009) (allowing only a “liability to be garnished” hence excluding general intangibles that are not payment rights); *see also* Moringiello, *supra* at 129.

Recent developments in state law have led to the creation of “turnover statutes” to fill the gap between Article 9 and state law remedies. For example, in Rhode Island a turnover statute allows a creditor to reach “any equitable estate, any equitable assets, or any choses in action of a debtor” in order to satisfy a judgment. R.I. Gen. Laws § 9-28-1 (2009). The 1st Circuit has interpreted this statute as allowing the seizure of general intangibles. *See Howe v. Richardson*, 193 F.3d 60, 62 (1st Cir. 2000) (“there is no general statutory bar to seizure of intangibles. Indeed, as we shall see, Rhode Island law facilitates such seizures”). These “filler” statutes however, have not been widely adopted in other jurisdictions.

VI. VALUATION OF GENERAL INTANGIBLES

Another factor that potentially could complicate collection from general intangibles is the difficulty in being able to assign a monetary value to intangible assets. This issue is likely to arise in the context of establishing a deficiency judgment or establishing such collateral value that does not exceed the amount of a particular judgment. For example, while the value of an intangible payment right would be defined by the cumulative payments left to be made toward a

creditor, a general intangible property right, such as the use of a domain name, is more ambiguous and can require complicated valuation techniques to establish value.