Repossession and Foreclosure of Aircraft from the Perspective of the Federal Aviation Act and the Uniform Commercial Code

John I. Karesh
REPOSSESSION AND FORECLOSURE OF AIRCRAFT FROM THE PERSPECTIVE OF THE FEDERAL AVIATION ACT AND THE UNIFORM COMMERCIAL CODE

John I. Karesh*

I. INTRODUCTION

This article will discuss the repossession and foreclosure of an aircraft by a secured party in the context of Article 9 of the Uniform Commercial Code ("UCC"), and the applicable provisions of the Federal Aviation Act¹ (the "Transportation Code"). This article will also analyze the standard Certificate of Repossession form adopted and formerly approved for use by the Federal Aviation Administration ("FAA"),² and the latest revision of that form,³ and some procedures commonly followed by creditors who repossess in the context of Article 9 of the UCC.

II. THE TRANSPORTATION CODE AND FEDERAL PRE-EMPTION

Section 44103(a)(1) of the Transportation Code specifically provides that the FAA shall register aircraft and issue a certificate of registration to its owner.⁴ Section 44107(a) of the Transportation Code generally provides that the FAA shall establish a system for recording conveyances that affect the following: (1) interests in civil aircraft registered in the United States; (2) leases and instruments executed for security purposes, including

---


2 See Form 8050-4 (6-99) [hereinafter Former AC Form 8050-4].
3 See Form 3050-4 (2-00) [hereinafter Revised AC Form 3050-4]; see also Aircraft Registration (visited Aug. 11, 2000) <http://registry.faa.gov/aircraft.htm> (providing a copy of Revised FAA Form 8050-4: Certificate of Repossession of Encumbered Aircraft)
conditional sale contracts, assignments, and amendments; and (3) interests in aircraft engines having 750 or more rated takeoff horsepower or its equivalent, propellers capable of absorbing at least 750 rated takeoff shaft horsepower, and spare parts maintained by or for an air carrier holding an operator's certificate issued under section 44705 of the Transportation Code.\(^5\)

It is generally acknowledged that the Federal Aviation Act\(^6\) is preemptive with regard to matters for which the Transportation Code contains express provisions, including recordation of conveyances under section 44103(a)(1) and leases and security instruments under section 44107(a).\(^7\) However, in \textit{Philko Aviation, Inc. v. Shacket},\(^8\) the United States Supreme Court recognized that although perfection of title to aircraft as well as interests in aircraft and engines is governed and preempted by the Transportation Code, priority among conflicting interests is governed by reference to state law.\(^9\)

The Transportation Code contains no provision relating to the procedures that a secured creditor must follow when enforcing its remedies against collateral consisting of aircraft, engines, or appliances. Such issues are left to state law. However, enforcement of a secured creditor's remedies under state law relates directly to the state of ownership at the FAA concerning encumbrances affecting aircraft and related equipment, and vice versa. Accordingly, it is necessary to be mindful of the practices and requirements under both statutes in connection with repossession and disposition of aviation collateral.

\section{III. \textsc{Uniform Commercial Code}}

Section 9-503 of the UCC provides, \textit{inter alia}, that: "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral . . . ."\(^{10}\)

\begin{itemize}
\item \textit{Id.} § 44107(a).
\item \textit{Id.} §§ 40101-49105.
\item 462 U.S. 406, 103 S. Ct. 2476, 76 L. Ed. 2d 678 (1983).
\item \textit{Id.} at 412-13; see also \textit{Gary Aircraft Corp. v. Gen. Dynamics Corp.}, 681 F.2d 365 (5th Cir. 1982), \textit{cert. denied}, 462 U.S. 1131 (1983); \textit{Aircraft Trading & Servs. v. Braniff, Inc.}, 819 F.2d 1227 (2d Cir. 1987) (holding that validity of any instrument recorded at the FAA is governed by applicable state law), \textit{cert. denied}, 484 U.S. 856 (1987).
\item U.C.C. § 9-503 (1999).
\end{itemize}
Section 9-504(4) of the UCC provides, *inter alia*, that: “[w]hen collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor’s rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto.”

Section 9-505(2) of the UCC provides, *inter alia*, that after default, the secured creditor may propose to retain the collateral in satisfaction of the secured obligation. The secured creditor must provide written notification of such a proposal unless the debtor has signed a statement after default renouncing or modifying its rights under this section.

When the debtor defaults and the lender elects to enforce its remedies as a secured party, unless otherwise agreed, the lender may repossess the aircraft from the debtor under section 9-503 of the UCC and elect either to retain the aircraft in full satisfaction of the debt pursuant to section 9-505(2) of the UCC (the so-called “strict foreclosure”) or to dispose of the aircraft in accordance with section 9-504 of the UCC.

The UCC sets forth two separate processes in the enforcement of the lender’s rights: (1) repossession of the aircraft from the debtor, and (2) either election of strict foreclosure or the disposition of the aircraft. Professor Roy Anderson notes “when the creditor repossesses the collateral, the creditor must either dispose of the collateral or retain it in full satisfaction of the debt.”

Repossession of the aircraft obviously deprives the debtor of possession. But it is the act of disposition of the collateral (whether by public sale, private sale, or otherwise) or the proper completion of the strict foreclosure process that forecloses or extinguishes the debtor’s right, title, and interest in the collateral.

The UCC contemplates that a period of time will elapse between when the lender physically repossesses the collateral and when the lender’s strict foreclosure becomes effective or the date on which the lender disposes of the collateral. Thus, in

---

11 *Id.* § 9-504(4).
12 *Id.* § 9-505(2).
15 It may not be necessary for the lender to obtain physical possession of the collateral first in order to sell it. *See*, e.g., Buran Equip. Co. v. H & C Inv. Co., 142
order to elect a strict foreclosure, the lender possessing the collateral must provide the debtor (and any other secured party from whom the lender has received written notice of a claim of interest in the collateral) notice of the lender’s proposal to retain the collateral in full satisfaction of the secured obligation. Alternatively, if the lender elects to dispose of the collateral, among other things, the lender must give the debtor reasonable notice of the time after which it will sell the collateral at public or private sale. Additionally, under section 9-506 of the UCC, a debtor retains its right to redeem the collateral at any time before the secured party has disposed of it, or entered into a contract for the disposition of it under section 9-504 of the UCC, or before the secured obligation has been discharged by strict foreclosure under section 9-505(2) of the UCC. It is generally acknowledged that a debtor’s rights of redemption and rights to receive notice of disposition cannot be waived prior to default.

IV. INCONSISTENCY BETWEEN UCC AND FORMER FAA PRACTICE

The former certificate of repossession form commonly filed with the FAA did not distinguish between repossession and divestiture of all of the debtor’s rights in the aircraft. It provided in substance that the secured creditor repossessed the aircraft on a given date and that:

[B]y virtue of such act of repossession [the secured party] divested the said debtor, and any and all persons claiming by, through or under [the debtor] of any and all claims they had or may have had, and now holds title to the aforesaid aircraft, free and clear of all rights and claims of any persons whatsoever, as fully as if [the secured party] had foreclosed in a court of law or equity.

Cal. App. 3d 388, 190 Cal. Rptr. 878 (1983). However, every aspect of the disposition of collateral—including the method, manner, time, place, and terms—must be commercially reasonable. See U.C.C. § 9-504(3) (1999). If the lender does not repossess the collateral, absent some cooperation from the debtor, it is unlikely that the lender will have the collateral available for inspection at the time and place of sale, which, in turn, could lead to an issue of whether the sale was commercially reasonable. See Gulf Homes, Inc. v. Goubeaux, 124 Ariz. 142, 602 P.2d 810 (Ariz. 1979).


See id. § 9-504(3).

See id. § 9-506.

Former AC Form 8050-4, supra note 2; see also Appendix A.
In the UCC context, however, it is incorrect to say that repossession divests the debtor of all of its rights to the aircraft, because under the UCC it is the disposition, not the repossession, of collateral that divests the debtor’s right, title, and interest, and a secured party will almost never repossess and simultaneously dispose of collateral. Secured creditors, however, are often of the view that they need to divest the debtor of title to the aircraft immediately upon repossession to facilitate the sale or leasing of the aircraft and ensure the debtor does not act inconsistently with the secured creditor’s rights, or to avoid problems if title remains in the name of the debtor should the debtor file for protection under the Bankruptcy Code of the United States. Such creditors recorded a certificate of repossession and a registration application with the FAA to vest title to the aircraft in the name of the secured creditor and often simultaneously filed a bill of sale from the secured creditor to a trustee or a special purpose entity as a means of “warehousing” title to the aircraft until it can be disposed of in a commercially reasonable manner or the secured creditor completes the strict foreclosure process. Assuming the lender elects to dispose of the aircraft by means of a sale, the lender would deliver, or cause its trustee or the special purpose entity to deliver, to the purchaser a bill of sale to transfer title to the purchaser or its designee.

V. PRACTICE UNDER REVISED AC FORM 8050-4

Clearly, it was premature under the UCC to file a certificate of repossession immediately upon repossession and prior to disposition. Recognizing this inconsistency between the UCC and the common practice under the Transportation Code, the AA has promulgated a revised form of certificate of repossession. The revised form contains a certification that the secured party has performed all obligations imposed on it by the security agreement and applicable local laws and that in accordance with the terms of said security agreement and pursuant to the pertinent laws of the relevant state, the holder of the security agreement and pursuant to the pertinent laws of the relevant state, the holder of the security agreement repossessed the aircraft and

---


21 Revised AC Form 8050-4, supra note 3; see also Appendix B.
foreclosed on it, and that pursuant to local law (not as a result of repossession as was provided in Former AC Form 8050-4), the secured party divested the debtor and any and all persons claiming by, through or under the debtor, of any and all title that the debtor had or may have had and that the secured party now owns the aircraft or the aircraft has been sold.

Revised AC Form 8050-4 contemplates that the certificate of repossession will be filed later in the process of enforcement of secured party remedies. Thus, the later filing contemplated by, and the new language contained in, the revised form will solve the inconsistency between practice under the UCC and the Transportation code that is discussed in this section IV, and will eliminate some other issues as well. These issues are discussed below.

VI. ISSUES ARISING OUT OF THE RELATION BETWEEN THE TRANSPORTATION CODE AND THE UCC

A. Perfection and Priority

Following the procedure outlined in section IV above created issues for the secured creditor under the UCC. Under the teachings of Philko,22 Gary Aircraft,23 and Braniff,24 the filing of the certificate of repossession will only pre-empt matters specifically covered by a provision in the Transportation Code. Perfection, and presumably loss of perfection, of a security interest are examples of such matters.25 Common wisdom is that the recordation of the certificate of repossession effects a cancellation of the mortgage under which the aircraft was repossessed, and vests title to the aircraft in the name of the repossessing creditor. Therefore, special FAA counsel advise that they could, if requested, issue a “clean” opinion that states title to the aircraft is vested in the name of the foreclosing creditor, as far as the FAA’s records are concerned, and the mortgage is not an encumbrance on the aircraft subsequent to the recordation of the certificate of repossession.

If the filing of the certificate of repossession causes a loss of perfection, the priority of the foreclosing creditor’s security interest (which is governed by state law) can be jeopardized. As

23 681 F.2d 365 (5th Cir. 1987).
24 819 F.2d 1227 (2d Cir. 1987).
between the debtor and creditor, an unperfected security interest remains valid and enforceable.\textsuperscript{26} As a general rule, however, section 9-301 of the UCC provides that an unperfected security interest is subordinate to the rights of the holder of a perfected security interest in the same collateral and may also be subject to rights of lien creditors and a trustee in bankruptcy.\textsuperscript{27}

If the lender has only obtained physical repossession of the aircraft, but had not disposed of the aircraft or successfully completed strict foreclosure, it might be premature to record a certificate of repossession, because this will have the effect of canceling the mortgage on the FAA's records. For example, the lender may require the continued perfection of its security interest until it finally disposes of the aircraft so the security interest's lien will retain its relative priority under applicable state law and "capture," on a first priority basis, additional charges which are likely to accrue and become secured by the mortgage instrument's lien, such as the lender's legal fees and costs of removal, repair, storage, insurance, and marketing of the aircraft.

B. Title

If the result of filing a certificate of repossession is that the lender's lien becomes unperfected and title becomes vested in the lender's name, the lender's newly acquired title may be subject to existing liens. Therefore, before obtaining title to the aircraft by virtue of filing a certificate of repossession and registration application in the foreclosing lender's name, the lender may want to investigate what title it will obtain and be able to convey to a buyer at a foreclosure sale or subsequent disposition. The lender may need to perform a search with the FAA to ensure no other lien or interest is recorded against the aircraft or related equipment, and search the relevant UCC and other records at the state level to see if there are any liens recorded or otherwise perfected under state law that could raise a priority issue between an unperfected aircraft financier's lien and perfected or other liens that arise under state law.\textsuperscript{28} This practice should still be followed.

The question arose under former practice whether the filing of a certificate of repossession absent compliance with sections 9-504(4) or 9-505(2) of the UCC really divests the debtor of all

\textsuperscript{26}See id. at 1233; see also U.C.C. § 9-301(1) (1999).

\textsuperscript{27}U.C.C. § 9-301(1)(b); see also U.C.C. § 9-301(3).

\textsuperscript{28}See U.C.C. § 9-312(5) (1999).
right, title, and interest in the aircraft if that is not the result that would occur under applicable state law. The FAA's records regarding title, while pre-emptive, create only a presumption of title—they do not conclusively establish title. The FAA's records regarding title and security interests do not pre-empt governing state law concerning validity of the FAA recorded instrument, or the priority that such federally recorded interests enjoy. Since registering the aircraft in the lender's name after recording a certificate of repossession and registration application only creates a presumption of ownership under the pre-emptive Transportation Code, this presumption might be overcome by showing the creditor failed to comply with all state laws or all contractual requirements necessary to terminate the debtor's title, notwithstanding language in the usual form of certificate of repossession to the effect that all such requirements have been complied with. If the presumption can thus be overcome, the lender's title might be vulnerable to attack. Fil ing later, at the time of disposition, should eliminate this time.

C. DEBTOR PROTECTION

If the recordation of the certificate of repossession evidences a divestiture of the debtor's title and all of its interest in the aircraft, issues could arise under former practice concerning whether the lender had improperly curtailed the debtor's rights of redemption or to notice of disposition of collateral and if so, whether the lender could thereby be liable to the debtor for damages. In Haraway v. Burnett, which did not involve aircraft or other titled assets, the court held that transferring title to pledged stock into the name of the foreclosing creditor violated the debtor's rights of redemption and to notice of disposition. In the case, Haraway purchased stock in a corporation from Burnett. Haraway then granted Burnett a security interest.

30 See Aircraft, 819 F.2d at 1231.
31 See Philko, 462 U.S. at 412; Gary, 681 F.2d at 369.
32 If the presumption can be overcome by a showing, contrary to the statements contained in the certificate of repossession, that the act of repossession has not divested the debtor of all rights, title, and interest in an aircraft, then one might argue that filing a certificate of repossession under such circumstances might constitute the making of a materially false statement or representation to the FAA. See generally 18 U.S.C. § 1001 (2000); 49 U.S.C. § 46306 (2000) (applying only to aircraft not used to provide air transportation).
in the stock to secure payment of the purchase price and delivered an irrevocable stock power to Burnett to facilitate the exercise of Burnett's foreclosure rights. When Haraway defaulted, Burnett exercised its rights under the stock power thereby becoming the "owner" of the stock. As owner of the stock, Burnett seized the corporation's assets. Haraway sued, among other things, to enforce his right of redemption. Burnett defended in part upon the argument that the collateral was transferred to him under the irrevocable stock power and he had disposed of the collateral before Haraway tendered his redemption money. The appellate court relied upon authorities that it said generally agree that transfer of title to collateral to the name of the secured creditor does not constitute a disposition of collateral within the meaning of section 9-504 of the UCC. Since there had been no disposition of the collateral, and Burnett had failed to elect strict foreclosure properly, Haraway's redemption rights remained viable.

If a debtor could argue that the effect of a lender's filing a certificate of repossession is to curtail the debtor's right of redemption or right to receive notice of the collateral's disposition, the debtor could contend, under section 9-507 of the UCC, that the lender has not complied with article 9's requirements and is thus liable for damages. A foreclosing secured creditor may try to avoid such a claim by acknowledging, in the certificate of repossession or in a separate notice, that the repossession of the aircraft and filing of the certificate of repossession is subject to the debtor's rights to notice and redeem. Such notice could inform the debtor that it will be notified before disposition of the aircraft and that it may redeem the collateral, any time before the collateral is disposed of or the creditor complies with the provisions of section 9-505(2) of the UCC. This, however, is notwithstanding the transfer of title to the lender and statements to the contrary in the certificate of repossession on record with the FAA on the theory that the rights of redemption and notice are matters of state law as to which the Transportation Code is silent and does not pre-empt. On the other hand, such reservation of rights would seem inconsistent with the unqualified language in the certificate of repossession regarding the complete divestiture of the debtor's title. Because the cer-

---

35 See id. at *7.
36 If the divestiture of title resulting from the filing of a certificate of repossession with the FAA causes any income tax consequences to the debtor that cannot be reversed or avoided by a reconveyance of title back to the debtor in connec-
Certificate of repossession is treated by the FAA as the document that evidences the divestiture from the debtor of all right, title, and interest in the aircraft, the FAA may not accept certificate of repossession that reserves to the debtor any rights not reflected on the FAA record, such as the debtor’s state law right of redemption and the right to receive notice of the aircraft’s disposition. Revised AC Form 8050-4 does not eliminate right of notice or redemption issues, but filing the certificate of repossession at the time of disposition rather than upon repossession should minimize the impact of such issues.

If the aircraft has not physically been repossessed, a certificate of repossession stating that the aircraft has been repossessed is not literally accurate. However, physical repossession may not be feasible because, for example, the aircraft may be in the lawful possession of a lessee. State law may not require physical repossession in order for the secured lender to enforce its rights against the debtor’s equity in the aircraft. There is nothing in the Transportation Code that requires the foreclosing lender to take any step beyond what is required by state law or the governing documents in order for the secured lender to foreclose on the debtor’s title to the aircraft. Revised AC Form 8050-4 still contains a certification that the secured party has repossessed the aircraft. However, the certification also contains language that divestiture of title has been accomplished pursuant to governing state law. If governing state law does not require repossession, presumably the portion of the secured party’s certification referring to repossession could be modified accordingly. If the lender has, indeed, complied with all requirements of the financing agreement and governing state law and, as a result, has divested the debtor of all right, title, and interest in the aircraft under state law, without the need for physical repossession, there should be no need to refer to the act of repossession in the certificate of repossession.

37 See supra note 14.
D. Third Party Protection

Both the revised and former forms of certificate of repossession state in part that all of the debtor's rights and those of all persons claiming through the debtor have been extinguished. However, it may not be desirable or lawful to extinguish all rights in an aircraft that are derivative through the debtor by the recordation of the certificate of repossession. Cases have arisen involving defaults by the debtor under loan documents in a leveraged lease financing transaction in which a default has also occurred under the lease but the lessor does not wish to terminate the lease at the moment of repossession of the aircraft to keep its options open concerning whether, when it sells the aircraft, it will do so subject to the lease, or whether it will terminate the lease and sell the aircraft free and clear of the lease. Alternately, the lessor-borrower may be in default under the loan documents (for example, by reason of the filing of a petition for relief under the Bankruptcy Code or due to some cross default provisions in the loan documents), but the lessee is not in default under the lease. In such a case, the lender may wish to enforce its rights against the borrower by foreclosing the equity, but the lender will not be able to repossess the aircraft and thus impair the lessee's right to quiet enjoyment of the aircraft so long as the lessee is not in default under the lease. Nevertheless, the lender should have the right to divest the debtor of its equity rights and sell the aircraft subject to the lease. When the time comes for the lender to sell or dispose of the aircraft's title subject to the lease, care will have to be taken to preserve the rights of the lessee if the lender files a certificate of repossession for recordation with the FAA.

The FAA has permitted the foreclosing secured creditor to indicate in the certificate of repossession that neither the act of repossession described in the certificate of repossession nor any transfer of title to the secured party pursuant thereto is intended to impair the rights of the lessee under the lease and that the certificate of repossession and title that will pass to the lender is subject to the lease.

Similarly, there could be junior liens encumbering the aircraft that the foreclosing senior lender does not wish to extinguish (or that the senior lender is obligated by an intercreditor agreement not to impair) before the date of disposition or strict

---

foreclosure. The senior lien holder’s filing of the certificate of repossession will not terminate such junior liens under state law, and the senior lender will need some way to remove the junior lien from the FAA’s record to obtain or convey “clean” title to the aircraft. Section 9-504(4) of the UCC provides that when the senior lender disposes of collateral after default, the disposition discharges the security interest under which the disposition is made as well as any security interest or lien that is subordinate thereto; therefore, the purchaser takes free of all such rights and interests. When the senior lender disposes of the collateral in accordance with governing state law, the discharge of the junior security interest that results from such disposition, while effective at the state level, may not be effective with the FAA. Although the junior lien is an interest claimed “by, through or under the debtor” within the meaning of the certificate of repossession and, therefore, should be divested according to the terms of the certificate of repossession, it is not clear that the recording of the certificate of repossession will effectuate the junior lien’s release because the financing documents creating the junior lien will remain in the FAA’s records. Those records are pre-emptive regarding the continued perfection of the junior lien. Therefore, the creditor foreclosing the senior lien should list all junior liens and interests created or claimed by, through, or under the debtor that are to be divested when it files the certificate of repossession. Moreover, recordation data relating to such junior liens and other interests should also be listed to reduce or eliminate any issue regarding continuing perfection of any junior lien or interest after the recordation of the certificate of repossession. This highlights why it is advisable for senior lenders to have an acceptable inter-creditor agreement that provides for a mechanism pursuant to which junior liens can be released or discharged with the FAA. Such issues remain under Revised AC Form 8050-4.


40 The writer is aware of a situation in which a secured creditor was the holder of both first and second priority security interests in an aircraft. The creditor foreclosed pursuant to its rights under the first priority security agreement, but wanted to preserve its second priority lien. The secured creditor expressly provided in the certificate of repossession that it was subject and subordinate to the second priority security holder’s interest. The FAA accepted a certificate of repossession containing such language. As with the certificate of repossession that is subject to the rights of the lessee, this “carve out” in the certificate of repossession is related to an interest recorded with the FAA.
VII. REVISED ARTICLE 9

The drafting committee, formed to recommend revisions to Article 9 of the UCC, has completed its work and its revisions were approved by the American Law Institute at its annual meeting in May 1998 and by the National Conference of Commissioners on Uniform State Laws at its annual meeting in July 1998. The revised article will be considered by several states and enactment is anticipated by most, if not all of them. The proposed effective date of revised Article 9 is July 1, 2001.41

Revised Article 9 contains a new section 9-619 that has no counterpart in existing Article 9. The new section 9-619(a) creates a new document known as a “Transfer Statement.” This new document is an authenticated record by a secured party that states:

(1) that the debtor has defaulted in connection with an obligation secured by specified collateral; (2) that the secured party has exercised its post-default remedies with respect to the collateral; (3) that, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and (4) the name and mailing address of the secured party, debtor, and transferee.42

Section 9-619(b) provides that “a Transfer Statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official . . . registration . . . .”43 This section also specifies that “[i]f a transfer statement is presented [to the registration official] with the applicable fee and request form to, the official shall: (1) accept the transfer statement; promptly amend its records to reflect the transfer; and, if applicable, issue a new appropriate certificate of title in the name of the transferee.”44 Subsection (c) provides that “[a] transfer of the record or legal title to collateral to a secured party under subsection (b) or otherwise is not, of itself a disposition of collateral under [Article 9] and does not . . . relieve the secured party of its duties under [Article 9].”45 Thus, there will be support in revised Article 9 in relation to non-aircraft collateral for the practice commonly followed by creditors

41 This provides ample opportunity for the FAA to consider the steps it might take to coordinate the form and effect of its certificate of repossession with the remedies now expressly made available to creditors under new section 9-619 of the UCC.
43 Id. § 9-619(b).
44 Id.
45 Id. § 9-619(c).
under the former form of certificate of repossession when foreclosing security interests in aircraft.

The official commentary to section 9-619 states that "[s]ubsection (b) contemplates a transfer of record or legal title to a third party, following a secured party's exercise of its disposition or acceptance remedies under [Article 9], as well as a transfer by a debtor to a secured party prior to the secured party's exercise of those remedies."46 Similarly, "[u]nder subsection (c), a transfer of record or legal title (under subsection (b) or under other law) to a secured party prior to the exercise of those remedies merely puts the secured party in a position to pass legal or record title to a transferee at foreclosure."47 However, the official commentary also points out that "use of this mechanism will not be effective to clear title to the extent that subsection (b) is preempted by federal law."48

Practice under UCC section 9-619 will be inconsistent with practice under the Transportation Code under both the former and revised versions of AC Form 8050-4 because one consequence of recording the forms is and should continue to be the clearing of title and the divestiture of the debtor's rights. Ironically, just as the FAA promulgated a revised form of certificate of repossession to make practice under the Transportation Code consistent with practice under the UCC, the drafters of revised article 9 to the UCC contemplate changing the UCC in a way that makes practice under section 9-619 consistent with former practice (although not necessarily the law) under the Transportation Code and Former AC Form 8050-4.

However, language in the customary form of certificate of repossession to the effect that as a result of the recordation of the certificate, the creditor holds title to the aircraft free and clear of all rights and claims of any persons whatsoever as fully as if the creditor had foreclosed in a court of equity, goes farther than what revised Article 9 provides. Moreover, as previously noted, a certificate of repossession has the effect of terminating the lien of the foreclosing creditor. Revised section 9-619(c) specifically provides that the secured party is not relieved of its duties, and since many of those duties are owed to the debtor, to that extent, the debtor's rights and claims are not extin-

46 Id. § 9-619 cmt.
47 Id. § 9-619(c).
48 U.C.C. § 9-619 cmt.
Section 9-619 provides in effect for the vesting of title in the name of the foreclosing creditor subject to whatever rights the debtor may retain. Under section 9-619, foreclosing creditors will know they retain the obligation to dispose of the collateral in a commercially reasonable manner. Likewise, the debtor retains, among other things, its rights to a commercially reasonable disposition, the right of redemption, and the right to reasonable notice of sale or other disposition of collateral, and that the registration of title as permitted by section 9-619 will not, of itself, constitute a violation of these rights or duties. It would be most helpful if the FAA were to promulgate regulations or implement a procedure analogous to that created under new section 9-619 regarding title issues affecting foreclosures on aircraft, that would eliminate many of the risks discussed earlier in this article that lenders frequently face when registering title to an aircraft in their name as part of the foreclosure process and still enable lenders to file a certificate of repossession earlier than upon disposition.

Nothing in section 9-619 or the official comments indicates that if title vests in the name of the creditor pursuant to section 9-619(b), the lien of the creditor’s security interest is terminated or the priority of that lien is somehow adversely affected. It would be useful if section 9-619 contained an express provision to this effect, thereby expressly eliminating any argument that could be made that a merger of the security and ownership interests occurs. But the policy behind section 9-619 is fairly clear and a forfeiture of perfection or priority under the circumstances contemplated by section 9-619 would appear highly inconsistent not only with the purposes that section 9-619 is intended to serve but also with the provisions of section 9-619(c), which clearly contemplate a disposition of the collateral at a later time—when the lien will be extinguished.

VIII. CONCLUSION

Secured creditors seeking to repossess and foreclose on interests in aircraft and related collateral need to be mindful of the Transportation Code and the UCC’s requirements to avoid is-

49 See id. § 9-619(c).
50 See id. § 9-619 cmt. 2 (“A secured party who has obtained record or legal title retains its duties with respect to the enforcement of its security interest, and the debtor retains its rights as well.”).
sues that could arise from the relation between the two statutes and their commonly followed procedures.

It is the writer’s view that revised Article 9 of the UCC should provide the impetus for the FAA to adopt regulations that parallel new section 9-619, or at least permit the inclusion in an FAA certificate of repossession of a statement by the foreclosing creditor to the effect that the certificate and title which vests in the creditor’s name pursuant thereto is subject to any of the debtor’s rights under applicable state law and that the creditor’s lien and its priority are preserved pending disposition or acceptance in strict foreclosure of the aircraft by the creditor.
APPENDIX A
AGENCY DISPLAY OF ESTIMATED BURDEN

The Federal Aviation Administration estimates that the average burden for this report is .5 hour per response. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to the Office of Management and Budget (OMB). You may also send comments to the Federal Aviation Administration, Civil Aviation Registry, P.O. Box 25504, Oklahoma City, OK 73125-0504.

U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION

Aircraft Registration Branch
PO Box 25504
Oklahoma City, Oklahoma 73125-0504

CERTIFICATE OF REPOSESSION OF ENCUMBERED AIRCRAFT

The undersigned hereby certifies that they are the true and lawful holder of a note or other evidence of indebtedness secured by a ___________________________ on the following described aircraft: ___________________________

(Type of Financing Agreement)

Aircraft Manufacturer and Model ___________________________

Aircraft serial number __________ FAA registration number __________

Said financing agreement on the above aircraft bears the date of __________ and was executed by ___________________________ to ___________________________

and assigned to ___________________________

and is in the principal amount of ___________________________. This financing agreement was recorded under Section 503 of the Federal Aviation Act of 1958, on the __________ day of __________, ____________, and was entered in the Agency record of conveyance as document no. ___________________________

On the __________ day of __________, ______ the aforesaid __________ breached the obligation and promises contained in the financing agreement and the promissory note secured thereby. The undersigned certifies that they have performed all obligations imposed upon them by the terms of the financing agreement and all local laws; that in accordance with the terms of said financing agreement, and pursuant to the pertinent laws of the State of ___________________________, the undersigned repossessed the aircraft described above on the __________ day of __________, ______ and that by virtue of such act of repossession they divested the said debtor, and any and all persons claiming by, through or under them, of any and all claims they had or may have had, and now hold title to the aforesaid aircraft, free and clear of all rights and claims of any persons whatsoever, as fully as if they had foreclosed in a court of law or equity.

NOTE: If the agreement involved was not recorded with the Aircraft Registration Branch, the original or certified true copy should accompany this certificate of repossession

NAME OF HOLDER OF ENCUMBRANCE

________________________________________

SIGNATURE (IN INK)

________________________________________

Title

ACKNOWLEDGMENT (Not required for purposes of FAA recording; however, may be required by local law for validity of the instrument.)

AC Form 8050-4 (6-99)
CERTIFICATE OF REPOSESSION INFORMATION

PRIVACY ACT OF 1974 (PL 93-579) requires that users of this form be informed of the authority which allows the solicitation of the information and whether disclosure of such information is mandatory or voluntary; the principal purpose of which the information is intended to be used; the routine uses which may be made of the information gathered; and the effects, if any, of not providing all or any part of the requested information.

Section 47.11 (b) of the Federal Aviation Regulations requires that the repossessor of an aircraft must submit a Certificate of Repossession or its equivalent, stating that the aircraft was repossessed or otherwise seized under the security agreement involved and applicable local law.

This form or its equivalent is to be completed by the holder of an encumbrance and submitted with an application for aircraft registration and required fee. This is a suggested form only, that meets the recording requirements of the Federal Aviation Act of 1958 and of the Federal Aviation Regulations. In addition to meeting these requirements, the form must meet local law. If it does meet local law, the aviation public may use it as it is; copies may be reproduced.

The following routine uses are made of the information gathered:

(1) To support investigative efforts investigation and law enforcement agencies of Federal, state, and foreign agreements.

(2) To serve as a repository of legal documents used by individuals and title search companies to determine the legal ownership of an aircraft.

(3) To provide aircraft owners and operators information about potential mechanical defects or unsafe conditions of their aircraft in the form of airworthiness directives.

(4) To provide supportive information in court cases concerning liability of individual in law suits.

(5) To serve as a data source for management information for production of summary descriptive statistics and analytical studies in support of agency functions for which the records are collected and maintained.

(6) To respond to general requests from the aviation community or the public for statistical information under the Freedom of Information Act or to locate specific individuals or specific aircraft for accident investigation, violation, or other safety related requirements.

(7) To provide data for the automated aircraft registration master file.

(8) To provide documents for microfiche backup record.

(9) To provide data for development of the aircraft registration statistical system

(10) To prepare an aircraft register in magnetic tape and publication form required by ICAO agreement containing information on aircraft owners by name, address, N-number, and type aircraft, used for internal FAA safety program purposes and also available to the public (individuals, aviation organizations, direct mail advertisers, state and local governments, etc.) upon payment of user charges reimbursing the Federal Government for its costs.

The aircraft records maintained by the Aircraft Registration Branch are public records and are open for inspection in room 122 of the Registry Building, Mike Monroney Aeronautical Center, 6425 S Denning, Oklahoma City, Oklahoma. Individuals interested in such information may make a personal search of the records or may avail themselves of the services of a company or an attorney.

The records are filed by aircraft N-number, but may and are quite frequently retrieved by name of the individual aircraft owners or operators.
PREPARATION: Except for signatures, all data should be typewritten or printed. Signatures must be in ink. If the agreement involved was not recorded with the Aircraft Registration Branch, the original or certified true copy should accompany this certificate of repossession.

This form is to be submitted with a completed AC Form 8050-1, Application for Aircraft Registration, in the name of the repossessor.

FEE: A $5 fee is required to issue a certificate of aircraft registration in the name of the repossessor.

If this form is used, please mail the original or copy which has been signed in ink to the Aircraft Registration Branch, PO Box 25504, Oklahoma City, OK 73125-0504.
APPENDIX B
AGENCY DISPLAY OF ESTIMATED BURDEN

The Federal Aviation Administration estimates that the average burden for this report is .5 hour per response. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to the Office of Management and Budget (OMB). You may also send comments to the Federal Aviation Administration, Civil Aviation Registry, P.O. Box 25504, Oklahoma City, OK 73125-0504, OMB number 2120-0042.

U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION

Aircraft Registration Branch
PO Box 25504
Oklahoma City, Oklahoma 73125-0504

CERTIFICATE OF REPOSESSSION OF ENCUMBERED AIRCRAFT

The undersigned hereby certifies that they are the true and lawful holder of a note or other evidence of indebtedness secured by a ___________________________ on the following described aircraft:

(Type of Financing Agreement)

Aircraft Manufacturer and Model ___________________________
Aircraft serial number ___________________________ FAA registration number ___________________________

Said financing agreement on the above aircraft bears the date of ___________________________ and was executed by ___________________________ to ___________________________ and assigned to ___________________________. This security financing agreement was recorded under Title 49, United States code, Section 44107, on the ___________________________ day of __________, ______, and was entered in the Civil Aviation Registry as document no. _______

On the __________ day of __________, ______ the aforesaid ___________________________ breached the obligation and promises contained in the security agreement and applicable laws; that in accordance with the terms of said security agreement, and pursuant to the pertinent laws of the state of ___________________________, the undersigned repossessed the aircraft described above and foreclosed on the __________ day of __________, ______, and that pursuant to local law, divested the said debtor, and any and all persons claiming by, through or under them, of any and all title they had or may have had, and the secured party now owns the aforesaid aircraft, or the aircraft has been sold.

NOTE: If the agreement involved was not recorded with the Aircraft Registration Branch, the original or certified true copy should accompany this certificate of repossession

__________________________________________
NAME OF HOLDER OF ENCUMBRANCE

__________________________________________
SIGNATURE (IN INK)

__________________________________________
Title

ACKNOWLEDGMENT (Not required for purposes of FAA recording; however, may be required by local law for validity of the instrument.)

AC Form 8050-4 (2-00) Supercedes previous editions
CERTIFICATE OF REPOSSESSION INFORMATION

PRIVACY ACT OF 1974 (PL 93-579) requires that users of this form be informed of the authority which allows the solicitation of the information and whether disclosure of such information is mandatory or voluntary; the principal purpose of which the information is intended to be used; the routine uses which may be made of the information gathered; and the effects, if any, of not providing all or any part of the requested information.

This form or its equivalent is to be completed by the holder of an encumbrance and submitted with an application for aircraft registration and required fee and/or a bill of sale as appropriate. This form meets the recording requirements of 49 USC Chap. 441 and the Federal Aviation Regulations. In addition to meeting these requirements, the form, the repossession and foreclosures must comply with local law. This form may be reproduced.

The following routine uses are made of the information gathered:

(1) To support investigative efforts investigation and law enforcement agencies of Federal, state, and foreign agreements.

(2) To serve as a repository of legal documents used by individuals and title search companies to determine the legal ownership of an aircraft.

(3) To provide aircraft owners and operators information about potential mechanical defects or unsafe conditions of their aircraft in the form of airworthiness directives.

(4) To provide supportive information in court cases concerning liability of individual in law suits.

(5) To serve as a data source for management information for production of summary descriptive statistics and analytical studies in support of agency functions for which the records are collected and maintained.

(6) To respond to general requests from the aviation community or the public for statistical information under the Freedom of Information Act or to locate specific individuals or specific aircraft for accident investigation, violation, or other safety related requirements.

(7) To provide data for the automated aircraft registration master file.

(8) To provide documents for microfiche backup record.

(9) To provide data for development of the aircraft registration statistical system

(10) To prepare an aircraft register in magnetic tape and publication form required by ICAO agreement containing information on aircraft owners by name, address, N-number, and type aircraft, used for internal FAA safety program purposes and also available to the public (individuals, aviation organizations, direct mail advertisers, state and local governments, etc.) upon payment of user charges reimbursing the Federal Government for its costs.

AVAILABILITY OF RECORDS

The aircraft records maintained by the Aircraft Registration Branch are public records and are open for inspection in room 122 of the Registry Building, Mike Monroney Aeronautical Center, 6425 S Denning, Oklahoma City, Oklahoma. Individuals interested in such information may make a personal search of the records or may avail themselves of the services of a company or an attorney.

The records are filed by aircraft N-number, but may and are quite frequently retrieved by name of the individual aircraft owners or operators.

PREPARATION
This is not a mandatory form. Therefore, an equivalent form meeting local law and the recording requirements of the Federal Aviation Regulations may be used. This form may be reproduced. See Section 47.11 of the Federal Aviation Regulations (14 CFR 47.00) for guidance.

Except for signatures, all data should be typewritten or printed. Signatures must be in ink. If the agreement involved was not recorded with the Civil Aviation Registry, the original or certified true copy should accompany this form.

When aircraft registration requirements are met by retention of the collateral by foreclosing party (sometimes referred to as strict foreclosure), and Application for Aircraft Registration (AC Form 8050-1) in the name of the foreclosing party should accompany this form.

When aircraft registration requirements are met by sale of the collateral (sometimes referred to as statutory foreclosure), a Bill of Sale and an Application For Aircraft Registration in the name of the buyer should accompany this form.

**FEE:** A $5 fee is required to issue a certificate of aircraft registration.