



THE ESSENTIAL GUIDE TO
“MEMO” TRANSACTIONS



CONTACTS

Jewelers Vigilance Committee
801 2nd Ave. Suite 303
New York, NY 10017
212-997-2002
www.jvclegal.org

The Jewelers Board of Trade
95 Jefferson Blvd.
Warwick, RI 02888
401-467-0055
www.jewelersboard.com

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Printed January 2009



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INTRODUCTION

In the jewelry industry, a “memo” transaction, also known as consignment, allows a party to hold a supplier’s product for a specified period of time while a buyer is sought. The holder of the product pays for it only if a sale is made; otherwise, at the end of the specified period, the product is returned to the supplier. This is a wide-spread practice in the industry used for generations.

Memo transactions can be very risky for a supplier, especially in an economic downturn. One reason: while the goods are held on memo, the law may give the holder the same rights and title to the goods as those of the supplier. This becomes important if the



holder fails to pay for the goods or enters bankruptcy proceedings while in possession of the goods. In that case, bankruptcy courts will ask whether the supplier properly perfected its consignment in the memo goods. If not, the goods – or any proceeds from the goods – may be used to satisfy the holder’s debts. Banks, and other secured creditors of the bankrupt holder, will be first in line to collect. The supplier will be at the back of the queue, standing at the same priority level as all general unsecured creditors.

It is vital to understand the risks associated with memo transactions, and to decide whether you need legal counsel, or the help of a UCC-filing service, to protect yourself against those risks. While you want your products to reach the marketplace, you definitely don’t want that to happen at a bankruptcy-fire sale, with the proceeds going to someone else.

What follows is a look at the relevant law, and some basic information on creating and filing the necessary documentation you need to help protect your goods traded using memo.

DISCLAIMER:

NO PART OF THE INFORMATION CONTAINED IN THIS PUBLICATION CONSTITUTES LEGAL ADVICE.

CONDUCTING BUSINESS ON MEMO: RISKS AND PRECAUTIONS

ACTING CAUTIOUSLY DECREASES THE POSSIBILITY THAT THE SUPPLIER
WILL EXTEND CREDIT TO A COMPANY THAT IS FINANCIALLY AT RISK.

To best understand the risks of memo transactions, think about consignment the way the law does – as a credit transaction – a loan. A supplier delivering goods to a holder on consignment is in effect lending the holder the agreed-upon cost of those goods. Like all credit transactions, the consignment must be documented correctly, as required by law, or it will be deemed to be unenforceable, that is, unsecured.

The supplier should thus exercise the same caution he would in any other instance that he was asked to make a loan. Before signing a consignment agreement, the supplier should assess the financial health of the customer by gauging profitability and cash flow – always good indications of fiscal well-being and the ability to re-pay the loan.

The best resource to make this assessment is The Jeweler's Board of Trade (JBT), the industry's dedicated credit and collections bureau. The JBT provides its members with much of the information needed to make independent credit judgments about potential customers. For public companies, filings that are required by the Security and Exchange Commission are

important to review on the appropriate web sites, or even on the company's own web site. Credit reports are also available from Dun & Bradstreet and elsewhere, but as these reports do not necessarily focus on the manner and timeliness of payments for jewelry they may be of limited use. Uniform Commercial Code (UCC) filings are another source of relevant information. These filings show whether, and what, assets of a company are collateral for any outstanding debts, and are discussed below.

After evaluating the credit risk, the supplier should determine how much money he can afford to lose. Every company has an individual financial profile and a different tolerance for risk. The supplier should evaluate this carefully before shipping any merchandise on consignment.

Acting cautiously decreases the possibility that the supplier will make a loan to a company that is financially at risk. But, since bankruptcy is always a possibility, there are other steps the supplier should take before delivering goods on consignment. These are discussed below.



CONSIGNMENT AND SECURED TRANSACTIONS

Let's say, hypothetically, that a supplier ships a parcel of diamonds to a merchant on memo. The supplier and the merchant likely believe that the supplier still "owns" the diamonds even though he has allowed the merchant to temporarily take custody. Thus, as between the supplier and the merchant both parties think they know what their rights are in the diamonds.

But what if a third party appears and claims rights to the property? This is exactly what can happen in the unfortunate event that the merchant becomes bankrupt. A bank may show up and assert that all the property in the merchant's possession, including the memo diamonds, is collateral for its secured loan. Or, an outside creditor with a lien on the merchant's inventory may assert that the diamonds are part of that inventory, and thus available to cover the lien.

IN A BANKRUPTCY, A BANK MAY SHOW UP AND ASSERT THAT ALL THE PROPERTY IN A MERCHANT'S POSSESSION, INCLUDING MEMO GOODS, IS COLLATERAL FOR THE BANK'S HIGHER-PRIORITY SECURED LOAN.

Should the merchant file for bankruptcy, our hypothetical could end one of two ways. In one scenario, the bankruptcy court decides that the merchant has title to the diamonds because the stones are in the merchant's possession on memo. The court then declares that the diamonds are part of the assets of the merchant, and thus part of the bankruptcy estate. The unsecured supplier watches in stunned disbelief

as the bankruptcy court sells the stones and the merchant's other creditors with perfected-security interests pocket the proceeds.

In another scenario, the supplier pulls out three documents, that were properly filed or delivered before a single diamond was shipped on memo: a consignment agreement signed by the merchant; a copy of a properly-filed UCC-1; and, a copy of the notice the supplier sent to the merchant's other creditors who hold perfected liens on inventory. Those documents, if drafted correctly, confirm the consignment relationship and create for the supplier an enforceable security interest in the diamonds that are still in the merchant's possession. The documents create the same enforceable security interest in the agreed cost of any diamonds that the merchant sold before the bankruptcy. The bankruptcy court reviews these documents, then instructs the bankrupt customer to return the diamonds – good news for the supplier!

CONSIGNMENT AND THE UNIFORM COMMERCIAL CODE

If a memo transaction meets all the criteria for a "consignment," as that term is defined in the Uniform Commercial Code, a security interest (property interest) in the goods is created. Specifically, the "consignor" — that would be the supplier in the above hypothetical — is granted a "purchase-money security interest" in the consigned goods — in our hypothetical that would be the parcel of diamonds. If this security interest is "perfected," then the consignor can enforce the security interest against other creditors.

That means that the debt owed to the supplier has higher priority for payment than other debts. A perfected security interest allows the supplier/consignor to take back the diamonds should the consignee — in our hypothetical that would be the merchant — declare bankruptcy.

Assume that in our hypothetical the diamonds were “consigned goods,” as defined by the UCC, at the time the merchant entered bankruptcy proceedings. The legal status of the diamonds, for the purpose of determining the rights of the merchant’s creditors, is governed by the UCC. The Code is clear: while the goods are in the possession of the merchant/con-

signee, the merchant/consignee is deemed to have the same rights and title to the goods, and right to transfer the goods, as the supplier/consignor. This is why the merchant has the authority to use the goods as collateral on a loan, for example, and why those goods can be “acquired” by a bank in the event the merchant goes belly-up.

A PERFECTED SECURITY INTEREST
ALLOWS A CONSIGNOR TO TAKE BACK
CONSIGNED GOODS SHOULD THE
CONSIGNEE DECLARE BANKRUPTCY.



FOR DETAILED DEFINITION OF TERMS,
SEE THE GLOSSARY ON PAGE 16.

CONSIGNMENT AND SECURED TRANSACTIONS, *continues*

THE RIGHTS OF THE CONSIGNOR

The UCC also addresses the rights of the supplier/consignor. As noted above, the supplier, as consignor, is deemed to have a “purchase-money security interest” in the consigned goods, the diamonds. This means that the diamonds themselves secure the merchant’s obligation to either pay for the stones or return them to the supplier.

The purchase-money security interest will put the supplier ahead of any other secured creditors in relation to the diamonds – IF the security interest has been “perfected.” Perfecting a security interest entails “putting the world on notice” of the security interest. This notice consists of both a UCC filing and a letter to existing lenders. As more particularly described below, the UCC filing informs prospective lenders, and the letter informs existing lenders, that the diamonds are collateral for the merchant’s debt to the supplier.



DELIVERY OF GOODS ON MEMO USING A CONSIGNMENT AGREEMENT IS THE EQUIVALENT OF THE SUPPLIER LOANING THE VALUE OF THE GOODS TO THE MERCHANT, WHO COULD POSSIBLY USE THE MEMO GOODS AS COLLATERAL FOR AN ADDITIONAL LOAN. FILING A UCC-1 (PERFECTING THE LOAN) CHANGES THIS EQUATION.

CREATING THE CONSIGNMENT AND PERFECTING THE SECURITY INTEREST

NOTICE TO PROSPECTIVE LENDERS IS ACCOMPLISHED BY FILING A FINANCING STATEMENT, KNOWN AS A UCC-1 BEFORE THE GOODS ARE DELIVERED.

Creating and perfecting a security interest in consigned goods requires knowledge of the law, good research skills, attention to detail and ongoing vigilance. For that reason you might want to consider consulting with an attorney, or using a UCC-filing service, before delivering goods on consignment. Here is a general description of how to create a consignment and perfect your interest in consigned goods:

CREATE THE CONSIGNMENT

Perhaps unknown to many jewelers, the traditional memo agreement, once it has been signed by the merchant, creates a consignment. Call it a memo agreement or a consignment agreement, it is the necessary first step to creating an enforceable security interest in the memo goods. For purposes of the UCC, the memo or consignment is the equivalent of a security agreement because it creates a loan. Specifically, the supplier/consignor has loaned the merchant/consignee the purchase price of any goods delivered to the merchant/consignee pursuant to the memo agreement.

The agreement can be drafted so that it covers not only the initial delivery of consigned goods, but subsequent deliveries as well. If the terms of the consignment are subsequently changed, depending on the changes and the parties' relationship, either a new or amended agreement will be required.

It is a good idea to include in the terms of the consignment a requirement that the consignee notify the consignor of any change of address, domicile or name. This will allow the consignor to correct the UCC filings, as appropriate. ALWAYS be sure to have the consignee sign the memo.

A COMPLETE PACKAGE TO
BEST PROTECT THE CONSIGNOR:
A SIGNED CONSIGNMENT AGREEMENT,
A FILED UCC-1 AND NOTIFICATION LETTERS
TO EARLIER LENDERS



CREATING THE CONSIGNMENT AND PERFECTING THE SECURITY INTEREST, *continues*

PERFECTING THE SECURITY AGREEMENT: UNDERSTANDING THE UCC-1

The function of perfection is to notify prospective lenders that someone already has a claim on some of the assets of the consignee as collateral for a loan. This protects the prospective lenders and prevents multiple claims to the same collateral. Perfection ensures that the consignor's security interest in the consigned goods will withstand attack if any other entity loans money to the merchant.

Notice to prospective lenders is accomplished by filing a financing statement, known as a UCC-1 before the goods are delivered. The UCC-1, filed in the state where the merchant/debtor is located, and usually with the Secretary of State of that state, is the document that puts the world on notice that the supplier's loan is secured by the memo goods. If the supplier properly filed a UCC-1, then prospective lenders that search the correct UCC-1 database will know that the diamonds are not the property of the merchant/consignee. They will also know that the diamonds are security for the supplier/consignor's loan to the consignee, and are not available as collateral for any

other loan. Thus, if the merchant becomes bankrupt, the supplier will be able to claim his diamonds without challenge from subsequent lenders. The subsequent lenders each had the opportunity to find out that the diamonds were collateral for the supplier's loan, so cannot cry "foul" when the supplier takes back his property.

The proper filing of a UCC-1 is discussed below.

NOTICE TO EARLIER CREDITORS

It is possible that an earlier lender may have already secured and perfected an interest in the merchant's inventory before the supplier came into the picture. It is the supplier's responsibility to find this out before delivering the diamonds, and to notify the existing lender(s) of his priority interest in the memo diamonds. This prevents future misunderstandings by informing the earlier lender that the supplier has a property interest in the identified-memo diamonds, and that those diamonds are not part of the merchant's inventory. The earlier lender now knows that the memo diamonds are not available to satisfy its loan.

A UCC-1 CAN BE DRAFTED TO COVER NOT ONLY THE INITIAL SHIPMENT OF MEMO GOODS TO THE CONSIGNEE, BUT ALSO SUBSEQUENT SHIPMENTS OF THE SAME CATEGORY OF GOODS.



ONCE A CONSIGNMENT AGREEMENT HAS BEEN CREATED AND SIGNED BY THE PARTIES, AND NOTICE GIVEN TO OTHER LENDERS, THE UCC-1 FORM SHOULD BE PROPERLY FILED.

Like every other aspect of perfecting a security interest, finding pre-existing secured parties, and giving proper notice, requires attention to specific requirements. Some of the tasks the supplier must perform include:

- ◆ Conducting a lien search using the merchant/consignee's full and correct legal name to find earlier-secured creditors;
- ◆ Conducting the search in the state of the merchant/consignee's incorporation or business registration. If the merchant is an individual, the search would be

done in state where the merchant resides. If it is an unregistered business entity, the place of business is determinative; and

- ◆ Giving notice to all secured parties, existing within five years before shipment of the consigned goods, that the supplier will be delivering consigned goods to the merchant.

IT IS THE SUPPLIER'S RESPONSIBILITY TO FIND OUT ABOUT EXISTING LENDERS AND NOTIFY THOSE LENDERS OF THE SUPPLIER'S PRIORITY INTEREST IN THE MEMO GOODS.



CREATING THE CONSIGNMENT AND PERFECTING THE SECURITY INTEREST, *continues*

FILING THE UCC-1 FINANCING STATEMENT TO PERFECT A SECURITY INTEREST

Once a consignment agreement has been executed, and notice given to other lenders, the UCC-1 form should be properly filed in the correct location. Only then should the supplier deliver memo goods to the merchant. A UCC-1 will cover the initial shipment of memo goods to the consignee. It will also cover subsequent shipments that are made under the consignment agreement while it is effective, as long as the category of goods described in the UCC filing does not change. Here are the steps to properly file a UCC-1 Financing Statement:

◆ Determine where to file the UCC-1:
The specific jurisdiction where you file the UCC-1 is important. Location is determined by the state of formation or incorporation of the entity that will possess the diamonds.

◆ Obtain, complete and file a UCC-1 Form:
Obtain a UCC-1 form from the state agency that handles UCC matters, generally the Secretary of State.

◆ Use the exact legal name of the debtor:
Enter the merchant's exact legal name, as it is known in the public record. If the name or location entered is not accurate the supplier's attempt at perfection will fail.

◆ Fill out the remainder of the UCC-1 form:
This includes the supplier/consignor's legal name, as the "secured party," and a specific description of the collateral. The description must reasonably identify the consigned goods.

◆ File the UCC-1 form, pay the fee and then deliver the consigned goods.

WHERE TO FILE UCC-1s	
CORP, LP, LLP	STATE OF ORGANIZATION
GENERAL PARTNERSHIP	LOCATION OF EXEC. OFFICE
INDIVIDUAL	STATE OF RESIDENCE



STAYING PROTECTED: REQUIRED FOLLOW-UP

Minimizing risk in the context of memo transactions is an ongoing job. Here are several tasks a consignor will need to perform after filing the UCC-1 and delivering the consigned goods.

- ◆ Conduct a search after submitting the UCC-1 to confirm that the form was actually filed and indexed.
- ◆ Institute quarterly monitoring to determine if the consignee has made changes to its principal place of business or legal structure, including a change in its name. If so, you must assume the UCC-1 originally filed against the consignee has been rendered ineffective and a new form, or an amendment to the original form, must be filed against the consignee. Once again, be careful to follow all the steps listed above, such as using the correct name of the consignee, filing in the correct location, and giving notice to existing lenders.
- ◆ The UCC-1 filing remains in effect for five years, and, if done correctly, should cover all goods delivered on consignment for that five-year period. A new UCC-1 filing must be made at the conclusion of the five-year period. Make sure you are aware of the expiration date of the UCC-1. In addition, a new notice to existing lenders must be made every five years, usually at same time that the UCC filing is renewed.
- ◆ Regularly check the credit-worthiness of the consignee. One way to anticipate problems is to monitor credit reports and SEC filings during the period of the consignment arrangement. The consignor should also be alert to the quality and timeliness of the consignee's reporting. Deterioration in that area could be a sign of financial instability.

THE UCC-1 FILING REMAINS IN EFFECT FOR FIVE YEARS, AND, IF DONE CORRECTLY, SHOULD COVER ALL GOODS DELIVERED ON CONSIGNMENT FOR THAT FIVE-YEAR PERIOD. BE SURE TO KNOW WHEN YOUR FILING EXPIRES!

- ◆ Join the JBT and place the consignee on its Credit-Watch list. If the consignee experiences a worsening of credit conditions, or a change of ownership or location, the member will be alerted. Further, keep an eye on the “Current Item of Interest” section of the JBT Weekly Alert, sent to its members, that lists entity identification changes to make sure that the filings are accurate regarding the name and location of the entity.
- ◆ Monitor the status of the consignee's other secured lenders, such as banks. If a bank has been acquired, or its loan to the consignee assigned elsewhere, this may have significance for the consignor.

RELEVANT JBT SERVICES

- CREDIT CHECKS
 - CREDIT WATCH LISTS
 - JBT WEEKLY ALERT:
“CURRENT ITEM OF INTEREST”
-

NOTE ABOUT BANKRUPTCY PROCEEDINGS — PREFERENTIAL TRANSFERS

One aspect of bankruptcy law should be well known – that is the 90 day preferential transfer rule. If you have been paid or goods have been transferred to you within 90 days of the date that the consignee/debtor declares bankruptcy, the transaction may be reversed by the bankruptcy court, and that asset claimed as part of the assets that can be claimed by the court. This is because the court will assume that all such transfers were made for the purpose of allowing a creditor to receive more than the allowable propor-

tionate share of the proceeds at a time that the debtor knew or should have known that a bankruptcy filing was planned. The burden is on the creditor (the recipient of the payment or return of the goods) to show that the transfer was not in contemplation of the bankruptcy of the debtor, often a very difficult thing to prove. If there are doubts about a customer's credit, be careful before you deposit a check or accept more goods.

ADDITIONAL SAFEGUARDS

Bankruptcy is not the only problem that can beset a memo transaction. The best practice is to anticipate these potential setbacks.

One area of concern is the possibility of loss, theft or damage while the goods are in the possession of the merchant/consignee. Before consigned goods are delivered, insurance should be in place, naming the supplier/consignor as the loss payee, to protect against these risks. If the price of precious metals and diamonds rises while the memo is outstanding, the risk of loss increases and so the level of insurance should increase as well.

A second concern involves the merchant's reporting and accounting methods. It is preferable that a consignment agreement obliges the merchant to pay the supplier within fifteen to thirty days of sale. Complying with this provision requires that the merchant

have adequate inventory and financial accounting, as well as sufficient controls, to ensure that appropriate payments to the supplier are triggered on a timely basis. One way to prevent problems is to arrange for monthly reconciliations.

A third concern involves payment terms. Given the risks and complexities of memo transactions, long payment terms should be avoided.

A fourth concern is whether the supplier will be able to identify his products once intermingled with other jewelry or precious stones in the merchant's possession. To prevent confusion, the products should be segregated and tagged so they are readily identifiable by anyone entering the merchant's premises. In addition, it can be helpful to trademark, and stamp goods with the trademark, to facilitate identification.

SUPPLIERS SHOULD JOIN THE JEWELERS BOARD OF TRADE AND PLACE CONSIGNEES ON THE JBT'S CUSTOMIZED CREDIT-WATCH LIST.

FREQUENTLY ASKED QUESTIONS

1. Does my customer, the merchant, have to sign the consignment agreement?

Yes.

2. Should I deliver the goods before I file the UCC-1?

While there are limited exceptions, the answer is no – do not deliver the goods until the filing of your secured interest (including a UCC-1) has been completed.

3. Does my customer, the merchant, have to sign the UCC-1 form?

No.

4. My customer is an entity with places of business all over the country. I deliver memo goods to several of those locations. Where do I file the UCC-1?

File the UCC-1 in the state of formation or incorporation of your customer. In most states the UCC-1 is filed with the Secretary of State. This is a welcome change in the law. Prior to 2001, UCC-1's were required in every county in which a customer maintained your consigned goods, an expensive proposition.

5. I'm frequently asked by regular customers to deliver diamonds on memo so the customers can show them to potential buyers. I know these customers and comply with the requests without creating any special paperwork. Are there any risks to doing business this way?

Yes, lots of risks. Before sending the diamonds you should evaluate the credit risk of your customers, have them sign a consignment agreement and perfect a security interest in the diamonds by filing a UCC-1 form.

6. I ship goods on consignment to one of my customers several times a year. Do I need to file a new UCC-1 before each shipment?

No. As long as you have a properly-drafted consignment agreement covering the category of goods that are shipped, and each shipment is covered by that agreement, you only need to have one UCC-1 on file. Of course, the description of collateral in that UCC-1 must cover whatever you ship pursuant to the consignment agreement.

7. Do I need to do anything after I file the UCC-1 to make sure it remains valid?

Yes. Institute quarterly checks to determine whether the merchant has made any material changes to its legal status, such as a name change. If so, you will need to file a new UCC-1 or an amendment to the original UCC-1. Consult with a lawyer to make sure that your new filing is adequate and correct under the circumstances. Also, monitor the credit worthiness of the merchant and be sure to know when your filing expires.

8. I'm filling out a UCC-1 form. What do I write in the section that asks for a description of collateral?

Describe the goods that you will be shipping on memo.

9. I'm confused. Where can I get help?

Attorneys who specialize in debtor rights are a good resource, and can provide counsel in this area. Additionally, there are companies that provide UCC-1 filing and monitoring services. Look for these services on line.



GLOSSARY

CONSIGNEE. The merchant to whom goods are delivered on consignment

CONSIGNOR. The supplier who delivers goods to a merchant in a consignment

CONSIGNMENT. A delivery of goods for sale by the merchant

CONSIGNMENT AGREEMENT. Traditionally known in the industry as a “memo” agreement. Sets forth payment and other terms of the memo/consignment. Must be signed by the consignee to be enforceable. For purposes of the UCC, this is a security agreement, but it is unsecured until a UCC-1 financing statement is filed.

CREDITOR. Lender

DEBTOR. Borrower

FINANCING STATEMENT — THE UCC-1. Describes the property agreed to as collateral by a lender (the consignor) and a borrower (the consignee). Once properly filed, establishes and confirms a security interest in the collateral, the consigned goods.

MEMO. A consignment agreement or transaction

PERFECTION. The steps required to ensure that a party’s interest in collateral will withstand attack by competing secured parties or lenders.

PURCHASE MONEY SECURITY INTEREST. A secured interest in the consigned goods, granted to the supplier/consignor

SECURITY AGREEMENT. The contract that governs the relationship between the lender and the borrower in a secured transaction. For purposes of the UCC, this includes a signed memo or consignment agreement.

SECURITY INTEREST. A property interest created by agreement or by operation of law covering assets used to secure the payment of a debt. The main purpose is to allow the holder to seize, and usually sell, the property to discharge the debt that the security interest secures.

UCC. The Uniform Commercial Code, adopted in some form in all fifty states.

UCC-1. The financing statement filed by the supplier/consignor to declare and confirm a security interest in the consigned goods. Filed with the Secretary of State or other designated state public official to secure the lender’s claim to the assigned collateral.

**THE JVC AND JBT THANK THE FOLLOWING
FOR THEIR EXPERT HELP IN THE PREPARATION
OF THIS PUBLICATION**

**JOSEPH VANN, ESQ.
COHEN TAUBER SPIEVACK & WAGNER, PC
420 LEXINGTON AVENUE- SUITE 2400
NEW YORK, NY 10170
(212) 586-5800
EMAIL: JVANN@CTSWLAW.COM**

**EDWIN E. SMITH, ESQ.
MORGAN LEWIS
ONE FEDERAL STREET
BOSTON, MA 02110
(617) 341-7700
EMAIL: EDWIN.SMITH@MORGANLEWIS.COM**



