PUBLICATION

Amendments to Article 9 of the Uniform Commercial Code

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Approximately ten years ago, all fifty states adopted a major revision to Article 9 of the Uniform Commercial Code ("Article 9") which was proposed by the Uniform Law Commission. Amendments have now been proposed, and adopted in several states, to that version of Article 9 in response to various issues that have arisen over the past decade. As was done with the last revisions to Article 9, the amendments proposed would have a uniform effective date of July 1, 2013, thereby allowing all states to simultaneously transition to the new rules.

Many of the proposed revisions are technical in nature and beyond the scope of this issue of Dispatches from the Trenches. However, the amendments described below should receive special attention.

Name of Registered Organization

Financing Statements are indexed under the name of the Debtor. As such, it is crucial that the name of the Debtor listed on the financing be accurate. A failure to provide the correct name of the Debtor is a "seriously misleading" error that can render the filing ineffective unless "a search of the filing office under the Debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails to sufficiently provide the Debtor's name." It is worth noting that "standard search logic" can vary widely amongst the different states and that simple mistakes can be fatal. For example, in Utah, forgetting periods after abbreviations was fatal where the filing listed "CW Mining Company" instead of "C.W. Mining Company".

Under the current version of Article 9, the name of a Debtor that is a registered organization is the name on the "public record" of the jurisdiction in which the Debtor is organized. There has been some debate over the last decade regarding what constitutes a "public record." To address this issue, the amendments to Article 9 recently promulgated will refer to a "public organic record." That term will mean: (i) a record that is available for public inspection, and consists of the record initially filed with or issued by a state to form or organize an organization; and (ii) subsequently filed records which amend or restate the initial record.

Under this approach, a certificate of good standing or a published index of domestic corporations would not be a "public organic record." The new official comments add some discussion on this point. Depending on deal size and other parameters, secured parties should consider policies requiring certified copies of Certificates of Incorporation or other formation documents from the applicable state department.

Name of Individual Debtors

If the Debtor is an individual, it is much more difficult to obtain an accurate name. Even driver's licenses or social security cards can contain outdated information due to a marriage or other name changes by an individual. So what document should a Secured Party use: driver's license, state-issued identification card, birth certificate, passport, social security card, military identification card?

This difficulty has resulted in a flurry of states passing or threatening to pass non-uniform "safe harbor" provisions specifying that certain sources of an individual's name will be accepted as providing the true name for UCC filing purposes. While this sounds like good news for filers, it can be bad news for searchers.

The proposed amendments therefore allow each state to choose between two alternatives, the "Only If" option and the "Safe Harbor" option.

The "Only if" option provides that if the Debtor is an individual to whom the state has issued a driver license (or other identification issued by the same agency) that has not expired, the financing statement sufficiently names the Debtor only if it contains the name indicated on the driver's license. If the Debtor does not have a driver's license, the financing statement may identify the Debtor by the individual name of the Debtor or the surname and first personal name of the Debtor.

The "Safe Harbor" option provides that if the Debtor is an individual, the financing statement sufficiently names the Debtor by providing: (i) the individual name of the Debtor, (ii) the surname and first personal name of the Debtor or (iii) the name provided on an unexpired driver license (or other identification issued by the same agency).

Under either alternative, a Secured Party will be able to rely upon the name indicated on an individual's driver license when filing a financing statement against the individual. However, it is important to note that the Safe Harbor option will not provide as much predictability to a party searching the UCC records due to the broader range of potential individual names.

Other Information on Financing Statements

Article 9, in an attempt to limit the headache of practitioners dealing with the "all-powerful filing office", tried to limit the circumstances under which a filing office could reject a financing statement. For example, if a financing statement fails to provide the name of the Debtor, mailing addresses for the Debtor or the Secured Party, the filing office may reject it.

The current version of Article 9 also allows the filing office to reject a financing statement if certain other information contained on the form UCC Financing is not completed. However, the amendments to Article 9 will remove the right of the filing office, as currently found in §9-516(b)(5)(C), to reject a financing statement which fails to provide (i) the type of organization of the Debtor; (ii) the jurisdiction of organization of the Debtor; and (iii) an organizational identification number for the Debtor or an indication that it has none. These fields will also be removed from the statutorily approved form of UCC Financing Statements.

Effect of a change of Debtor's Jurisdiction on After-Acquired Collateral

The Amendments also deal with perfection issues arising with respect to after-acquired property when the proper jurisdiction for a filing changes due to either the movement of a Debtor or a transfer of collateral from one Debtor into another.

The current version of Article 9 already addresses situations in which (1) the original Debtor changes its location from its original state (the "original state") to that of a different state (the "new state") or (2) the original Debtor transfers the collateral to a new Debtor that is now located in the new state in such a manner that the new Debtor is bound by the security agreement (consider, for example, a situation where an existing Debtor is an Alabama corporation and merges into a Delaware corporation, with the Delaware corporation being the survivor). In both cases, the original financing statement is filed in the original state but the Debtor becomes located in the new state. The law of the new state becomes the law that governs perfection and that law requires the financing statement to be filed with the Secretary of State in the new state.

The drafters of Article 9 had to balance two competing interests. On one hand is the interest of a subsequent Secured Party that is looking to obtain a security interest in the collateral. That Secured Party would search in

the new state as the "location of the Debtor" and therefore the proper place to file under Article 9. On the other hand is the interest of the original filer, who should not be burdened with the obligation of constantly monitoring the Debtor for a change of location.

The compromise, which is present in the current version of Article 9, is that unless the original filing has an earlier termination date, it remains perfected for (a) 4 months after the original Debtor moves to the new state, or (b) one year after the original Debtor transfers the collateral to the new Debtor who is located in the new state. If the Secured Party timely files a financing statement in the new state, its security interest in the collateral will be continuously perfected. If the Secured Party fails to file a financing statement in the new state within the appropriate time frame, the security interest then becomes unperfected with respect to other Secured Parties or purchasers of the collateral. However, the security interest remains perfected against donees or lien creditors and therefore would stand up against a trustee in bankruptcy. *See* §9-316. Proceeds of the original collateral (for example, insurance proceeds or accounts generated from the sale of inventory) are treated the same as the collateral itself. In other words, as long as the Secured Party is perfected with respect to the collateral, it is perfected with respect to identifiable proceeds. Note that a Secured Party's priority in proceeds depends upon the complex proceeds priority rules.

However, the current version of Article 9 provides no protection with respect to after-acquired property (other than proceeds) since current §9-316 only addresses whether a perfected security interest ***remains*** perfected. The amendments provide some protection with new subsections 9-316(h) and (i) by allowing for continued perfection in after-acquired collateral for four months. So long as the Secured Party files in the new jurisdiction within that four month period, it remains perfected. Note that the same fourth-month window applies to new Debtors as well as Debtors who have moved

Information Statements

Article 9 currently allows a Debtor to file a “correction statement” claiming that a filed financing statement was not authorized. *See* §9-518. While such a filing has no legal effect on the underlying claim, it allows the Debtor to reflect its concerns in the public record. The amendments change the term “correction statement” to “information statement” to further clarify its role.

In addition, the amendments authorize the Secured Party of Record to file an information statement if it believes that an amendment to its financing statement was not authorized. This change allows secured parties, for example, to identity in the public record: (a) a termination statement improperly filed by its Debtor or an assignor of a lease that is no longer the Secured Party of Record; or (b) an amendment to its financing statement inadvertently filed by another Secured Party due to an error in the filing number referenced in that amendment. The comments also make clear that the Secured Party has no duty to file an information statement, even if it knows of the unauthorized filing.