

## Changes in the Works for UCC Article 9

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A process is now underway that will likely result in the first changes to UCC Article 9 since the enactment of Revised Article 9 in 2001. Some of the issues that may be addressed through statutory amendments to Article 9 could have a significant impact on the UCC filing process. This article will identify the most significant filing issues and explain how proposed changes could affect best practices for filing and searching.

The UCC is a joint project of the National Conference of Commissioners on Uniform State Laws and the American Law Institute ("NCCUSL/ALI"). Ordinarily, these organizations prefer to wait about ten years after enactment of a uniform law before considering significant changes to the text or official comments. It often takes that much time to fully develop all the issues that must be addressed.

Revised Article 9 has been in effect in most states for just over seven years. While NCCUSL and ALI would prefer to follow the normal UCC revision timeline, they have been under pressure to accelerate the process with regard to Article 9. The primary impetus for NCCUSL and ALI action is the growing threat of nonuniform state legislation. Within the past eighteen months, Texas, Tennessee and Nebraska all enacted legislation with significant nonuniform amendments to the debtor name provisions of Article 9. A number of other states have either proposed or already enacted other nonuniform amendments that could further erode the level of uniformity under current Article 9.

To reduce the likelihood of further nonuniform legislation, the Permanent Editorial Board of the Uniform Commercial Code created the Article 9 Review Committee. The Review Committee's task was to identify those issues that may require changes to Article 9. The Review Committee completed its task and delivered its findings in a report dated June 24, 2008.

In response to the Review Committee report, NCCUSL and ALI proceeded to create the Article 9 Joint Review Committee ("JRC"). The JRC will recommend changes to the statute and Official Comments as necessary to resolve the issues identified in the June 24, 2008 report. It must be noted that the JRC is not a "drafting committee" and will not engage in a broad rewrite of Article 9. Instead, the JRC will focus only on those issues identified in the June 24, 2008 Review Committee report.

The JRC held its first meeting in Chicago from October 35, 2008. Much of its agenda dealt with filing issues, including debtor names, forms and transmitting utility filings. The issues that could have the greatest impact on are summarized below.

### Individual Debtor Names

One of the most pressing issues before the JRC concerns the sufficiency of individual debtor names. If the debtor is an individual, the financing statement must provide the individual name of the debtor. See Section 9503(a)(4)(A). However, Article 9 provides no standard that a secured party can use to establish the correct individual name. The secured party can do little more than exercise its best judgment and hope the courts will later agree. Many lenders found the utter lack of guidance unacceptable. It was the individual debtor

issue that led to the nonuniform legislation of greatest concern to NCCUSL and ALI.

The JRC explored several options for resolving the individual name issue. These included creating a safe harbor for the name shown on the individual's driver's license or stateissued identification card, creating a hierarchy of documentary name sources, using names provided on tax returns and a suggestion that the law return to a "reasonably diligent searcher" standard for individual names.

After extended discussion, most committee members appeared to support the concept of a simple safe harbor using the name on the driver's license or stateissued identification issued by the state of the debtor's principal residence. The JRC must still work out some related issues, such as whether the solution would require a transition period, but it intends to further pursue the safe harbor option. The issue was turned over to the Reporter to draft a safe harbor proposal for discussion at the next JRC meeting in early 2009.

### **Registered Organization Debtor Names**

The JRC agenda included an issue regarding the correct name of a registered organization. The name of a registered organization is sufficient under Section 9503(a)(1) only if the financing statement provides the name found on the "public record" that shows the debtor to have been organized. Yet, Article 9 does not define the term "public record."

The drafters of Revised Article 9 intended that the source of a registered organization name would be the articles of incorporation or equivalent formation documents. However, many UCC filers look to the state business entity index as the source of registered organization names. The index is arguably a public record, readily available online and usually available free of charge. However, these indexes were never intended to provide correct entity names. The states commonly modified entity names during data entry. The result is that the names in the business entity index may not match the name indicated in the formation documents.

The threshold issue facing the JRC was to determine which public record should provide the source of a registered organization name. The committee members generally agreed that it should be the articles of incorporation or equivalent formation documents. The registered organization name can be determined with certainty by examination of the articles. Any name changes would be clearly indicated in amendments to the articles. In contrast, the business entity index could be changed at any time without a record of who made the change and for what reason.

The JRC members agreed that a statutory clarification was in order and turned the registered organization name issue over to the Reporter. The Reporter will draft a recommended solution for discussion at the next meeting in 2009.

### **Safe Harbor Forms**

The Section 9521 form safe harbor was also on the JRC agenda. Filing offices cannot refuse to accept the forms embedded in Section 9521. However, those forms contain a clearlylabeled field for the debtor's Social Security Number. Filers often provide the debtor's SSN simply because the field is there.

When filers unnecessarily place SSNs in the UCC records it creates problems for filing offices. The filing offices are under tremendous political pressure to avoid public disclosure of SSNs. To minimize the risk of receiving SSNs, some states have eliminated the form safe harbor and delegated the approval of forms the filing office must accept to the filing office itself.

After some discussion the JRC decided that a statutory amendment may be necessary to prevent more states from eliminating the safe harbor. The best options are either to eliminate the SSN field from the current safe harbor forms or substitute new forms in Section 9-521. The Reporter is working on a draft solution for discussion at the next JRC meeting.

### **Transmitting Utilities**

The JRC addressed two transmitting utility issues. There first was a request from the International Association of Commercial Administrators ("IACA") to clarify how a UCC filer can indicate the debtor is a transmitting utility. Section 9515(f) provides that "If the debtor is a transmitting utility and a filed financing statement so indicates, the financing statement is effective until a termination statement is filed." The definition of "financing statement" in Section 9102(a)(39) includes records comprised of an initial financing statement and any filed record relating to the initial financing statement. Thus, the definition of "financing statement" includes amendments.

The problem for filing offices is that the only way for a filer to indicate the debtor is a transmitting utility is to check the box on an *initial* financing statement by attaching the addendum form. There is no way for the filer to make such an indication on an amendment form. The Amendment form has no indication check boxes and the filing officers do not read the contents. Even if the filing office noticed an indication, system limitations prevent some offices from resetting the lapse date.

IACA requested that Section 9515(f) be amended to clarify that the filer can only indicate the debtor is a transmitting utility on an initial financing statement. There was no objection to this approach from the JRC. The only issue raised by committee members was whether the necessary changes would require a transition period or could be effective just from the date of enactment. The Reporter will draft recommended language for discussion at the next JRC meeting.

The second transmitting utility issue addressed by the JRC was a clarification of the proper place to file a financing statement that covers the fixtures of a transmitting utility. Section 9501(b) designates the office with a state in which to file a financing statement to perfect a security interest in the collateral of a transmitting utility debtor, including fixtures. What is not entirely clear from the text is that the place to file on fixtures of a transmitting utility is the Section 9501(b) office in the state where the fixtures are located, not the state where the debtor is located under Section 9307.

The committee members generally agreed that the current text of Section 9501(b) sufficiently describes the law. However, there is room for a filer to misinterpret the filing location, so the JRC decided to clarify the issue through a change to the Official Comment. The Reporter will draft suggested language for review at the next JRC meeting.

### **Correction Statements**

Section 9518 permits a person to file a correction statement with respect to a record indexed under that person's name. Official Comment 2 indicates that the purpose of a correction statement is to afford a nonjudicial means for the debtor to correct a financing statement that was inaccurate or wrongfully filed.

There are two problems with this provision. The first is that a correction statement doesn't "correct" anything. Changes to the record require an amendment. The other is that there is just as much need for a secured party and others to put comments in the record when a termination or other action was wrongfully filed by an unauthorized party.

IACA originally proposed that the states amend Section 9518 to also make the correction statement available to secured parties. The JRC considered the IACA proposal, as well as the option to eliminate the section entirely. The committee members expressed concern that allowing other parties to file these records would "clutter" the filing system and perhaps cause confusion for searchers. However, various stakeholders made it clear that secured parties need such a tool. It was also pointed out that many states currently allow anyone to file correction statements and there is no evidence this has caused clutter or confusion. In the end, the JRC will consider the IACA recommendation at its next meeting.

## Recommendations and Conclusion

There are a couple actions that UCC filers can take now in anticipation of the proposed changes to Article 9. When filing a financing statement on an individual debtor, the secured party should continue to follow the current process for establishing the name required by Section 9503(a)(4)(A). However, the secured party should take the additional step of reviewing the debtor's driver's license or, if the debtor does not have one, the state-issued identification card. If the Section 9503(a)(4)(A) name differs from the driver's license name, the secured party should list both names as separate debtors on the financing statement. That should bring the financing statement within the safe harbor as currently under consideration by the JRC.

Secured parties should also be prepared for changes to Section 9503(a)(1) that clarify the sole source of a registered organization name is the entity's articles of incorporation or equivalent formation documents. If, as seems likely, the JRC does make such a clarification, there will be no question that the name in the business entity index will not be sufficient if it differs from the name on the articles.

The JRC is also addressing a number of other Article 9 issues that will have little or no impact on the search and filing process, but are nonetheless important for lenders and legal professionals. The Article 9 Review Committee report is available online at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=320>.

CSC will continue to monitor the Article 9 review process and provide periodic updates in CSCFlash.

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