
Keeping Your Priorities Straight: The New Amendments to Article 9

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This article provides an overview of the upcoming Article 9 amendments addressing creditor status and priority dates by highlighting the amendments' significance and implications in bankruptcy. As the amendments have been introduced in Florida, local practitioners should start educating themselves on the changes the amendments will bring about.¹

The Debtor's Name on the Financing Statement

In order for a financing statement to be sufficient, it must include three pieces of information: 1) the name of the debtor, 2) the name of the secured party, and 3) the collateral covered.² The name of the debtor is particularly important as the filing office indexes the financing statements by the name of the debtor, thereby making the debtor's name the avenue through which potential lenders inquire about secured status.³ In regards to individual debtors, the sufficiency of the debtor's name is where most of the issues arose, which was the primary focus of the legislature when drafting the new amendments.⁴ While Article 9 does include guidelines for the debtor's name, such as the minor error and standard search logic test, these provisions did not sufficiently address the problem.⁵ For example, if an individual's birth name is Pamela Smith, but all of her friends know her as Pam, and her married last name is Matthews— what name would she be filed under? She might be Pamela Smith, Pam Smith, Pam Matthews, Pam Smith-Matthews, Pam Smith Matthews—the list could go on.

The amendments to Article 9 address the confusion that can arise under a debtor's name by providing two

alternatives the states may adopt.⁶ Both alternatives focus on the driver's license.⁷ States that choose alternative A will be adopting a stricter rule, where a party looks first to a debtor's most recent unexpired driver's license,⁸ only if the debtor does not have a driver's license can the filer then look to "the individual name of the debtor or the surname and first personal name of the debtor."⁹

The appropriate driver's license is the one issued by the state where a debtor maintains her principal residence. If a debtor subsequently changes her principal residence, the law of the new state governs perfection. Currently, § 9-316 provides a four-month window for re-filing in the new state in order for the collateral to continue to be perfected and not lapse. For example, if Pamela Smith is a resident of Florida and later moves to Indiana, the collateral continues to be perfected for four months while the creditor files in Indiana. Under alternative A, the debtor's name on the new filing must match that of the driver's license issued in Indiana. If the creditor properly files in Indiana within the four-month period, the collateral remains perfected. But, if the four-month period lapses before the creditor files, the security interest becomes unperfected and the effect will be as if it had never been perfected.

On the other hand, states that choose alternative B will be adopting the "safe harbor" test. Under alternative B there are three ways in which a debtor's name can be sufficient on the financing statement: 1) the individual name of the debtor 2) the debtor's surname and first personal name, or 3) the name that appears on the debtor's unexpired driver's license issued by the state where the debtor has its principal residence. Alternative B still emphasizes the use of a driver's license, but it differs in that the driver's license becomes a safe harbor as opposed to a required starting point.

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1 H.B. 483, 2012, 114th Sess. (Fla. 2012).

2 11 U.S.C. § 9-502(a). In place of the name of the secured party, its representative is also appropriate. *Id.* Additionally, § 9-503 provides further guidance on the required name of the debtor. 11 U.S.C. § 9-503.

3 11 U.S.C. § 9-519.

4 ALI, *Uniform Commercial Code Proposed Amendments to: Article 9. Secured Transactions* xi (2010) [hereinafter Proposed Amendments] ("By far the largest amount of . . . time was spent on the question of the debtor's name on a financing statement: what happens when an individual uses multiple names (middle name, middle initial, birth name, name altered after divorce) in different transactions . . .").

5 11 U.S.C. § 9-506 (stating a financing statement is sufficient even if it includes minor errors unless the errors are extensive enough to make "the financing statement seriously misleading").

6 Proposed Amendments at 24-31 (changing the current § 9-503 to include the choice of two alternatives). It appears as if Florida has chosen alternative A through the addition of subsections (d) and (e) to section 679.5031 of the Florida Statutes. H.B. 483, 2012, 114th Sess. (Fla. 2012).

7 Proposed Amendments at 24-31.

8 Proposed Amendments at 30 (finding it is also suggested that in states where an individual can hold either a driver's license or non-driver identification card, but not hold both simultaneously, then it would be appropriate to include the phrase "driver's license or identification card").

9 Proposed Amendments at 26 (adding subsection (5) to existing § 9-503(a)). A reading of proposed alternative A appears to leave a large amount of ambiguity regarding where to look in circumstances where a debtor does not have an unexpired driver's license. *See id.*

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Perfection Issues on After-Acquired Property Following a Debtor's Relocation

Currently, if a debtor relocates to a different jurisdiction there is a four-month window where the collateral remains perfected, and it will remain continuously perfected if it is perfected in the new jurisdiction within the four-month window.¹⁰ But, if the collateral is not perfected within the four-month period the effect will be as if the collateral had never been perfected.¹¹ The problem arises in after-acquired property with the two most common examples being inventory and receivables. When the debtor changes jurisdiction, any inventory on hand before the change in jurisdiction remains perfected within the four-month window, but any inventory acquired after the change in jurisdiction is considered unperfected until the lender files in the new jurisdiction.¹² The day the lender files in the new jurisdiction becomes the lender's priority date for the after-acquired property.

Under the proposed amendments, the after-acquired collateral would also remain perfected after the change in location if a financing statement is filed in the new location during the four-month period.¹³ This would also mean that the after-acquired collateral would fall under the original perfection date and not take on the new filing date.¹⁴

Amendments Affecting a New Debtor

A similar amendment is proposed in regards to a change in debtor, such as a restructuring scenario where there is a successor by merger.¹⁵ The problems that arise resemble the change in location, continued perfection, and priority date addressed above.¹⁶

Currently, if a lender perfects its interest in a debtor's current location, but the debtor merges with a newly created company located in a different jurisdiction, the lender's security interest in pre-merger collateral remains perfected for one year after the merger. This

only applies to collateral the lender is perfected in at the time of the merger, and thus the lender is unperfected in any collateral acquired by the new debtor corporation in the new jurisdiction until the lender files in the new jurisdiction.¹⁷

Under the proposed amendments, similar to the amendment for change of jurisdiction, the lender would remain perfected in both pre and post-merger collateral for four months, and maintain continuous perfection if the lender perfected the collateral in the new jurisdiction within the four-month period.¹⁸

If the debtor target corporation is merging with an existing acquiring corporation located in a new jurisdiction, the acquiring corporation's pre-merger collateral also becomes an issue. The security interest held by the target corporation's lender attaches to the pre-merger inventory held by the acquiring corporation when the acquiring corporation becomes bound by the security interest of the debtor.¹⁹ If the target corporation's lender perfects within the four-month period, the security interest remains perfected.²⁰

Additional Proposed Amendments

Another change the amendments address is the change of "correction statement" to the phrase "information statement" in § 9-518 to properly clarify the operation of this provision. A debtor files a correction statement when he believes that a previously filed financing statement naming him is inaccurate or was wrongfully filed. The correction statement has no legal effect, but purely acts as a mechanism for notice, prompting the change of the document's name to information statement.²¹

The proposed amendments to Article 9 bring clarity and practicality to already existing provisions. As this article only provides an overview, it is important to become educated on the changes and how they will affect your practice as they are slated to have a uniform effective date of July 1, 2013.

10 11 U.S.C. § 9-316(b).

11 *Id.*

12 See § 9-316(a) (noting that an existing security interest remains perfected, not addressing security interests that have not yet occurred) (emphasis added).

13 Proposed Amendment at 13-15 (amending section § 9-316 to include subsection (h)).

14 David Frisch, *The Recent Amendments to UCC Article 9: Problems and Solutions*, 45 U. Rich. L. Rev. 1009, 1021 (noting the current four-month rule without the amendment draws "a sharp distinction between collateral acquired by the debtor prior to its relocation to another jurisdiction and collateral acquired after relocation").

15 Proposed Amendments at 13-17 (adding additional subsection (i) to current § 9-316), § 9-102(a)(56) (providing a definition for new debtor as one who is bound by a security agreement previously entered into by another person).

16 Proposed Amendments at 15 (comparing proposed subsection (i) to proposed subsection (h) stating "whereas the latter addresses a given debtor's change of location, the former addresses situations in which a successor to the debtor becomes bound as a debtor by the original debtor's security agreement").

17 § 9-316(a).

18 Proposed Amendments at 13 (adding additional subsection (i) to current section § 9-316), *Id.* (eliminating the risk that collateral acquired after the merger would be unperfected until the lender discovers the merger and files in the new jurisdiction).

19 Proposed Amendments at 16 (appearing as part of proposed subsection (i)).

20 *Id.* (noting that this could create a "double-debtor" problem addressable in current § 9-326).

21 The function of an information statement is comparable to that of a credit report. Discussion with Dean Kristin David Adams, Author, *Uniform Commercial Code in a Nutshell* (Summer 2011).