

## **Report on the Article 9 Review Committee September 2009 Meeting**

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### **I. Introduction**

#### *A. History*

In 2007, the Permanent Editorial Board authorized an Article 9 Review Committee to consider the need for possible statutory modifications or comment amendments to the Official Text of Uniform Commercial Code Article 9. The Review Committee held several telephone conference calls during the spring and summer of 2008 and issued a report in June 2008 of possible modifications that are needed. The Uniform Law Commission (ULC) (formerly known as the National Conference of Commissioners on Uniform State Laws) and the American Law Institute (ALI) then authorized a drafting committee, the Joint Review Committee for Article 9 of the UCC. The drafting committee's charge is to deal only with issues that have arisen in practice, are the subject of nonuniform amendments, or are of sufficient importance that some change needs to be made. The committee is also to consider the difficulties of the transition issues and the ramifications of any change. The drafting committee may initially only propose changes to the statute for those issues discussed in the June 2008 report unless the drafting committee obtains permission from the sponsoring organizations (the ULC and the ALI) to add other items.

If the drafting committee recommends changes to the statutory text or comments, those proposed changes will not become official until they have been passed by the ULC at its annual meeting (held in August each year) and by the ALI at its annual meeting (held in May each year).

#### *B. Meetings and membership*

The drafting committee held its first meeting in October 2008 (Chicago), its second meeting in February 2009 (Portland, Oregon), and its third meeting in March, 2009 (Chicago). A draft was read at the ULC annual meeting in July 2009 (Sante Fe). A fourth meeting of the drafting committee was held in September 2009 (Minneapolis). All drafting committee meetings are open to the public.

The drafting committee members are Edwin E. Smith, Chair (Bingham McCutchen LLP), Prof. Steven L. Harris, Reporter (Chicago-Kent College of Law), E. Carolan Berkley (Stradley Ronon Stevens & Young, LLP), Carl Bjerre (University of Oregon School of Law), Thomas J. Buiteweg (Hudson Cook, LLP), Neil B. Cohen (Brooklyn Law School), William H. Henning (University of Alabama School of Law), Gail Hillebrand (Consumers Union), John T. McGarvey (Morgan & Pottinger, P.S.C.), Charles W. Mooney, Jr. (University of Pennsylvania School of

Law), Harry C. Sigman (Law Offices of Harry C. Sigman), Sandra S. Stern (Nordquist & Stern, PLLC), Steven O. Weise (Prosauker Rose, LLP), James J. White (University of Michigan School of Law), Stephen L. Sepinuck, ABA Advisor (Gonzaga University School of Law), John F. Hilson,

### *C. September 2009 meeting*

Previous committee meetings concentrated on reviewing the entire issues list that was set forth for consideration. At the September 2009 committee meeting, the discussion was focused on only some of the provisions in the September 2009 draft that are considered to be “open” matters for committee decision. The September 2009 draft, however, contains material on all matters that the committee has considered and made decisions on. All the drafts are available at the ULC website at [www.nccusl.org](http://www.nccusl.org).

The committee contemplates completing its work in one more meeting so that a final draft can be read at the ALI annual meeting in May 2010 and at the ULC annual meeting in July 2010.

This report is only as to those items discussed at the September 2009 meeting.

## **III. Scope of committee’s work**

At the request of the ULC Scope and Programs Committee, the drafting committee discussed whether to start making changes to Article 9 in order to harmonize the uniform statute with the Convention on the Assignment of Receivables in International Trade. After discussion, the drafting committee unanimously determined that at the most, Article 9 should refer to the Convention in updated comments and that even that was not necessary. To the extent an international treaty is adopted, it would be overriding federal law and given that there are numerous federal laws that may preempt Article 9 in whole or part, or may supplement Article 9, that to call out one particular aspect of federal law is not necessary.

## **IV. Reference to security interest in Article 3**

When Article 9 was revised in 1999, even though sales of promissory notes were included within the scope of Article 9, the references to security interest in Article 3 were not examined to determine if updating was needed given that sometimes security interests would not secure a debt but be used to refer to a sale transaction. Three provisions in Article 3 refer to security interest, UCC § 3-304(c), § 3-302(e), and 3-303(a)(2). Upon discussion, it was determined that no amendments to Article 3 are necessary.

## **V. Conversion in form of entity of a debtor**

Under some state laws, it is not clear that when a debtor converts from one form of entity to another (example, corporation to limited liability company or partnership to limited liability company) whether the surviving entity is the same debtor or a different debtor for purposes of filing a financing statement to perfect a security interest.

If the surviving entity is the same entity as the old entity, and the surviving entity has a name that would not show up in a search under the name of the old entity, the name of the debtor on the financing statement against the old entity should be amended under UCC § 9-507, and a new financing statement against the new entity is not necessary and, in any event, would not tack the time for perfection back to the time for filing against the old entity.

If the surviving entity is not the same entity as the old entity, then the financing statement against the old entity should not be amended under UCC § 9-507, rather a new initial financing statement should be filed against the new entity under UCC § 9-508.

The concern is that if there is an amendment of the name of the debtor under UCC § 9-507 when the surviving entity is a new entity and not a continuation of the old entity, the creditor will have “unperfected” itself as to the old and the new collateral acquired within 4 months of the name change as the name of the old debtor has not changed.

The proposed solution is to put a comment into 9-512, or 9-507, that a secured party may file an amendment to an existing financing statement to add the name of the surviving entity as an additional debtor without amendment of the name of the old entity, and that would count as compliance with the name change requirement if the surviving entity was not a new entity. That would leave the filing in place as to the old debtor name and the new debtor name.

A comment will be drafted.

## **VI. Certificate of title**

Previous discussions of the drafting committee had focused on three issues concerning certificates of title. First, some states allow for filing a lien notice as the operative perfection step and not the notation on the certificate of title. Second, some states do not state clearly that the effect of a notation on the certificate of title is essential to perfect. Third, some states do not issue paper certificates and instead are relying solely on electronic record notations of liens in the vehicle registration process.

The September 2009 draft provided an amendment to UCC § 9-102(a)(10) as follows:

(10) “Certificate of title” means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor with respect to collateral. The term includes another record maintained by the governmental unit that issues certificates of title as an alternative to issuing a certificate for the collateral if a statute permits the security interest in question to be indicated on the record as a condition or a result of the security interest’s obtaining priority over the rights of a lien creditor with respect to the collateral.

A proposed new comment provides:

**11. Choice-of-Law-Related Definitions: “Certificate of Title”; “Governmental Unit”; “Jurisdiction of Organization”; “Registered Organization”; “State.”** These new definitions reflect the changes in the law governing perfection and priority of security interests and agricultural liens provided in Part 3, Subpart 1.

Statutes often require applicants for a certificate of title to identify all security interests on the application and require the issuing agency to indicate the identified security interests on the certificate. Some of these statutes provide that priority over the rights of a lien creditor (i.e., perfection of a security interest) in goods covered by the certificate occurs upon indication of the security interest on the certificate; that is, they provide for the indication of the security interest on the certificate as a “condition” of perfection. Other statutes contemplate that perfection is achieved

upon the occurrence of another act, e.g., delivery of the application to the issuing agency, that “results” in the indication of the security interest on the certificate. A certificate governed by either type of statute can qualify as a “certificate of title” under this Article. The statute need not expressly state the connection between the indication and perfection. For example, a certificate issued pursuant to a statute that requires applications to identify security interests, requires the issuing agency to indicate the identified security interests on the certificate, but is silent concerning the legal consequences of the indication would be a “certificate of title” if, under a judicial interpretation of the statute, perfection of a security interest is a legal consequence of the indication.

In many states, a certificate of title covering goods that are encumbered by a security interest is delivered to the secured party by the issuing authority. To eliminate the need for the issuance of a paper certificate under these circumstances, several states have revised their certificate-of-title statutes to permit or require a state agency to maintain an electronic record that evidences ownership of the goods and in which a security interest in the goods may be noted. Such a record is a “certificate of title” if it is in fact maintained as an alternative to the issuance of a paper certificate of title, regardless of whether the certificate-of-title statute provides that the record is a certificate of title and even if the statute does not expressly state that the record is maintained instead of issuing a paper certificate.

The committee discussed whether the definition should be modified to pick up “hybrid” systems where the electronic system for notation of liens supplements a paper certificate. The committee directed that a comment be prepared as a legislative note for states to examine their systems to make sure that they meet the definition as amended. A comment will also be inserted that provides that if there is such a hybrid system, it qualifies as a certificate of title system if it meets the test of the first sentence of the definition.

The committee also determined that UCC § 9-337 should be modified to make sure that it treats an electronic system and a paper system in a comparable manner in terms of protecting buyers and secured parties from un noted liens.

The September 2009 draft also contains a new proposed example and comment to UCC § 9-316 regarding the intersection of subsections (a) and (d).

The results in Examples 8 and 9 do not depend on the fact that the original perfection was achieved by notation on a certificate of title. Subsection (d) applies regardless of the method by which a security interest is perfected under the law of another jurisdiction when the goods became covered by a certificate of title from this State.

**Example 9A.** Debtor, whose principal residence is in Mississippi, owns a recreational boat that is subject to Lender’s security interest. Mississippi’s certificate-of-title statutes do not cover watercraft, and so Lender perfects by filing a financing statement in Mississippi. Debtor wishes to use the boat exclusively on a lake in Alabama, but Alabama law prohibits Debtor from doing so without first applying for an Alabama certificate of title. When Debtor delivers an application for an Alabama certificate to the appropriate authority and pays the applicable fee, the boat becomes covered by an Alabama certificate of title and Alabama law governs perfection, the effect of perfection or nonperfection, and priority of the security interest. See Section 9-303. Under Alabama’s Section 9-316(d), Lender’s security interest remains perfected until it would have become unperfected under Mississippi law had the boat not become covered by the Alabama certificate of title (e.g., because the effectiveness of the filed financing statement lapses). However, as against a purchaser of the boat for value, Lender’s security interest would become unperfected and would be deemed never to have been perfected if Lender fails to reperfect under Alabama’s Section 9-311(b) or 9-313 in a timely manner. See subsection (e).

Subsections (d) and (e) would not govern if, under the facts of Example 9A, Debtor applied for an Alabama certificate of title after having relocated to Alabama. From the time that Debtor relocates, the local law of Alabama would govern perfection. See Sections 9-301(1), 9-303. Under Alabama's Section 9-316(a), the perfected status of the security interest would continue until the earlier of the time perfection would have ceased under Mississippi law and four months after the change of location. If Lender fails to perfect under Alabama law before the earlier of those times, its security interest would become unperfected and be deemed never to have been perfected against a purchaser for value under Alabama's Section 9-316(b). Accordingly, Alabama's subsection (d), which governs security interests that are perfected under the law of another jurisdiction when the boat becomes covered by an Alabama certificate of title, would not apply, nor would Alabama's subsection (e).

Section 9-337 affords protection to a limited class of persons buying or acquiring a security interest in the goods while a security interest is perfected under the law of another jurisdiction but after this State has issued a clean certificate of title.

This comment was approved by the drafting committee with the addition that at the end of the second new paragraph, there be a sentence added telling the reader that subsection (a) and (b) would apply.

## **VII. Section 9-318**

At the March 2009 meeting, Prof. Ken Kettering raised the point that UCC § 9-318(a) has been treated in some circumstances as a priority rule by using principles of nemo dat to resolve issues that the priority rules in Article 9 are intended to resolve. He was asked to draft a comment for consideration. A proposed comment was provided. Prof. Tom Plank wrote a memorandum in opposition. After extensive discussion, it was decided that the draft would not have an additional comment added to section 9-318 on this as it became clear that potential additional clarity was outweighed by the risks of disagreement on outcomes, analysis, and wording of the comment.

## **VIII. Broadening control definition for deposit accounts and commodity accounts**

The control provisions in UCC § 9-104 (deposit accounts) and § 9-106 (commodity accounts) do not contain the analog to UCC § 8-106(d)(3). The decision at previous meetings was to conform those definitions of control and to make conforming changes to the priority rules in UCC § 9-327 and § 9-328. The September 2009 draft contains the following amendments:

### **SECTION 9-104. CONTROL OF DEPOSIT ACCOUNT.**

(a) **[Requirements for control.]** A secured party has control of a deposit account if:

- (1) the secured party is the bank with which the deposit account is maintained;
- (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; ~~or~~
- (3) the secured party becomes the bank's customer with respect to the deposit account; or
- (4) another person has control of the deposit account on behalf of the secured party, or, having previously acquired control of the deposit account, acknowledges that it has control on behalf of the secured party.

### Official Comment

3. **Requirements for “Control.”** This section derives from Section 8-106 of Revised Article 8, which defines “control” of securities and certain other investment property. Under subsection (a)(1), the bank with which the deposit account is maintained has control. The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary; all actual and potential creditors of the debtor are always on notice that the bank with which the debtor’s deposit account is maintained may assert a claim against the deposit account.

**Example:** D maintains a deposit account with Bank A. To secure a loan from Banks X, Y, and Z, D creates a security interest in the deposit account in favor of Bank A, as agent for Banks X, Y, and Z. Because Bank A is a “secured party” as defined in Section 9-102, the security interest is perfected by control under subsection (a)(1).

Under subsection (a)(2), a secured party may obtain control by obtaining the bank’s authenticated agreement that it will comply with the secured party’s instructions without further consent by the debtor. The analogous provision in Section 8-106 does not require that the agreement be authenticated. An agreement to comply with the secured party’s instructions suffices for “control” of a deposit account under this section even if the bank’s agreement is subject to specified conditions, e.g., that the secured party’s instructions are accompanied by a certification that the debtor is in default. (Of course, if the condition is the *debtor’s* further consent, the statute explicitly provides that the agreement would *not* confer control.) See revised Section 8-106, Comment 7.

Under subsection (a)(3), a secured party may obtain control by becoming the bank’s “customer,” as defined in Section 4-104. As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See Sections 4-401(a), 4-403(a).

Under subsection (a)(4), a secured party may obtain control if another person has control and the person acknowledges that it has control on the secured party’s behalf.

**SECTION 9-327. PRIORITY OF SECURITY INTERESTS IN DEPOSIT ACCOUNT.** The following rules govern priority among conflicting security interests in the same deposit account:

(1) A security interest held by a secured party having control of the deposit account under Section 9-104 has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in paragraphs (3) and (4), security interests perfected by control under Section 9-314 rank according to priority in time of obtaining control. For purposes of this paragraph, if a secured party obtained control through another person under Section 9-104(a)(4), the time of obtaining control is the time the other person obtained control.

(3) Except as otherwise provided in paragraph (4), a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control under Section 9-104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained.

### **SECTION 9-106. CONTROL OF INVESTMENT PROPERTY.**

\* \* \*

(b) [**Control of commodity contract.**] A secured party has control of a commodity contract if:

(1) the secured party is the commodity intermediary with which the commodity contract is carried; ~~or~~

(2) the commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer; or

(3) another person has control of the commodity contract on behalf of the secured party, or, having previously acquired control of the commodity contract, acknowledges that it has control on behalf of the secured party.

**SECTION 9-328. PRIORITY OF SECURITY INTERESTS IN INVESTMENT PROPERTY.** The following rules govern priority among conflicting security interests in the same investment property:

\* \* \*

(2) Except as otherwise provided in paragraphs (3) and (4), conflicting security interests held by secured parties each of which has control under Section 9-106 rank according to priority in time of:

\* \* \*

(C) if the collateral is a commodity contract carried with a commodity intermediary, ~~the satisfaction of the requirement for control specified in Section 9-106(b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary and:~~

(i) if the secured party obtained control under Section 9-106(b)(2), the commodity intermediary's agreement to apply any value distributed on account of the commodity contract as directed by the secured party; or

(ii) if the secured party obtained control through another person under Section 9-106(b)(3), the time on which priority would be based under this paragraph if the other person were the secured party.

\* \* \*

After discussion, the committee was satisfied with these amendments. The comments will make clear that these provisions do not displace agency principles but rather also operate when agency principles are not applicable.

## **IX. Notification of dispositions, UCC § 9-611**

An additional comment was proposed to be added to UCC § 9-611 as follows:

10. **Other Law.** Other law may require that notification of disposition be given to additional parties. For example, federal law imposes notification requirements with respect to the enforcement of mortgages on federally documented vessels.

After discussion, there was consensus that additional commentary should state that the effect of failure to comply with such notifications under other law was determined under that other law.

## **X. Additional issues**

An request was made to the drafting committee to add a comment to UCC § 9-102 to clarify that the right of a merchant to payment from an acquiring bank in a transaction initiated by a credit card, debit card, prepaid card, or other payment card transaction is not an account but rather is a payment intangible. The cardholder's obligation to pay the issuer is the account. At stake is whether 9-406 or 9-408 governs the ability of the merchant to assign that right to its creditors. A committee will be drafted for consideration at the next meeting.

## **XI. Who is the debtor in relation to trust property**

### *A. Location of the debtor*

The September 2009 draft contained a proposal to change the definition of debtor to designate who was the debtor when the collateral was the res of a trust. After discussion of the difficult choice of law issues, the decision was made to amend UCC § 9-307 to provide in effect that if the debtor is a trust that is not a registered organization or if the debtor is a trustee acting with respect to trust property and is not a registered organization, the location of the debtor should be the jurisdiction in which the trust is formed or organized.

There is concern about transition issues and the next draft will consider this proposal.

### *B. Name of the debtor*

At previous meetings of the committee, issues were raised as to what name to use for debtors when the collateral is the res of the trust. This issue is complicated by inconsistent state law on who is the debtor: either the trust or the trustee. The September 2009 draft provides:

#### **SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.**

(a) [**Sufficiency of debtor's name.**] A financing statement sufficiently provides the name of the debtor:

(1) if the debtor is a registered organization and is not a trustee acting with respect to property held in trust, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

(2) if the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

(3) if the debtor is a trust that is not a registered organization or is a trustee acting with respect to property held in trust for the beneficial owner of a trust that is not a registered organization, only if the financing statement:

(A) provides the name specified for the trust in its organic ~~documents~~ record or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and

(B) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust;

(4) if the debtor is a trustee acting with respect to property held in trust for the beneficial owner of a trust that is a registered organization, only if the financing statement provides the name of the trust indicated on the public organic record filed with or issued or enacted by the trust's jurisdiction of organization; and

~~(4)~~(5) in other cases:

(A) if the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor. \* \* \*

#### **Official Comment**

\* \* \*

2. **Debtor's Name.** The requirement that a financing statement provide the debtor's name is particularly important. Financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name. Subsection (a) explains what the debtor's name is for purposes of a financing statement. If the debtor is a "registered organization" (defined in Section 9-102 so as to ordinarily include corporations, limited partnerships, and limited liability companies), then the debtor's name is the name shown

on the public records of the debtor's "jurisdiction of organization" (also defined in Section 9-102). Subsections (a)(2) and (a)(3) contain special rules for decedent's estates and common-law trusts. (Subsection (a)(1) applies to ~~business~~ trusts that are registered organizations, and subsection (a)(4) applies to trustees acting with respect to property held in such trusts.) As used in subsections (a)(3) and (a)(4), the term "beneficial owner" refers to the owner of the beneficial interest in the trust. Cf. Uniform Statutory Trust Entity Act § 102(1).

#### **Reporter's Note**

The amendments are meant to clarify current law.

After discussion of these amendments, suggestion was made to remove the phrase "for the beneficial owner of a trust" as not being necessary and creating confusion. A long discussion was held on the issue of what is part of the debtor's name when the trust does not have the name and the settlor's name is used. The statute requires "additional information" in order for the name to be sufficient. There is concern that that additional information should not be the debtor's name box on the form as that will prevent searchers from finding the filing, particularly in an exact match system. In addition, there was disagreement regarding whether that additional information is part of the debtor's correct name for purposes of the "sufficiency" of the financing statement. The next draft will address this issue.

An additional suggestion was that (a)(3)(B) should be referencing the debtor's name from its organic record.

## **XII. Expansion of definition of registered organization**

Section 9-503(a)(1) requires that the financing statement must provide "the name of the debtor indicated on the public record of the debtor's jurisdiction which shows the debtor to be organized."

The definition of registered organization is "an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized." UCC § 9-102(a)(70).

Issues have arisen regarding what is the public record (database, filed documents, etc.), whether some statute must require the state to maintain the public record, how to deal with corporations which are chartered by a governmental entity, and how to deal with business trusts where states require a filing after the trust is formed.

The September 2009 draft provides:

### **SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.**

(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

(1) subject to subsection (f), if the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the ~~public~~ organic record ~~of~~ filed with or issued or enacted by the debtor's jurisdiction of organization which shows the debtor to have been organized;

\* \* \*

(f) [Name of registered organization.] For purposes of subsection (a)(1), if the public organic record indicates more than one name of the debtor, "the name of the debtor indicated on the public organic record" means:

(1) if the public organic record is composed of a single record that states the name of the debtor, the name of the debtor which that record states to be the debtor's name;

(2) if the public organic record is composed of more than one record, the name of the debtor which is indicated on the most recently filed, issued, or enacted record that is intended to amend or restate the debtor's name; and

(3) if the most recently filed or issued record of a kind specified in paragraph (2) indicates more than one name of the debtor, the name of the debtor which that record states to be the debtor's name.

## **SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.**

(a) [Article 9 definitions.] In this article:

\* \* \*

(50) "Jurisdiction of organization", with respect to a registered organization, means the jurisdiction under whose law the organization is formed or organized.

\* \* \*

(67A) "Public organic record" means:

(A) a record or records composed of the record initially filed with or issued by a State or the United States to form or organize an organization and any record filed with or issued by the State or the United States which effects an amendment or restatement of the initial record, if the record or records are available to the public for inspection;

(B) an organic record or records of a business trust composed of the record initially filed with a State and any record filed with the State which effects an amendment or restatement of the initial record, if a statute of the State governing business trusts requires that the record or records be filed with the State and the record or records are available to the public for inspection; and

(C) a record or records composed of legislation enacted by the legislature of a State or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the State or United States which states the name of the organization, if the record or records are available to the public for inspection.

\* \* \*

(70) "Registered organization" means an organization formed or organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or United States. The term includes a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust's organic record be filed with the State.

\* \* \*

### **Reporter's Note**

1. The amendments to Section 9-503 and the related amendments to Sections 9-102 are meant to designate more clearly the public record that is relevant to determining the name of a debtor that is a registered organization. The relevant public record is always a "public organic record." In most cases, this will be a record that is "filed with a State or the United States." However, the term also includes a charter that is "issued by a State or the United States." Any other public record that the State creates, such as a certificate of good standing or an index of domestic corporations, would not be a "public organic record" and so would be irrelevant to the determination of the debtor's name under Section 9-503(a)(1).

Section 9-503(f) covers two cases where the public organic record may indicate more than one name for the debtor. Under paragraph (1), the name that must be provided in the financing statement is the name that is indicated on the most recently filed public record that is intended to state, amend, or restate the debtor's name. If that record indicates more than one name of the debtor, the name that must be provided is the name that the record states to be the debtor's name.

The references to the “public organic record” in Section 9-503(a) and “the most recently filed or issued record” in Section 9-503(f) are not meant to refer to any randomly filed or issued record. Rather, they are meant to refer to the public organic record filed or issued with respect to the debtor and most recently filed or issued record that constitutes part of that public organic record. The Joint Review Committee may wish to consider whether these phrases should be amplified in the text.

2. The amendments to the definition of “registered organization” also are meant to clarify that the term includes an organization that is created without the need for a public record but that is “formed” only when a public filing has been made. For example, under Delaware law, a statutory trust is “created by a governing instrument,” Del. Code Ann. tit. 12, § 3801(g)(1), but is “formed at the time of the filing of the initial certificate of trust in the office of the Secretary of State or at any later date or time specified in the certificate of trust.” Del. Code Ann. § 3810(a)(2). The definition presents alternative approaches to clarifying that a Massachusetts business trust is a registered organization. The Joint Review Committee may wish to consider whether the approach taken should be extended to all organizations, not just statutory trusts.

The Review Committee was satisfied with this approach with a couple of questions raised for further consideration. First, in the definition of “public organic record” what does “available for inspection” mean? Could it just say “available to the public”? Second, in the amendment regarding the name of the registered organization in UCC § 9-503(f)(2), the “intended to amend or restate” may be problematic if it gets into a need to determine subjective intent.

### **XIII. Individual debtor name**

Past meetings of the review committee and previous drafts had set forth different ways of dealing with providing more certainty regarding an individual debtor’s name. Section 9-502 requires the debtor’s name be on the financing statement in order to be effective. Section 9-503 provides that if the debtor is an individual, the financing statement has to provide the individual’s name. It gives no guidance on what the debtor’s correct name is. The stakes are high, as a financing statement without the correct name is presumptively seriously misleading under section 9-506 and thus ineffective. If the incorrect name is used on the filed financing statement, it is not seriously misleading only if a search using the filing office’s standard search logic under the “correct” name returns the filing with the incorrect name. The courts have confronted what is the “correct” name in several cases<sup>1</sup> and some states have adopted non-uniform amendments to Article 9 to address this issue.<sup>2</sup>

Prior drafts had provided for three different approaches: a safe harbor approach (if you file under the name on the driver’s license, you have used the “correct name” but other names could be correct as well), an “only if” approach (the debtor’s name is correct only if as listed on the driver’s license), and the priority approach (other names other than the driver’s license could be

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<sup>1</sup> See, e.g., In re Borden, 2007 WL 2407032 (D. Neb. 2007); In re Stewart, 2006 WL 3193374 (Bankr. D. Kan. 2006); In re Berry, 2006 WL 2795507 (Bankr. D. Kan. 2006); In re Jones, 2006 WL 3590097 (Bankr. D. Kan. 2006).

<sup>2</sup> Vernon’s Texas Code Ann., Business & Commerce § 9-503 (driver’s license and state identification card as source of debtor’s name if debtor an individual); Tenn. Code Ann. § 47.9-503 (same); Neb. Legis. 308A (2008) (amendment to 9-506, if search by individual debtor’s last name and find the financing statement, the financing statement is not seriously misleading, delayed effective date to Sept. 2, 2009).

the correct debtor name but if the driver's license name was used, that filing would have priority over filings using other correct debtor's name). The American Bankers Association working group had expressed a strong preference for the priority approach at previous meetings. The July 2009 annual meeting draft contained all three approaches.

Although the September 2009 draft contains all three approaches, at the September 2009 meeting, Ed Smith, chair of the Review Committee reported that the priority approach received significant negative commentary at the annual meeting and we should consider the priority approach off the table. The September 2009 draft contained the following drafts of the safe harbor approach and the only if approach:

*[Alternative A: Name for Individual Debtor—"Only If" Approach]*

**SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.**

(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

\* \* \*

(3) \* \* \*

\* \* \*

(B) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; ~~and~~

(4) subject to subsection (g), if the debtor is an individual:

(A) to whom this State has issued a [driver's license] that, at the time the financing statement is filed, appears on its face not to have expired, only if it provides the name of the individual which is indicated on the [driver's license];

(B) as to whom subparagraph (A) does not apply, and to whom this State has issued an [identification card] that, at the time the financing statement is filed, appears on its face not to have expired, only if it provides the name of the individual which is indicated on the [identification card];

(C) as to whom neither subparagraph (A) nor subparagraph (B) applies, and to whom the United States has issued a passport that, at the time the financing statement is filed, appears on its face not to have expired, only if it provides the name of the individual which is indicated on the passport; and

(D) as to whom none of the preceding subparagraphs applies, only if it provides the surname, first given name, and first initial of the second given name, if any, of the individual; and

~~(4)~~(5) in other cases:

(A) if the debtor has a name, only if it provides the ~~individual or~~ organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

\* \* \*

(g) **[Multiple licenses or cards.]** If this State or the United States has issued to an individual more than one [driver's license], [identification card], or passport of a kind described in the applicable subparagraph of subsection (a)(4), the one that was issued most recently is the one to which the subparagraph refers.

**SECTION 9-507. EFFECT OF CERTAIN EVENTS ON EFFECTIVENESS OF FINANCING STATEMENT.**

\* \* \*

(c) **[Change in debtor's name.]** If a debtor so changes its name that a filed financing statement becomes seriously misleading under Section 9-506:

(1) the financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change; and

(2) the financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change.

(d) [Name sufficient under Section 9-503(a)(4).] An individual debtor changes the debtor's name for purposes of subsection (c) if:

(1) after the filing of a financing statement that provides a name that is sufficient under Section 9-503(a)(4)(A):

(A) the [driver's license] that indicates the name appears on its face to expire and the name that, immediately upon the expiration, would be sufficient under Section 9-503(a)(4) is different from the name provided; or

(B) this State issues to the debtor a [driver's license] that indicates a name different from the name provided;

(2) after the filing of a financing statement that provides a name that is sufficient under Section 9-503(a)(4)(B):

(A) the [identification card] that indicates the name appears on its face to expire and the name that, immediately upon the expiration, would be sufficient under Section 9-503(a)(4) is different from the name provided; or

(B) this State issues to the debtor a [driver's license] or [identification card] that indicates a name different from the name provided; or

(3) after the filing of a financing statement that provides a name that is sufficient under Section 9-503(a)(4)(C):

(A) the passport that indicates the name appears on its face to expire and the name that, immediately upon the expiration, would be sufficient under Section 9-503(a)(4) is different from the name provided; or

(B) this State issues to the debtor a [driver's license] or [identification card], or the United States issues to the debtor a passport, that indicates a name different from the name provided.

## **SECTION 9-506. EFFECT OF ERRORS OR OMISSIONS.**

\* \* \*

(c) **[Financing statement not seriously misleading.]** If a search of the records 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 sufficiently to provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading.

(d) **[“Debtor's correct name.”]** For purposes of Section 9-508(b), the “debtor's correct name” in subsection (c) means the correct name of the new debtor.

(e) **[Individual “debtor's correct name.”]** If a debtor who is an individual changes the debtor's name under Section 9-507(d), the “debtor's correct name” in subsection (c) means:

(1) in the case of a change under Section 9-507(d)(1)(A), 9-507(d)(2)(A), or 9-507(d)(3)(A), the name of the debtor that would be sufficient under Section 9-503(a)(4) immediately after the apparent expiration; and

(2) in the case of a change under Section 9-507(d)(1)(B), 9-507(d)(2)(B), or 9-507(d)(3)(B), the name of the debtor indicated on the [driver's license], [identification card], or passport, as the case may be, that indicates a name different from the name provided on the financing statement.

*[End of Alternative A—“Only If” Approach]*

**Reporter's Note**

1. Alternative A uses a cascade, or waterfall, to determine the name of an individual debtor which is sufficient for a financing statement. Although the particular steps in the cascade remain under discussion, the three steps under the draft are the debtor's driver's license, identification card, and U.S. passport, in that order. Because States use different terms for the driver's licenses and identification cards they issue, the words "driver's license" and "identification card" appear in brackets. If a debtor has been issued more than one identity document (i.e., license, identification card, or passport) described in the applicable paragraph of Section 9-503(a)(4), the document that was issued most recently would be the one that indicates the debtor's name for purposes of that paragraph.

The last step in the cascade (draft Section 9-503(a)(4)(D)) is based upon the approach taken by the filing-office regulations of some Canadian provinces. It is independent from the remainder of Alternative A and can be deleted or revised without affecting the remaining provisions. If the Joint Review Committee wishes to retain this approach, it may wish to consider whether paragraph (D) is too limiting. For example, should it be expanded to include debtors whose names do not include both a surname and a first given name? Should a special rule be provided for debtors whose names include both a matronymic and patronymic, e.g., Vicente Fox Quesada (the former President of Mexico)?

2. The draft refers to a license or ID card issued by "this State." Perfection of a security interest by filing is determined by the law of the jurisdiction in which the debtor is located. See Section 9-301(1). A debtor who is an individual is located at the individual's principal residence. Thus, a given State's Section 9-503 will apply during any period when the debtor maintains his principal residence in that State. Consider the following example:

Debtor, who resides in Illinois, grants a security interest to SP in certain business equipment. SP files a financing statement with the Illinois filing office. The financing statement provides the name appearing on Debtor's Illinois driver's license ("Joseph Allan Jones"). Illinois' Section 9-503(a)(4) (Alternative A) or 9-503(g) (Alternative B) would make this filing sufficient to satisfy subsection (a)(4), even though Debtor's correct middle name is Alan, not Allan. As long as Illinois remains Debtor's principal residence, Debtor's acquisition of a driver's license or ID card from another State would not affect the effectiveness of the Illinois filing.

If the debtor relocates by changing his principal residence, perfection will be governed by the law of the debtor's new location. As a consequence of the application of that State's Section 9-316, a security interest that is perfected by filing under the law of the debtor's former location will remain perfected for four months after the relocation, and thereafter if the secured party perfects under the law of the debtor's new location. Consider the following example:

Debtor, who resides in Illinois, grants a security interest to SP in certain business equipment. SP files a financing statement in Illinois that provides a name that is sufficient under Illinois' Section 9-503(a)(4) (Alternative A) or 9-503(g) (Alternative B). On January 1, Debtor relocates to Indiana. Upon the relocation, the governing law changes from the law of Illinois to the law of Indiana. However, under Indiana's Section 9-316, a security interest perfected by the Illinois filing remains perfected for four months, i.e., through the end of April. If SP does not file in Indiana before the four month period expires, then the security interest will become unperfected and will be deemed never to have been perfected as against a purchaser of the collateral for value. See Indiana's Section 9-316(b).

In the example, the name on Debtor's Illinois driver's license would be irrelevant for purposes of Indiana's Section 9-503(a)(4) (Alternative A) or 9-503(g) (Alternative B), inasmuch as it was not issued by "this State," i.e., Indiana. Of course, a financing statement providing that name might be effective under Section 9-506 (i.e., it might not be seriously misleading) and, under Alternative B, it might satisfy Indiana's Section 9-503(a)(4) (i.e., it might be the individual name of the debtor).

3. Draft Section 9-507(d) specifies two events that would constitute a change of the debtor's name. First, an individual debtor would change his name upon the apparent expiration of the identity document indicating the name provided in the financing statement, if, immediately following the apparent expiration, the debtor's name under Section 9-503(a)(4) is different from the name provided. Second, an individual debtor would change his name when a new identity document is issued that is on a higher step than, or superseding, the one indicating the name provided in the financing statement, if the new document indicates a name different from the one provided on the financing statement. An individual whose name is determined under Section 9-503(a)(4)(D) would change his name as under current law.

Even if the debtor's name changes, the filed financing statement does not become seriously misleading if it can be found by searching under the debtor's "correct" name, using the filing office's standard search logic. Draft Section 9-506(e) explains what is meant by the debtor's "correct name" when the debtor's name changes under Section 9-507(d). If the name change results from the expiration of the identity document, the correct name is the name that Section 9-503(a)(4) would yield after the expiration. If the name change results from the issuance of a new identity document, the correct name is the name that is indicated on the new document (which, of course, is the name that Section 9-503(a)(4) would yield after the issuance of the new document).

4. To satisfy Section 9-503(a)(4), the name provided on the financing statement must be the same as the name indicated on the license. For example, a filing against "Joseph A. Jones" or "Joseph Jones" would not satisfy either of those sections if Jones's driver's license shows his name to be "Joseph Allan Jones." Determining whether the name provided on the financing statement is the same as the name indicated on the license must not be done mindlessly. For example, the order in which the components of an individual's name appear on a driver's license differs among the States. Some States, such as Illinois, put the individual's "last name" (as the term is used on the financing statement form in Section 9-521) last, e.g., "Joseph Allan Jones." But even where the driver's license puts the individual's "last name" first, the driver's license may indicate that the name appearing first is the debtor's "last name" for the purpose of the financing statement. This would be the case, for example, with a driver's license on which the debtor's name appears as "Jones, Joseph Allan."

5. Still to be decided by the Joint Review Committee are whether, and, if so, how to deal with the situations in which the filing office refuses to accept a financing statement because it cannot index the name specified by Section 9-503(a)(4) (e.g., because its character set does not include a character appearing in the identity document and provided in the name), refuses to allow searches under the name specified by Section 9-503(a)(4), or indexes the financing statement providing the name specified by Section 9-503(a)(4) under a name other than the name provided (e.g., by truncating the name) so that the financing statement cannot be found by a search under the name specified.

6. If the debtor is a trust whose organic documents do not specify a name for the trust, Section 9-503(a)(3) requires a financing statement to provide the name of an individual as debtor. If the draft's "driver's license/identification card" approach is acceptable, the Joint Review Committee should consider whether the same approach should be taken with respect to the name of an individual shown as debtor under Section 9-503(a)(3). Any such expansion would likely require additional changes to the filing provisions.

Regardless of the approach it decides to take towards specifying the name of an individual debtor, the Joint Review Committee may wish to consider whether to clarify that, where the debtor is not an individual but the financing statement must provide the name of an individual as debtor, the financing statement must provide the name in the field designated for the name of an individual debtor.

*[Alternative B: Name for Individual Debtor— "Safe Harbor" Approach]*

*[Alternative B1—Name on official document]*

## **SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.**

(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

\* \* \*

(4) in other cases:

(A) except as otherwise provided in subsection (g), if the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

\* \* \*

(g) **[Exception for individual debtor's name.]** Subject to subsection (h), a financing statement that does not provide the individual name of the debtor nevertheless does sufficiently provide the name of a debtor who is an individual if it provides the name of the individual which is indicated on a [driver's license] or [identification card] that was issued to the individual by this State, if at the time the financing statement is filed the [driver's license] or [identification card] appears on its face not to have expired.

(h) **[Multiple licenses or cards.]** If this State has issued to an individual more than one [driver's license] or [identification card] of a kind described in subsection (g), the one that was issued most recently is the one to which the subsection refers.

#### **SECTION 9-507. EFFECT OF CERTAIN EVENTS ON EFFECTIVENESS OF FINANCING STATEMENT.**

\* \* \*

(c) **[Change in debtor's name.]** If a debtor so changes its name that a filed financing statement becomes seriously misleading under Section 9-506:

(1) the financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change; and

(2) the financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change.

(d) **[Name sufficient solely under Section 9-503(g).]** An individual debtor changes the debtor's name for purposes of subsection (c) if, after the filing of a financing statement that provides a name that is sufficient solely under Section 9-503(g):

(1) the [driver's license] or [identification card] that indicates the name appears on its face to expire and the name that, immediately upon the expiration, would be sufficient under Section 9-503(a)(4) is different from the name provided; or

(2) this State issues to the debtor a [driver's license] or [identification card] that indicates a name different from the name provided and from the name that, immediately upon the issuance, would be sufficient under Section 9-503(a)(4).

#### **SECTION 9-506. EFFECT OF ERRORS OR OMISSIONS.**

\* \* \*

(b) **[Financing statement seriously misleading.]** Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) or (g) is seriously misleading.

(c) **[Financing statement not seriously misleading.]** If a search of the records 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 sufficiently to provide the name of the debtor in accordance with Section 9-503(a) or (g), the name provided does not make the financing statement seriously misleading.

(d) **[“Debtor's correct name.”]** For purposes of Section 9-508(b), the “debtor's correct name” in subsection (c) means the correct name of the new debtor.

(e) [Individual “debtor’s correct name.”] If a debtor who is an individual changes the debtor’s name under Section 9-507(d), the “debtor’s correct name” in subsection (c) means the name of the debtor which, immediately after the change, would be sufficient under Section 9-503(a)(4) or (g).

*[End of Alternative B1]*

*[Alternative B2—Form of Name]*

**SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.**

(a) **[Sufficiency of debtor’s name.]** A financing statement sufficiently provides the name of the debtor:

\* \* \*

(4) in other cases:

(A) except as otherwise provided in subsection (g), if the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

\* \* \*

(g) [Exception for individual debtor’s name.] A financing statement that does not provide the individual name of the debtor nevertheless does sufficiently provide the name of a debtor who is an individual if it provides the surname, first given name, and first initial of the second given name, if any, of the individual.

*[End of Alternative B: “Safe Harbor” Approach]*

**Reporter’s Note**

1. Under Alternative B, a financing statement providing the name on the debtor’s driver’s license or identification card would be sufficient, if the license or card appears on its face not to have expired. See Section 9-503(g). However, a financing statement that provides the debtor’s individual name would also be sufficient, even if that name does not appear on the license or card. See Section 9-503(a)(4). If the State of the debtor’s principal residence (“this State”) has issued more than one such document, the name that is sufficient is the one indicated on the most recent document. See Section 9-503(h).

2. Draft Section 9-507(d) specifies two events that would constitute a change of the debtor’s name. First, an individual debtor would change his name upon the apparent expiration of the identity document indicating the name provided in the financing statement, if, immediately following the apparent expiration, the debtor’s name under Section 9-503(a)(4) is different from the name provided. Second, an individual debtor would change his name when the State of the debtor’s principal residence issues a license or card that indicates a name different from the one provided on the financing statement. An individual whose name is determined under Section 9-503(a)(4) would change his name as under current law.

Even if the debtor’s name changes, the filed financing statement does not become seriously misleading if it can be found by searching under the debtor’s “correct” name, using the filing office’s standard search logic. Draft Section 9-506(e) explains what is meant by the debtor’s “correct name” when the debtor’s name changes under Section 9-507(d): The name that Section 9-503(a)(4) or (g) would yield immediately after the debtor’s name changes.

3. The rule in Section 9-503(g) has been drafted as an exception to the rule in Section 9-503(a)(4). The Joint Review Committee may wish to consider whether the rule should appear instead as an alternative.

Discussion then commenced of the other two alternatives with the bulk of the focus on the merits of the “only if” approach compared to the “safe harbor” approach. The American Bankers

Association working group provided a draft of the “only if” approach which modified the September 2009 draft approach by dropping the idea that a passport was an acceptable document to use to provide the debtor’s name and that rejected the idea that an expired driver’s license constituted a name change event.

Some of the issues with the “only if” approach were concerns about whether the debtor would have a driver’s license issued by the state whose law governed under the choice of law rules (that is the debtor’s principal residence is in a state other than where have driver’s license), what should be treated as a name change event (document expiration, reissuance in another name, etc.) which raises problems with remaining perfected as to after acquired collateral, and what the transition rules should provide regarding old financing statements. In addition, it does not eliminate the need for searching under other names as there could be filings under other driver’s license names.

In the “form of name” provision in these drafts, concern was raised as to why just an initial for the second name instead of the whole second name. States differ as to how they treat the period after an initial in their standard search logic. Additional concern was raised about the meaning of “given” name.

The process for moving forward is to compile a list of the issues posed by the only if approach and provide that list to the American Bankers Association Working Group. This will be followed up with a phone call with the committee/observers, to determine what approach to take for the next draft.

#### **XIV. Wrongfully filed records**

Bogus filings against individuals present a problem that the states are determined to attack and the September 2009 contains two different items to deal with the issue. First, section 9-518 is amended to not refer to a “correction statement” but rather a statement of a claim regarding an inaccurate or wrongfully filed record in order to not mislead parties regarding the effectiveness of filing such a record (it has no effect on the effectiveness of the filing which is allegedly inaccurate or wrongfully filed). The September 2009 draft provides:

##### **SECTION 9-518. CLAIM CONCERNING INACCURATE OR WRONGFULLY FILED RECORD.**

(a) ~~[Who may file~~ **Statement with respect to record indexed under person’s name.** A person may file in the filing office a ~~correction~~ statement of a claim with respect to a record indexed there under the person’s name if the person believes that the record is inaccurate or was wrongfully filed.

##### **[Alternative A]**

(b) ~~[Sufficiency of correction statement under subsection (a).]~~ **A correction-statement of a claim** under subsection (a) must:

- (1) identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;
- (2) indicate that it is a ~~correction~~ **statement of a claim**; and
- (3) provide the basis for the person’s belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person’s belief that the record was wrongfully filed.

##### **[Alternative B]**

(b) **[Sufficiency of ~~correction~~ statement under subsection (a).]** A ~~correction~~-statement of a claim under subsection (a) must:

(1) identify the record to which it relates by:

(A) the file number assigned to the initial financing statement to which the record relates; and

(B) if the ~~correction~~ statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1), the date [and time] that the initial financing statement was filed [or recorded] and the information specified in Section 9-502(b);

(2) indicate that it is a ~~correction~~ statement of a claim; and

(3) provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

**[End of Alternatives]**

(c) **[Statement by secured party of record.]** A person may file in the filing office a statement of a claim with respect to a record filed there if the person is a secured party of record with respect to the financing statement to which the record relates and believes that the person that filed the record was not entitled to do so under Section 9-509(d).

**[Subsection (d)—Alternative A]**

(d) **[Sufficiency of statement under subsection (c).]** A statement of a claim under subsection (c) must:

(1) identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) indicate that it is a statement of a claim; and

(3) provide the basis for the person's belief that the person that filed the record was not entitled to do so under Section 9-509(d).

**[Subsection (d)—Alternative B]**

(d) **[Sufficiency of statement under subsection (c).]** A statement of a claim under subsection (c) must:

(1) identify the record to which it relates by:

(A) the file number assigned to the initial financing statement to which the record relates; and

(B) if the statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1), the date [and time] that the initial financing statement was filed[or recorded] and the information specified in Section 9-502(b);

(2) indicate that it is a statement of a claim; and

(3) provide the basis for the person's belief that the person who filed the record was not entitled to do so under Section 9-509(d).

**[End of Alternatives]**

~~(e)~~(e) **[Record not affected by ~~correction~~ statement of claim.]** The filing of a ~~correction~~ statement of a claim under this Section does not affect the effectiveness of an initial financing statement or other filed record.

*Legislative Note: States whose real-estate filing offices require additional information in amendments and cannot search their records by both the name of the debtor and the file number should enact Alternative B to Sections 9-512(a), 9-518(b), 9-518(d), 9-519(f) and 9-522(a).*

## **SECTION 9-516. WHAT CONSTITUTES FILING; EFFECTIVENESS OF FILING.**

\* \* \*

(b) **[Refusal to accept record; filing does not occur.]** Filing does not occur with respect to a record that a filing office refuses to accept because:

\* \* \*

(3) the filing office is unable to index the record because:

\* \* \*

- (B) in the case of an amendment or ~~correction~~ statement of a claim, the record:
- (i) does not identify the initial financing statement as required by Section 9-512 or 9-518, as applicable; or
  - (ii) identifies an initial financing statement whose effectiveness has lapsed under Section 9-515;

\* \* \*

#### **Reporter's Note**

1. Current Section 9-518 provides a mechanism whereby an aggrieved debtor may use the filing office to make a public declaration concerning the debtor's belief that a filed financing statement naming the debtor is inaccurate or was wrongfully filed. New subsections (c) and (d) would provide a similar mechanism to a secured party of record for a financing statement to express its belief that a person who filed a record relating to the financing statement was not entitled to do so. As the current text does with respect to subsection (b), the amendments would provide alternative versions of subsection (d). Each State would choose the alternative that is better suited to the method by which searches are conducted in the real-estate records maintained in the State.

2. Because this section currently refers to the statement as a "correction statement," some debtors have filed one under the misapprehension that the filing has legal effect. It does not. See subsection (c) (as amended, subsection (e)). To prevent future confusion, the amendment would refer to the statement as a "statement of a claim." The comments will be amended to reflect this change in terminology.

The committee approved the changes to section 9-518 and noted that the captions should not refer to "sufficiency" of the statement (as that confuses it with sufficiency under section 9-503) and that there should be a comment that such a filing is not necessary for any reason even if the filer knows there is an error in the record.

Second, a new section was proposed that allowed a victim of a bogus filing to file a request for the filing office to terminate a filing with notice to the filer. The new section puts the burden on the filer to start the action to reinstate the filing. The September 2009 draft provides:

**SECTION 9-513A. TERMINATION OF WRONGFULLY FILED RECORD; REINSTATEMENT.**

(a) **["Government employee."]** In this section, "government employee" means:

(1) an employee or elected or appointed official of this State, the United States, or a governmental unit of this State or the United States; and

(2) a member of an authority, board, or commission established by this State, the United States, or a governmental unit of this State or the United States.

(b) **[Application of this section.]** This section applies only with respect to a filed financing statement that indicates all secured parties of record to be individuals, identifies as a debtor an individual who was a government employee at or before the time the financing statement was filed, and was filed by an individual not entitled to do so under Section 9-509(a). If the financing statement indicates more than one debtor, the provisions of this section apply only with respect to those debtors who are individuals and were government employees at or before the time the financing statement was filed.

(c) **[Affidavit of wrongful filing.]** A government employee identified as a debtor in a filed financing statement [to which this section applies] may file in the filing office a notarized affidavit, made under oath or penalty of perjury, in the form prescribed by the [Secretary of State], stating that the financing statement was filed by an individual not entitled to do so under Section 9-509(a). The [Secretary of State] shall adopt and, upon request, make available to a government employee a form of affidavit to be used under this subsection.

(d) [Termination statement by filing office.] If an affidavit is filed under subsection (c), the filing office shall promptly file a termination statement with respect to the financing statement. The termination statement must indicate that it was filed pursuant to this section.

(e) [No fee charged or refunded.] The filing office shall not charge a fee for the filing of an affidavit under subsection (c) or a termination statement under subsection (d). The filing office shall not return any fee paid for filing the financing statement to which the affidavit relates, whether or not the financing statement is reinstated under subsection (h).

(f) [Notice of termination statement.] On the same day that a filing office files a termination statement under subsection (d), it shall send to the secured party of record for the financing statement a notice advising the secured party of record that the termination statement has been filed. The notice shall be sent by certified mail, return receipt requested, to the address provided for the secured party in the financing statement.

(g) [Action for reinstatement.] An individual who believes in good faith that the individual was entitled to file the financing statement as to which a termination statement was filed under subsection (d) may file an action to reinstate the financing statement. The exclusive venue for an action shall be in the [circuit] court for the county where the filing office in which the financing statement was filed is located or, if the government employee resides in this State, the county where the government employee resides. The action shall have priority on the court's calendar and shall proceed by expedited hearing.

(h) [Action for reinstatement successful.] If, in an action under subsection (g), the court determines that the financing statement should be reinstated, the secured party of record may provide a copy of the court's judgment or order to the filing office. If the filing office receives a copy within 30 days after the entry of the judgment or order, the filing office shall promptly file a record that identifies by its file number the initial financing statement to which the record relates and indicates that the financing statement has been reinstated.

(i) [Effect of reinstatement.] Except as otherwise provided in subsection (j), upon the filing of a record reinstating a financing statement under subsection (h), the effectiveness of the financing statement is retroactively reinstated and the financing statement shall be considered never to have been ineffective as against all persons and for all purposes. If the effectiveness of a financing statement that is reinstated would have lapsed between the time of the filing of the termination statement and the time of the filing of the record reinstating the financing statement, the secured party of record may file a continuation statement not later than 30 days after the time of the filing of the record reinstating the financing statement. Upon the timely filing of a continuation statement, the effectiveness of the financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective had no termination statement been filed by the filing office.

(j) [Exception to subsection (i).] A financing statement whose effectiveness is reinstated shall not be effective as against a person that purchased the collateral in good faith and for value between the time of the filing of the termination of the financing statement and the time of the filing of the record reinstating the financing statement.

(k) [Liability for wrongful filing.] If, in an action under subsection (g), the court determines that the individual who filed the financing statement was not entitled to do so under Section 9-509(a), the government employee may recover from the individual the costs and expenses, including reasonable attorneys' fees, that the government employee incurred in the action. [This recovery is in addition to any recovery to which the government employee is entitled under Section 9-625.]

#### **Reporter's Note**

This section responds to those who think it desirable to provide an administrative remedy to deal with "bogus" financing statements. To preserve the integrity of the filing system, it is available only under specified circumstances, provides a right of action to an aggrieved secured party of record, and protects good faith purchasers for value.

If the Joint Review Committee adopts this approach, it may wish to consider whether an amendment to Section 9-510(a) would be necessary. Section 9-510 provides that a filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509. Section 9-509 does not include records that would be authorized to be filed by the Secretary of State under this Section.

There was some concern about the new section in terms of its scope as not being effective to deal with the problem (filings by individuals as against government employees) and the added burden it would place on filing offices. The committee did not seem open to other options such as providing a mechanism for approving filers, providing a mechanism for a potential victim to block filings made against it, broadening the application to non individual filers, narrowing the scope from all government employees, or broadening the scope to more than government employees.

The new section is not proposed as part of the official text, but rather as a potential amendment for states interested in dealing with the issue.

#### **XV. Discussion of official forms**

Given the ongoing discussion regarding debtor's name issues under UCC § 9-503, the forms have continued to undergo revision to make them line up with the statutory requirements. The forms will continue to evolve along with the process. The IACA representatives are taking the lead in making changes to the official forms in the process.

#### **XVI. Discussion of ABA Joint Task Force on Filing Operations & Search Logic Report**

The Task Force reported on two issues, how filing offices deal with non-QWERTY keyboard characters and field length. The operations of the filing office regarding these issues affect the ability of parties to file against the correct debtor's name in an electronic filing, the indexing of debtor's name for search purposes, and the name under which a search is allowed. The proposal for purposes of amending Article 9 is to require the filing offices to disclose the filing office operations regarding these issues and to track when changes are made to the system that affect what will display in a search.