KEY AMENDMENTS TO ARTICLE 9 TAKE EFFECT JULY 1, 2013

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Amendments to article 9 of the U.C.C., governing secured transactions, take effect on July 1, 2013. To date, Texas and 27 other states have adopted these amendments, and bills to adopt them are pending in several others.

The most significant amendments deal with the proper identification of debtors on financing statements. Other changes relate to electronic records, what happens when a debtor changes its name, merges or relocates, restrictions on assignments, the filing of information statements and how the transition to the amended statute is to be implemented.

Identification of debtors and other filing issues
The vast majority of article 9 security interests are perfected by filing a financing statement. Section 9.503(a) controls what is sufficient to identify a debtor and is the subject of extensive amendments. Proper identification of the debtor on the financing statement is necessary to perfect a security interest that will be enforceable against subsequent creditors or purchasers for value. Proper perfection of the debtor is crucial because, under the U.C.C and Bankruptcy Code, an unperfected security interest can be avoided in a debtor's bankruptcy, even if there is no other secured creditor claiming an interest in the collateral. If the security interest can be avoided in bankruptcy, then the secured party becomes a general unsecured creditor, and loses any rights to repossess the collateral, receive full payment of a secured claim, receive adequate protection payments, and the right to seek attorney's fees if it is over-secured. Financing statements are indexed and searchable according the name of the debtor. Thus, it is critically important to correctly identify the debtor. If the financing statement cannot be found by searching for the debtor's correct name on the Secretary of State's website, then the financing statement was not effective to perfect a security interest[1].

Individual debtors
A financing statement against an individual debtor must be filed in the state where the individual has his or her principal residence. After the 2013 amendments take effect, if a Texas resident has a Texas Driver's License ("TDL") or an unlicensed driver has a Texas Personal Identification Card ("TXID"), then the **only** way to perfect a security interest in that debtor's collateral will be to file a financing statement containing the debtor's name **exactly** as it appears on his or her TDL or TXID [amended §9.503(a)(4)]. If the person has more than one TDL, then the name as it appears on the most recently issued one controls [amended §9.503(g)]. Thus, a prudent lender will request to inspect the debtor's unexpired TDL or TXID before extending credit and record the correct name to use on the financing statement.

[1] For example, if the debtor's correct name is "Terrance Joseph Kinderknecht", a financing statement that identifies a debtor as "Terry J. Kinderknecht" will not perfect a security interest, even if the debtor is commonly known as "Terry J. Kinderknecht". See, *In re Kinderknecht*, 308 B.R. 71 (B.A.P. 10th Cir. 2004).

Amended Section 9.503(a)(5) provides that if Texas has not issued a TDL or TXID to the debtor, or if it has expired, then the financing statement must reflect either (i) the individual name of the debtor or (ii) the surname and first personal name of the debtor. This is simply a continuation of the present, unclear standard.

Organizations
The amendments make it clear that the same rules apply to an organizational debtor whether it is a corporation, limited liability company, or partnership. The term that is now used is "registered organization", which means any entity for which formation or organization documents ("public organic records") are on file with a public agency and available for inspection by the public [amended §9.102(71)]. A financing statement against a Texas corporation or Texas LLC must be filed in Texas.

Identification
To properly identify such a debtor, the financing statement **must** use "the name that is stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by" the applicable public agency that "purports to state, amend or restate the registered organization's name" [amended §9.503(a)(1)]. Thus, a prudent lender should check the publicly available filings on the Secretary of State's website for the **precise** spelling of the debtor's registered name before extending credit to such a debtor.[2]

There are additional sections that set forth the requirements to properly identify the debtor and perfect a security interest when the collateral is being held by a decedent's estate [§9.503(a)(2)] or in trust [amended §9.503(a)(3)]. There are detailed provisions regarding which trusts are to be considered "registered organizations" and which are not [amended §9.502(a), (c)].

Debtor's change of location, change of structure, and after acquired property.
Presently, if a debtor changes its location after a security interest has been perfected, perfection continues in the collateral that was owned at the time of relocation for up to four months after relocation even if no action is taken, provided that the security interest does not lapse by its own terms. That provision remains in effect unchanged. After the amendments take effect, a secured party will also have a perfected security interest in after acquired collateral for four months after relocation, and thereafter if the secured party perfects its security interest under the laws of the new state within those four months [amended §9.316(h)]. If an original debtor is merged into another entity that is located in another state, the surviving entity is considered a new debtor that becomes bound by the original debtor's security agreement. Presently, a secured party remains perfected as to the transferred collateral at the time of the merger, without taking any action, for a period of up to one year [§9.316(a)(3)] But, under present law, the secured party has no security interest in collateral acquired by new debtor after the merger until it files a financing statement identifying new debtor. Under the 2013 amendments, the secured party will have a perfected security interest in the new debtor's after acquired collateral for a period of four months, and thereafter if the secured party perfects its interests under the laws of the new jurisdiction within those four months [amended §9.316(i)].

[2] See, e.g., *In re Jim Ross Tires, Inc.*, 379 B.R. 670, 677-78 (S. D. Tex. 2007) (financing statement that identified debtor as "Jim Ross Tire Inc." did **not** perfect security interest in collateral owned by "Jim Ross Tire**s** Inc.").

Misc filing issues
A fixture filing no longer needs to include a statement that it will be filed in the real property records, and the identification of an individual debtor does not need to comply with amended §9.503(a)(4) [amended §9.502(c)]. Secured parties will have the right to file "information statements" to address information filed by others that affect their security interests [amended §9.518(c)]. This could be used, for example, to respond to a termination statement that the secured party contends was filed by someone who was not entitled to do so.

Restrictions on assignments
A secured party will be generally permitted to assign security interests in accounts, and chattel paper notwithstanding any anti-assignment language in the documents creating such interests.

Assignments of security interests in promissory notes and payment intangibles can only be made not withstanding such restrictions if the assignment is part of the disposition of collateral under section 9.610, or acceptance in full satisfaction under section 9.620 [amended §9.406(d)].

Electronic records

The definition of “authenticate” now includes “with present intent to adopt or accept a record, to attach or logically associate with the record an electronic sound, symbol or process.” [amended §9.103(7)(B)]. A “certificate of title” now includes “another record maintained as an alternative to a certificate of title by the governmental unit that issues certificates of title if a statute permits the security interest in question to be indicated on the record as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral” [amended §9.102(10)]. Whether one is in “control” of electronic chattel paper is now a more flexible analysis. “A secured party has control of electronic chattel paper if a system employed for evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was assigned.” [amended §9.105(a)] This section now conforms to section 7.106 regarding electronic documents of title. The prior standard is now a “safe harbor” that will guarantee a finding of control [amended §9.105(b)].

Important transition provisions

The amendments include transition provisions which are found at amended sections 9.801 - 9.809. The amendments do not apply to suits filed before July 1, 2013 [amended §9.802(b)].

But, in suits filed after July 1, 2013, the amendments will control the interpretation of documents that were created or filed before July 1, 2013 [amended §9.802(a)]. One of the drafters’ Official Comments addresses how two of the key provisions [amended §§9.803 and 9.805] are to be construed when faced with a situation that could be common – a financing statement that sufficiently identified the debtor under the prior version of the statute but would be insufficient under the amendments. The Official Comment to amended section §9.801, and the example therein, states that if the financing statement was effective when it was filed, it will remain effective after July 1, 2013 and the security interest will remain perfected. A continuation statement, however, will have to comply with the more stringent identification requirements of the amendments. Thus, it would be wise for lenders to double check the names provided for individual debtors and organizations against the individual’s TDL and the organization’s filings before filing continuation statements for financing statements that lapse after July 1, 2013.