

January 26, 2009

State Bar of Texas Business Law Section UCC Committee (“Texas”) Comments
on Joint Review Committee (“Committee”) Meeting, February 6-8, 2009, Draft Amendments
 (“Feb. 2009 Draft”) to Uniform Commercial Code Revised Article 9 (“R9”)

“An overarching goal of the [R9] revisions was to provide in the transactional context *enhanced certainty and predictability from the inception of transactions*” (emphasis added).¹ NCCUSL had unprecedented success with R9 in achieving these goals, as evidenced by its adoption by all 50 states. Because it was uncertain when NCCUSL would again revisit R9, Texas took the lead in 2007 to provide for: (1) enhanced clarity as to the name of a registered organization, (2) use of a driver’s license as a safe harbor for individual debtor names and (3) secured parties to file correction statements (“Texas 2007 Amendment”). However, Texas has a strong preference for NCCUSL to take the lead in effectively addressing concerns by promulgating uniform laws. Texas has prepared R9 legislation for consideration in the 2009 Texas legislative session relating to certain of the matters addressed in this paper, but it is refraining from acting, pending effective action by the Committee.

Texas limits its *written* comments on the Feb. 2009 Draft to four select issues.

1. **Individual debtor name**

The debtor name rules of §9.503(a) do not set forth guidelines for ascertaining the names of individuals, *leaving such determination to other state law*. Texas supports the approach, taken in the Feb. 2009 Draft, of using the driver’s license name for the name of an individual debtor. A significant volume of small business loans are affected by the individual debtor name requirements for UCC filings. In Texas, approximately one-half of UCC filings are in individual debtor names and a significant portion of small business lending in the state is to sole proprietors. Under the filing rules, the financing statements for these borrowers must be in the sole proprietor’s name rather than the assumed name for the business. The use of nonfiling insurance is permitted as a substitute for filing a financing statement on regulated consumer credit and has become a common practice in Texas. It is unlikely that most individual debtor name filings in Texas are for consumer debt.

The Texas 2007 Amendment to §9.503(a)(4) specified that the name on the individual’s driver’s license or identification certificate issued by state of residence is a safe harbor, preserving the existing uniform rule for individual debtors without a driver’s license or identification certificate. This approach is consistent with the most prevalent practice of financial institutions in their “customer identification programs” (CIP) under the USA PATRIOT Act. Under that law, financial institutions must verify the identity of both depositors and credit customers. This can be done through documentary means, such as the driver’s license or passport (31 CFR 103.121). The driver’s license and state-issued identification card are the most commonly used documentary methods for verification of customers.

While the Texas 2007 Amendment provided a safe harbor for perfection, it did not address priority. The Joint Review Committee should consider making the driver’s license name an “only if” name, consistent with the other provisions of §9.503, with a workable transition schedule. This should provide enhanced certainty and predictability for the majority of individual debtor filings. Alternatively, the Committee should consider clarification of priority concerns related to having individual name rules inconsistent with the other “only if” debtor name rules in §9.503.

2. **Trust “debtor”**

There are uncertainties in the uniform provisions when the collateral is property of an express trust. While §9.102(a)(28) defines “debtor” as “a person having *an* interest...in the collateral” (emphasis added), §1.201(a)(27) defining “person” does not include a trustee but does include “an individual...,”

business trust, estate, *trust...*” (emphasis added). The debtor who has “an interest” in collateral under §9.102(a)(28) may be the trustee or the trust under a particular state’s law.²

State law does not necessarily provide clarification. For example, Texas Property Code §111.004(6) defines “interest” as “any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible” for purposes of the Texas Trust Code. A trust is a bundle of interests beyond just the legal title noted in the Texas Trust Code definition.

The Committee should consider promulgating statutory language such as the following, providing for clarification on who the debtor is in a trust situation (since other state law is looked to under the current uniform rule):

9.102(a) (28) “Debtor” means:

(A) subject to paragraph (D), a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) subject to paragraph (D), a seller of accounts, chattel paper, payment intangibles, or promissory notes;~~or~~

(C) subject to paragraph (D), a consignee; or

(D) if the collateral is property held in an express trust created or organized under the law of this State, [the trustee of the trust] [the trust].

While it may seem more natural for the trustee to be the debtor since the trustee signs a security agreement, the simplest approach would be to name the trust as the debtor. This is not different from the decision of the original R9 Drafting Committee to locate registered organizations in the state where organized. “Calling it” in this fashion under state law provides not only certainty but consistency with both §1.201(a)(27), which excludes trustees from the definition of “person,” and §9.503(a)(3)(A), which specifies that the name of the trust, if it has a name, is sufficient for the name of the debtor. Since prudent secured parties should currently be obtaining a copy of the trust’s organic documents under §9.503(a)(3)(A), to ascertain if a trust name is specified in the trust’s organic documents, it should not impose an additional burden on the secured party to determine what law is specified in those documents as governing the trust.

3. Name of decedent’s estate and trust debtors

Texas agrees with Note 10 on pp. 67-68 of the Feb. 2009 Draft, relating to a debtor that is a decedent’s estate and a trust whose organic documents do not specify a name for the trust. The Committee should consider how best to set out information distinguishing such a trust from other trusts by the same settlors, in a media neutral fashion. For example, such information could be set out in the collateral description field rather than the debtor name field.

4. Name of registered organization

Texas prefers its 2007 approach for registered organization names (using the name in the “formation” documents, as also adopted by Tennessee in 2008) as opposed to the approach taken in the Feb. 2009 Draft, because in Texas, for example, general partnerships with a written partnership agreement are created without the filing of any formation documents with the Texas Secretary of State.

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¹ Steven L. Harris and Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9? Reflections of the Reporters*, 74 Chicago-Kent Law Review 1363 (1999).

² Norman Powell, *Filing Against Trusts and Trustees*, Practice Under Article 9 of the UCC at 129 (2d ed. 2008).