

**JOINT REVIEW COMMITTEE ON
UNIFORM COMMERCIAL CODE ARTICLE 9**

SECOND REVISED PRELIMINARY DRAFT

of

Provisions Concerning Collateral Held in Trust
February 8, 2010

Reporter's Prefatory Note

The Preliminary Draft of Provisions Concerning Collateral Held in Trust (November 2, 2009) contained amendments to Section 9-307 (location of the debtor) and 9-503 (name of the debtor) as they affect collateral held in trust. During its teleconference of January 14, 2010, the Joint Review Committee appears to have reached a consensus that the relevant provisions of Section 9-307 should not be amended.

The Revised Preliminary Draft (February 1, 2010) contains revised amendments to Sections 9-503. These amendments would make it unnecessary—for purposes of providing the name of the debtor—to determine whether the debtor with respect to collateral held in trust is the trustee or the trust.

This Second Revised Preliminary Draft of § 9-503 incorporates section (a)(4) of the previous draft into subsection (a)(1). The change is intended to make the statute easier to understand while yielding the same outcomes as the prior draft. Changes are marked to the existing Official Text.

Determining the identity of the debtor (trust or trustee) would remain necessary for purposes of determining the location of the debtor under Section 9-307. At the request of the Chair, the Reporter presented for the Joint Review Committee's reconsideration the approach to this issue that appeared in the draft of September 10, 2009. This approach is reproduced below.

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) except as otherwise provided in paragraph (3), if the debtor is a registered organization or a trustee acting with respect to property held in a trust that is a registered organization, only if the financing statement provides the name of the debtor registered

organization indicated on the public organic record ~~of filed with or issued or enacted by the~~
~~debtor's registered organization's~~ jurisdiction of organization ~~which shows the debtor to have~~
~~been organized;~~

* * *

[Subsection (a)(3)—Alternative A]

(3) if the ~~debtor is a trust or a trustee acting with respect to property held in trust~~
collateral is held in 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 under subsection
(x) and additional information sufficient to distinguish the ~~debtor trust~~ 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 a trust;

[End of Alternative A]

[Subsection (a)(3)—Alternative B]

(3) if the ~~debtor is a trust or a trustee acting with respect to property held in trust,~~
~~only if the financing statement:~~

~~(A) provides the name specified for the trust in its organic documents 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,~~
collateral is held in a trust that is not a registered organization, only if the financing statement:

(A) provides, as the name of the debtor:

(i) if the organic record of the trust specifies the name of the trust, the name so specified; or

(ii) if the organic record of the trust does not specify a name for the trust, the name of the settlor under subsection (x); and

(B) in a [field] [part of the financing statement] separate from that in which the name is provided:

(i) if the name is provided in accordance with subparagraph (A)(i), indicates that the debtor is a trust or is a trustee acting with respect to property held in a trust; or

(ii) if the name is provided in accordance with subparagraph (A)(ii), provides additional information sufficient to distinguish the trust from other trusts having one or more of the same settlors and indicates that the debtor is a trust or is a trustee acting with respect to property held in a trust, unless the additional information so indicates;

[End of Alternative B]

[End of Alternatives]

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(x) The “name of the settlor” in subsection (a)(3) means:

(1) if the settlor is an individual [or an organization other than a registered organization], the name of the settlor indicated in the trust’s organic record; and

(2) if the settlor is a registered organization, the name of the registered organization indicated on the public organic record filed with or issued or enacted by the registered organization’s jurisdiction of organization.

Reporter's Note

1. To be sufficient under Section 9-502(a)(1), a financing statement must provide the name of the debtor. The revisions to Section 9-503(a) would give additional guidance for satisfying the requirement with respect to collateral that is held in trust. The revisions contain rules, described below, that address the variety of situations that may arise. The specific rule that applies may depend on one or more of the following three factors:

(1) whether, under the applicable law, the debtor with respect to the collateral is the trustee or the trust;

(2) regardless of who the debtor is, whether the trust is a registered organization, and

(3) if the trust is not a registered organization, whether the trust's organic record specifies a name for the trust.

The draft rules are designed to accomplish two purposes. First, they are designed to make the first factor irrelevant for purposes of providing the name of the debtor on a financing statement. As a practical matter, the name that must be provided would depend solely on the other two factors, i.e., whether the *trust* is a registered organization and, if it is not, on whether the trust's organic record specifies a name for the trust. Second, the revisions are designed to clarify the manner in which the required data must be formatted in the financing statement. The Joint Review Committee may wish to adopt the changes that accomplish one of the purposes and not the changes that accomplish the other.

2. The potential situations that may arise, and the rules applicable to them, are as follows:

Trust that is not a registered organization. Subsection (a)(3) provides the rules applicable when collateral is held in a trust that is not a registered organization. This draft presents alternative formulations (Alternatives A and B) for these rules. Alternative B is more detailed; however, many of the details expressed in Alternative B (e.g., that the debtor-name field of the financing statement should include only the name of the trust or settlor, as the case may be) might be relegated to an Official Comment.

If the trust's organic record specifies a name for the trust, the financing statement must provide, as the name of the debtor, the name specified in the organic record. In addition, the financing statement must indicate that the debtor is a trust or is a trustee acting with respect to property held in trust. This indication must be provided in a field separate from the debtor-name field. This rule would apply regardless of whether the debtor is the trust itself or is a trustee acting with respect to property held in the trust.

If collateral is held in a trust that is not a registered organization, and if the trust's organic record does not specify a name for the trust, then the financing statement must provide, as the

name of the debtor, the name of the settlor. In addition, the financing statement must provide sufficient additional information to distinguish the trust from other trusts having one or more of the same settlors and must indicate that the debtor is a trust or is a trustee acting with respect to property held in trust. Although required for the sufficiency of the financing statement, this additional information and indication must be provided in a field separate from the debtor-name field. This rule would apply regardless of whether the debtor is the trust itself or is a trustee acting with respect to property held in the trust.

Trust that is a registered organization. Subsection (a)(1) provides that when the debtor is a trust that is a registered organization, a financing statement must provide, as the name of the debtor, the name for the trust indicated on the trust's public organic record. In many cases, the debtor may be a registered organization acting as the trustee of a trust. If the trust is itself a registered organization, subsection (a)(1) would require that the financing statement provide, as the name of the debtor, the name for the trust indicated on the trust's public organic record. If, however, the trust is not a registered organization, then subsection (a)(3), which would be an exception to subsection (a)(1), would govern. Depending on the circumstances, the name of the trust or the settlor would be required as the name of the debtor.

3. An Official Comment might explain the following points, all of which would appear to be clarifications of current law:

(a) A financing statement that fails to provide an indication that the debtor is a trust or is a trustee acting with respect to property held in a trust does not “substantially satisfy[] the requirements” of Part 5 within the meaning of Section 9-506(a) and so is ineffective.

(b) A financing statement that fails to provide additional information that is sufficient to distinguish the trust from other trusts having the same settlor does not “substantially satisfy[] the requirements” of Part 5 within the meaning of Section 9-506(a) and so is ineffective.

(c) The “minor-error-not-seriously-misleading” test of Section 9-506(a), and not the debtor-name rules of Section 9-503(b) and (c), determines whether a financing statement that provides the wrong indication of the debtor's status (e.g., it indicates that the debtor is a trust when in fact the debtor is a trustee) is sufficient to perfect.

4. A question has arisen whether the sufficiency of “additional information . . . to distinguish the trust from other trusts having one or more of the same settlors” is to be tested with respect to other trusts actually settled by the same settlor or with respect to other trusts that hypothetically might be settled by the same settlor. For example, is any additional information required if the settlor settles only one trust and the financing statement includes the required indication that the debtor is a trust or is a trustee acting with respect to property held in a trust? The Joint Review Committee may wish to consider whether an Official Comment addressing this issue would be useful.

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

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

* * *

(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; and

(D) if the collateral is property held in an express trust and the law of this State determines who has an interest in the collateral, [the trustee of the trust] [the trust].

Reporter’s Note

The foregoing amendment to the definition of “debtor” has been proposed by The State Bar of Texas Business Law Section UCC Committee. The Texas Committee explains the proposal as follows:

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.

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):

[A modified version of the proposed language appears above.]

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.

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”) 2-3 (Jan. 26, 2009).