



MEMORANDUM

To: Joint Review Committee for Article 9
From: Professors Stephen L. Sepinuck & Linda J. Rusch
Date: January 20, 2010
Re: Proposed Amendments to § 9-316(h) and § 9-322(b)(3), (h)

We recommend that the Committee withdraw its proposals to give secured parties a four-month grace period for perfection as to collateral acquired by the debtor after moving to new jurisdiction, § 9-316(h), and the accompanying changes to the priority rules necessitated by this proposal, § 9-322(b)(3), (h).

Throughout the Committee's deliberations, Committee members have consistently indicated that they do not wish to revisit policy decisions made in the revision process a decade ago. In addition, members have indicated repeatedly that no change should be proposed unless there is a demonstrated need for it. We believe that the proposed grace period and accompanying changes to the priority rules violate both of these tenets the Committee has set for itself. In addition, the proposal adds substantial complexity for little gain.

The Proposal Represents a Major Change in Policy

The lack of a grace period to perfect in collateral acquired after the debtor moves to a new jurisdiction is not new. As originally enacted, Article 9 contained no grace period for perfecting in newly acquired collateral. This was certainly true for collateral such as accounts, for which the place to file was the location of the debtor. It was also indirectly true for goods, for which the place to file was where the goods were located, if the newly acquired goods were with the debtor in the new jurisdiction.

The 1998 revisions did not change this. No grace period was added even though the place to file as to almost all collateral became the location of the debtor. That was in part because the rules on where a debtor is deemed to be located. Under revised § 9-307(e), a registered entity is located in the jurisdiction in which it is organized. Registered entities do not move. They may merge, with the result that a "new debtor" becomes bound by the security agreement, *see* § 9-316 cmt. 2, but they do not move to a new jurisdiction. Thus, the changes proposed now are relevant only to individual debtors, general partnerships, and other unregistered entities. Indeed, they are relevant only to such entities that have granted a security interest in after-acquired collateral. Our experience suggests that this is a very small fraction of debtors in secured transactions.

History of the Changes Before the Committee

The idea underlying these changes was discussed in the Report of the Article 9 Review Committee. It wrote:

a financing statement filed in the debtor's original location is not effective to perfect a security interest in collateral that the debtor acquires after it relocates. If a drafting committee thinks that a "grace period" is desirable in the setting of a new debtor, it may wish to consider whether a "grace period" is desirable in the debtor-relocation setting as well.

Providing "grace periods" in these contexts may reflect a policy change that would need to be justified.

Report of Article 9 Review Committee 11 (2008).

At its first meeting, the Joint Review Committee did not reach consensus on whether the problem is sufficient to merit a change, given the added complexity it would bring. The Committee nevertheless asked the reporter to draft a proposal for consideration.

At its second meeting, the Committee reviewed a draft new § 9-316(h). It agreed to the draft in principle but thought that an additional change would be necessary to ensure that buyers and new secured parties who file first in the new jurisdiction should have priority over the old secured party (as they do under current law). The Committee asked the reporter to draft one or more priority rules but acknowledged that, if those rules prove too complicated, the Committee may revisit its conclusion about whether to propose this change. At its third meeting, the Committee agreed to the revised proposal with little discussion.

It is telling that at no time did the Committee truly evaluate the need for the proposed changes. We are aware of no reported case under revised Article 9 involving the lack of a grace period for perfection following a relocation of the debtor.

Complexity Not Needed

The proposed changes would add three new provisions – § 9-316(h), § 9-322(b)(3), and § 9-322(h) – that collectively contain in excess of 300 words. They therefore add substantial complexity. They do this to change a policy codified in original Article 9 and confirmed in revised Article 9, to deal with an issue that applies to a small proportion of debtors and that has not proven to be a problem.

We appreciate the work of the reporter but nevertheless suggest that the Committee refrain from recommending these amendments.