# Joint Article 9 Review Committee
# Meeting Notes for March 26-28, 2010

**Prepared by Professor Stephen L. Sepinuck**

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Chair Report:

After this meeting, a draft will be prepared for the ALI annual meeting in May and the ULC annual meeting in July, for those organizations to consider and, hopefully, approve.

1. Deletion of Example 9A and the Related text of Comment 5 to Draft § 9-316.

The Committee agreed to this.

2. Considerations in Determining the Relationship of Other Law to the Notification Requirements of Article 9, Part 5 (§ 9-611, Comment 10).

10. **Other Law.** Other law may contain requirements concerning notification of a disposition of property by a secured party. For example, federal law imposes notification requirements with respect to the enforcement of mortgages on federally documented vessels. Principles of statutory interpretation and, in the context of federal law, supremacy and preemption determine whether and to what extent law other than this Article supplements, displaces, or is displaced by this Article. See Sections 1-103(b), 1-104, 9-109(c)(1).

The Committee agreed to this, but added "state or federal" after the first word.

3. Amendments to Comment 5d to § 9-102, Addressing the Classification of Rights to Payment Related to Credit-card Transactions.

d. **"General Intangible"; "Payment Intangible."** "General intangible" is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument. A debtor's right to payment from another person of amounts received by the other person on the debtor's behalf, including the right of a merchant in a credit-card, debit-card, prepaid-card, or other payment-card transaction to payment of amounts received by its bank from the card system in settlement of the transaction, is also a "general intangible." (In contrast, the right of a credit-card issuer to payment arising out of the use of a credit card is an "account.") * * *

The Committee discussed this at some length. The underlying assumption was that the merchant's agent had been paid and the merchant had a right to payment from its agent.

The Committee decided to delete this addition and instead add a comment relating to the term "account" that says that § 9-102(a)(2)(vii) deals only with the cardholder's obligation to pay.

4. Anti-*Commercial Money Center*

[However, a] [A] right to the payment of money is frequently buttressed by ancillary ~~covenants~~ rights, such as covenants in a purchase agreement, note, or mortgage

requiring insurance on the collateral or forbidding removal of the collateral, or covenants to preserve the creditworthiness of the promisor, such as covenants restricting dividends and the like. This Article does not treat these ancillary rights separately from the rights to payment to which they relate. For example, attachment and perfection of an assignment of a right to payment of a monetary obligation, whether it be an account or payment intangible, also carries these ancillary rights. Among these ancillary rights are the lessor's rights with respect to leased goods that arise upon the lessee's default. See Section 2A-523. Accordingly, and contrary to the opinion in *In re Commercial Money Center, Inc.*, 350 B.R. 465 (B.A.P. 9th Cir. 2006), if the lessor's rights under a lease constitute chattel paper, an assignment of the lessor's right to payment under the lease also would be chattel paper, even if the assignment excludes other rights.

The Committee decided to delete "Accordingly and" and to move a portion of first additional sentence – "the lessor's rights with respect to leased goods that arise upon the lessee's default" – to end of the first sentence of the paragraph.

5. Addition to Comment 11 to § 9-102

The first sentence of the definition of "certificate of title" includes both tangible and electronic records. If a state's certificate-of-title statute provides for both a tangible and an electronic record, the term "certificate of title" should be interpreted in a manner consistent with the effect given to the two records by the certificate-of-title statute.

The Committee agreed to this.

6. Changes to Comment 3 to § 9-330

3. **Chattel Paper.** Subsections (a) and (b) follow former Section 9-308 in distinguishing between earlier-perfected security interests in chattel paper that is claimed merely as proceeds of inventory subject to a security interest and chattel paper that is claimed other than merely as proceeds. Like former Section 9-308, this section does not elaborate upon the phrase "merely as proceeds." For an elaboration, see PEB Commentary No. 8.

For a security interest to qualify for priority under subsection (a) or (b), the secured party must "take[] possession of the chattel paper or obtain[] control of the chattel paper under Section 9-105." When chattel paper comprises one or more tangible records and one or more electronic records, a secured party may satisfy this requirement, and perfect a security interest in the chattel paper, by taking possession of the tangible records and having control of the electronic records.

The Committee agreed to this after deciding to move "and perfect a security interest in the chattel paper" to a separate sentence.

7. New Comment 5 to § 9-512

5. **Amendment Adding Debtor Name.** Many states have enacted statutes governing the "conversion" of one organization, e.g., a corporation, into another, e.g., a limited liability company. This Article defers to those statutes to determine whether the resulting organization is the same legal person as the initial, converting organization (albeit with a different name) or whether the resulting organization is a different legal person. When the governing statute does not clearly resolve the question, a secured party whose debtor is the converting organization may wish to proceed as if the statute provides for both results. In these circumstances, an amendment adding to the initial financing statement the name of the resulting organization may be preferable to an amendment substituting that name for the name of the debtor appearing on the initial financing statement. In the event the governing statute is construed as providing that the resulting organization is the same person as the converting organization but with a different name, the timely filing of such an amendment would satisfy the requirement of Section 9-507(c)(2). If, however, the governing statute is construed as providing that the resulting organization is a different legal person, such an amendment would have the effect of adding the resulting organization as a debtor. See Comment 4. Regardless of how the governing statute is construed, the converting and resulting organizations may be organized under the law of different jurisdictions and so may be located in different jurisdictions under Section 9-307. In that case, a filing in the location of the resulting organization may be advisable.

The Committee agreed to this.

8. The Requirements for the Affidavit of a Debtor Who Initiates a Termination Statement under § 9-513a Now Require the Affiant to State That He Was a Governmental Employee.

**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 affiant is an individual who was a government employee at or before the time the financing statement was filed and 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.]

The Committee decided to add a "new value" requirement to subsection (j).

The Committee discussed whether subsection (a) should be limited to government employees of this state. It decided to change "this" to "a" to be sure that a government employee in State A who lives in State B could make use of this provision if the financing statement was filed in State B and State B had enacted this section.

The Committee considered a suggestion to delete "and was filed by an individual not entitled to do so under Section 9-509(a)" from subsection (b) because the filing office would have no way of knowing that. For the same reason, it considered a suggestion to amend subsection (c) by changing "an individual" to "a person." Eventually the Committee decided to establish a subcommittee to work on revising the section. The Committee also agreed that this section should be not be in or an appendix to Article 9, and should merely be available if and when states seek to deal with the issue of fraudulent financing statements.

9. § 9-518 and Comment 2 (Concerning the "Information Statement") Have Been Revised and a Conforming Change Has Made to § 9-516.

* * * Sometimes a person files a termination statement or other record relating to a financing statement without being entitled to do so. A secured party of record with respect to the financing statement who believes that such a record has been filed may—but need not—file an information statement under subsection (c). If the person filing the record was not entitled to do so, the filed record is ineffective, regardless of whether the secured party of record files an information statement. Likewise, if the person filing the record was entitled to do so, the filed record is effective, even if the secured party of record files an information statement. See Section 9-510(a), 9-518(e).

The Committee agreed to this. The Committee also discussed allowing the person who wrongfully filed a record to file the information statement. This would allow the accidental filer to try to clear up the record without bothering the secured party of record. Moreover, an information statement filed by the person who filed the wrongful record might be more likely to be believed. However, the Committee chose not to expand this section in this manner.

The Committee also agreed to strengthen the comment to make it more clear that the secured party or record, even one who knows of the filing of an unauthorized amendment, has no duty to file an information statement.

10. An erroneous cross-reference in § 9-616, Comment 2, has been corrected.

> 2. **Duty to Send Information Concerning Surplus or Deficiency. * * *** A debtor or secondary obligor need not wait until the secured party commences written collection efforts in order to receive an explanation of how a deficiency or surplus was calculated. Subsection ~~(b)(2)~~(a)(1)(B) obliges the secured party to send an explanation within 14 days after it receives a "request" (defined in subsection (a)(2)).

The Committee agreed to this but changed the correction to "Subsection (b)(1)(B)."

11. Four-Month Grace Period of Perfection As to New Collateral After Debtor Moves – §§ 9-316(h), 9-322(b)(3), (h)

The Committee considered a proposal to delete the proposed amendments for lack of demonstrated need. The Committee decided to retain the proposal in part because corporate law was changing to allow registered entities to move (*i.e.*, a re-incorporation in a new state would be the same entity).

Later in the meeting, the Committee reviewed an analysis presented to it that the proposed changes could result in circular priorities. Specifically:

> Sp1 files and perfects in Jurisdiction 1. Sp2 files and perfects in Jurisdiction 1. Debtor moves to Jurisdiction 2. Sp2 re-files in Jurisdiction 2 (within four months of move). Sp3 files in Jurisdiction 2. Sp1 re-files in jurisdiction 2 (within four months of move).
>
> As to collateral acquired after the move, Sp2 beats Sp3. § 9-322(a), (b)(3). Sp3 beats Sp1. § 9-322(b)(3). Sp1 beats Sp2. § 9-322(h). Thus we have a circular priority.

In connection with this, the point was made that Sp3 will usually search in Jurisdiction 1 anyway because it will usually be interested in collateral acquired before the move. After some discussion, the Committee decided that if the reporter could easily draft a change that would subordinate Sp3 to Sp1 and Sp2 in post-move collateral if the prior filers re-file in Jurisdiction 2

within four months of the move, then that would be a good change. The Committee reached a similar agreement with respect to the proposed new § 9-316(i) and the accompanying amendments to priority rules

12. Control of Electronic Chattel Paper

**SECTION 9-105. CONTROL OF ELECTRONIC CHATTEL PAPER.**

(a) **[General rule: control of electronic chattel paper.]** 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. * * *

(b) **[Specific facts giving control.]** A system satisfies subsection (a), and a secured party has control of electronic chattel paper, if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the secured party as the assignee of the record or records;

(3) the authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) copies or ~~revisions~~ amendments that add or change an identified assignee of the authoritative copy can be made only with the ~~participation~~ consent of the secured party;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any ~~revision~~ amendment of the authoritative copy is readily identifiable as ~~an~~ authorized or unauthorized ~~revision~~.

Concern was raised that if there are two assignees and the evidence points to both being in control, then neither of them will have control. The Committee will consider revising the comment to deal with this.

13. Certificates of Title

(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 the 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 result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

The Committee agreed to add "of title" before "for the collateral" and o delete "for the collateral." The Committee also agreed to change "another" to "a."

14. § 9-104(a)(4), concerning control of a deposit account through another person having control, has been revised and a draft comment added

(4) a person, other than the bank, having previously acquired control of the deposit account, [acknowledges] [authenticates a record acknowledging] 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).

* * *

Subsection (a)(4) enables a secured party to obtain control through the acknowledgment of another secured party that has control. This subsection differs from the analogous provision in Section 8-106 in two ways. First, it does not expressly provide that a secured party may obtain control of a deposit account if another person has control on its behalf. This result follows from the law of agency, which applies generally to Article 9. See Section 1-103. Second, control does not arise under subsection (a)(4) if the acknowledging secured party is the bank with which the deposit account is maintained. This limitation, which is inherent in Section 8-106, follows from the fact that the key to the control concept is that the secured party has the ability to reach the collateral (here, the funds on deposit) without further action by the debtor. A secured party may lack the ability to reach the funds on deposit without further action by the debtor, even if the bank with which the deposit account is maintained, and which has control under Section 9-104, acknowledges that it has control on behalf of the secured party.

The Committee discussed at length whether and how to mirror the rules for control in § 9-104 to those for control in § 8-106, in particular whether control should be permitted by acknowledgment of someone in control and, if so, whether that should work if the acknowledging party is the intermediary. Eventually the Committee decided to delete the proposed amendments to § 9-104, 9-327, and § 9-607, and to replace them with a comment that control of a deposit account can be effected through an agent. The draft example to § 9-104 cmt. 3 will also be retained.

15. Perfection in Commodity Accounts Through an Agent – § 9-106

> (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.

The Committee discussed whether to add this language, which mirrors language in § 8-106, and if so whether this would permit control by the commodities intermediary merely acknowledging that it holds for the new secured party. The Committee decided to delete this proposal, given that it agreed to withdraw the similar change to § 9-104 regarding control of deposit accounts.

16. Placement of Transition Rules

The Committee discussed whether the transition rules should be in the code – such as a Part 8, Transition Rules for the 2010 Amendments – or merely part of the legislative package. It decided that the rules should be Part 8 of Article 9.

17. Uniform Effective Date

The Committee agreed that a uniform effective date was desirable, in part because it signaled to states the need act swiftly. Because time is needed to bring filers up to speed on the new rules and filing offices time to adapt to the new forms, the uniform effective date should be in 2013.

18. § 9-802

> SECTION–9-802. DEFINITION. As used in this part, "pre-effective-date financing statement" means a financing statement filed before this [Act] takes effect.

The Committee agreed to give the reporter the discretion to retain or delete this, as needed.

19. § 9-803

**SECTION ~~9-702~~ 9-803. SAVINGS CLAUSE.**

(a) **[Pre-effective-date transactions or liens.]** Except as otherwise provided in this part, this [Act] applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this [Act] takes effect.

(b) ~~**[Continuing validity.]** Except as otherwise provided in subsection (c) and Sections 9-703 through 9-709:~~

~~(1) transactions and liens that were not governed by [former Article 9], were validly entered into or created before this [Act] takes effect, and would be subject to this [Act] if they had been entered into or created after this [Act] takes effect, and the rights, duties, and interests flowing from those transactions and liens remain valid after this [Act] takes effect; and~~

~~(2) the transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by this [Act] or by the law that otherwise would apply if this [Act] had not taken effect.~~

~~(c)~~ **[Pre-effective-date proceedings.]** This [Act] does not affect an action, case, or proceeding commenced before this [Act] takes effect.

The language of proposed § 9-803 is drawn from § 9-702 and redlining is used to show the differences, but no change is to be made to § 9-702. The same is true for the remaining transition rules discussed below.

The Committee agreed that subsection (b) in old § 9-702 is not necessary because there are no new scope rules.

20. § 9-804

**SECTION ~~9-703~~ 9-804. SECURITY INTEREST PERFECTED BEFORE EFFECTIVE DATE.**

[(a) **[Continuing ~~priority over lien creditor~~ perfection: perfection requirements satisfied.]]** A security interest that is ~~enforceable~~ a perfected security interest immediately before this [Act] takes effect ~~and would have priority over the rights of a person that becomes a lien creditor at that time~~ is a perfected security interest under [Article 9 as amended by this [Act]] if, when this [Act] takes effect, the applicable requirements for ~~enforceability~~ attachment and perfection under [Article 9 as amended by this [Act]] are satisfied without further action.

[(b) **[Continuing ~~priority over lien creditor~~ perfection: perfection requirements not satisfied.]** Except as otherwise provided in Section ~~9-705~~ 9-806, if, immediately before this [Act] takes effect, a security interest is ~~enforceable and would have priority over the rights of a person that becomes a lien creditor at that time~~ a perfected security interest, but the applicable requirements for ~~enforceability or~~

perfection under [Article 9 as amended by this [Act]] are not satisfied when this [Act] takes effect, the security interest~~:~~

~~(1) is a perfected security interest for one year after this [Act] takes effect;~~

~~(2) remains enforceable thereafter only if the security interest becomes enforceable under Section 9-203 before the year expires; and~~

~~(3)~~ remains perfected thereafter only if the applicable requirements for perfection under [Article 9 as amended by this [Act]] are satisfied ~~before the year expires~~ within one year after this [Act] takes effect.]

The Committee discussed whether this adequately preserved priority under § 9-317(a)(2) and concluded that it probably did.

The Committee was not certain that subsection (b) was needed, but decided to leave it in.

21. § 9-805

**SECTION ~~9-704~~ 9-805. SECURITY INTEREST UNPERFECTED BEFORE EFFECTIVE DATE.** A security interest that is ~~enforceable~~ an unperfected security interest immediately before this [Act] takes effect ~~but which would be subordinate to the rights of a person that becomes a lien creditor at that time:~~

~~(1) remains an enforceable security interest for one year after this [Act] takes effect;~~

~~(2) remains enforceable thereafter if the security interest becomes enforceable under Section 9-203 when this [Act] takes effect or within one year thereafter; and~~

~~(3)~~ becomes perfected~~:~~

~~(A)~~(1) without further action, when this [Act] takes effect if the applicable requirements for perfection under [Article 9 as amended by this [Act]] are satisfied before or at that time; or

~~(B)~~(2) when the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

The Committee agreed to this.

22. § 9-806

**SECTION ~~9-705~~ 9-806. EFFECTIVENESS OF ACTION TAKEN BEFORE EFFECTIVE DATE.**

(a) ~~**[Pre-effective-date action; one-year perfection period unless reperfected.]** If action, other than the filing of a financing statement, is taken before this [Act] takes effect and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before this [Act] takes effect, the action is effective to perfect a security interest that~~

~~attaches under this [Act] within one year after this [Act] takes effect. An attached security interest becomes unperfected one year after this [Act] takes effect unless the security interest becomes a perfected security interest under this [Act] before the expiration of that period.~~

~~(b)~~ **[Pre-effective-date filing effective.]** The filing of a financing statement before this [Act] takes effect is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under [Article 9 as amended by this [Act]].

~~(c)~~(b) **[~~Pre-effective-date filing in jurisdiction formerly governing perfection~~When pre-effective-date filing becomes ineffective.]** This [Act] does not render ineffective an effective financing statement that, before this [Act] takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [~~former Section 9-103~~Part 3 of Article 9 in force immediately prior to the effective date of this Act]. However, except as otherwise provided in subsections (~~d~~c) and (~~e~~d) and Section ~~9-706~~ 9-807, the financing statement ceases to be effective at the ~~earlier~~ earliest of:

(1) if the financing statement is filed in this State, the time the financing statement would have ceased to be effective had this [Act] not taken effect; or

(2) if the financing statement is filed in another jurisdiction, the time the financing statement would have ceased to be effective under the law of ~~the~~ that jurisdiction ~~in which it is filed~~; or

(~~2~~3) June 30, ~~2006~~ 2018.

~~(d)~~(c) **[Continuation statement.]** The filing of a continuation statement after this [Act] takes effect does not continue the effectiveness of the financing statement filed before this [Act] takes effect. However, upon the timely filing of a continuation statement after this [Act] takes effect and in accordance with the law of the jurisdiction governing perfection as provided in Part 3 [of Article 9 in force immediately prior to the effective date of this Act], the effectiveness of a financing statement filed in the same office in that jurisdiction before this [Act] takes effect continues for the period provided by the law of that jurisdiction.

~~(e)~~(d) **[Application of subsection ~~(c)(2)~~ (b)(3) to transmitting utility financing statement.]** Subsection ~~(c)(2)~~ (b)(3) applies to a financing statement that, before this [Act] takes effect, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [~~former Section 9-103~~ Part 3 of Article 9 in force immediately prior to the effective date of this Act], only to the extent that Part 3 as amended by this [Act] provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

~~(f)~~(e) **[Application of Part 5.]** A financing statement that includes a financing statement filed before this [Act] takes effect and a continuation statement filed after this [Act] takes effect is effective only to the extent that it satisfies the requirements of Part 5 as amended by this [Act] for an initial financing statement.

The Committee agreed to this, but paragraphs (b)(2) and (3) will be merged, so that the June 30, 2018 date will apply only to filings in other jurisdictions, thus preserving the efficacy of filings with an effective duration longer than five years. An appropriate change will be made to subsection (d).

The language of subsection (c) will clarified.

23. § 9-807

**SECTION ~~9-706~~ 9-807. WHEN INITIAL FINANCING STATEMENT SUFFICES TO CONTINUE EFFECTIVENESS OF FINANCING STATEMENT.**

(a) **[Initial financing statement in lieu of continuation statement.]** The filing of an initial financing statement in the office specified in Section 9-501 continues the effectiveness of a financing statement filed before this [Act] takes effect if:

(1) the filing of an initial financing statement in that office would be effective to perfect a security interest under [Article 9 as amended by this [Act]];

(2) the pre-effective-date financing statement was filed in an office in another State ~~or another office in this State~~; and

(3) the initial financing statement satisfies subsection (c).

(b) **[Period of continued effectiveness.]** The filing of an initial financing statement under subsection (a) continues the effectiveness of the pre-effective-date financing statement:

(1) if the initial financing statement is filed before this [Act] takes effect, for the period provided in [former Section ~~9-403~~ 9-515] with respect to ~~a~~ an initial financing statement; and

(2) if the initial financing statement is filed after this [Act] takes effect, for the period provided in Section 9-515 as amended by this [Act] with respect to an initial financing statement.

(c) **[Requirements for initial financing statement under subsection (a).]** To be effective for purposes of subsection (a), an initial financing statement must:

(1) satisfy the requirements of Part 5 as amended by this [Act] for an initial financing statement;

(2) identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) indicate that the pre-effective-date financing statement remains effective.

The Committee agreed to this with the understanding that the reporter will consider whether the deleted language in paragraph (a)(2) should be retained to cover fixture filings or the like.

The scope of subsection (b) is extremely narrow because it applies only to transmitting utilities whose location has changed, and there are very few entities for whom the amendments even arguably change their location. Nevertheless, the Committee chose to retain it.

24. § 9-808

**SECTION ~~9-707~~ 9-808. AMENDMENT OF PRE-EFFECTIVE-DATE FINANCING STATEMENT.**

(a) ~~**[ "Pre-effective-date financing statement".]** In this section, "pre-effective-date financing statement" means a financing statement filed before this [Act] takes effect.~~

~~(b)~~ **[Applicable law.]** After this [Act] takes effect, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in Part 3 as amended by this [Act]. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(~~c~~b) **[Method of amending: general rule.]** Except as otherwise provided in subsection (~~d~~c), if the law of this State governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after this [Act] takes effect only if:

(1) the pre-effective-date financing statement and an amendment are filed in the office specified in Section 9-501;

(2) an amendment is filed in the office specified in Section 9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies Section~~9-706(c)~~ 9-807(c); or

(3) an initial financing statement that provides the information as amended and satisfies ~~Section 9-706(c)~~ 9-807(c) is filed in the office specified in Section 9-501.

(~~d~~c) **[Method of amending: continuation.]** If the law of this State governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under Section ~~9-705(d)~~ 9-806(c) and (~~f~~e) or ~~9-706~~ 9-807.

(~~e~~d) **[Method of amending: additional termination rule.]** Whether or not the law of this State governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in this State may be terminated after this [Act] takes effect by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies Section ~~9-706(c)~~ 9-807(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 as amended by this [Act] as the office in which to file a financing statement.

The Committee agreed to this.

25. § 9-809

**SECTION ~~9-708~~ 9-809. PERSONS ENTITLED TO FILE INITIAL FINANCING STATEMENT OR CONTINUATION STATEMENT.** A person may file an initial financing statement or a continuation statement under this part if:

(1) the secured party of record authorizes the filing; and

(2) the filing is necessary under this part:

(A) to continue the effectiveness of a financing statement filed before this [Act] takes effect; or

(B) to perfect or continue the perfection of a security interest.

The Committee agreed to this.

26. § 9-810

**SECTION ~~9-709~~ 9-810. PRIORITY.**

~~(a) [Law governing priority.]~~ This [Act] determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before this [Act] takes effect, [~~former~~ pre-amendment Article 9] determines priority.

~~(b) [Priority if security interest becomes enforceable under Section 9-203.] For purposes of Section 9-322(a), the priority of a security interest that becomes enforceable under Section 9-203 of this [Act] dates from the time this [Act] takes effect if the security interest is perfected under this [Act] by the filing of a financing statement before this [Act] takes effect which would not have been effective to perfect the security interest under [former Article 9]. This subsection does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement.~~

The Committee agreed to this.

27. Transition in General

The comment was made that these transition rules are very complicated – mostly out of completeness – but many have little or no applicability. Therefore, the Committee agreed that a comment was in order to explain that there should in fact be few transition problems.

28. Name of Registered Organization

(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; and

(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 purports to amend or restate the debtor's name.

The Committee discussed this at length and the reporter agreed to consider rephrasing the rule to make it simpler: the name of the debtor is the name stated to be the debtor's name on the most recently filed record that states what the debtor's name is. The reporter will also change "is comprised" to "consists of."

29. Business Trusts

(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.

The Committee agreed that a comment should explain that a business trust can be a statutory trust, in which case it would covered by subparagraph (A) or a common-law business trust, in which case it is covered by subparagraph (B). Either way, it would be a registered organization.

30. Name of Decedent's Estate

Section 9-503(a)(2) begins by with the proviso: "if the debtor is a decedent's estate." A suggestion was made that this formulation is problematic because a decedent's estate is not an entity. The owner is either the personal representative or the heirs. Accordingly, a suggestion was offered to change the introductory phrase to: "if the collateral is being administered by the personal representative of a decedent" and that the name of the debtor on the financing statement should be "[t]he name of the decedent indicated on the order appointing the personal representative of the decedent issued by the court having jurisdiction over the collateral is sufficient as the "name of the decedent."

This suggestion does not deal with who the debtor is or where the debtor is located, merely what name to use. It also implies two additional points. First, if the property passed by operation of law immediately to the beneficiary, this rule would suggest that a name change occurs when the collateral ceases to be administered by the personal representative. If the property is deemed to be owned by the personal representative, then when the passage of the collateral to an heir would a transfer.

The Committee agreed to this, with the understanding that a comment may indicate that the name used should be the "first" name listed in the order appointing the personal representative, if the order lists more than one name for the decedent.

31. Name of Debtor for Property Held in Trust

**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 the collateral is 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~~;

(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 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 separate part of the financing statement:

(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;

* * *

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

(1) 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; and

(2) in other cases, the name of the settlor indicated in the trust's organic record.

The Committee agreed to this after agreeing to change "the debtor is a trust or is a trustee" in (a)(3)(B) to "the collateral is held in trust." The Committee also agreed to simplify paragraph (a)(1) "public organic record filed with or issued or enacted by registered organization's jurisdiction of organization" to "public organic record for the registered organization" or something similar to be drafted by the reporter.

32. Applicability of individual-debtor-name rules to individuals named in mortgages that are effective as fixture filings (§ 9-502(c)), to individuals comprising a nameless debtor (§ 9-504(a)(5)(B)), and to situations in which an individual name is to be used even though the debtor is a different entity (*e.g.,* a partnership).

The Committee agreed that the individual debtor name rules should apply when the debtor is a partnership without a name and the financing statement is to be filed under the partners' names.

The Committee also agreed that a mortgage should operate as a fixture filing regardless of whether it complies with the new rules on the individual debtor's name. A fixture filing will have to comply with the new rules on the debtor's name.

33. Individual Debtor Name

The Committee began its deliberations with the chair summarizing the current two options under consideration: (i) Alternative A – the "only if" rule with the debtor's driver's license as the only name to use and, if there is none, the debtor's first and last name: (ii) Alternative B – the safe harbor rule with the debtor's driver's as a safe harbor and, if there is none, the debtor's first and last name.

A proposal was made to have a legislative note that for states that: (i) have non-driver IDs issued by the same entity that issue driver's licenses; and (ii) do not allow individuals to have both a driver's license and a non-driver ID, to permit either to ID to work for both Alternative A and Alternative B. The Committee agreed to this, with the understanding that it may need to hold a conference call after the reporter drafts appropriate language.

34. Alternative A – § 9-503

**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:

* * *

(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 to whom this State has issued a [*driver's license*] that appears not to have expired, only if it provides the name of the individual which is indicated on the [*driver's license*];

(5) if the debtor is an individual as to whom paragraph (4) does not apply, only if it provides the individual name of the debtor or the surname and first personal name of the debtor; and

~~(4)~~(6) 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 has issued to an individual more than one [driver's license] or [identification card] 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.

The Committee agreed to delete "or [identification card]" in subsection (g)

The Committee also agreed to change "appears not to have"to "has not" and to explain in a comment that "expired" relates only to time, not to cancellation or lapse of driving privileges. It then agreed to the alternative as a whole.

35. Alternative B – § 9-503

The Committee agreed to this.

36. Legislative Note Regarding Individual Debtor Name

"Short" Version

This legislation contains two alternative sets of amendments relating to the names of individual debtors. Both alternatives refer, in part, to the name as shown on a debtor's [driver's license]. The Legislature should be aware that, in some states, certain characters that may be used by the state's department of motor vehicles (or similar agency) in the name on a [driver's license] may not be accepted by the state's central or local UCC filing offices under current regulations or internal protocols. This may occur because of technological limitations of the filing offices or merely as a result of inconsistent procedures. Similar issues may exist for field sizes as well. In these situations, perfection of a security interest granted by a debtor with such a [driver's license] may be impossible under Alternative A of the amendments and may be more difficult under Alternative B. Accordingly, the Legislature may wish to determine if one or more of these issues exist in this state and, if so, to make certain that such issues have been resolved, which might be accomplished by statute, agency regulation, or technological change effectuated before or as part of enacting the amendments relating to the name of an individual debtor.

"Long" Version

This legislation contains two alternative sets of amendments relating to the names of individual debtors. Both alternatives refer, in part, to the name as shown on a debtor's [driver's license]. The Legislature should be aware that, in some states, certain characters that may be used by the state's department of motor vehicles (or similar agency) in the name on a [driver's license] may not be accepted by the state's central or local UCC filing offices under current regulations or internal protocols. This may occur because of technological limitations of the filing offices or merely as a result of inconsistent procedures. Similarly, the field sizes available in the State's [driver's license] system for the surname, first personal name or additional personal names may exceed the analogous field sizes at the UCC filing office, possibly resulting in omission or truncations. If this situation exists in this state, (i) under Alternative A, perfection of a security interest granted by a debtor with such a [driver's license] may be impossible under Alternative A of the amendments, and (ii) under Alternative B, the flexibility

offered would be diminished to the extent that one of the three statutory safe harbor options might be unreliable. Accordingly, the Legislature may wish to determine if one or more of these issues exist in this state and, if so, to make certain that such issues have been resolved, which might be accomplished by statute, agency regulation, or technological change, effectuated before or as part of enacting the amendments relating to the name of an individual debtor.

If the Legislature wishes to enact this legislation without undertaking the actions mentioned above, the Legislature might consider deferring the effective date of the amendments relating to the name of an individual debtor to a date that will provide sufficient time to resolve issues of the sort described in the previous paragraph.

The Committee agreed to go with the shorter version, but to change the language "and may be more difficult under Alternative B" to something that makes clear that the incompatibilities do not make Alternative B more difficult than current law but merely diminish the benefits of the change by making one of the safe harbors (the driver's license name) unavailable.

37. Draft Comment on Individual Debtor Name

"Short" Version

In both Alternative A and Alternative B, Sections [9-503(a)(5)] and [9-503(a)(4)(A)] provide in some circumstances for a financing statement to provide the "name" of an individual debtor. Further, Sections [9-503(a)(5)] and [9-503(a)(4)(B)], respectively, provide a "safe harbor" for individuals without a [driver's license], if the financing statement provides the debtor's first personal name and surname. In each of these situations, it is the state's law of names that determines which words constitute the person's name (including the person's surname) at the relevant time.

a. *Context*. When looking to a state's law of names, it should be noted that the state's law of names may address a person's name in other contexts. In determining a person's name under Article 9, the reference to a state's law of names should take into account the context of the use of the name under Article 9.

b. *Other documents*. The name on a person's birth certificate is not necessarily the person's name, unless the state's law of names [considers] [recognizes] the name on the birth certificate to be the person's name. Further, the words that a person puts into other documents as that person's name, such as a bankruptcy petition or a tax return, are not the person's name, unless state law of names [considers] [recognizes] them as the person's name.

c. *Surnames*. The identification of an individual debtor's surname does not depend on the location of the surname in the sequence of words that make up the individual's

name. While in most cases, the surname is the last word of an individual's name, in some cultures the surname is the first word, and in others it may be a word in the middle. In addition, in some situations, the surname may consist of more than one word, which may or may not be hyphenated. Moreover, in some cultures, a person may have two family names, one from the person's father and one from the person's mother. In some cases, the person's surname consists of both names. In other cases, only one of those family names is the person's surname. In all of these situations, it is the state's law of names that determines which word or words constitute the person's surname.

d. *Nicknames*. A nickname is not a part of a person's name, unless the nickname has become the person's name under the state law of names. See Section 9-503(d) (providing only a debtor's trade name on a financing statement is not sufficient).

"Long" Version
(Additions to "short" version are underscored)

In both Alternative A and Alternative B, Sections [9-503(a)(5)] and [9-503(a)(4)(A)] provide in some circumstances for a financing statement to provide the "name" of an individual debtor. Further, Sections [9-503(a)(5)] and [9-503(a)(4)(B)], respectively, provide a "safe harbor" for individuals without a [driver's license], if the financing statement provides the debtor's first personal name and surname. In each of these situations, it is the state's law of names that determines which words constitute the person's name (including the person's surname) at the relevant time.

a. *Context*. When looking to a state's law of names, it should be noted that the state's law of names may address a person's name in other contexts. In determining a person's name under Article 9, the reference to a state's law of names should take into account the context of the use of the name under Article 9. The context of the goals of the UCC is to have an operational system that, by simplicity and predictability, facilitates financing. There is a value in uniformity in the determination of a person's name in the context of the fact that searchers and filers are not necessary local to the state in which the filing is made.

b. *Other documents*. The name on a person's birth certificate is not necessarily the person's name, unless the state's law of names [considers] [recognizes] the name on the birth certificate to be the person's name. The text of Article 9 does not refer to a person's "legal" name and a court should not rely on the "legal" if the debtor's name under the state's law of names is different from what might be considered the "legal" name, such as a birth certificate name. Further, the words that a person puts into other documents as that person's name, such as a bankruptcy petition or a tax return, are not the person's name, unless state law of names [considers] [recognizes] them as the person's name.

c. *Surnames*. The identification of an individual debtor's surname does not depend on the location of the surname in the sequence of words that make up the individual's name. While in most cases, the surname is the last word of an individual's name, in some cultures the surname is the first word, and in others it may be a word in the middle. In addition, in some situations, the surname may consist of more than one word, which may or may not be hyphenated. Moreover, in some cultures, a person may have two family names, one from the person's father and one from the person's mother. In some cases, the person's surname consists of both names. In other cases, only one of those family names is the person's surname. In all of these situations, it is the state's law of names that determines which word or words constitute the person's surname.

d. *Nicknames*. A nickname is not a part of a person's name, unless the nickname has become the person's name under the state law of names. See Section 9-503(d) (providing only a debtor's trade name on a financing statement is not sufficient).

The Committee discussed this at some length. Many expressed concern about referencing the law of names, which may not exist, may not be readily ascertainable, and even if it can be discovered is likely to have arisen to deal with issues unrelated to purposes of the Article 9 filing system. A suggestion was made that preference should be given to the name used on government-issued documents. The Committee ultimately decided to leave this to the reporter and that no further statutory changes were needed.

38. Forms

The Committee discussed how to conform the official forms to the new statutory text.

39. Anti-*Highland Capital* Provision

**SECTION 8-103. RULES FOR DETERMINING WHETHER CERTAIN OBLIGATIONS AND INTERESTS ARE SECURITIES OR FINANCIAL ASSETS.**

* * *

(h) An obligation, share, participation, or interest does not satisfy Section 8-102(a)(13)(ii) or 8-102(a)(15)(i) merely because the issuer or a person acting on its behalf:

(1) maintains records of the owner thereof for a purpose other than registration of transfer; or

(2) could, but does not, maintain books for the purpose of registration of transfer.

Comment

9. Subsection (h) rejects the holding of *Highland Capital Management LP v. Schneider*, 8 N.Y.3d 406 (2007). The registrability requirement in the definition of "registered form," and its parallel in the definition of "security," are satisfied only if books are maintained by or on behalf of the issuer for the purpose of registration of transfer, including the determination of rights under Section 8-207(a) (or if, in the case of a certificated security, the security certificate so states). It is not sufficient that the issuer records ownership, or records transfers thereof, for other purposes. Nor is it sufficient that the issuer, while not in fact maintaining books for the purpose of registration of transfer, could do so, for such is always the case. Subsection (h) is declaratory of the proper interpretation of the definitions of "registered form" and "security," not a change in law.

The Committee agreed to delete the section but retain a modified version of the comment, in Article 8, rejecting the decision, with the hope that New York would enact this section as part of the amendments to Article 9.