Entity conversions: financing statements – continued perfection and priority issues

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The problems

- Assume that:

  (i) An entity is an Article 9 debtor and its secured party has perfected its security interest by the filing of a financing statement

  (ii) The entity converts into or merges with another entity and the surviving entity is located in the same jurisdiction as was the disappearing entity

  (iii) the surviving entity has a name that is so different from the disappearing entity's name that it would fail the standard search logic test, and

  (iv) the conversion/merger statute is not clear on whether the survivor is the "same" entity as the disappearing entity; assume further that Article 9 would follow "other" law on this issue

- If the survivor in the conversion/merger is the "same" person (with a new name), then the secured party has to amend the financing statement filed against the disappearing entity in the conversion/merger to show the survivor's new name under 9-507(c), or the secured party will be unperfected for post-4 month collateral

- If the survivor in the conversion/merger is **not** the "same" person, then the conversion/merger is a disposition of the existing collateral and in order to maintain perfection and priority in *that* collateral against the creditors of the transferee, the secured party has to maintain the perfection of the security interest in the transferred collateral (9-507(a) and 9-325(a)); because the disappearing entity's name has *not* changed in this scenario, the financing statement filed against it should *not* be amended to show the name of the survivor (the secured party would have to file a new financing statement against the survivor to perfect a

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[*] We have no pride of authorship or thinking. Nor do we think this is the only answer.

security interest in collateral acquired by the survivor from a different source (9-508(b)(2))

- If the secured party thinks that the survivor *is* the "same" person and amends the financing statement filed against the disappearing entity to show the name of the survivor (in order to maintain perfection under 9-507(c)), but it turns out that the survivor is *not* the "same" person (because of an interpretation of the conversion/merger statute), then the amendment of the financing statement that had been filed against the disappearing entity unperfects the security interest against the disappearing entity for purposes of 9-507(a) and the secured party loses both perfection and priority (9-325(a)) at that point because the financing statement no longer has the name of the transferor

- If the secured party thinks that the survivor is *not* the same person as the survivor and does *not* amend the financing statement filed against the disappearing entity (in order to maintain perfection under 9-507(a)), but it turns out that the survivor *is* the "same" person (with a new name), then the financing statement is no longer good as to post-4 month collateral under 9-507(c)

- So the secured party is put to a "Hobson's choice" because if it chooses the wrong route, it suffers a potential loss; the secured party can't have it both ways to guard against the risk of "same" or "not same"

The proposed solution

- The solution lies in adding a Comment to 9-512 (or elsewhere) to make it clear that the secured party can amend a financing statement to show an additional *name* for the debtor, even if there is not an additional *debtor*

- Right now, Comment 4 to 9-512 sort of suggests that a secured party that wants to amend a financing statement with respect to the debtor's name has only the binary choice of changing the debtor's name *or* adding the name of a different debtor, but not showing an additional name for the debtor

- The UCC-3 form (see item 5) is different in a way that matters – it refers in the third box to "ADD[ing] a name" (not adding a "debtor"); although note that label on the first box in that item says that the first box is the box to check for a name "CHANGE"

- The statute does not restrict amendments to *adding* a debtor – it says that the secured party can "amend the information" in the financing

statement; so the statute does not preclude a Comment of the type that we suggest below

- So, we propose adding a Comment to 9-512 that explains this problem and then says that a secured party can "add" a name in an amendment, which would suffice as a name "change" if it turns out there was a name change

- This would be similar to the common practice of putting additional debtor names in the original financing statement where it is not clear what the debtor's real name is (hard to imagine . . .); this might require some tinkering with what is now item 5 of the amendment form, but we're tinkering with the form anyway

- If this change were implemented and the secured party of the disappearing entity amended the financing statement to show an additional (not new) name, the secured party of the disappearing entity would be protected however a court analyzes the "same"/"*not* same" issue:

  (i) if the survivor is the "same" person as the disappearing entity, the additional name would be sufficient to show the new name (9-507(c)), and

  (ii) if the survivor were *not* the same entity as the disappearing entity, the financing statement filed against the disappearing entity would still be good because it would still have the original (and still correct) name of the disappearing entity (9-507(a))

- To protect against a court concluding that the survivor is *not* the same entity the secured party would still have to file a new financing statement against the survivor (the addition of the survivor's name to the amended financing statement would not suffice because under the proposal the addition of the name is intended to refer to the name of the disappearing corporation)

- No searcher would be mislead because a search under either name would turn up the very same financing statement that had been filed against the disappearing corporation

- There are similar issues when the survivor is located in a different jurisdiction, but the same "solution" should work