

## MEMORANDUM

To: Article 9 Joint Review Committee

From: Steven L. Harris, Reporter

Re: Definition of “debtor” with respect to collateral held in trust

Date: September 2, 2009

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The Scope and Program Committee of the Uniform Law Commission recently expanded the scope of the Joint Review Committee’s charge to has received approval to consider whether the definition of “debtor” in UCC § 9-102 should be amended to identify the Article 9 “debtor” with respect to property held in trust. An amendment along these lines has been suggested by the State Bar of Texas Business Law Section UCC Committee.

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):

### **SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.**

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

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(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 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.

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).

S. L. H.