

Joint Article 9 Review Committee

Meeting Notes for September 25-26, 2009

Prepared by Professor Stephen L. Sepinuck

Committee Members

[Edwin E. Smith](#), Chair
Bingham McCutchen LLP

[Professor Steven L. Harris](#), Reporter
Chicago-Kent College of Law

[E. Carolan Berkley](#)
Stradley Ronon Stevens & Young, LLP

[Carl Bjerre](#)
University of Oregon School of Law

[Thomas J. Buiteweg](#)
Hudson Cook, LLP

[Neil B. Cohen](#)
Brooklyn Law School

[William H. Henning](#)
University of Alabama School of Law

Gail Hillebrand
Consumers Union

[John T. McGarvey](#)
Morgan & Pottinger, P.S.C.

[Charles W. Mooney, Jr.](#)
University of Pennsylvania School of Law

Harry C. Sigman
Law Offices of Harry C. Sigman

[Sandra S. Stern](#)
Nordquist & Stern PLLC

[Steven O. Weise](#)
Proskauer Rose LLP

[James J. White](#)
University of Michigan School of Law

Advisors

[Stephen L. Sepinuck](#), ABA Advisor
Gonzaga University School of Law

[John F. Hilson](#), Business Law Section Advisor
Paul, Hastings, Janofsky & Walker LLP

Chair Report:

A proposal will be made to the PEB about issuing a commentary on papering out electronic chattel paper, to permit more detailed discussion than would be possible in a comment.

The goal is to complete the project this spring and seek approval from the ALI and ULC later in 2010.

1. Relationship of Article 9 to Receivables Convention

The Report of the Committee to Harmonize North American Law with Regard to the Assignment of Receivables in International Trade Convention (June 15, 2007) suggested that the Convention, if ratified, would be self-executing, and that there was no need to amend the text of Article 9 to coordinate with it. The Report did suggest, however, the comments should be amended to alert people to the choice-of-law changes the Convention would make. At the ULC annual meeting, some concern was expressed about this approach, and some urged that the UCC itself be amended.

The Committee discussed what approach it would recommend. There was no interest in amending the Code. Doing so would be complicated, it might become outdated if the Convention is amended, and international transactions in receivables tend to be lawyered transactions among sophisticated parties. The Committee voted unanimously to no amend Article 9 to deal with this.

2. Amendments to Article 3 – References to Security Interests

By a memo of August 11, 2009, th Reporter concluded that no amendments to Article 3 were necessary to deal with the broadening of the definition of “security interest” in Article 1 to cover sales of promissory notes.

The Committee decided not to pursue this matter.

3. Entity Conversion Issues

In some entity conversion statutes, it is not clear if the new entity is the same entity or new entity. If it is the same entity and the name changes, then a secured party should file an amendment to its filing. If the entity is a new entity, then a secured party should file a new financing statement (*i.e.*, leave the original filing intact). One solution to the dilemma of which action to follow is to file an amendment that adds a new debtor name to the original financing statement.

The Committee agreed to create a comment to explain the problem and proposed solution and to make it clear on the form (or its instructions) that an amendment can add a name (not just a debtor).

4. Certificates of Title

The current draft amends § 9-102(a)(10) to cover electronic records under a certificate of title act. A new comment also tries to make it clear that the definition

covers certificates issued in a state whose statute does not expressly mention perfection of which treats presentation of the application as perfection.

The Committee agreed to this proposal, but wants § 9-337 amended to clearly cover both clean paper certificates and clean electronic certificates. The Committee also would like a legislative note to States that if their certificates do not identify second or third liens, then the certificate should at least state that other liens may exist

The comments will be amended to add a sentence that a certificate of title issued pursuant to a statute that permits both paper certificates and electronic records is a certificate of title. In other words, if the first sentence of § 9-102(a)(10) applies, the “as an alternative” language in the second sentence of the proposal does not contradict that.

The Committee also agreed to the draft additions to the comment.

5. Section 9-318 comments

These comments are attempting to clarify that § 9-318(a) does not operate as a priority rule; that even if a debtor retains no interest in them, the debtor may have a the power to transfer rights in them, provided the priority rules of Article 9 apply.

There was extensive discussion about whether to address this at all, whether to do it by comment, or whether to do it by amending that statute. There was no interest in pursuing a statutory change. The Committee then included that the benefits of a comment are outweighed by its risks. The Committee will therefore not propose any change on this issue.

6. Control of Deposit Accounts

The draft contains a new example of perfection through an agent.

The Committee agreed to the comment. The Committee also discussed and noted that the amendment to § 9-104(a) would allow for perfection by control through a representative, whether or not the representative qualifies as agent under the common law. It also allows for control without the agreement of the depository.

Question arose whether the operation of § 9-104(a)(4) could be overridden by the control agreement. The issue would arise as well under § 8-106. The Committee chose not to deal with that issue.

The question was raised as to whether a similar provision should be added to §§ 9-105 and 9-107, dealing with control of electronic chattel paper and letter-of-credit rights, respectively. The Committee chose not to pursue that. Adding the provision to § 9-104 is necessary not only to mirror

§ 8-106 but also to avoid the characterization problem of whether the collateral is a deposit account or securities account. That characterization problem does not exist with respect to electronic chattel paper or letter-of-credit rights.

7. New Comment to § 9-611 on Compliance with Other Law

The new comment alerts people to the fact that federal law may require additional notifications of disposition.

The Committee agreed to the idea behind the comment but the comment will be revised to make it clear that the effect of a failure to give such a notification is left to other law.

8. Comment To Clarify Merchant's Right to Credit Card Payments

A proposal was made that a comment be drafted to clarify that a merchant's right to receive payment from its credit card bank for charges initiated by the merchant's customers (the cardholders). The theory is that is not an account under § 9-102(a)(2)(i) because the cardholder's obligation is discharged and thus right to payment is not for goods or services, but pursuant to the bank-merchant contract. It is not an account under § 9-102(a)(vii) because that provision cover's the card issuer's right to payment.

The Committee agreed to ask the reporter to draft a comment on this matter.

9. Filing Issues: Debtor with Respect to Property Held in Trust

The Committee reviewed a proposal derived from an earlier proposal from the State Bar of Texas UCC Committee to amend § 9-102(a)(28) to add a new subparagraph (D) saying “if the collateral is property held in trust in an express trust created or organized under the law of this State, [the trustee of the trust] [the trust].

The Committee noted that one problem of giving states freedom to identify either the trust or the trustee as the debtor is that a different state's law might apply. The choice of law is largely (but not entirely) determined by where the debtor is located. If different states will point to different answers about who the debtor is, then we could have significant interpretive problems.

The problem is compounded by the fact that states have different types of trusts, and may need different answers for different types of trusts.

The Committee then discussed as an alternative the following addition to § 9-307:

If the debtor is a trust that is not a registered organization or a trustee acting in relation to property held in trust, the debtor is located in the jurisdiction under whose law the trust is [formed] [organized].

At its first meeting, the Committee concluded that the problems associated with transitions, non-uniformity (from non-simultaneous enactments) would make this such a change extremely difficult. In addition, it noted that the law chosen in the trust agreement could change at any time. The Committee therefore chose not to pursue this issue.

The Committee likes the rule, but remains concerned about transition. If we would have a uniform effective date (for this rule), then the problems would be manageable. Although that would still have to be several years out and we would still need in lieu filings. The Committee will return to this matter.

10. Debtor's Name: Trust Issues

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) if the debtor is a registered organization and is not a trustee acting with respect to property held in trust, only if the financing statement provides the name of the debtor indicated on the public record of the debtor'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 that is not a registered organization or is a trustee acting with respect to property held in trust for the beneficial owner of 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 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;

(4) if the debtor is a trustee acting with respect to property held in trust for the beneficial owner of a trust that is a registered organization, only if the financing statement provides the name of the trust indicated on the public organic record filed with or issued or enacted by the trust's jurisdiction of organization; and

~~(4)~~(5) 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.

* * *

The Committee discussed whether the phrase “for the beneficial owner of a trust” needs to be included in paragraphs (3) and (4), and tentatively concluded that it does not.

The Committee also discussed whether the additional material required by § 9-503(a)(3)(A) and (B) is part of the debtor’s name or merely a requirement for an effective filing. The Committee agreed to amend (A) and (B) to make the additional required information not part of the debtor’s name.

11. Debtor’s Name in Public Organic Record

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) subject to subsection (f), if the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public organic record of filed with or issued or enacted by the debtor’s jurisdiction of organization ~~which shows the debtor to have been organized;~~

* * *

(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;

(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 is intended to amend or restate the debtor’s name; and

(3) if the most recently filed or issued record of a kind specified in paragraph (2) indicates more than one name of the debtor, the name of the debtor which that record states to be the debtor’s name.

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

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

* * *

(50) “Jurisdiction of organization”, with respect to a registered organization, means the jurisdiction under whose law the organization is formed or organized.

* * *

(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.

* * *

(70) “Registered organization” means an organization formed or organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or United States. The term includes a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust’s organic record be filed with the State.

* * *

These amendments are designed to cover a wide array of different types of organizations. The Committee invited comment as to whether the language reaches the desired breadth.

12. Individual Debtor’s Name

The Committee decided not to adopt the “priority approach.” The Committee then discussed the “only-if” rule. In doing so, it noted several potential problems:

- A. Possible inconsistency between the office issuing the ID and the UCC filing office as to character set and character size.
- B. The rule increases the prospect for name changes, which may lead to a loss of perfection in after-acquired collateral. Indeed, debtors who have granted security interest in after-acquired collateral may strategically change their ID to destroy perfection. Thus there is a monitoring requirement that the safe harbor rule does not indirectly impose.
- C. It deceives the searcher into thinking that all they need to do is search under the current ID, when in fact they need to search under the name depicted in prior IDs, and those names may be difficult or impossible to discover.
- D. About eleven states do not put middle names or middle initials in a driver’s license. This could lead to massive responses to a search request against a debtor with a common given name and a common surname.
- E. Unlike a safe-harbor rule, it presents a significant transition-rule problem.

The Committee will have a follow-up conference call on this issue. In advance of this, the reporter will prepare a memorandum detailing the concerns with the only-if rule, the Committee will

share that memo with the American Banker's Association working group, and that group will be asked to prepare a response. The Committee will make a decision either at the end of the conference call or at its next meeting.

The Committee then discussed changes to the "only-if" rule proposed by the American Banker's Association. That proposal deletes the passport as a source of the debtor's name, makes an expiration of the ID not a name change, and deletes the word "given" after "first" and "second."

There was also some discussion on how to identify the surname, whether a period goes after the initial, *etc.*

Even if using an ID name, filers may still have the problem of identifying which is the surname.

13. Claim Concerning Inaccurate or Wrongfully Filed Record

SECTION 9-518. CLAIM CONCERNING INACCURATE OR WRONGFULLY FILED RECORD.

(a) ~~Who may file~~ Statement with respect to record indexed under person's name.]

A person may file in the filing office a ~~correction~~ statement of a claim with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed.

[Alternative A]

(b) [Sufficiency of ~~correction~~ statement under subsection (a).] A ~~correction~~ statement of a claim under subsection (a) must:

- (1) identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;
- (2) indicate that it is a ~~correction~~ statement of a claim; and
- (3) provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

[Alternative B]

(b) [Sufficiency of ~~correction~~ statement under subsection (a).] A ~~correction~~ statement of a claim under subsection (a) must:

- (1) identify the record to which it relates by:
 - (A) the file number assigned to the initial financing statement to which the record relates; and
 - (B) if the ~~correction~~ statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1), the date [and time] that the initial financing statement was filed [or recorded] and the information specified in Section 9-502(b);
- (2) indicate that it is a ~~correction~~ statement of a claim; and
- (3) provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

[End of Alternatives]

(c) [Statement by secured party of record.] A person may file in the filing office a statement of a claim with respect to a record filed there if the person is a secured party of record with respect to the financing statement to which the record relates and believes that the person that filed the record was not entitled to do so under Section 9-509(d).

[Subsection (d)—Alternative A]

(d) [Sufficiency of statement under subsection (c).] A statement of a claim under subsection (c) must:

(1) identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) indicate that it is a statement of a claim; and

(3) provide the basis for the person’s belief that the person that filed the record was not entitled to do so under Section 9-509(d).

[Subsection (d)—Alternative B]

(d) [Sufficiency of statement under subsection (c).] A statement of a claim under subsection (c) must:

(1) identify the record to which it relates by:

(A) the file number assigned to the initial financing statement to which the record relates; and

(B) if the statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1), the date [and time] that the initial financing statement was filed [or recorded] and the information specified in Section 9-502(b);

(2) indicate that it is a statement of a claim; and

(3) provide the basis for the person’s belief that the person who filed the record was not entitled to do so under Section 9-509(d).

[End of Alternatives]

(e)(e) [Record not affected by ~~correction statement of claim.~~] The filing of a ~~correction statement of a claim under this Section~~ does not affect the effectiveness of an initial financing statement or other filed record.

The Committee agreed to delete “of a claim” It also agreed to consider a new comment to make it clear that a filer has no duty (good faith or otherwise) to file such a statement, even if it knows of an error in the public record.

14. Termination of Wrongfully Filed Record.

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 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 discussed alternative ways to police the filing system of bogus filings, such as by requiring that filers be pre-approved. There was no great interest in that idea, and the Committee then turned to the proposed new § 9-513A.

The Committee agreed that the individual should have to include in the affidavit that the individual is a government employee. A comment was made that the term “government employee” is very narrow. Another comment was made that the term is very broad, potentially picking up every member of the armed services or the reserves.

The idea remains that this would be a hip picket amendment, not an alternative section, and therefore not part of the official text.

15. Official Forms

The Committee reviewed IACA’s draft revisions to the forms and accompanying instructions. It made several suggestions and noted how previous decisions of the Committee during this meeting may require some additional minor changes.

16. Indexing Issues

The Committee reviewed a memo from the ABA Task Force on Filing Office Operations and Search Logic (FOOSL) on how filing offices deal with special characters (*e.g.* tildes, umlauts). FOOSL proposed requiring filing offices to replace special characters with a place holder (*e.g.*, “*”).

The Committee concluded that putting new requirements – with financial implications – on filing offices was not desirable. Therefore, it agreed to instead require filing offices to publicly disclose its practices/rules with respect to special characters, truncation, and noise words. Such disclosure needs keep track of how those rules/practices change, at least going forward. Thus, if the practice is X now and becomes Y later, after the switch the office needs disclose both X and Y, along with the effective date of the change.

IACA apparently desires guidance on how filing offices should deal with these matters, and FOOSL will continue to work on that.

Concern was also expressed about how the “only-if” rule would work and whether the test of § 9-506(c) can be applied if the filing office will not allow a search under the debtor’s correct name.