

## MEMORANDUM

TO: Joint Review Committee on UCC Article 9                      DATE: February 16, 2010

FROM: Kenneth C. Kettering

RE: Applicability of the proposed rules on the name of an individual debtor to  
(a) a filing against a nameless debtor that has an individual as partner, member or the like, and  
(b) a mortgage deemed effective as a fixture filing against an individual mortgagor

This memorandum notes two issues that the committee should consider in connection with the proposed new optional rules on the name of an individual debtor. Both issues arise under the “only if” as well as the “safe harbor” version of those rules.

**1. Filing against a nameless debtor that has an individual as partner or member.** Current 9-503(a)(4)(B) provides that, in general, if a debtor does not have a name, a financing statement in regard to that debtor is sufficient “only if [the financing statement] provides the names of the partners, members, associates, or other persons comprising the debtor.” If such a nameless debtor has an individual as its partner, member or the like, the question arises as to whether the name of that individual should be subject to the “only if” or “safe harbor” rules, in a state that has enacted those rules.

Under the February 1, 2010 draft, the proposed “only if” and “safe harbor” rules apply only to the name of an individual debtor. Hence those rules would not apply to the foregoing situation, in which the individual named on the financing statement is not the debtor. As a result, the name of the individual on such a financing statement would continue to be governed by the fuzzy standard that applies under current law.

Query the wisdom of that result. The same reasons that motivate the adoption of “only if” or “safe harbor” for the name of an individual who is debtor seem to apply equally to a non-debtor individual who is identified pursuant to 9-503(a)(4)(B).

I therefore recommend that the “only if” or “safe harbor” rules be written to apply to the name of an individual who is identified pursuant to 9-503(a)(4)(B).

An alternative might be to provide that, for the purpose of 9-503(a)(4)(B), the name of an individual partner, member or the like is the name of that individual as stated in the organic record of the nameless debtor. (That would be analogous to the treatment of the name of the settlor of a trust under the proposed rules for filing against a trust.) I do not believe that alternative is desirable, because a debtor that does not have a name seems unlikely to have a clearly identifiable organic record.

**2. Mortgage deemed effective as a fixture filing, when the mortgagor is an individual.** Current 9-503(c) provides that a record of a mortgage of real property is “effective . . . as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if,” among other things, the record “satisfies the requirements for a financing statement in this section . . .” Those requirements include the debtor’s name, per 9-502(a)(1). For simplicity of exposition, the following discussion focuses on a mortgage effective as a fixture filing, and makes no further mention of as-extracted collateral or timber to be cut.

If a state enacts the “only if” rule, and the mortgagor is an individual, the mortgage will not be effective as a fixture filing unless the mortgage states the debtor’s name as per the “only if” rule. Because perfection in goods covered by a fixture filing is governed by the law of the state in which the real property is located (9-301(3)(A)), the operation of the “only if” rule in this case has a different flavor than

in the more usual case in which perfection is governed by the law of the state in which the debtor resides. For example, if the debtor resides in state X, has a driver's license from state X, and the real property is in state X, then debtor's mortgage will be effective as fixture filing only if the mortgage sets forth the debtor's name as per his state X driver's license. If the debtor resides in state X, has a driver's license from state X, and the real estate is in state Y (from which the debtor has no driver's license or ID), then debtor's mortgage will be effective as a fixture filing only if the mortgage shows the debtor's name as "surname, first personal name, and first initial of the second personal name" (under the February 1 draft); the state X driver's license is irrelevant. If the debtor resides in state X, has a driver's license from state X, and the real estate is in state Y, from which the debtor also has a driver's license, then debtor's mortgage will be effective as a fixture filing only if the mortgage shows the debtor's name as per his state Y driver's license (a rather odd result).

In addition, after-acquired property that is subject to the mortgage (e.g., later-affixed fixtures) would be at risk of not being covered by the mortgage as a fixture filing if a name-change event described in 9-507(d) later occurs, absent amendment to the mortgage to update the debtor's name. Of course the scope of 9-507(d) remains unsettled after the conference call that took place earlier today.

A similar analysis applies if a state enacts the "safe harbor" rule and the mortgagor is an individual.

The committee should consider whether the foregoing outcome is sensible. The point is that there would seem to be a high probability that an individual's mortgage of real property will not satisfy the "only if" or "safe harbor" rule. A real property mortgage is likely to show the debtor's name as being the name on the deed into the debtor, already extant in the public real estate records. If the "only if" or "safe harbor" rules are adopted in their current form, it is not clear to me what a mortgagee should do if he wants to be certain that his mortgage is valid under local real estate law and is effective as a fixture filing, if the debtor's name on the deed is different from the debtor's name as shown on his driver's license. I expect that local real estate law should have some procedure to accommodate a mortgagor who has changed his name after he took the deed in. Thus, for instance, I expect that the individual mortgagor should be allowed to record an affidavit of name change, showing his "new name" to be the character string set forth on his driver's license, and his mortgage could then be recorded in that name. Query: it is reasonable to expect mortgagees to jump through that hoop in order to get the benefit of 9-502(c)?

Of course the mortgagee could always file a UCC-1 as a fixture filing against the name shown on the individual's driver's license. But that undercuts the notion that a mortgage ought to serve as a fixture filing in its own right, and would burden the mortgagee with the necessity of filing continuations.

It might be argued that the mortgagee isn't substantially hurt even if the mortgage doesn't qualify as a fixture filing due to noncompliance with the debtor name requirement. So long as the mortgage is adequate under real property law, the mortgagee will have rights in the fixture under real estate law. That argument, however, amounts to saying that 9-502(c) is superfluous. The point of that provision is to give a mortgagee rights under Article 9 automatically, in addition to his rights under real property law. So long as Article 9 contains 9-502(c), it would be questionable to allow its operation to be randomly interrupted by extraneous rules on the name of individual debtors that are being adopted in contemplation of commercial financing transactions quite different from the ordinary real estate transaction.

I seek here only to raise this issue for the committee to consider, not to propose a particular response, if indeed any response is called for.

KCK