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What's in a Name? The 2010 Amendments to UCC Article 9 (Secured Transactions) and Alternative A and Alternative B

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During the drafting of the 2010 Amendments to UCC Article 9, the American Law Institute/Uniform Law Commission Drafting Committee considered multiple issues. One of the most significant related to provisions concerning the name of an individual debtor.

UCC Article 9's requirement that a financing statement provide the debtor's name is particularly important. Financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name.

The question before the Drafting Committee was clear: Should Article 9 provide a more certain rule to determine the name of a debtor who is an individual? Many felt that clarification was needed. One reason was because courts, in interpreting the Uniform Commercial Code, have struggled in determining whether a particular financing statement that contains the debtor's name as reflected on his or her birth certificate, driver's license, passport or other identification, or even a debtor's nickname or commonly used name, is the correct name of the debtor for the financing statement to be sufficient.

There was a difference of opinion within the Drafting Committee as to the best approach on this matter. As a compromise, the Committee decided to provide states with two alternative sets of amendments relating to the names of individual debtors. There is an Alternative A (sometimes called "Only If Approach"), and there is an Alternative B (sometimes called "Safe Harbor Approach") to address the issue. Each state legislature can choose the approach it desires. The 2010 Amendments have wording to implement each approach.

Alternative A -- Only If Approach

The Comment following UCC Section 9-503 succinctly highlights the Only If Approach: "Alternative A distinguishes between two groups of individual debtors. For debtors holding an unexpired driver's license issued by the State where the financing

statement is filed (ordinarily the State where the debtor maintains the debtor's principal residence), Alternative A requires that a financing statement provide the name indicated on the license. When a debtor does not hold an unexpired driver's license issued by the relevant State, the requirement can be satisfied in either of two ways. A financing statement is sufficient if it provides the 'individual name' of the debtor. Alternatively, a financing statement is sufficient if it provides the debtor's surname (i.e., family name) and first personal name (i.e., first name other than the surname)."

Alternative B -- Safe Harbor Approach

Generally, "Alternative B provides three ways in which a financing statement may sufficiently provide the name of an individual who is a debtor. The 'individual name' of the debtor is sufficient, as is the debtor's surname and first personal name. If the individual holds an unexpired driver's license issued by the State where the financing statement is filed (ordinarily the State of the debtor's principal residence), the name indicated on the driver's license also is sufficient." [See Comment following UCC Section 9-503.]

ABA Working Group Concludes that Only If Approach is the Way to Go

The American Bankers Association Working Group on UCC Article 9 has studied the matter in detail. Composed of bank lawyers and state bankers association professionals, the Group had numerous conference calls over a two-year period. In meetings with the ALI/ULC Drafting Committee, our Group highlighted the advantages of the Only If Approach. The ABA Group stressed that the Only If Approach simplifies both filing and searching. Particularly with respect to a debtor having the specified driver's license, the approach will provide greater certainty and more definition of the name. Although the Safe Harbor Approach outlines possible names to use to achieve perfection, it does little to address priority issues. Bottom line: The Only If Approach does not solve all problems, but as one authority has noted, there will be no practical outcome with no shortcomings.

ABA Working Group Position Paper

A Position Paper emphasizing its strong support for the Only If Approach has been produced by our ABA Working Group. It outlines issues and urges adoption of Alternative A by the states. The Position Paper (dated 3/17/11) can be found at

Leading UCC Authority Barkley Clark Reiterates Support for Only If Approach

One of the foremost authorities on the Uniform Commercial Code is Barkley Clark, a nationally-recognized attorney and co-author of *The Law of Secured Transactions Under the UCC*. Mr. Clark is renowned for his ability to explain complex issues in an understandable way.

In a paper entitled “Four Reasons To Adopt Alternative A For Individual Debtor Names,” Clark provides answers to the basic questions at issue. The document can be found at

<http://www.aba.com/aba/documents/GeneralCounsel/UniformLaws/UCC9FourReasons03182011.pdf>.

ABA and our Working Group members express sincere appreciation to Mr. Clark for both his analysis and the time he has devoted to this matter. Barkley Clark is a partner in Stinson Morrison Hecker LLP.

Legislative Note Following Section 9-503 of the Amendments

Please be aware of an important Legislative Note relating to the alternative sets of amendments, which follows Section 9-503:

“1. This Act contains two alternative sets of amendments relating to the names of individual debtors. A State should enact the same Alternative, A or B, for both subsections (a) and (i) of Section 9-503. A State that enacts Alternative A of the amendments to this section should also enact the amendments to Section 9-502.

2. 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 the utility of Alternative B, under which the name on the driver’s license is one of the names that is sufficient, may be reduced. Accordingly, the State may wish to determine if one or more of these issues exist and, if so, to make certain that such issues have been resolved. A successful

resolution might be accomplished by statute, agency regulation, or technological change effectuated before or as part of the enactment of this Act.

3. Regardless of which Alternative is enacted, in States in which a single agency issues driver's licenses and non-driver identification cards as an alternative to a driver's license, such that at any given time an individual may hold either a driver's license or an identification card but not both, the State should replace each use of the term 'driver's license' with a phrase meaning 'driver's license or identification card' but containing the analogous terms used in the enacting State. In other States, the State should replace the term 'driver's license' with the analogous term used in the enacting State."

Importance of a Uniform Effective Date in State Legislation

UCC Section 9-801 provides for a delayed effective date of July 1, 2013. The hope is that the 50 state legislatures and the District of Columbia will have enacted the amendments by that time.

The Legislative Note following the section highlights the importance of this effective date: "Because these amendments change the proper place in which to file to perfect certain security interests, it is particularly important that States adopt a uniform effective date. Otherwise, the status of a particular security interest as perfected or unperfected would depend on whether the matter was litigated in a State in which the amendments were in effect or a State in which the amendments were not in effect. Any one State's failure to adopt the uniform effective date will significantly increase the cost and uncertainty surrounding the affected transactions."

State Legislation

The amendments have been introduced in some form in 2011 in at least twelve state legislatures (Connecticut, Indiana, Kentucky, Massachusetts, Minnesota, Nebraska, Nevada, North Dakota, Oklahoma, Rhode Island, Texas, and Washington) and the District of Columbia.

At least nine states have enacted the legislation in some form:

1. Connecticut [see CT HB 6274 (2011) and <http://www.cga.ct.gov/>]
2. Indiana [see IN HB 1321 (2011) and <http://www.in.gov/legislative/index.htm>]
3. Minnesota [see MN SB 194 (2011) and <http://www.leg.state.mn.us/>]
4. Nebraska [see NE LB 90 (2011) and <http://nebraskalegislature.gov/>]
5. Nevada [see NV AB 109 (2011) and <http://www.leg.state.nv.us/>]
6. North Dakota [see ND HB 1137 (2011) and <http://www.legis.nd.gov/>]

7. Rhode Island [see RI HB 5573 (2011) and RI S 520 (2011) and <http://www.rilin.state.ri.us/>]
8. Texas [see TX SB 782 (2011) and <http://www.capitol.state.tx.us/>]
9. Washington [see WA HB 1492 (2011) and <http://www.leg.wa.gov/pages/home.aspx>]

Of the nine states that have enacted UCC Article 9 legislation, seven generally use the Alternative A approach (Indiana, Minnesota, Nebraska, Nevada, North Dakota, Rhode Island, and Texas). Connecticut and Washington generally use the Alternative B approach. Please be aware that it is entirely possible that a state might have adopted variations to the uniform text of Alternative A or Alternative B. Therefore, it is important to check the state law involved for any differences.

Conclusion

We hope that the papers referenced above and the information herein will be useful to bankers, state bankers associations, policymakers, and others as the UCC Article 9 Amendments are considered in the states.