

Authorization Nunc Pro Tunc In UCC Proposed Amendments

By David L. Wanetik

Revised Article 9 of the Uniform Commercial Code provided detailed provisions to make it clear that any filing made without authorization from the debtor would not be effective. The “authorization” requirement was based upon the elimination of signatures on UCC forms. The signature had been the authorization so you could not file an unsigned form. The issue of authorization was, therefore, moot as the signature met the requirement.

When signatures were eliminated, the code became very specific about the effectiveness of all UCC forms. The terms “effective filings” versus “recorded filing” came into existence.

Knowing that under the revision anyone could file against anyone without the required signature on the form, the chronic question remained how to determine the timing and effectiveness of a filing that was made initially without authorization but did receive authorization post-filing.

Types of Authorization

When I started presenting UCC Seminars in the late 1990s on the significant changes proposed in Revised Article 9, the item that got the most attention was the elimination of signatures on the financing statement. Despite the fact that the signatures were neither notarized nor verified, attorneys and financial institution managers sat in amazement and terror. There were multiple reasons to eliminate the signatures. First, these financial transactions had underlying documents such as security agreements wherein the debtor provided authorization to the secured party to file whatever they deemed necessary to perfect their lien. There was no need to have an additional authorization on the financing statement.

In addition, with the advent of electronic filing, the drafters were determined to eliminate the signatures which would have created a significant impediment.

The concern was that without the requirement of a signature on the UCC, filings could potentially be made without the authority from the debtor. How are those filings to be viewed when they appear on a search report?

As stated above, provisions in the revision indicated that obtaining authorization from the debtor to file was critical to an effective filing. Sections 9-509 and 9-510 clearly indicate that without authorization, the filing is not effective.

Section 9--509. Persons Entitled to File a Record.

(a) Person entitled to file record. A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) the debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c)...
UCC 9-510 adds emphasis to UCC 9-509.

Section 9--510. Effectiveness of Filed Record.

(a) Filed record effective if authorized. A filed record is effective only to the extent that it was filed by a person that may file it under Section 9--509.

Amendments

While any question about initial authorization is clarified by these sections, the question that has been debated since the enactment of Revised Article 9 in 2001 was what to do about filings made prior to obtaining authorization but which subsequently did obtain that authority? What date did that filing become effective, if at all, since it did not have authority at the time of filing?

A reply to that question has been located as part of the proposed amendments scheduled to be enacted in 2013. It appears in a new Official Comment after UCC 9-322—Priorities Among Conflicting Security Interests.

SECTION 9-322, entitled: PRIORITIES AMONG CONFLICTING SECURITY INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL, remains intact without amendment. However, the additional Official Comment 4 to UCC 9-322 directly answers the question posed:

Under a notice-filing system, a filed financing statement indicates to third parties that a person may have a security interest in the collateral indicated. With further inquiry, they may discover the complete state of affairs. When a financing statement that is ineffective when filed becomes effective thereafter, the policy underlying the notice-filing system

determines the “time of filing” for purposes of subsection (a)(1). For example, the unauthorized filing of an otherwise sufficient initial financing statement becomes authorized, and the financing statement becomes effective, upon the debtor’s post-filing authorization or ratification of the filing. See Section 9-509, Comment 3. Because the authorization or ratification does not increase the notice value of the financing statement, the time of the unauthorized filing is the “time of filing” for purposes of subsection (a)(1). The same policy applies to the other priority rules in this part.

And to complete the edit, a reference to this new Official Comment (See Section 9-322, Comment 4) has been added to the end of Official Comment 3 of Section 9-509 titled Unauthorized Filings.

The rationale of this comment is that the Uniform Commercial Code under Article 9 is a notice system. The financing statements and amendments alone cannot create a relationship between the parties. Other documents are required.

So the comment takes the position that: “Under a notice-filing system, a filed financing statement indicates to third parties that a person *may* [emphasis added] have a security interest in the collateral indicated. With further inquiry, they may discover the complete state of affairs.”

The comment makes note of the system as nothing more than a notification system: “Because the authorization or ratification does not increase the notice value of the financing statement, the time of the unauthorized filing is the ‘time of filing’ for purposes of subsection (a)(1).”

So based upon this comment, an unauthorized filing that subsequently obtains authorization will nunc pro tunc its effective filing date back to the date of filing.

This does not resolve the issue for the potential secured party who discovers an unauthorized filing which may or may not become effective but wants to create a financial relationship with the debtor. That potential secured party will have to get assurances of some kind that the secured party listed in the earlier filing will not be provided with authorization to activate the filing. A termination or some kind of subrogation agreement would be appropriate. It will have to be part of final set of documents between the parties to protect the ultimate secured party.

DAVID L. WANETIK is counsel and chief operating officer of the UCC Division of the First American Title Insurance Company

Published in the New York Law Journal on December 29, 2011