

CORRECT NAME FOR PERSONAL PROPERTY LIENS UCC ARTICLE 9 PROPOSALS - 2013 REVISIONS PENDING

By David L. Wanetik, Esq.

Verifying liens on real property has the benefit of reviewing the land records rather than trying to search against the name of the owner. That is in contrast to searching liens against personal property. The Uniform Commercial Code provides guidance which is required since there is no database for the ownership of personal property. And the key to such searches is how the name of the owner is determined. Current law provides such guidance, but proposed revisions will make further clarifications.

It has been nearly 10 years since Revised Article 9 of the Uniform Commercial Code was enacted. At that time rather than trying to amend the 40 year old code to take advantage of many technological advances, the entire code was scrapped and a new code was adopted by the states.

Now the first major amendments are being promulgated by National Conference of Commissioners for Uniform State Laws (NCCUSL) and are being sent to the states for enactment. RA9 II, as this author likes to call it, has various changes. The proposed effective date of these amendments is July 1st, 2013. However, guidance from these revisions may encourage changes in procedures before that time.

Revised Article 9 eliminated the concepts of “dumb filer” and “smart searcher”. Unlike the prior statute, the secured party now had the on us to get the name of the debtor right. When the debtor is a registered organization, the current statute was directed to use the name indicated on the “public record” but did not define the term. Considering that one of the major goals of the revision was to be able to search and file electronically, many assumed that going to the database of a state would meet this requirement.

However, over time, when there was a conflict between the database and the organizational documents, the courts held that the organizational documents provided the correct name.

CONTINUED...

The proposed revision will make this concept part of the statute. Under the definition found in Section 9-102(b)(68), the new term of “public organic record” has been created. A “public organic record” means a record that is available for public inspection, and consists of the record initially filed with or issued by a state to form or organize an organization. The definition also includes subsequently filed records which amend or restate the initial record.

To further reflect the change, a certificate in good standing would not be a “public organic record”.

So to satisfy this requirement once enacted, lender would need to obtain copies of the original organizational documents and any amendments made thereto. But based upon court decisions to date, you should commence this practice in your due diligence rather than waiting for the changes to occur.

Getting the correct name under the revision will require a little more work than just going into the corporate database of a state. Better safe than sorry because if a conflict arises, the database will not win.

Two final notes: While the proposed revisions have a recommended “uniform commencement date” of July 1st, 2013, some states may decide to move ahead prior to that date. Since some of the recommendations include changes to UCC forms, it will be critical to monitor adoption of these changes state by state.

And finally, the name requirements referred to in this article only apply to UCC filings. Other types of liens, such as Federal Tax Liens, do not mandate the exact name which continues to cause difficulty when searching. ▼

David Wanetik, Esq.

Chief Operating Officer,

UCC Division

dwanetik@firstam.com