

Basics of Revised UCC Article 9

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Article 9 of the Uniform Commercial Code concerns "Secured Transactions", the granting of interests in personal property to secure the repayment of indebtedness. The Article sets forth rules governing the attachment, perfection, and enforcement of a lien, or a "security interest", in personal property.

A security interest in personal property is realized only under Article 9, with certain exceptions. A lien on fixtures can be created either under Article 9 or by the grant of a lien in a real estate mortgage. Other specific state laws govern certificates of title to vehicles. Otherwise, a security interest in personal property falls under Article 9.

Personal property subject to an Article 9 security interest can include a debtor's rights in collateral such as accounts receivable, as-extracted collateral (mineral rights at the wellhead), chattel paper, consumer goods, deposit (bank) accounts, documents, equipment, farm products, fixtures, health care insurance receivables, instruments, inventory, investment property, letters of credit, manufactured homes, promissory notes, timber to be cut, and (as regards everything else not specifically mentioned in Article 9) general intangibles. In New York, a security interest in a cooperative unit can only be perfected by filing under the UCC.

A security interest is said to "attach" to the collateral when it is enforceable as against the Debtor. A security interest becomes "perfected" when the "attached" security interest becomes enforceable against creditors and transferees of the Debtor, and against a trustee in bankruptcy. Perfection occurs, depending on the type of collateral, when a financing statement is properly filed or there is possession or control over the collateral. The emphasis of this article is on the perfection of a security interest by filing.

The Uniform Commercial Code, including Article 9 on Secured Transactions, is national, model legislation drafted under the supervision of the National Conference of Commissioners on Uniform State Laws and adopted by the various states, with modifications, to provide rules for commercial transactions involving personal property.

About ten years ago a task force sponsored by the National Conference and the American Law Institute began an effort to revise Article 9. The intention of the draftspersons was to arrive at a

scheme that would simplify the rules for the attachment, perfection, priority and enforcement of security interests. In anticipation of advances in technology, they also determined that the revision would facilitate the use of electronic commerce in the filing of financing statements and the searching of the records.

Revised Article 9, in substantially similar form, has been enacted in all 50 states, and in the District of Columbia and the United States Virgin Islands. It is also under consideration in Puerto Rico. In New York it was enacted as Chapter 84 of the Laws of 2001. The uniform effective date is July 1, 2001 excepting in Alabama, Florida and Mississippi, in which the effective date of the revision will be January 1, 2002, and in Connecticut, in which the effective date is October 1, 2001.

Revised Article 9 is expected to simplify the procedure to file financing statements, at least after completion of the five-year transitional period in which existing filings must be brought into compliance with the new rules. Until the end of that period, one may consider the changes to have made a confusing situation even more complicated. Some of the changes made by Revised Article 9 are set forth in the following discussion.

First, no signature is required for a financing statement. All that is necessary is that the related security (loan) agreement be "authenticated" which does not require a signature. For example, two parties negotiating a loan to be secured by personal property send emails to each other, hammering out the terms of the security agreement. Finally, both parties agree to the terms. If that "agreement", although electronically concluded, can be established, the agreement has been authenticated. Nothing further is required.

It does not follow, however, that a financing statement must be accepted by the filing office in electronic form. Although electronic searching and filing is authorized and even encouraged by Revised Article 9, the New York State Department of State's "Standard Forms and Procedures" for the filing of financing statements, set forth as Part 143 of Title 19 of the NYCRR, presently authorize the acceptance for filing in that office of only written records. County filing offices in New York, in which financing statements as to real estate related collateral are to be filed, as noted below, may authorize filing "in any additional medium". The "UCC Rules" are on the Internet at <http://www.dos.state.ny.us/corp/ucc9info.html>.

Under Revised Article 9, the state in which a financing statement is to be filed is to be determined by the location of the debtor, not the location of the collateral as is generally the case under former Article 9. If the debtor is an individual the filing is to be made in the state of the debtor's principal residence. For debtors that are "Registered Organizations", such as corporations, limited partnerships, limited liability companies, and Massachusetts Business Trusts, filing is to take place in the state of the entity's organization. For businesses that are not Registered Organizations and have only one place of business, filing is required to be made in the state in which the business is conducted. If the company is not a Registered organization and has more than one place of business, filing is required in the state in which the chief executive office is located. Financing statements against foreign entities are required, with certain exceptions, to be filed in the District of Columbia. The local use of a trade name or the fact that an entity has qualified to do business in another jurisdiction are irrelevant. Additional filings will

be necessary during the period in which a financing statement is effective for it to remain in effect as to third parties if there is a change in the location of the debtor.

As a general rule, under Revised Article 9 financing statements are required to be filed in each state's Department of State; central filing replaces the need to additionally file in a local county clerk of register's office. The exceptions to this rule in New York are financing statements as to fixtures, timber to be cut and as-extracted collateral, and security interests in cooperative units. Financing statements for these real estate related types of collateral are to be filed in the local, county office in which a real estate mortgage would be recorded.

The filing officer's duties are to be ministerial. They are directed, in effect, to determine that only that the minimum requirements for completing the financing statement have been met and the filing fee has been paid. They are not to consider whether the information on the financing statement is correct, whether there is a valid security interest, or whether the filing is otherwise legally sufficient.

There are now national forms. There is a Financing Statement (UCC1), a Financing Statement Addendum (UCC1Ad), a Financing Statement Amendment (UCC3), a Financing Statement Amendment Addendum (UCC3Ad), a Correction Statement (UCC5), and an Information Request (UCC11). Form UCC3 can be filed as a termination, continuation, assignment or amendment. New York's Department of State has indicated that the forms in use prior to enactment of Revised Article 9 will not be accepted in this state.

With central filing and national forms, no longer will one have the pleasure of trying to locate for a client on a national transaction the forms of financing statements required in each applicable jurisdiction and then undertaking to file the financing statements in some of the approximately 4,300 filing offices under the prior Article 9, many with unique filing requirements.

These forms, with instructions, can be downloaded from the Department of State WEB site at the Internet address above noted.

Filing offices in New York are generally required to maintain financing statements in their records on July 1, 2001 for seven years. For timber to be cut, as-extracted collateral, and fixtures covered by a financing statement, and for financing statements generally after the seven year period expires, financing statements are to be maintained in the records of the filing office for one year after they have, or would have absent the filing of a termination statement, lapsed by reason of the expiration of the period for which they are effective, usually five years absent the filing of a continuation statement.

It is imperative that a search of a filing office's records for filed financing statements report as a matter of course even those financing statements which have apparently lapsed due to the passage of time and those which have been terminated by the filing of a termination statement. A financing statement may have been continued under Revised Article 9 by a filing in a new, different filing office, and there is no requirement that there be filed in the former filing office any notice that a related filing is being made in a different filing office. In addition, a debtor is authorized under Revised Article 9 to file a termination statement if the debtor believes that the

filing is wrongful or is no longer of effect. It will be incumbent on a new secured party to investigate the authority of the debtor to file that termination. Only authorized filings are effective.

Thus far, one might conclude, this is pretty straightforward. Then come the rules that govern the transition to Revised Article 9. This is what makes it all very interesting!

Secured parties are required to comply with the new filing requirements of Revised Article 9 by June 30, 2006. They can do so by filing a new "initial" financing statement in the new filing office, by filing a "true" continuation statement, continuing a filing for five years, in the same office as the existing financing statement if no change in the location of the filing office is required under Revised Article 9, or by filing an "initial financing statement in lieu of a continuation statement" in the new filing office. An "in lieu" filing continues the effectiveness of a filing under former Article 9 in the "new" filing office for a period of five years from the date of the filing of the "in lieu" statement. An "in lieu" can be filed to continue multiple financing statements between the same debtor and secured party; it is effective even when it was filed prior to the effective date of Revised Article 9.

An amendment to a filing under the former Article 9 can be filed after the effective date of Revised Article 9 in a "new" filing office only after filing of an "in lieu" financing statement. A termination statement file after the effective date can be filed in the prior filing office without first transitioning into the "new" filing office so long as an "in lieu" financing statement has not been filed. The new forms must be used.

Lastly, a financing statement filed under former Article 9 against an interest in a cooperative unit, which former Article 9 provided was to remain in effect until it was terminated, will only be effective until June 30, 2006 unless a Cooperative Addendum (UCC1CAD) is filed in connection with that financing statement. The Cooperative Addendum renders the financing statement effective for fifty years. For a new financing statement being filed against an interest in a cooperative unit, filing a Cooperative Addendum with the Financing Statement makes the filing effective for fifty years.

A financing statement as to a cooperative unit filed without an Addendum will be effective for only five years, subject to continuation, as is the case with most all other financing statements. This form, with instructions, can also be downloaded from the Department of State Website.

Although the five-year transitional period will cause some degree of difficulty and legitimate concern, Revised Article 9 over the long term will function to streamline the method by which financing statements are filed and the process of searching for filed financing statements in New York State and nationally.

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