

Filings Against Trusts and Trustees
Under Revised Article 9 – Thirteen Variations

By

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At this time, Uniform Commercial Code Revised Article 9 (“Revised Article 9”) has become law in all fifty states, the District of Columbia, and the U.S. Virgin Islands. Much has been written about the Revised Article 9 enactment process, the substantive provisions of Revised Article 9, and the impact of Revised Article 9 on transactions closed under prior law, among other topics. Somewhat less has been written about the “nuts and bolts” of Revised Article 9’s application to certain types of transactions. This article focuses on, and attempts to provide clarity with respect to, the seemingly ministerial tasks of filling out and filing financing statements in transactions in which trusts or trustees are debtors. Unless otherwise noted, all citations in this article are to Revised Article 9.

Where to File. A key issue in determining where to file against trusts and trustees is who is the “debtor.” Except with respect to filings relating to fixtures (§9-301(3)(A)), timber to be cut (§9-301(3)(B)), and as-extracted collateral (§9-301(4)),¹ Revised Article 9 provides for filing in the debtor’s location, without regard to the location of the collateral to which the filing relates (§9-301(1)). Section 9-307 sets forth the rules for determining a debtor’s location. A threshold question in filings against trusts and trustees is who, in fact, is the debtor. Section 9-102(a)(28) defines the term debtor as, among other things, “a person having an interest...in the collateral....” Because the answer to this question is beyond the scope of both Revised Article 9 and the Uniform Commercial Code generally, the inquiry begins with the analysis, under law other than the Uniform Commercial Code, of who holds an “interest” in the trust estate. There would appear to be several possible answers, depending on the relevant law (*i.e.*, the law governing the creation and existence of the trust, and in particular the law governing those aspects of the trust relevant to who holds an interest in the trust estate).

Trust Is Debtor and Is a Registered Organization. Certain trusts, such as Delaware statutory trusts,² are separate legal entities distinct from their settlors and trustees, and under applicable law generally hold legal title to the trust estate (*see* Delaware Statutory Trust Act, 12 Del. C. § § 3801(a), 3805(f)). In such cases, the debtor is the trust, the trust may be (and in the case of a Delaware statutory trust, is) a registered organization, and the filing should be made in the trust’s location as determined under the applicable subsection of § 9-307 (subsection (e) in the case of a Delaware statutory trust). The location of the settlor, trustee, or any other party is irrelevant.

Trustee Is Debtor. Certain trusts, such as Delaware common law trusts, do not feature the same separate legal entity status as Delaware Statutory Trusts and, under applicable law, the trustee generally holds legal title to the trust estate, in trust for the benefit of the designated beneficiary. In such cases, the trustee is the debtor, for the reason that it has an interest in the trust estate (*see* § 9-102(a)(28)), and the filing should be made in the trustee’s location as determined under the applicable subsection of § 9-307.³ A trustee that is a registered organization organized under state

¹ Security interests in goods covered by a certificate of title (§9-303), deposit accounts (§9-304), and letter-of-credit rights (§9-306) are perfected by methods other than filing.

² The entity formerly known as a “Delaware business trust” is now known as a “Delaware statutory trust” existing under the Delaware Statutory Trust Act, 12 Del. C. §3801 *et seq.*, which was formerly known as the “Delaware Business Trust Act” (*see* 73 Del. Laws 329 (2002)).

³ Note that a trustee can have but one location under Revised Article 9. That is, a trustee is located in one jurisdiction notwithstanding that it may administer various trusts from a number of offices in multiple jurisdictions.

law is located in the state under whose laws it is organized (§ 9-307(e)). For example, Wilmington Trust Company, a Delaware banking corporation, is located in Delaware pursuant to § 9-307(e). A trustee that is a registered organization organized under federal law is located in the jurisdiction designated by the federal law under which it is formed (§ 9-307(f)(1)), the jurisdiction designated by the trustee in accordance with the federal law under which it is formed (§ 9-307(f)(2)), or in the District of Columbia, if neither of the foregoing applies (§ 9-307(f)(3)). For example, Wachovia Trust Company, National Association, a national banking association, is located in Delaware by way of its designation of Wilmington, Delaware as its main office in its Articles of Association filed with the Office of the Comptroller of the Currency in accordance with 12 U.S.C. § 21, pursuant to § 9-307(f)(2).⁴ A trustee that is an organization but not a registered organization organized under either state or federal law is located in its place of business if it has only one place of business (§ 9-307(b)(2)), or its chief executive office if it has more than one place of business (§ 9-307(b)(3)). A trustee that is an individual is located at the individual's principal residence (§ 9-307(b)(1)).

Trust Is Debtor and Is Not a Registered Organization. Certain trusts, while not registered organizations, may nevertheless hold legal title to the trust estate. In such cases, the debtor is the trust, and the filing should be made in the trust's location as determined under § 9-307(b). If the trust has only one place of business, the trust is located at its place of business (§ 9-307(b)(2)). If the trust has more than one place of business, the trust is located at its chief executive office (§ 9-307(b)(3)).

How to Provide Debtor-Related Information on the UCC1 Financing Statement. Section 9-503 sets forth the rules for providing the debtor's name on the financing statement. Section 9-503(a)(1) provides the rule applicable where the debtor is a registered organization, and requires that the debtor's own name be used. Where the debtor is a trust which is not a registered organization, or is a trustee acting with respect to property held in trust, the applicable rules are found in § 9-503(a)(3). If there is a name specified for the trust in its organic documents, § 9-503(a)(3)(A) requires that such name be used. If no name is so specified, § 9-503(a)(3)(A) requires that the settlor's name be used, together with additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors. Section 9-503(a)(3)(B) requires, in connection with all filings involving trust or trustee debtors (other than trust debtors that are registered organizations, to which § 9-503(a)(3) is inapplicable – *see* § 9-503, Official Comment 2), that the financing statement indicate that the debtor is a trust or is a trustee acting with respect to property held in trust. This requirement may be met if the debtor's name as it appears in box 1a or 1b includes such indication (note, however, that no modification of or words additional to the debtor's name should appear in box 1a or 1b), or if the debtor's name as it appears in box 1a or 1b does not include such indication, if the appropriate item (trust or trustee acting with respect to property held in trust) is checked in box 17 of the national form of UCC1 financing statement

⁴ Revised Article 9 as enacted in Delaware includes a non-uniform clarifying sentence in § 9-307(f), which provides, "For purposes of paragraph (2) [of § 9-307(f)] above, if a registered organization designates a main office, a home office, or other comparable office in accordance with the law of the United States, such registered organization is located in the state that such main office, home office, or other comparable office is located." Modifications to the Official Comments to Revised Article 9 approved in December, 2001 by the Executive Committee of the National Conference of Commissioners on Uniform Laws, Permanent Editorial Board for the Uniform Commercial Code, likewise attempt to remove any doubt as to whether designation of a main office, home office, or other comparable office constitutes designation of state of location for purposes of § 9-307(f)(2). While courts generally defer to the Official Comments, those particularly disinclined toward risk might note that the Official Comments to Revised Article 9 may not be afforded the weight of law in all jurisdictions.

addendum. Thus, there are special and perhaps counterintuitive rules governing what information must appear in box 1a (organization's name) or 1b (individual's name) of the financing statement.

The remainder of the information called for in the subparts of box 1 (*viz.*, boxes 1c through 1g), is to be completed with information corresponding to the debtor, regardless of whether the trust's name (if it has one) or the settlor's name (if the trust has no name) appears in box 1a or box 1b. In no instance should the financing statement name the trustee in box 1a or 1b (the style widely used under former Article 9), excepting only the unlikely case of an unnamed trust whose settlor and trustee are one and the same. As a practical matter, in any instance in which Revised Article 9 requires that box 1a or 1b contain a name that might not be readily associated with the address which follows in box 1c, consider completing box 1c so as to specify a "care of" address. Thus, communications addressed to the trust by name or, if it has none, to the settlor, would be sent in care of the person readily associated with the address appearing in box 1c, better assuring proper delivery and routing than might occur should communications arrive at such address without such person's name.⁵

Transition Period. Of course, a great many filings against trusts or trustee debtors were made under former Article 9 in ways that do not comply with the requirements of Revised Article 9 discussed above. Under the transition rules of Revised Article 9, financing statements properly filed under former Article 9 generally remain effective until the earlier of the time they would have ceased to be effective under the law of the jurisdiction in which they were filed, or June 30, 2006 (§ 9-705(c)). Thus, an otherwise proper filing which does not identify the debtor in the manner required by § 9-503 need not be cause for immediate alarm. But such a financing statement must be amended so as to meet the requirements of § 9-503 as in effect at such time as the financing statement is otherwise amended or is continued (§ 9-707(b)). Similarly, if a financing statement filed under former Article 9 is to be continued by filing an *in lieu* continuation statement in a different jurisdiction than that in which the original filing was made, the *in lieu* continuation statement must meet the requirements of Revised Article 9 as in effect in the jurisdiction in which it is to be filed.

Certain Non-Uniform Provisions in Delaware. Recognizing the risk, burden, and potential for errors posed by the transition from former Article 9 to Revised Article 9, Delaware has adopted a non-uniform § 9-703(c) providing special transition rules for financing statements filed under former Article 9 with respect to trusts and trustees as debtors. This non-uniform provision, and the accompanying non-uniform text in § 9-705(f), effectively provides that certain Delaware filings made under former Article 9 and identifying the debtor in the manner customary under former Article 9 (*e.g.*, Wilmington Trust Company, not in its individual capacity, but solely as Owner Trustee) can be continued under Revised Article 9 without necessity of complying with the debtor naming convention mandated by Revised Article 9 discussed above. This special rule applies only to continuations, and not to amendments. When a Delaware filing made under former Article 9 is first amended in any respect, it also must concurrently be amended to comply with Revised Article 9's requirements for identifying the debtor. Additionally, in adopting Revised Article 9, Delaware declined to adopt § 9-516(b)(5)(C)(iii), with the consequence that filers can

⁵ The address specified in box 1c must be that of the debtor. If, for example, the debtor is the trustee of an unnamed trust, Revised Article 9 requires that the settlor's name appear in box 1a or 1b and that the trustee's address appear in box 1c. This suggestion is intended to avoid the confusion and delay which could accompany attempted delivery at the trustee's address of correspondence identifying only the settlor as addressee.

omit the debtor's organizational identification number from box 1g of the national form of UCC1 financing statement without fear of rejection by the Delaware Secretary of State.

Thirteen Variations Summarized. The chart appearing below summarizes and provides step-by-step guidance for the completion of UCC1 financing statements relating to trusts and trustees as debtors. It includes nine variations where a trustee is the debtor, three variations where a trust which is not a registered organization is the debtor, and a single variation where a trust which is a registered organization is the debtor. Finally, the chart indicates where UCC1 financing statements prepared in each of the thirteen variations should be filed.

Filings Against Trusts and Trustees Under Article 9 – Thirteen Variations

UCC 1 Financing Statement Box	Trust is Debtor and is a Registered Organization	Trustee is Debtor									Trust is Debtor and is not a Registered Organization		
		Trust with a Name			Trust without a Name						Trust with a Name	Trust without a Name	
		Individual Trustee	Registered Organization Trustee	Organization Trustee (other than Registered Organization)	Individual Trustee		Registered Organization Trustee		Organization Trustee (other than Registered Organization)			Individual Settlor	Organization Settlor (including Registered Organization)
					Individual Settlor	Organization Settlor	Individual Settlor	Organization Settlor	Individual Settlor	Organization Settlor			
Box 1a	A	A	A	A	N/A	Q	N/A	Q	N/A	Q	A	N/A	Q
Box 1b	N/A	N/A	N/A	N/A	Q	N/A	Q	N/A	Q	N/A	N/A	Q	N/A
Box 1c	B	C	C	C	C	C	C	C	C	C	B	B	B
Box 1d	D	E	E	E	E	E	E	E	E	E	D	D	D
Box 1e	F	N/A	G	G	N/A	N/A	G	G	G	G	F	F	F
Box 1f	H	N/A	I	I	N/A	N/A	I	I	I	I	H	H	H
Box 1g	J	N/A	K	N/A	N/A	N/A	K	K	N/A	N/A	J	J	J
Box 10	N/A	N/A	N/A	N/A	S	S	S	S	S	S	N/A	S	S
Box 17	N/A	L	L	L	L	L	L	L	L	L	T	T	T
Where to File	M	N	P	O	N	N	P	P	O	O	R	R	R

KEY	
A	Name of trust
B	Mailing address of trust*
C	Mailing address of trustee*
D	Tax ID # of trust
E	Tax ID # of trustee
F	Trust's type of organization
G	Trustee's type of organization
H	Trust's jurisdiction of organization
I	Trustee's jurisdiction of organization
K	Trustee's organizational ID #
L	Check second item (Trustee acting with respect to property held in trust)
M	Trust's location per RA-9 § 307(e)
N	Trustee's location per RA-9 § 307(b)(1) or (c)
O	Trustee's location per RA-9 § 307(b)(2), (b)(3), or (c)
P	Trustee's location per RA-9 § 307(e) or (f)
Q	Name of settlor
R	Trust's location per RA-9 § 307(b)(2), (b)(3), or (c)
S	Information to distinguish debtor (whether trust or trustee) from other trusts with same settlor per RA-9 § 503(a)(3)(A)

J	Trust's organizational ID #	T	Check first item (Trust)
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* Where the name in box 1a or 1b is not commonly associated with the address in box 1c, consider specifying the address in box 1c "in care of" or "c/o" a name commonly associated with such address, *e.g.*, the trustee's name.