

**PROPOSED CHANGES TO ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE
AFFECTING PERFECTION OF SECURITY INTERESTS AGAINST INDIVIDUALS**

One of the more difficult problems under Article 9 of the Uniform Commercial Code (the “UCC”) is perfection of security interests against individuals by filing financing statements. The requirement under the UCC appears deceptively simple. Section 9-502(a)(1) of the UCC provides that a financing statement must, among other requirements, provide the name of the debtor in order for the financing statement to be sufficient, and Section 9-503(a)(4)(A) of the UCC states that if the debtor is an individual who has a name, the financing statement must provide the individual debtor’s name. Moreover, Section 9-506 of the UCC provides that a financing statement is seriously misleading, and is therefore ineffective, if the financing statement provides a debtor name other than the name required by Section 9-503(a)(4)(A) of the UCC, unless a search under the required name, using the filing office’s standard logic, will disclose the financing statement. The problem is that Article 9 does not tell us which of the debtor’s names to use if the debtor is an individual with multiple possible names. Law other than the UCC dictates the answer. An individual may have several names, all legitimate. For example, a married woman may use her maiden name and her married name simultaneously and may change from one to the other over time. It is possible that a man’s nickname may constitute his name (e.g., Bill Clinton). Courts, in interpreting Sections 9-503(a)(4)(A) and 9-506 of the UCC, have struggled to determine whether a debtor’s name as it appears on his or her birth certificate, driver’s license, passport or other identification,¹ or a commonly used nickname,² is the correct name of the debtor for the financing statement to be sufficient.

Not having clarity as to an individual’s name is problematic because (i) a potential secured party may not obtain notice of an existing lien, since under Section 9-519 of the UCC financing statements are indexed by the filing office of each state under the debtor’s name, and (ii) a secured party may unknowingly fail to obtain a perfected security interest in collateral that is perfected by filing.

¹ In re Gustafson, 14 U.C.C. Rep. Serv. 231 (Bankr. W.D. Okla 1973), where the court held that a financing statement filed against “Gustaven,” even though the debtor’s true name was “Gustafson,” was effective to perfect a security interest in the indicated collateral, since the debtor had changed the spelling of his name to “Gustaven” and such spelling appeared on various other identifications.

² In re Kinderknecht, 308 B.R. 71 (10th Cir. BAP 2004), where the court stated that “for a financing statement to be sufficient under Kansas law, the secured creditor must list the individual debtor by his or her legal name, not by a nickname.” It held that the secured party did not perfect its interest in the debtor’s property because the financing statement indicated that the debtor’s name was “Terry J. Kinderknecht” rather than “Terrance Joseph Kinderknecht.”

Recently, several states have passed nonuniform amendments to the UCC as in effect in such states to attempt to resolve this issue. Nebraska has enacted legislation to the effect that a financing statement containing the debtor's last name is sufficient. Tennessee and Texas permit the name of the debtor as reflected on his or her driver's license to be sufficient.

In 2008, the Uniform Law Commissioners (the "*ULC*") and the American Law Institute (the "*ALI*") formed an Article 9 Joint Review Committee (the "*Committee*") to propose revisions to Revised Article 9 of the UCC adopted in 2001 by all states in the United States and the District of Columbia. One of the issues that the Committee addressed was whether when the debtor is an individual, more than one name may satisfy the requirements of Section 9-503(a)(4)(A) of the UCC. The Committee proposed a uniform statutory solution for determining the name of an individual debtor for purposes of satisfying the sufficiency requirements for a financing statement.

The Committee developed three possible approaches to providing further certainty as to the name of an individual debtor:

- (i) amend Article 9 of the UCC to provide that a financing statement filed against an individual debtor is effective only if it specifies the name for the debtor that appears on the debtor's unexpired driver's license, state identification card or other specified document (the "*Only If Approach*");
- (ii) amend Article 9 of the UCC to provide a safe harbor for satisfying the existing "name of debtor" requirement (the "*Safe Harbor Approach*"); or
- (iii) amend Article 9 to create two classes of security interests: (a) a first priority class for financing statements filed against the name of a debtor that appears on the debtor's unexpired driver's license, state identification or other specified document, and (b) a class that is subordinate to financing statements filed against the name of the debtor that appears on the debtor's unexpired driver's license, state identification card or other specified document (the "*Priority Approach*").

Each proposal is discussed in more detail below.

The Proposals

- I. Only If Approach. The Only If Approach uses a waterfall to determine the individual's name that is sufficient for a financing statement. If a debtor has an unexpired driver's license, the name on such driver's license is sufficient. If the debtor does not have an unexpired driver's license but has an unexpired state identification card, the name on such state identification card is sufficient. If the debtor does not have an unexpired driver's license or a state identification card but has an unexpired United States issued passport, the name on such United States issued passport is sufficient. If the debtor was issued more than one unexpired driver's license, state identification card or United States passport, the most recent is the one that indicates the debtor's name for the purposes of

this provision. If the debtor does not have an unexpired driver's license, state identification card or United States passport, the surname, first given name, and first initial of the second given (middle) name (if any) is sufficient.

- II. Safe Harbor Approach. The Safe Harbor Approach provides that the name on an unexpired driver's license or state identification card is sufficient. However, a financing statement with another name of the individual, one that does not appear on the unexpired driver's license or state identification card, may also be sufficient if, in accordance with Section 9-506 of the UCC, a search under such name, using the filing office's search logic, will disclose the financing statement.
- III. Priority Approach. The Priority Approach gives priority to a secured party that files against the name on an unexpired driver's license, or if none, on an unexpired state identification card, or if none, on an unexpired United States passport. If a name that is not on such driver's license, state identification card or United States passport is used, the secured party will be perfected if it is the name of the individual debtor, but the secured party will generally not have priority against other secured parties that used the name provided on an unexpired driver's license, state identification card or United States passport.

Looking Forward

A draft of these proposed revisions will be read at the ULC's annual meeting this summer. After further Committee review, the revisions will be presented to the ALI for consideration and approval in the spring of 2010 and to the ULC for consideration and approval in the summer of 2010. Adoption of any of these alternatives will affect the way we search records for existing liens and perfect security interests against individuals. Transition rules will be necessary for implementation of any of these three approaches.

In the meantime, we recommend that a secured party file and search under their individual debtor's name as it appears on his or her driver's license, state identification card, United States issued passport, other passports, and birth certificate, to the extent the individual debtor has such specified document, and under any nickname, as applicable. Filings and searches should be done both with and without the middle name and middle initial. While this may seem excessive, until Article 9 is revised to give clarity as to the individual debtor's name, this is the best way to be sure that the Article 9 requirement for the "name of the debtor" is satisfied for an individual debtor.

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If you have any questions regarding these proposed revisions to Article 9 of the Uniform Commercial Code, please contact Cindy J. Chernuchin (212-728-8606, cchernuchin@willkie.com) or the Willkie attorney with whom you regularly work.

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July 13, 2009

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