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SUMMARY OF THE 2010 AMENDMENTS TO CHAPTER 9 OF THE TEXAS UNIFORM COMMERCIAL CODE

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SUBJECT: Summary of the 2010 Amendments to Chapter 9 of the Texas Uniform Commercial Code, Effective July 1, 2013

I. INTRODUCTION

Article 9 of the Uniform Commercial Code, the article dealing with secured transactions, was last substantially revised in 1998 (“**Revised Article 9**”). By January 1, 2002, Revised Article 9 had become effective in all fifty states. Revised Article 9 is codified in Texas as Chapter 9 of the Texas Business and Commerce Code (the “**Texas UCC**”).

The Uniform Commercial Code’s sponsoring organizations, the American Law Institute (the “**ALI**”) and the Uniform Law Commission (the “**ULC**”), elected to further amend Revised Article 9 in light of certain states’, including Texas’s, passage of non-uniform amendments to their enactments of Revised Article 9. These amendments were intended to resolve ambiguity in Revised Article 9’s treatment of the name of an individual debtor on a financing statement, and to provide filers greater comfort that their interests would be perfected.¹ The International Association of Commercial Administrators (“**IACA**”) also sought a number of changes to the filing provisions of Part 5 of Revised Article 9 based on the experiences of filing offices.²

The ALI and the ULC approved certain amendments to Article 9 of the Uniform Commercial Code (the “**ULC Amendments**”) in 2010. The ULC Amendments were considered and approved, with minor, non-uniform changes, by Texas in 2011 with a July 1, 2013, effective date.³ The three most noteworthy ULC amendments impact: (i) the required name of an individual on a financing statement (the only controversial issue), (ii) the perfection of collateral following the debtor’s relocation to a new jurisdiction, and (iii) collateral acquired by a new

¹See TEX. BUS. & COM. CODE ANN. § 9.503(a)(4) (Vernon 2011); (the 2007 statute created a “safe harbor” for the name of an individual debtor on a financing statement filed in the State of Texas; the financing statement was sufficient if it provides the debtor’s name as shown on the debtor’s Texas driver’s license or Texas identification card).

²See Edwin E. Smith, A Summary of the 2010 Amendments to Article 9 of the Uniform Commercial Code, 42 No. 4 UCC L.J. Art. 1, October 2010, at 2.

³Act of May 5, 2011, 82d Leg., R.S., ch. 67 §§ 1–20, 2011.

debtor. This paper provides a summary of the three most noteworthy changes along with a brief discussion of less material statutory amendments.

II. SUMMARY OF NOTEWORTHY CHANGES:

A. The Debtor's Name: Individuals

The original Article 9 created a notice filing system, under which financing statements are indexed and discoverable under the name of the debtor. When the ALI and ULC issued Revised Article 9, the drafters made substantial revisions to ensure its continued viability in preparation for future filing and searching technologies. Section 9-503 of Revised Article 9 provided that a financing statement was not seriously misleading if it listed (a) for a “registered organization,” the name of the debtor indicated on the public record in the debtor’s jurisdiction of organization, or (b) for an individual debtor, simply the name of the debtor. The model form provided in Section 9-521 of Revised Article 9 asks only for the debtor’s “exact full legal name.”

While Sections 9-503 and 9-521 might appear to be sufficient at first glance, it became apparent that issues remained – *e.g.*, whether trade names should be included and how to identify an individual who is commonly known by more than one name.⁴ Creditors who misidentified debtors under Revised Article 9 faced uncertainty as to whether their financing statements were seriously misleading; such name errors could be fatal to the creditor’s attempted filing of a security interest under Revised Article 9.⁵ Of all the amendments, the issue of the correct name of the debtor is the most significant, because it addresses those situations where, due to an error in the name of the debtor, a secured creditor’s seemingly perfected security interest is in fact found to be unperfected. Such an unperfected the security interest would be subordinate to the rights of a lien creditor or other filers and would negatively affect the secured creditor’s priority in the case of the debtor’s bankruptcy.⁶

Effective June 16, 2007, in response to the confusion concerning individual debtors’ names on financing statements, the Texas legislature adopted Section 9.503(a)(4), a non-uniform amendment to Revised Uniform Article 9.⁷ This amendment provided that the name of an individual as reflected on a driver’s license or identification certificate issued by the state of the

⁴See *Genoa Nat’l Bank v. Sw. Implement, Inc. (In re Borden)*, 353 B.R. 886, 887-88 (Bankr. D. Neb. 2006) (stating that the debtor’s legal name was Michael Ray Borden, as it appeared on legal documents, such as his birth certificate, driver’s license, and real estate conveyancing documents, even though the debtor signed some legal documents, such as tax forms, as “Mike Borden”).

⁵*Compare ITT Commercial Fin. Corp. v. Bank of the West*, 166 F.3d 295, 301-302 (5th Cir. 1999) (finding that a filing naming the former sole proprietor of a recently incorporated company was “seriously misleading” and defeated the lender’s priority as against a later lender to the company) *with Peoples Bank v. Bryan Bros. Cattle Co.*, 504 F.3d 549 (5th Cir. 2007) (Finding that a filing naming the debtor by his nickname, in which he opened bank accounts and held himself out to the public was properly perfected).

⁶See Cynthia G. Fischer & Emma H. C. Lee, Schnader Harrison Segal & Lewis LLP, Corporate & Finance Alert: Protecting Yourself as a Secured Creditor – Proposed Amendments to Article 9 of the Uniform Commercial Code 1 (2012), http://www.schnader.com/files/Uploads/Documents/Corporate%20Alert_January%202012.pdf.

⁷Act of May 17, 2007, 80th Leg., R.S., ch. 565, §§ 1-6.

individual's residence would be sufficient for a financing statement. Texas's non-uniform amendment, along with other states' amendments, highlighted secured lenders' need for clarity as to what name should be provided for an individual debtor on a financing statement.

Responding in large part to Texas's 2007 amendment to Section 9.503(a)(4), the ULC Amendments provide states with two options – Alternatives A and B – offering greater clarity with respect to sufficiency of an individual debtor's name. Pursuant to Senate Bill 782, Texas has selected “**Alternative A**,” which requires a lender to use the name on the debtor's most recent unexpired Texas driver's license or personal identification card, if the debtor has one.⁸ If the debtor has no unexpired Texas driver's license or personal identification card, then the lender can use the individual's name, as required by Revised Article 9, or the individual's surname and first personal name.⁹ Essentially, Alternative A “divides the universe of individual debtors into two categories: those to whom ‘this State’ (...where the financing statement is filed) has issued a driver's license that has not expired, and all other individuals.”¹⁰ Under this alternative, lenders filing large numbers of financing statements would be able to establish standard procedures to conduct searches of the filing office based on driver's license names and to make appropriate filings.¹¹

Alternative A creates an “only if” standard, where the debtor's name “will be sufficient only if the name provided is the name on the driver's license,”¹² allowing for two alternative names, the debtor's name as under Revised Article 9 or the debtor's surname and first personal name, only where the debtor does not have a driver's license in the state of filing. In contrast, Alternative B holds that **any** of those three possible names for the debtor would be sufficient.¹³ Alternative B has therefore been called the “safe harbor” approach to the driver's license rule, in contrast to the “only if” approach reflected in Alternative A.¹⁴ And, under either alternative, the filing statement should only refer to the debtor's most recently issued driver's license when referencing the debtor's name as shown on his or her driver's license.¹⁵

Proponents of Alternative A believe that it provides a clear method for identifying a debtor. As always, however, change brings forth critics: one legal commentator notes that a number of states include “MD” after doctors' surnames and asks whether filers should include

⁸See TEX. BUS. & COM. CODE ANN. § 9.503(a)(4) (Vernon 2011). Note that revised Section 9.502(c) provides that adherence to Section 9.503(a)(4) is not required with respect to a mortgage filed as a financing statement covering fixtures, as-extracted collateral, or timber to be cut.

⁹See *id.*

¹⁰Harry C. Sigman, *Improvements (?) to the UCC Article 9 Filing System*, 46 Gonz. L. Rev. 457, 475 (2011). See also BUS. & COM. § 9.503(a).

¹¹See Smith, *supra* note 2, at 5.

¹²See *id.*, at 6.

¹³See U.C.C. § 9-503(a) Alternative B (Proposed Revisions 2010).

¹⁴See Smith, *supra* note 2, at 5.

¹⁵See BUS. & COM. § 9.503(g).

“MD” as part of the surname.¹⁶ Furthermore, the Texas DMV accepts a tilde over the “n” for Hispanic names, but the current Texas UCC filing system does not.¹⁷ Additional possible problems in enacting Alternative A include:¹⁸

1. Incompatibilities between the DMV and Uniform Commercial Code filing systems both at the outset and on an ongoing basis;
2. Incorrect name sources obtained by creditors operating in multiple states, where some states select Alternative A and others Alternative B.¹⁹
3. Creditors may need to examine debtors’ driver’s licenses, which is currently voluntary to the extent permitted by state enactments of Revised Article 9;
4. Creditors may need to monitor changes in the DMV system, including name format;
5. Creditors may need to determine whether a debtor has been issued prior licenses under a different name, and to actively monitor whether subsequent licenses are so issued, which may not be feasible on the basis of public records; and
6. Because a debtor may commonly use a different name from that on his or her driver’s license, a financing statement may contain a different name from that used on other loan documentation, which could cause errors.

Of the 30 states (an Puerto Rico)²⁰ that have enacted the ULC Amendments as of April 16, 2012, 25 have selected the individual debtor name Alternative A, while only 5 states (Colorado, Connecticut, New Hampshire, Oregon, and Washington) have chosen Alternative B.²¹

¹⁶See Sigman, *supra* note 10, at 472.

¹⁷See *id.* at 473.

¹⁸See *id.* at 480-81.

¹⁹The risk of this can be mitigated by creditors, though, by instituting a policy of always using the driver’s license – *i.e.*, assuming all states have adopted Alternative A.

²⁰As of November 9, 2012, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Puerto Rico, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin have enacted the ULC Amendments. [Legislative Fact Sheet – UCC Article 9 Amendments \(2010\)](http://uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%209%20Amendments%20%282010%29), Uniform Law Commission, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=UCC%20Article%209%20Amendments%20%282010%29> (last visited November 9, 2012).

²¹See [2010 Amendments to UCC Article 9 Legislative Status](http://meetings.abanet.org/webupload/commupload/CL710043/otherlinks_files/status_chart_10242012.pdf), Corporation Service Company (October 24, 2012), http://meetings.abanet.org/webupload/commupload/CL710043/otherlinks_files/status_chart_10242012.pdf; see also

The ULC Amendments suggest that a state (such as Texas) that adopts Alternative A should verify that its Uniform Commercial Code data base is compatible with the state's driver's license data base as to characters, field length, etc.²² Similarly, Alternative A would not be a viable option if a state's data bases are not compatible, because many names as shown on driver's licenses could not be entered in the state's Uniform Commercial Code data base, which would undermine the system.²³

B. The Debtor's Name: Registered Organizations

Under Revised Article 9, the filer must provide the name of a "registered organization" debtor that is indicated on the **public record** of the debtor's jurisdiction of organization and which demonstrates the debtor's organization. The ULC determined, however, that the definition of "registered organization" under Revised Article 9 was unclear. Filers were uncertain whether corporations, limited liability companies, and other entities were "registered organizations" under Revised Article 9's definition, which applied only to entities for which the state "**must maintain a public record** showing the organization to have been organized."²⁴

Under the ULC Amendments, the duty of a state to keep and maintain such a public record is no longer relevant to the definition of "registered organization." Section 9-102(71) of the ULC Amendments (and the corresponding Texas statute) amends the definition of "registered organization" under Revised Article 9 to clearly include organizations formed or organized by (i) the filing or issuance of a "**public organic record**,"²⁵ or (ii) by legislative enactment, even if such organizations are created without the need for a "public organic record."²⁶ The amended definition of "registered organization" also includes "business trusts."²⁷

Because of its focus on the "public organic record," the amendment to Section 9-102(71) should not impact common law trusts (i) formed for non-business or commercial purposes or (ii) formed for business or commercial purposes but not otherwise required to file a "public

UCC Article 9 Amendments (2010), Uniform Law Commission, <http://uniformlaws.org/Act.aspx?title=UCC%20Article%209%20Amendments%20%282010%29> (last visited November 9, 2010).

²²See U.C.C. § 9-503, Legislative Note 2 (Proposed Revisions 2010).

²³See Smith, *supra* note 2, at 8.

²⁴See TEX. BUS. & COM. CODE ANN. § 9.102(71) (Vernon 2011).

²⁵See U.C.C. § 9-102(68); BUS. & COM. § 9.102(68-a). A public organic record is a publicly available document, most commonly that document filed with, or issued by, a state or the United States in order to form or organize an organization.

²⁶See U.C.C. § 9-102(71); BUS. & COM. § 9.102(71).

²⁷See *id.* With respect to trusts, if collateral is held by a statutory trust or in Massachusetts-type business trust, the trust is a registered organization and the trust's name is the debtor name. For common law trusts that are not Massachusetts type business trusts, the financing statement must provide the name of the trust as identified in the trust's organic records if it has name indicated there, or otherwise the name of the settlor or testator and sufficient additional information to distinguish a particular trust from others held by that same settlor or testator.

organic record.” Neither of these types of common law trusts are considered to be a “registered organization” under either Revised Article 9 or under new Section 9-102(71).²⁸

The amendment to Section 9-102(71), along with the newly defined term “public organic record,” should assure creditors that a financing statement will properly reflect the debtor’s name under the Texas UCC if the name shown on the financing statement matches the name shown on the applicable “public organic record” of a “registered organization.” Solely relying on a good standing certificate from the Texas Comptroller of Public Accounts to obtain the debtor’s name **will not suffice** – one must obtain the “public organic record,” or **organizational or formation document**, to comply with ULC Amendments as adopted in Texas. Furthermore, if the name of the debtor on the State of Texas’ searchable database differs from the name on its “public organic record,” the debtor’s name on the financing statement should be the debtor’s name as reflected on the charter document.

C. Debtor’s Location

Revised Article 9 provides for a 4 month grace period upon a debtor’s relocation to a new jurisdiction, during which period a creditor must file a financing statement or otherwise perfect its security interest pursuant to the laws of the new jurisdiction. It should be noted, however, that the Revised Article 9 grace period **does not apply** to any after-acquired property, and therefore the creditor’s interest in any after-acquired collateral pursuant to any security agreement would only be perfected at the time of the creditor’s filing of a financing statement or otherwise perfecting its interest under the laws of the new jurisdiction.

Newly added Subsection (h) to Section 9.316 of the Texas UCC addresses the gap in the existing rules governing post-change of location, after-acquired property, of the debtor. This section, if enacted in the debtor’s original location, provides that the original financing statement shall cover any after-acquired property for a period of four months following the debtor’s change of location.²⁹ Under this amendment, the creditor’s filing of a financing statement or other perfection of its interest in the new jurisdiction would be effective to perfect its interest in any property of the debtor covered by the original statement, including such after-acquired property.

While Section 9.316(h) helps existing secured creditors, it also introduces risk for secured parties seeking to make loans to the same debtor after a change in location. Lenders making a secured loan to a debtor on property acquired after a debtor’s change of location must thoroughly check for prior UCC filings on the debtor to determine whether or not they will be subordinate to an existing secured party’s lien through its original filing in the old jurisdiction. For this reason, lenders should take particular care to ensure prospective debtors provide complete and accurate disclosures of all previous addresses and dates of use of such addresses in order to conduct appropriate searches.

²⁸See Smith, *supra* note 2, at 5.

²⁹See TEX. BUS. & COM. CODE ANN. § 9.316(h) (Vernon 2011).

D. New Debtor

Newly added Subsection (i) to 9.316 of the Texas UCC provides protection for a security interest in after-acquired property following the assumption of debt subject to the creditor's financing statement by a **new debtor** residing in a different jurisdiction from the old debtor. Under Revised Article 9 a creditor in such circumstances would have a grace period of 1 year in which to file a financing statement in the jurisdiction of the new debtor in order to preserve its perfected security interest with respect to property held at the time the new debtor assumed the obligation. However, such grace period would not apply to any after-acquired property. The amended Section 9.316(i) grants a 4 month grace period to the creditor with respect to after-acquired property analogous to that provided for a change of jurisdiction. It should be noted that this grace period will not preserve priority of a creditor's interest in after-acquired property that is perfected solely by a financing statement in the old debtor's jurisdiction, and that an interest perfected by another creditor in the jurisdiction of the new debtor can take priority over such interest.³⁰ For this reason, creditors should take care to ensure that debtors provide complete, accurate, and timely information regarding any planned assignment and assumption of the debt subject to a financing statement, and that full identifying information including jurisdiction of such assuming debtor is provided prior to the closing of any such transaction, so that the creditor may file a financing statement immediately upon closing in the new debtor's jurisdiction. Revisions to Section 9.326 of the Texas UCC were also implemented in connection with those of Section 9.316 to address priority issues with respect to conflicting security interests in assets of a new debtor located in a **different** jurisdiction than the original debtor.

E. Miscellaneous Changes Related to Filing / Texas Rejections

1. Section 9.502(c) – Revised Article 9 provides that a mortgage or deed of trust filed as either (a) a fixture filing or (b) a financing statement covering as-extracted collateral or timber to be cut, must satisfy the requirements of a financing statement. New Section 9.502(c) of the Texas UCC provides that the record need not indicate that it is to be filed in the real property records nor provide an individual debtor's name, if any, in accordance with new Section 9.503(a)(4) (requiring identification of the debtor by the most recently issued and unexpired Texas driver's license or most recently issued and unexpired Texas ID Card issued by the same office that issues Texas driver's licenses) if the record otherwise reflects the individual name of the debtor or the surname and first personal name of the debtor.

2. Section 9.507(c) – Section 9.507(c) of the Texas UCC now provides that any event (not just a name change, as was the case under Revised Article 9) that causes the name of a debtor on a financing statement to become seriously misleading under Section 9.503(a) of the Texas UCC triggers the four (4) month temporary perfection period under Section 9.507.

3. Sections 9.516 and 9.518 - The Texas UCC adopts the ULC Agmendments' change of the term "correction statement" to "information statement,"

³⁰See Smith, *supra* note 2, at 8.

which more accurately describes the statement's purpose. Whereas only the debtor could file a "correction statement" under Revised Article 9, **a secured party of record** is allowed, though not required, to file an information statement under new Sections 9.516 and 9.518. Such an information statement would be appropriate where such secured party believes that another party has made a filing affecting the secured party's financing statement without authorization.

It should be noted that Texas did not adopt ULC Amendments' deletion of language that allows a filing office to reject any financing statement that does not provide the debtor's type of organization, jurisdiction of organization, or organizational identification number or indication that the debtor does not have such a number.³¹ Section 9.516(b)(5)(C) of the Texas UCC continues to permit the Secretary of State's office to refuse to file a financing statement for a debtor that is a registered organization if any of (i) the type of organization for the debtor, (ii) the jurisdiction of organization for the debtor or (iii) an organizational identification number for the debtor (or a statement that the debtor has none), are not provided in the appropriate places on the financing statement. **Therefore, financing statements filed in Texas must continue to reflect these three (3) pieces of information.**

4. **Texas Rejected the ULC's new Financing Statement Forms.** The ULC Amendments provide for a new form of (i) initial financing statement and (ii) financing statement amendment to reflect the ULC Amendments. **But Texas rejected the financing statement forms promulgated by the ULC and contained in Section 9-521 of the ULC Amendments.** In 2004, Texas repealed Section 9.521 of the Texas UCC and added Section 9.5211 of the Texas UCC instead. Section 9.5211 prohibits the rejection by an officer of a filing office in the State of Texas that accepts written records of either (i) a written initial financing statement or (ii) a written record that is, in each case, made on an industry standard form, including a national standard form or a form approved by the International Association of Commercial Administrators, adopted by rule by the Secretary of State of the State of Texas.

F. Miscellaneous Changes Unrelated to Filing

1. **Section 9.307(f)** - The ULC Amendments codify a comment to Section 9-307 of Revised Article 9³² by expressly providing that where federal law permits a registered organization to designate a main office, home office, or similar office such office is properly designated as the State of location of the registered organization.

2. **Section 9.607(b)** - The ULC Amendments clarify that the triggering default event allowing non-judicial foreclosure sale of a mortgaged property must be a default with respect to the mortgagor's obligations. This precludes the interpretation that

³¹The ULC Amendments delete 9-516(b)(5)(C).

³²See U.C.C. § 9-307 cmt. 5 (2009).

a default by an assignor of such mortgage could trigger such a right. Section 9.607(b)(2) of the Texas UCC implements this change.

III. CONCLUSION

Before the ULC Amendments become effective in Texas on July 1, 2013, careful consideration should be given to the available options with respect to individual debtor names under Alternative A. Lenders and their counsel need to be familiar with not only the current UCC filing office system but also the DMV's filing system. For individual debtors, obtaining an image of the driver's unexpired license or State Identification Card and tracking the expiration date **must become part of due diligence**. If the driver's license or State ID expires, it is no longer a relevant source for verifying the individual debtor name. And middle names must be considered -- whether spelled out, an initial, or missing (*e.g.*, 11 states do not include the middle name on the driver's license). **The exact name on the license must be used even if it contains an error**. One should list **all variations** of the name on the UCC Financing Statement including the middle name even if that middle name is not provided on the driver's license or State ID. Searching and listing all name variations will become common filing practice.

And while the ULC Amendments have eliminated the SSN/FEIN and "e,f,g" boxes, providing (i) the type of organization for the debtor, (ii) the jurisdiction of organization for the debtor or (iii) an organizational identification number for the debtor (or a statement that the debtor has none) **is still required in Texas**. **Therefore, financing statements filed in Texas must continue to reflect these three (3) pieces of information**. But identifying the corporate structure, state of organization and organizational ID number will no longer be required in virtually all other states that have adopted the ULC Amendments. Since the Section 9-521 Uniform Form of Written Financing Statement and Amendment has eliminated the SSN/FEIN and "e,f,g" boxes, the State of Texas will have a different UCC-1 Financing Statement form than that of most other states. The final decision on what version of the form will be left up to each state.

If filings in other states are required, counsel will need to determine if the ULC Amendments are effective in that state, and, if so, if Alternative A or B is in effect. Until all 50 states effect the ULC Amendments, counsel should be careful to minimize any risks presented by conflict of laws issues.

If you wish to review the entirety of the ULC Amendments, they can be downloaded in full at <http://extranet.ali.org/directory/files/UCC9%20amendments%202010.pdf>.