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UCC Section 9-403(2) and the Continuing Saga of Continuation Statements

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QUARTERLY REPORT

UCC Section 9-403 and the Continuing Saga of Continuation Statements

By William E. Carroll and Alvin C. Harrell

There are a number of concerns that most business people have about怎么办 the effectiveness of a financing statement, even the simplest and most straightforward of those concerns, the six-month filing window specified in section 9-403(3) continues to be a Waterloo for many a secured party. In spite of the fact that the statute has for Senate has made it abundantly clear that the six month filing window provided by section 9-403(3) is the exclusive period for filing a continuation statement and that a continuation statement filed at any other time will not be effective, these problems apparently continue unabated, as illustrated by a stream of new cases. Here are some recent examples.

II. The Six Month Window Period

Rainbow Manufacturing Co. v. Bank of Fitzgerald (No. Rainbow Manufacturing Co.) serves as yet another reminder that a premature filing of the continuation statement will not continue perfection.* Article 9 requires filing of the continuation statement during the six month period preceding the end of the five year effective life of the financing statement. A similar extension period exists for a period of five years after the expiration of the effective life of the previously filed continuation statement (not necessarily five years from the date of the previous filing). In Rainbow the secured party filed continuation statements approximately six and 12 months after the original financing statement was filed, clearly outside the six month "window" period preceding the five year anniversary date. The Rainbow court correctly noted that a premature continuation statement has no effect, hence perfection is lost. Unfortunately the Rainbow court went on to make the misleading statements incorrectly indicating that the continuous continuation period runs from the time a continuation statement is correctly filed, rather than from the end of the preexisting five year period of perfection.

The Lender in Rainbow was not even close, but another case illustrates that near miss is as good as a mile. In Banque Worms v. Davis Construction Co., Inc. the Lender filed its continuation statement two days before the beginning of the six month "window" period for filing. Following a number of cases cited in the opinion, the court stated that the UCC time periods are to be given a literal, strict application. The court properly declined to allow constructive or actual knowledge of the competing parties to be a factor, and the security interest became perfected.

Matter of Elitching Motors, Inc.11 points out that filing a continuation statement too late is likewise ineffectual. In Elitching the secured party failed to file the continuation statement at the end of the six month window period. The court noted that at the end of the six month period (which is also the end of the five year period of perfection) the perfection expired. After that there is nothing to continue. A subsequently filed continuation statement does not continue or revive the acquisition first perfected, and cannot continue perfection because it is not a financing statement. In essence, a continuation statement filed outside the six month window period provides in section 9-403(3) is of no effect whatsoever.

III. Tolling Under Non-Code Law

An area of concern that is closely related to the six month window rule and which may modify the calculation of the six month window period is that of the tolling that is provided for in the Code or that may be imposed by a court under non-Code law. Two recent cases have dealt with the tolling impact of "an insolvency proceeding," which postpones the duty to file until 60 days after termination of the insolvency proceeding under UCC section 9-403(12).2

In Re Helmar Distributors, Inc.3 inquired whether this tolling provision, specifically applicable to continuation statements, also applies to the four-month grace period for filing in another state pursuant to section 9-103(6) after the collateral has been removed from the jurisdiction where perfection exists. The Helmar court concluded that section 9-403(12) also tolls the four-month grace period at section 9-103(6) (and presumably some other UCC time periods as well): "[T]he policies which underlie tolling the five year period are equally applicable beyond section 9-403(12)."

While not clearly provided for in Article 9, this makes sense, as otherwise the Bankruptcy Code automatic stay at 11 U.S.C. section 362 (which is designed to preserve the pre-petition status quo) might preempt timely filing and result in loss of secured status. Under current law the safe approach for secured parties is to seek relief from the stay and refile, but this may not always be feasible and, in any event, from a policy perspective there is no apparent reason to clutter the bankruptcy courts with such actions.4 The Helmar decision presents a logical approach to this problem. Nonetheless, a matter that probably should be clarified in the proposed revision of Article 9.

The reasoning in Helmar (relating to the tolling provision of section 9-403(12), in part, to the automatic stay in bankruptcy) is consistent with another recent case refusing to apply the tolling provision in section 9-403(12) to appointment of a receiver on grounds that such was not an "insolvency proceeding."5 In In re Cannon Nursing Centers6 the secured party allowed the security interest to lapse (by failing to file a continuation statement), after appointment of a prejudgment receiver. The secured party argued that this appointment was tantamount to an insolvency proceeding under section 9-403(2), thereby extending the five year life of the financing statement. Bankruptcy of Richard Bohanans, however, not being under UCC section 1-201(22) as an "insolvency proceeding" to one designed to liquidate or reorganize the debtor's estate. This is consistent with the reasoning in Helmar relating (somewhat subtly, perhaps) the need for section 9-403(12) to the fact that an insolvency proceeding interferes with the lender's ability to maintain perfection due to the Bankruptcy Code automatic stay.

These cases should be compared with Avant Petroleum, Inc. v. Banque Paribas,7 which applied the tolling provision in section 9-403(12) to appointment of a receiver as an interpleader action on grounds that such an action is analogous to an insolvency proceeding. While Helmar cited Avant Petroleum with approval (as supporting application of the tolling provision out...
side the precise scope of section 4-402(a), Halmor clearly intended an in- 

solvent proceeding under Section 11 of the Bankruptcy Code), while Cinamor and Avon Petroleum clearly did not. Thus the results in Halmor and Cinamor are consistent on this point, even though Halmor cited Avon Petroleum with ap- 

proval and Avon is contradictory to Cinamor. 

The Halmor court's approval of Avon Petroleum is coaxed in broad terms, in- 

dicating support for the application of section 9-403(a) in cases not involving an insolvency proceeding, “when the fund is in the possession and control of a court.” 19 It is in contrast to the limited tolling effect of section 9- 

402(a) to insolvent proceedings as de- 

fined in the UCC. As noted, this is not inconsistent with the result in Halmor, an insolvency case. But Cinamor is clearly inconsistent with Avon Petroleum and the broad statements in Halmor favoring the extension of the section 9-402(a) toll- 

ing provision to non-insolvency cases. You authors have previously criticized Avon Petroleum, and believe that Cinamor is correct on this point. 20 But again this is an issue that deserves clari- 

fication in the forthcoming revision of Article 9.

IV. Who May File? 

Another pitfall that may be encou-

tered on the road to effectively contin-

uing a financing statement is the require-

ment of section 9-403(a) that a calculation of secu- 

rity interest must be filed only by the 

secured party of record or by one who 

presents a continuation statement for fi-

ling which is accompanied by a “separate written statement of assignment signed by the secured party of record” and which complies with the requirements of sec- 

tion 9-402(a). In Siebers v. FDC (In re 

Ditterm) 21 the court gave a wooden read- 

ing to the requirement that a continu- 

ation statement must be filed by the se- 

cured party of record, which resulted in a questionable ruling that the continu- 

ation statement should be filed by the legal owner of the security interest was not effective, in spite of the fact that no one was in any way misled or prejudiced by the filing officer.

V. Calculating the Five Year Period 

An obvious concern in continuing a financing statement is that of calculating the beginning and ending dates of the five year effective period of the financing statement. Correctly determining the last day of the effective five year period of the financing statement and correctly cal- 

culating the first day of the six months window period can spell success or fail- 

ure for a secured party filing a continua- 

tion statement. As the Code does not specify how the five year period is to be 

calculated, the matter will be governed by the non-Code law of the controlling 

jurisdiction. The beginning and ending dates of the five year period will vary by one day depending on whether the controlling 

jurisdiction or state laws provides for calculation of the period to commence with the day of filing (with lapse occurring on the fifth anniversary of the filing date) 22 or that the day of filing is not to be counted with the fifth anniversary of the filing being the last day of the effective five year pe- 

riod. 23

VI. Filing Officer Error 

Another concern that should be noted is the provision in section 9-403(1) that 

presentation of a financing statement to the filing officer, accompanied by the proper fee, constitutes filing, without re- 

gard to what the filing officer thereafter does with the filing. Consequently, the effect of section 9-403(1) is that the ef- 

fectiveness of a filing is not impaired by filing officer error. 

However, it should be aware of a recent in- 

cident in which the secured party filed a continuation statement on the last day of the five year period. However, for some unknown reason, the filing officer marked the continuation statement with a filing date that was several days later than the true date. Consequently, the records of the filing officer indicated that the related financing statement had lapsed. The secured party had sent the continuation statement to the filing offi- 

cier via Federal Express, and the secured party was fortunate in having retained a receipt from Federal Express evidencing the fact that the continuation statement had been timely delivered to the filing officer. Although no third party interests were involved in the incident, the poten- 

tial for disaster was present for both the filing creditor and some third party who might have acquired a security interest in the collateral covered by the subject financing statement, in reliance on the filing records. Consequently, when con- 

fronted by filing officer records that re- 

dicted an apparent lapse, a prospective se- 

cured party would well advised to con- 

tact the earlier filed secured party to con- 

firm the filing and to ensure that no basis 

exists for the continued effectiveness of 

the “lapsed” financing statement.

VII. Related Issues involving Amendments 

In Rentschler, Inc. v. Transwestern Real Estate Finance Corp. (In re Rentschler, Inc.), 24 the secured party filed a finan- 

cing statement on June 6, 1988. The debtor made a seriously misleading notice change on January 22, 1990. The secured party then filed an amendment on October 8, 1990 to reflect the notice change. The 

clearly was not sufficient to constitute continuous perfection because the amendment was not filed within the four- 

month grace period at UCC section 9- 

402(a). However, it would seem that this amendment should be sufficient for reperfection from October 8, 1990, until the end of the five year period of perfec- 
	ion of the earlier financing statement. 

The Rentschler court took the position that four months after the name change, the financing statement ceased to be ef- 

fective for purposes of perfection, and that the perfection was not revived or re- 

stated by the filing of the amendment on October 8, 1990. Consequently, the court held that the related security interest continued to be perfected under the original financing statement as to goods acquired before the name change and during the four-month grace period. Since that is the case, it seems somewhat narrow to say that the financing statement has lapsed. 

It is, however, clear that filing an amendment does not continue the perfection beyond the existing five year period; an amendment merely amends the pre- 

vious financing statement; it does not in any way extend the life of the financ- 

ing statement. 

This is another point not always recog- 

nized by secured parties, as illustrated in Kabuto Tractor v. Citizens & So. Nat. Bank, 25 where the secured party filed an amendment within the six months “window” period for continuation statements at section 9-403(3), but never filed a con- 

tinuation statement. The court correctly pointed out that only a continuation state- 

ment can extend the period of perfection beyond the five year period; an amend- 

ment is an entirely different animal. 26 

In another amendment case, F. Case Co. v. Creastor Bank, 27 the court ignored this basic point as well as the most im- 

portant consideration of all—the six month filing window. From the opinion 

it is impossible to determine if any con- 

tinuation statement filings were made within the six month window period, as the opinion does not give the filing dates of any of the original financing state- 

ments. The court thereby did not rec- 

ognize the significance of the relevant dates, holding that a continuation state- 

ment cannot be filed without the date that an amendment is filed. This, of course, is not what the Code provides, as the secured party would in effect be continuing the financing statement without meeting filing requirements. In cases where multiple amendments had been filed, there would be chaos, as multiple continuation statements might be filed, making the fact that there was only one financing statement.

VIII. No Relation-Back Under Bankruptcy Code Section 547(e)(2)(A) 

Bankruptcy Code section 547(e)(2)(A) 28 provides a ten day grace period that, in essence, recognizes the filing of an amendment can extend the effective date of the transfer if the secur- 

ity interest is perfected within ten days, for purposes of the Bankruptcy Code preferential transfer rules. 

In In re Four Winds Enterprises, Inc., 29 the perfection of a security interest lapsed during the 90 day Bankruptcy Code “preference period” 30 and the secured party refilled within ten days, claiming that the refiling was timely for purposes of continuous perfection because of the grace period at section 547(e)(2)(A). 

If the perfection was not continuous, then it is the initial filing lapse, then the refiling constituted a new perfection of a previously unperfected security interest, as of the time of the refiling. 31 In turn

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19. 900 C.C. p. 177. 


21. 118 B.R. 211. 


23. For instance, in Siebers v. FDC (In re Ditterm), 118 B.R. 211, 212 (Bkrtc., M.D. Tex. 1991), the court stated: “...a separate written statement of assignment signed by the secured party of record which complies with the requirements of section 9-402(a) . . . contains all information necessary to the filing officer to properly complete the filing and be in compliance with the Code...” 118 B.R. 211, 212. 


27. Bankruptcy Code section 547(e)(2)(A) provides a ten day grace period that, in essence, recognizes the filing of an amendment can extend the effective date of the transfer if the security interest is perfected within ten days, for purposes of the Bankruptcy Code preferential transfer rules. 

28. In In re Four Winds Enterprises, Inc., a perfection of a security interest lapsed during the 90 day Bankruptcy Code “preference period” 30 and the secured party refilled within ten days, claiming that the refiling was timely for purposes of continuous perfection because of the grace period at section 547(e)(2)(A). 

29. If the perfection was not continuous, then it is the initial filing lapse, then the refiling constituted a new perfection of a previously unperfected security interest, as of the time of the refiling. 31 In turn


33. Generally, the 90 day period for the filing of a filing statement begins to run on the date in which the debtor files its bankruptcy petition. 118 B.R. 211 (Bkrtc. M.D. Tex. 1991). 

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this would constitute a transfer of the debtor's property to the creditor on behalf of an antecedent debt, and could be voided by the trustee in bankruptcy as a preferential transfer.35

As another secured party sought to avoid this result by claiming that the perfection was continuous because the refinancing occurred within a ten day grace period as provided by Bankruptcy Code section 547(2)(A). The secured party argued that this provided a "relief back" of the perfection that made the perfection continuous and preserved lapse.

The Fourth Circuit court rejected this argument, largely on the basis of the UCC noting that after five years perfection lapses unless a continuous statement is timely filed, and a subsequent refinancing after lapse does not constitute continuous perfection.36

While this decision is clearly correct, it is surprising that the court did not give more mention to the language of the Bankruptcy Code section 547(2)(A) and its impact on these issues. The language of section 547(2)(A) has caused confusion in other cases,37 and perhaps the Fourth Circuit court simply preferred to avoid those controversies. Nonetheless the language of section 547(2)(A) clearly supports the court's decision in Fourth Circuit.

Section 547(2)(A) provides a ten day grace period that applies only if the transfer (in this case a security interest) is perfected within ten days after it was transferred. In the context of a security interest this will mean it must be perfected within ten days of the time the security interest "attaches."38

While the Fourth Circuit court did discuss this issue, it appears that the security interest in that case attached during 1982 or 1983 when the original loan documents were executed. Therefore, the ten day grace period did not apply, it was unnecessary for the court to consider the impact of that grace period on the lapse of perfection.

II. Secured Party Has No Obligation to Preserve Lapse

In State Bank of Hartford v. Arndt39 the debtor granted the secured party a security interest in the business assets of a bridal salon business, which was perfected by filing. Later the lender also took a mortgage on the borrowers' homestead, to secure a new advance. Still later the lender allowed the original perfection to lapse, by failing to file a continuation statement, so that the security interest in the business assets became unperfected.

When the debentors filed bankruptcy, the lender filed an unsecured claim as regards the business assets, then sought foreclosure of its mortgage against the homestead (which had been excluded as exempt property in the bankruptcy case). The debentors defended on grounds that the lender's failure to file a continuation statement, which caused the lender's perfection to as a business assets to lapse, constituted an impairment of collateral under the UCC which released the debentors from liability.40

The Wisconsin Court of Appeals correctly rejected this argument, pointing out that a secured party has no obligation to file a continuation statement or prevent lapse of perfection, and that Article 9 of the UCC doesn't provide for an impairment of collateral.41

X. "Minor Errors" in Continuation Statements

While there are no financing statements, "subsequent perfection" with Article 9 would not be effective "even though it contains minor errors which are not seriously misleading."42

By its terms section 9-402(8) applies only to financing statements, but in Federal Deposit Insurance Corp. v. Villanueva,43 the court held that the "minor errors" exception applies to continuation statements.

In victory Lanes the error related to the capacity of the FDBC as secured party. The FDBC errediously signed the continuation statement in its corporate capacity rather than as receiver of the failed bank. Applying section 9-402(8), the court concluded that this was a minor error that could not be seriously misleading to a party conducting a lien search.

The court in Victory Lanes distinguished the Fourth Circuit decision in In re Kitchen Equipment Co. of Virginia,44 which held that the filing of a "minor error" exception could not be used to save an error in a termination statement. The Victory Lanes court concluded that a continuation statement is insufficiently similar to a financing statement to be covered by section 9-402(8), while a termination statement is not.

E. Effect of Lapse on State and Federal Law Security Interests

U.S. v. Carrick Grain, Inc.45 serves as an interesting example of a financing statement lapses due to the passage of time, the security interest is imperfect both prospectively and retroactively, as against subsequent competing claims and those who became purchasers or obtained a competing lien or security interest before the lapse.46

Commentary: State-Chartered Financial Institutions in the 1990s-A New Perspective

The banking regulators obviously have brainstormed this area and hoping to meet, simply by taking up regulatory rulemaking.47 At the same time, however, there have been efforts by regulators to stem the flow from federal regulation by discouraging the use of all escape routes except merger with disposition by another owner or institution that would remain within the same regulatory tradition.48

All of this provided some cause for concern in the part of the association's Board of Directors. There was some concern that the OCCC's (Ohio Creditors' Committee) agreement that together with the FDBC would not be taken seriously, we've got just what do we think you're trying to tell us? As the regulators start telling us about the "quality of life" in the banking institution, the Ohio Savings Banks' Association and Ohio Savings Bank and Thrift Institutions Association of Ohio called a meeting of its board of directors to discuss the latest developments in their efforts to improve the regulatory climate for savings institutions.

This underscores the Board's concern that the 03's might use the high discriminatory CRA rating system to give Home Savings a low rating and to ensure that block the block.