DELBERT HOSEMANN
Secretary of State

2012 Uniform Commercial Code Study Group

Minutes of the UCC Study Group, Meeting #1

August 23, 2012

This meeting of the Uniform Commercial Code (UCC) Study Group (hereinafter the "Study Group" or the "Committee") was called to order on Thursday, August 23, 2012 at 11:05 A.M. at the Office of the Secretary of State, 401 Mississippi Street, Jackson, Mississippi. A list of the persons in attendance is attached as Exhibit A.

Welcome

Drew Snyder, Assistant Secretary of State for Policy and Research, welcomed the group and thanked all for their participation in the study group. Mr. Snyder reviewed some of the past topics considered by study groups and the topics being reviewed by other study groups this year. Mr. Snyder introduced the Secretary of State Staff members who were present for the meeting. The group members introduced themselves and Drew Snyder recognized Rod Clement of Bradley Arant Boult Cummings for providing lunch for the group.

Remarks by the Secretary

Secretary Hosemann welcomed and thanked all the members. A similar UCC study group met two years ago and Secretary Hosemann commented on the good work done by that study group and that the bills coming out of that group were passed by the legislature. Secretary Hosemann also commented on the progress of the Business Services and IT department implementing online UCC filings over the past year.

Remarks by Tom Riley on Article 9 and Fraudulent UCC Filings

Tom Riley, Assistant Secretary of State for Business Services, stated that business services receives over 300,000 UCC filings per year, with about seventy-five percent (75%) of those being filed electronically. The online system captures the document as it is entered, so the new system helps eliminate human error with entering the name of the debtor.

In addition to the Article 9 amendments, the group needs to consider fraudulent UCC filings. The number of bogus filing is only four to five per month, but this is a big issue for the official who gets a fraudulent UCC filing against them. This is a problem around the country and becoming a problem here. There are laws in other states that we can adopt to address these issues.

Group Discussion on Article 9

Drew Snyder asked Mr. Clement to start the discussion on issues related to the adoption of Article 9. Mr. Clement requested we obtain information from the Department of Public Safety (DPS) on

how DPS determines names, change names, etc. Individual names will be an issue. Tom Riley stated he had contacted DPS about accent marks and other punctuation and was informed those are not used by DPS in names.

Mr. Clement also suggested reviewing Section 2-719(4). The limitation on remedies needs a small change because of a change made after that section was reviewed by the previous study group. Currently, the law allows remedies to be disclaimed, but the remedies cannot be limited.

The group began discussing the name of the debtor and the amendment to Article 9. The name of the debtor is important for perfection and searching. A standard search picks up only exactly what is entered. A non-standard search will find much more. The legal standard is that a secured party is properly perfected when the filing appears in a standard search.

The Amendment provides that an individual does not have to search every variation of a name; instead, the name shown on the driver's license is sufficient. Secretary Hosemann stated that he felt tying this to the driver's license would not make a good system due to the errors present in the drivers' license database.

It was stated that small lenders, such as Tower Loan, prefer the safe harbor provision in Alternative B of Article 9, but other group members stated that Alternative A also provides for cases where a borrower has no driver's license. Others also stated that Alternative A provides a more specific rule to make perfection easier.

There are two important points in the amendment. First, if the borrower has a driver's license and the lender uses the name as it appears on the license, then the lender is perfected. Second, if another lender uses the driver's license to search for prior liens they will be able to easily find those liens.

Secretary Hosemann raised the issue of expired licenses. With many Mississippians having expired licenses, would perfection only occur with unexpired licenses? The language of Alternative A says a driver's license of this state that is not expired. There is a fallback for those without driver's licenses, the lender would put the individual name or first personal name and surname.

The issue is not just the ease of perfecting the first time, which may be easier under Alternative B, but also searching for prior liens. Under Alternative A, if the debtor has a driver's license that is the name the lender searches under.

After much discussion on Alternative A and Alternative B, it was suggested that an entire session may need to be devoted to that issue. Questions were also raised as to the accuracy of the driver's licenses, for example: name changes after marriage – do the driver's licenses accurately reflect the name or do some people wait until it expires to change the name on the driver's license. Another question for later discussion was whether the few states who adopted Alternative B had specific reasons for adopting that Alternative. Secretary Hosemann suggested including non-driver's identification issued by DPS.

Additional changes in the amendment included adding that the name on the "public organic record" as the name to be used for an organization. Also, a secured party could file a correction statement whereas the current version only allows the debtor to file the statement. It is not a correction issue, but an issue of authority to file.

Tom Riley raised the concern that a UCC filing could have the name correct, but a typing error in the filing office could result in the filing not appearing in the standard search. If a lender finds this using a non-standard search would they still lend knowing the previous lender was unperfected because

it was entered incorrectly by the filing office? A group member suggested that the result would be the same under either Alternative. The question is what name or how many variations must be checked when doing a standard search. There was additional discussion on typographical errors and previous issues caused by such problems. The group also discussed the issue in the context of fixture filings and land records, and using A/K/A to cover all names.

Secretary Hosemann asked the group to again consider the driver's licenses issues and the potential issues the office may face for typographical errors. The group discussed the issue and it was stated that there is a difference between (1) knowing that you are perfected because you use the driver's license and (2) deciding what type of search requirements the lender should use to ensure there is nothing previously filed. The issue of the standard search was again discussed, including possibly expanding the standard search.

Fraudulent UCC filings

Tom Riley began discussing fraudulent UCC filings. These are usually filed by "freemen" or "sovereign citizens." The idea is that the freeman claims an interest in his body and everything he owns. This is to keep the government from claiming any interest in his property. People also file these against public officials who they do not like, such as VA officials or the Governor. Mississippi needs a way to deal with these before they are filed. Currently, if the form is correctly filled, it must be accepted. There are several options in different states that can be considered to help stop this. Several examples of fraudulent filings were also discussed, including individuals putting bloody thumb prints on the filings.

Additional Issues to Consider in the Next Meeting

Before closing, the group questioned the amendment adding the definition of good faith in Article 9 of the UCC. There was some discussion on this topic and that the definition is already included in Article 1. Also there was an issue raised on where to file common law trusts.

Closing

Drew Snyder reviewed goals for the next meeting, including making a determination as to Alternative A, B, or neither. The group will also need to move further into reviewing fraudulent filings and what the best action is in Mississippi. Policy and Research will conduct some research on the issues raised during the meeting such as name changes, drivers' license changes, and the good faith definition. Drew Snyder and Secretary Hosemann thanked everyone for their participation and the meeting was adjourned at 12:45 PM.

EXHIBIT A

Minutes of the L3C Study Group, Meeting # 1

August 16, 2012

Members in Attendance:

1. Betty Morgan Benton
2. Rod Clement
3. Gordon Fellows
4. Jerome Hafter
5. Cliff Harrison
6. Jeff Stancill
7. John Tucker

Members in Attendance by Telephone:

1. Les Alvis
2. Cheryn Baker
3. Mary Largent Purvis

Secretary of State's Staff:

1. Delbert Hosemann, Secretary of State
2. Diane Hawks, Chief-of-Staff
3. Lin Floyd, Senior Assistant /Legislative Liaison
4. Drew Snyder, Assistant Secretary of State, Division of Policy and Research
5. Tom Riley, Assistant Secretary of State, Business Services
6. Justin Fitch, Senior Attorney, Division of Policy and Research
7. Preston Goff, Attorney, Division of Policy and Research

AMERICAN BANKERS ASSOCIATON UCC ARTICLE 9 WORKING GROUP
SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY
POSITION PAPER

Position: The UCC Article 9 Working Group of the American Bankers Association representing banks and bankers associations nationwide supports the uniform adoption of Alternative A of Subsection (a) (4) of Section 9-503 of the 2010 Amendments to Uniform Commercial Code Article 9 ("Alternative A").

Alternative A, unlike Alternative B, provides the most cost-effective, simple and certain method for lenders nationwide to identify the name of an individual borrower for the purpose of achieving a priority security interest in a borrower's accounts, inventory, equipment and other collateral for which filing a financing statement is the preferred or necessary method of perfection under the applicable provisions of the Uniform Commercial Code (the "UCC"). Alternative A provides an easy-to-understand method for the secured lending community to follow when filing and searching against individuals, and is consistent with "know your customer" procedures already in place. By creating more certainty and simplicity in the filing and search process, lenders can expect cost savings, which may be of particular importance when dealing with low-margin secured loans to individuals.

Background: Banks and other lenders provide loans to individual borrowers, which loans are frequently business purpose loans to sole proprietorships secured by accounts receivable, inventory and equipment. To obtain a priority security interest in such collateral, the secured creditor most often has to file a UCC financing statement in the state where the borrower is located. This is not a consumer issue, as the type of collateral and method in obtaining consumer credit usually does not require the filing of a UCC financing statement.

The practical effect of filing a financing statement in these situations is two-fold. First, it establishes which secured creditor has the first priority interest in the collateral - the rule being that the first party to file the financing statement usually has the priority interest. Second, the filed financing statement provides notice to any potential new secured creditor that other secured parties have a prior filed interest in some or all of the borrower's assets.

The UCC requires that the secured party identify the "name of the debtor" on the financing statement. When the borrower is an entity such as a corporation, determining the name is relatively easy, as there is an organic record of that name within the state where the entity was formed. For example, with a corporation that is a borrower, its name for filing purposes would be derived from the name listed in its filed Articles of Incorporation. But when lending to a sole proprietorship (an individual), the secured party has little statutory guidance as to the source for that name. Is it the name the individual goes by? Is it the name appearing on a tax return, a birth certificate, a social security card, a passport, a marriage license, a business card, a driver's license or a state identification card?

Therein lies the problem for secured creditors today. Article 9 of the UCC does not clearly define what the name of an individual debtor is for these purposes. Lenders struggle to determine what name to file upon and also what name or names to search for in order to identify other secured parties who might have filed before them. Is a lender today supposed to ask for all of the documentation described above, search under all of the different names that the debtor goes by, and file financing statements under each name?

Alternative A states that the name on a financing statement filed against an individual debtor will only be sufficient if it provides the name indicated on the debtor's driver's license (if the debtor does not have an unexpired driver's license, then it is to provide the individual name or the surname and first personal name). For the lending industry, this is the clarity we have long sought. Since nearly all of our individual commercial borrowers will have a driver's license, there will finally be a definitive source that lenders can look to for the name of an individual borrower for UCC filing purposes.

The driver's license is already one of the primary components to verify an individual borrower's identity for "Know Your Customer"/Patriot Act purposes. It will not be uncommon nor unexpected to our customers that they be asked to provide us with a copy of their drivers license upon initiation of a loan or at a loan renewal. In those rare instances where a customer does not have a license or the customer had a license, but failed to renew it, Alternative A provides the other method mentioned above for determining the name of an individual that is to be shown on the financing statement.

Unlike the certainty provided by Alternative A, Alternative B allows more than one name of an individual to be used on a financing statement, which means that lenders who want to obtain a first priority security interest will continue to face uncertainty as to what names to search under. While Alternative B may be an improvement over current law in that Alternative B states that a lender who files against the name appearing on a debtor's driver's license will be perfected, it does not guaranty that filing under such a name will give the lender priority, because prior filings made by other lenders under other names may be sufficient under Alternative B. So, under Alternative B lenders can be expected to continue to deal with additional time, confusion and cost in defining an individual name for the purposes of filing and searching.

Proponents of Alternative B raise concerns about the implementation and effectiveness of Alternative A in certain circumstances. The ABA Working Group finds that the risks of these limited, if not rare, occurrences are outweighed by the advantages of Alternative A. The greater certainty afforded by Alternative A as to both perfection and priority of UCC filings should help lenders reduce their costs associated with filings, searches, legal fees and losses over time. All of this will be of particular importance to lenders who may be considering the smaller cost margin on loans to individuals and who may be trying to keep their efforts to file and search on potential individual borrowers to an absolute minimum. Also, under Alternative A, it is expected that lenders can be much more readily trained as to the simple and straightforward method of relying upon the name on a borrower's driver's license as the name to use for filing purposes.

After exhaustive discussions and canvassing of their representatives' concerns and interests over a two year period, the UCC Article 9 Working Group of the American Bankers Association strongly supports the uniform adoption of Alternative A.

ABA Working Group[1]

[1] The ABA Working Group consists of representatives of the American Bankers Association, long-time State Bankers Association General Counsel and government relations professionals, and counsel for a number of national and regional financial institutions.

(3/18/11)

FOUR REASONS TO ADOPT ALTERNATIVE A FOR INDIVIDUAL DEBTOR NAMES

***Reason #1: Alternative A gives more certainty to filers and searchers.** Alternative A in the 2010 amendments to UCC 9-503 is called the "only-if" approach. It provides that a UCC financing statement properly designates the name of an individual debtor **only if** it indicates the name that appears on the debtor's driver's license. If the debtor has a current driver's license, use of any other name means that the security interest is unperfected. The great advantage of this bright-line rule is that it reduces compliance costs, the cost of credit, and litigation.

By contrast, the "safe-harbor" approach (Alternative B) continues the uncertainty that exists under current law because a variety of debtor names might be allowed by the courts. Under the safe-harbor approach, a court could find that a financing statement was sufficient, for example, if it contained the debtor's name as reflected on his or her (1) birth certificate, (2) driver's license, (3) passport, (4) tax return, (5) social security card or (6) bankruptcy petition. That's a lot of ships crowding into the "safe harbor". As a result, secured lenders must search under a variety of names to be sure they aren't trumped by an earlier filing under a different name—and even then, there's no certainty.

A typical example. As an example of problems created by the safe-harbor approach, consider this real-life scenario that arose in Texas about a year ago: Secured Creditor #2 files under the debtor's driver's license name and does a search under that name that reveals no prior security interest. Secured Creditor #2 is perfected because Texas has enacted a nonuniform amendment to Article 9 which adopts the safe-harbor approach. But perfection only protects Secured Creditor #2 from the debtor's trustee in bankruptcy; it doesn't assure **priority.** In the Texas case, a competing secured creditor (Secured Creditor #1) had filed earlier, using the name that appeared on the debtor's birth certificate. During its search, Secured Creditor #2 didn't pick up #1's security interest. A court could easily rule that the birth certificate name was a proper name for the financing statement, so that Secured Creditor #1 would prevail under the first-to-file rule. The bottom-line problem is that multiple debtor names could pass muster under Article 9. The Texas case was settled short of litigation, but it nicely illustrates the uncertainty brought by the safe-harbor approach. The harbor was not really so safe after all for Secured Creditor #2. The problems created by allowing multiple debtor names are eliminated by the only-if approach.

Reason #2: An only-if approach for individual debtors is consistent with the UCC rules governing entity debtors, which have worked well over the years. Under Article 9, a financing statement filed against a debtor organized as a corporation, LLC, LLP, or limited partnership perfects a security interest **only if** it uses the name that appears on the public organic record that gives birth to the entity as a legal person. That only-if standard was put into Article 9 in order to bring more certainty for filers and searchers. It has worked well. The same model should be used for individual debtors.

Reason #3: The drafters of the 2010 amendments to Article 9 have eliminated most of the problems that raised concern about relying on driver's licenses. During the drafting process for the 2010 amendments, the Joint Review Committee took great pains to resolve concerns raised regarding the use of a driver's license standard, particularly under an only-if approach: (1)

if the debtor doesn't have a current driver's license, then it is sufficient to use the debtor's surname and first personal name; (2) if for some reason the debtor holds two driver's licenses, the most recently-issued license controls; (3) if the driver's license expires, or the debtor gets a new license with a different name, the normal UCC rules governing change-in-name come into play and give the secured party a four-month grace period to refile the financing statement in the new name (with no deadline for presently-owned fixed assets like equipment); (4) the secured creditor will continue to have a second bite at the apple, i.e. the old name is okay if it would be found by a search under the new name, using the filing office's standard search logic; and (5) in response to concerns that some driver's license names could not be entered into the financing statement database because of incompatible character sets, field lengths and the like, the 2010 amendments include a "Legislative Note" urging the state legislatures to verify whether there are any compatibility problems of this sort; if there are, the delayed effective date of July 1, 2013 leaves plenty of time to make any necessary system adjustments. So far, no big problems of compatibility have surfaced. In short, Alternative A isn't perfect, but the drafters have done a good job of anticipating issues and resolving them.

***Reason #4: Those who deal with secured lending on a daily basis strongly support Alternative A.** The banking industry, under the auspices of the American Bankers Association, worked with the Joint Review Committee throughout its deliberations. Based on the hands-on experience of secured loan officers and other personnel around the country, the industry strongly supports Alternative A because of its efficiency, certainty and lower cost. Secured lenders around the country routinely use the debtor's driver's license as the baseline to comply with the "Know Your Customer" principle and the Patriot Act. For both UCC filing and searching purposes, they need a definitive source of debtor-name information, which is what the debtor's driver's license provides.

Because of frustration over the lack of certainty regarding individual debtor names and recurrent litigation, institutional secured lenders have pushed for nonuniform amendments to Article 9 that focus on the driver's license name. To date, four states—Texas, Virginia, Tennessee and Nebraska—have passed nonuniform amendments to Article 9 in response to the problem. Texas, which has the highest number of UCC filings, has been a leader in this effort. For several years, it has been working with a "safe harbor" standard similar to Alternative B. Now bankers from Texas are among the strongest voices urging a shift from safe-harbor to only-if.

Since most secured consumer lending transactions involve purchase-money security interests that are automatically perfected, or are perfected by noting a lien on a certificate of title, this is not a "consumer protection" issue. It is a secured lender issue, and the parties most strongly affected urge the only-if approach because of its certainty, simplicity and lower cost. The philosophy of the UCC from its beginning has been to recognize, codify and encourage industry practice, which is what Alternative A does. The more states that enact Alternative A, the more "uniform" the Uniform Commercial Code will be.

Barkley Clark*

*Co-author of *The Law of Secured Transactions Under the UCC*

To: House Business and Labor Committee

From: Oregon Law Commission Chair, Lane Shetterly and
Oregon Law Commission Deputy Director and General Counsel, Wendy Johnson

Date: February 6, 2012

Reasons for Selection of Alternative B (Individual Debtor Name)
for UCC Art. 9-503 (ORS 79.0503)

HB 4035, section 12

The 2010 amendments to Article 9 of the Uniform Commercial Code, as approved by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) and the American Law Institute, offered states two alternatives for addressing the requirements of an individual debtor's name, for the purpose of filing (and searching for) a financing statement. Alternative A requires that the debtor's name be the name as it appears on the debtor's most recently issued valid driver's license, if the debtor has a driver's license. Alternative B is broader in what it permits, including the debtor's "individual name," the debtor's surname and first personal name, or the debtor's name as it appears on the most recently issued driver's license. The Article 9 Work Group of the Oregon Law Commission recommended adoption of Alternative B for Oregon, as reflected in section 12 of HB 4035.

The reasons the Work Group recommended Alternative B are addressed in the Work Group report that accompanied HB 4035 at pages 7-8. Those reasons are explained further, below, and reasons in addition to those reflected in the report are provided.

1. Alternative B protects unsophisticated filers and also sophisticated attorneys from filing "invalid" financing statements and perhaps committing malpractice. The name requirement is a substantive requirement in the law, and Alternative B provides more flexibility. If Alternative A is chosen, the workgroup was concerned that filers would be more prone to make mistakes by either not using the driver's license name always or not copying it exactly.
    - For example if the debtor's driver's license says "Jones, Cynthia Allison," under Alternative A, if the filer omits the "Allison" they will not have complied with the debtor's name requirements for the filing statement. If the debtor goes by Cindy Jones and the filer puts "Cindy Jones" on the statement, the filer will also not have complied with the requirements of Alternative A. In both instances, the statement would most likely be held sufficient under Alternative B.
2. Alternative B keeps present law (see Section 12 (1)(d)(A)) and then also adds two other ways to name the debtor (i.e., by driver's license or by surname and first personal name). No training or change in practice is required to maintain status quo for valid financing statements in Oregon.
3. Whether A or B is chosen, searchers will continue to need to search for more than just a driver's license name in order to check for prior secured transactions because 1) financing statements are good for five years and thus valid statements will have been filed under other name variances (prior to this new law); 2) federal tax liens do not use the driver's license name (they use social security names generally); 3) people change their driver's license name over time; and 4) some people do not have a driver's license. Thus, the work group was not persuaded by the argument often advanced for Alternative A, that it provides "certainty" or makes it easier for searchers.

4. The requirement in Alternative A that if an individual has a state issued driver's license or identification card, that name must be used, could place debtors who do not have a license or card in a position of having to prove a negative to get financing. There was concern expressed to the work group that individuals who do not have such identification will not be able to get financing, or at least have a harder time doing so. Additionally, lenders may begin requiring such identification, thereby making one's driver's license name his or her "official name," and elevating the role of a driver's license beyond that which is intended in the driver's licensing laws.
5. Crop lien claims generally use the same financing forms as Article 9, and are foreclosed using the procedures in ORS Chapter 79 as well. Providing the flexible name requirement of B will protect unsophisticated property owners and farmers who lease their land from costly mistakes that would subject their lien to loss of priority or make it potentially invalid.
6. Oregon has a sophisticated and free UCC database through the Oregon Secretary of State's office. According to Tom Wrosch, the Director of UCC filings at the Oregon Secretary of State's office, Oregon searchers use the "Extended UCC search option online, to find out all the possible names, and then - if necessary - do a UCC search logic search. Nationally states don't always offer that option, but Oregon has always offered it and will always continue to." In short, Oregon does not have a searcher problem. The Work Group felt that neither Alternative A nor B should be preferred for the purpose of searching debtors' names, as searchers should search the same way with either version.
7. Oregon does have a DMV search problem because Oregon does not allow public or professional access to DMV driver's license records. Thus, filers cannot verify a driver's license in Oregon, which Alternative A would presumably require (at least for careful filers). Unless and until the DMV statutes are amended to make driver's license information easily accessible, via on-line searches to verify existing DMV licenses, the Work Group concluded that Alternative A could be a trap for filers that might result in an increase in improper filings and related uncertainty. It is important to note that, of the seven states that have so far adopted Alternative A, six of them have public DMV databases for filers to verify a driver's license. (See attachment with links to driver license verification web databases. Note that Washington also has a searchable DMV database.)
8. Alternative B still allows for use of a driver's license name as a sufficient name of the debtor. In fact, the use of a debtor's name on an unexpired valid driver's license provides filers a "safe harbor," so they can know the driver's license name will meet the name requirement of ORS 79.0502. The difference is that Alternative B *permits* the driver's license name and Alternative A *requires* it and only it.
9. The work group felt that Alternative B is more logical to users in the circumstances of a name change or married name. If a lender knows that an individual has recently married or changed names, it will seem logical to use this new name. However, use of such name could be invalid if Alternative A is chosen, as only the *driver's license name* would be sufficient, even if the debtor's *common name* has changed (and the license has not).
10. One argument advanced for Alternative A is that of "uniformity:" that is, that Oregon should adopt the alternative chosen by most other states. At this early point in the nationwide adoption process of the 2010 amendments, it is too soon to say with any certainty what the majority of states will choose to do. If Oregon adopts *Alternative B, but* the great majority of states choose *Alternative A,* it may be necessary for Oregon to at least re-evaluate its choice. At this stage in the adoption process, however, the Work Group felt it was preferable to choose the option that best meets the needs and interests of debtors and filers which, for the above reasons, the work group determined was Alternative B.

Of the seven states that have chosen Alternative A, all but Nevada have searchable DMV databases where driver's licenses can be verified. Below is a list of the DMV searchable websites from the respective states.

INDIANA

The Bureau of Motor Vehicles houses a great deal of pertinent information for companies and individuals all around Indiana. For a yearly subscription fee of $95 for 10 user names and passwords, an individual or company can access the BMV's driver's license records, registration records, and title and lien records. Subscribers must also pay online fees of $7.50 per driver's license record, $5 per title and lien record, and $5 per registration record.

Ready to get started?

Start a driver's license records search

Start a title and lien records search

Start a registration records search

Start a single record request

Learn more about obtaining an IN.gov subscription

If you would like to access or update your own records, please create a myBMV account. Your personal myBMV account is a virtual license branch that gives you more information about your records as well as the ability to securely access many services online. Through myBMV you may view and download your driving record.

http://www.in.gov/bmv/5274.htm

MINNESOTA
https://dps.mn.gov/divisions/dvs/online-self-services/Pages/default.aspx
Check Driver's License Status

NEBRASKA
http://www.clickdmv.ne.gov/

NORTH DAKOTA
https://secure.apps.state.nd.us/dot/dlts/dlos/requeststatus.htm

RHODE ISLAND
https://www.ri.gov/DMV/mvr/citizen/sample.php

TEXAS
http://www.txdps.state.tx.us/DriverLicense/driverrecords.htm

NOTE: Washington has opted for Alternative B, but members have heard they may change to A.
WASHINGTON
http://www.dol.wa.gov/driverslicense/checkstatus.html

Instructions for 17 and older Application

The section numbers on this page explain the matching section numbers on the application below.

The Information requested in section 1 – 3 must be printed, using black or blue ink.

SECTION 1 – INDICATE TYPE OF APPLICATION AND PROVIDE INFORMATION

With this application, you may apply for one of the following an Operator's License, a Learner's Permit (17 or over), a Commercial Driver License (CDL), a Class "D" Commercial License (Non-CDL) or a Non-Driver's Identification Card. You may also use this section to change your name and/or address on your driver license and/or voter registration files.

- If you are applying for a driver license, you must hold a valid learner's permit and pass a skills test, OR you must present a valid out-of-state driver's license, have a Social Security card, and pass the vision, signs and rules of the road examinations.
- If you are applying for a learner's permit, you must be at least 17 years old. (IF you are less than 17 years old, ask the examiner for assistance). You must present a certified birth certificate and Social Security card. If you are under 18 years of age you must also present proof that you are enrolled in school or have completed high school.
- If you are applying for a non-driver's identification card, you must be at least 6 years old. You must also present a certified birth certificate, Social Security Card and have your signature notarized.
- If you are changing your name and/or address on your driver license there is a $5.00 fee for this service. You must also provide official documents reflecting your new name (example: court order, marriage license, birth certificate). A Social Security card alone is not sufficient proof.
- If you are currently registered to vote in Mississippi, you may also change your name and/or your address on your voter registration by filling out this application and completing Section 4 on bottom of the form. This is a free service.
- If you are applying for a commercial class "D" license, you must pass a written and vision examination and be at least 17 years of age. If you do not possess a valid license, you will be required to pass a skills test.
- If you are applying for a CDL, see the instructions below.
- Complete the mailing address portion ONLY if you receive your mail at a location that is different from your home address.
- FILL IN ALL BLOCKS PERTAINING TO YOUR AGE AND PHYSICAL DESCRIPTION.

SECTION 2 – DRIVER LICENSE, HEALTH QUESTIONS, AND DECLARATION.

- You must answer all questions in this section. If you answer "YES" to any question, please explain briefly in the space provided.
- Signature of Applicant. Proofread your application, read the declaration and sign using your normal signature. Include the date on your application.

SECTION 3 – REGISTERING TO VOTE

- If you decline to register to vote, that decision will remain confidential and will only be used for registration purposes. If you choose to register to vote, information regarding the office through which you applied will remain confidential and will only be used for registration purposes. If you would like to make application to register to vote, indicate by marking the "YES" block. If you choose not to register to vote, indicate by marking the "NO" block. If you do not check a box, you will be considered to have decided not to register to vote at this time. If you complete Section 3 your information will be forwarded to your circuit clerk's office for processing. You will then receive your voter status by mail your circuit clerk's office.

FOR COMMERCIAL DRIVER LICENSE (CDL) APPLICANTS ONLY

Under the Commercial Motor Vehicle Safety Act of 1986, persons who operate commercial vehicles are required to obtain a Class A, B, or C designation on their driver's license. Please read the following and circle the class of license and endorsements for which you are applying:

- **Class A** – Any combination of vehicles with a gross vehicle weight rating (GVWR) of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds.
- **Class B** – Any single vehicle with a GVWR of 26,001 or more pounds, and any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR.
- **Class C** – Any single vehicle less than 26,001 pounds GVWR or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR. This group allies to vehicles which are placarded for hazardous materials or designed to transport 16 or more persons, including the operator.
- **L** – Commercial instruction permit

ENDORSEMENTS

E - Motorcycle
H - Hazardous Materials
N - Tank Vehicles
P - Passenger Vehicles
T - Double/Triple Trailers
X - Tank Vehicle W/Hazardous Endorsement
S – School Bus

1. CHECK THE PROPER BOX FOR YOUR APPLICATION AND FILL OUT COMPLETELY

☐ Other State ☐ Learner's Permit ☐ Name Change ☐ CDL ☐ Class D Comm. Lic. ☐ ID Card
Surrender ☐ CDL ☐ Regular ☐ Motorcycle

PRINT IN BLACK INK

(Last Name) (First Name) (Middle/Maiden) (Circle if Appropriate)
Full Name Jr. Sr. II III IV ____

Home Address
(Use 911 Address)

Assigned Number

City State Zip

Social Security Number

Office Use ONLY:

Date of Birth				
Mo.	Day	Year	Age	Race
Sex	Height	Weight	Eyes	Hair

SECTION 2. ANSWER THE FOLLOWING QUESTIONS

YES NO

1. ☐ ☐ Have you ever held a driver's License in any state in the past 10 years?
What State? _____ What year? _____ DL Number _____
2. ☐ ☐ Have you ever held a Identification card in any state? What State? _____ What Year? _____ ID Number _____
3. ☐ ☐ Are you subject to any disqualification under 49 CFR 383.51, or any license suspension, revocation, or cancellation under State law, and do you have a driver's license from more than one State or jurisdiction?
What State? _____ What year? _____ Why? _____
4. ☐ ☐ Have you ever been denied a license? Why? _____
5. ☐ ☐ Are you currently being treated for diabetes? If so are you currently taking a shot or pill for treatment? _____
6. ☐ ☐ Do you have any physical defects which would interfere with your ability to operate a motor vehicle safely? Explain _____
_____
7. ☐ ☐ Are you a United States Citizen? Date of Citizenship _____
8. ☐ ☐ Do you wish to indicate your desire to become an organ donor and have such marking denoted on your license and or ID card?

CDL ONLY

9. ☐ ☐ Is drive test vehicle representative of the class you will drive?
10. ☐ ☐ Are you exempt from the requirements of 49 CFR 391? If yes, how are you exempt? _____
11. ☐ ☐ Do you meet the qualification requirements of 49 CFR 391?

NOTICE: Persons who are convicted of any registrable sex offense must report to the Sheriff of the county of their residence and also to DPS for appropriate sex offender registration. Authority: MCA 45-33-27. I acknowledge that I have read and understand the requirement to register as a Sex Offender as set forth above.

I DO SOLEMNLY SWEAR/AFFIRM THAT I AM THE PERSON NAMED AND DESCRIBED HEREIN AND THAT THE STATEMENTS ON THIS APPLICATION ARE TRUE AND CORRECT. I UNDERSTAND THAT MY LICENSE WILL BE SUBJECT FOR SUSPENSION BY KNOWINGLY AND WILLINGLY FALSIFYING ANY INFORMATION GIVEN BY ME.

X _____ _____
USUAL Signature of Applicant Date

SECTION 3. DO YOU WISH TO REGISTER TO VOTE ( ) YES ( ) NO

Receipt No.				Class of D.L.			
L.P. Receipt No.				Endorsements			
Application Fee				Restrictions			
End. Receipt				Acuity	L20/	R20/	B20/
Gen. Knowledge				Acuity Corr.	L20/	R20/	B20/
Air Brakes				O/S Exp. Date of Driver License			
Combination				Residency Document			
Motorcycle				Surrender/Exempt from Test ( )			
Double/Triples				SSA & SI Checked ( )			
Tanker				NCIC Checked ( )			
Passenger				Photo number			
School Bus (S)				**Name Change**			
Hazmat				Marriage Lic ( ) Divorce ( ) Court Order ( )			
Pre-Trip				Document ID No.			
Basic Control		Medical Card Expiration Date		Previous Name			
Road Test				Mother's Maiden Name			
				Place of Birth			
Vehicle Info	Tag #		P ( ) F ( )	Date of Birth Change			

Insurance Policy No. ID. Document
Rehab. Permit

Examiner **Badge Number**

account," types of collateral that its security agreement did cover. The court rejected this argument out of hand. Quoting the bankruptcy court, it stated that "[i]f the security agreement does not expressly grant a security interest in the underlying tort claim or its proceeds, no subsequent transformation will magically result in an automatic attachment of those proceeds." It even repeated the reference to "magic," as if Algonquin's argument was somehow fanciful. But it was not Algonquin's argument that was fanciful, it was the court's understanding of secured transactions and Article 9.

Property transforms from one classification to another all the time. Thus, for example, a debtor may sell inventory to generate accounts. A security interest in the debtor's existing and after-acquired accounts will not cover the inventory, but will attach automatically to any proceeds of inventory that fall under the definition of accounts. Similarly, a security interest in a bank account will extend to any funds subsequently deposited into the bank account, regardless of what kind of property the debtor liquidated to generate the funds. In other words, as the debtor's property transforms, it may shift from non-collateral to collateral. Even a simple change in use – such as when inventory is taken off the shelf and used as equipment – may cause a security interest to attach (or de-attach). It is not clear why the court had so much difficulty accepting this simple concept.

In re Miller, 2012 WL 32664 (Bankr. C.D. Ill. 2012)

This case shows why states need to enact the 2010 amendments to Article 9. Unfortunately, it does so at the expense of a secured party that quite arguably did nothing wrong.

The facts of the case are quite simple. The secured party filed a financing statement identifying one of the married debtors as "Bennie A. Miller." This was the name the debtor had used much of his life and which appeared on his driver's license, social security card, tax returns, and the deed to his residence. Seven months after the debtors filed a chapter 13 bankruptcy petition, they sought to avoid the secured party's lien. The bankruptcy court ruled for the debtors, concluding that the filing was ineffective to perfect because the debtor's legal name was the name on his birth certificate, "Ben Miller," and a search under that name did not reveal the filing. In making this ruling, the court rejected the argument that the debtor might have two acceptable names, such that a filing against either would be sufficient to perfect.

This is the only known decision to invalidate a filing that identified the debtor by the name used on the debtor's driver's license. Certainly numerous cases have refused to treat as effective a filing against the debtor's nickname, but none of those cases involved a name that actually appeared on the debtor's driver's license. *See In re Larsen*, 2010 WL 909138 (Bankr. S.D. Iowa 2010) ("Mike D. Larsen" instead of "Michael D. Larsen"); *In re Jones*, 2006 WL 3590097 (Bankr. D. Kan. 2006) ("Chris Jones" instead "Christopher Gary Jones"); *In re Borden*, 353 B.R. 886 (Bankr. D. Neb. 2006) ("Mike Borden" instead of "Michael R. Borden"), *aff'd*, 2007 WL 2407032 (D. Neb. 2007); *In re Berry*, 2006 WL 2795507 (Bankr. D. Kan.), *opinion supplemented*, 2006 WL 3499682 (Bankr. D. Kan. 2006) ("Mike" instead of "Michael"); *In re Kinderknecht*, 308 B.R. 71 (B.A.P. 10th Cir. 2004) ("Terry J. Kinderknecht" instead of "Terrance Joseph Kinderknecht"). Indeed, in *Borden*, the court rejected the use of a nickname in part because that was not the name that appeared on his birth certificate, driver's license, real estate deeds, bank accounts, tax returns, and bankruptcy petition. 353 B.R at 887.

The flaws in the *Miller* court's analysis were twofold: (i) in requiring the debtor's "legal" name on the financing statement; and (ii) even if the debtor's legal name were necessary, equating the name on debtor's birth certificate with the debtor's legal name. Nowhere in its text or comments does Article 9 use the phrase "legal name." Instead, § 9-502 requires the name of the debtor, § 9-503(a)(4)(A) supplements that marginally by indicating the name of an individual should be the "individual . . . name," and § 9-506(c) indicates that if a search under the debtor's "correct name" yields the filing, then the filing is not seriously misleading. In short, Article 9 requires the debtor's *correct* individual name, not the debtor's *legal* name. Even if the legal name were required, there is no reason to assume, as the court blithely did, that the birth certificate name is the legal name of an adult who goes by something different. Although the *Kinderknecht*, *Borden*, and *Pankratz Implement* decisions, all of which the court cited, referred to the debtor's "legal name," none of those cases equated "legal name" with the name on the debtor's birth certificate. In fact, none of these cases purported to define the term at all. In most states, an individual's legal name can be anything the debtor regularly uses for non-fraudulent purposes. *See* Darrell W. Pierce, *The Revised Article 9 Filing System: Did It Meet Its Objectives?*, 44 UCC L.J. 1, 12-13 (2011).

So, what is an individual debtor's *correct* name? A strong argument can be made that, under current law, the debtor's correct name is the name that the debtor uses and by which the debtor is generally known, particularly by creditors. *See Peoples Bank v. Bryan Bros. Cattle Co.*, 504 F.3d 549 (5th Cir. 2007) ("Louie Dickerson" instead of "Brooks L. Dickerson" was effective because the debtor held himself out to the community as Louie Dickerson and frequently used his nickname in business affairs); *cf.* 1 BARKLEY CLARK & BARBARA CLARK, THE LAW OF SECURED TRANSACTIONS ¶ 2.09[1][d] (3d ed. 2011) (suggesting that in most cases the name on the debtor's driver's license, bankruptcy petition, or social security card is the best evidence of the debtor's "legal" name and only in cases of conflict among those documents should the name on the debtor's birth certificate be used). After all, the UCC is intended to facilitate commercial transactions, not frustrate them. *See* § 1-103(a). Given that few debtors carry around their birth certificate, it would be a hassle for secured parties to require that the debtor exhibit that document before completing a financing statement. Moreover, it is far easier for searchers to search under the name the debtor uses than by the name on a piece of paper that few ever see.

Admittedly, this standard lacks certainty and can be quite problematic when the debtor goes by more than one name. However, in *Miller*, the debtor was known by only one first name – "Bennie" – and that name appeared on his state-issued driver's license and all his contemporary financials. Only his birth certificate, which was of course quite old in comparison, indicated a different first name. Therefore, "Bennie" was his *correct* name, even if not his *legal* name.

Fortunately, the 2010 amendments will add clarity on this point and change the result. Under either version of § 9-503 offered for states to enact – Alternative A or Alternative B – a filing that identifies an individual debtor by the name on the debtor's driver's license will be effective, provided the license is current and is issued by the state in which the debtor is located.

Commercial Capital Bank v. House, 2012 WL 220214 (W.D. La. 2012)

In this priority dispute between two secured parties, the court reached the correct result but its analysis was unnecessarily complicated. The case also illustrates a common practice that secured parties needlessly follow.

The facts of the case are essentially as follows. In 1997, 1999, and 2009, the debtor borrowed funds from Farm Service Agency ("FSA"). Each debt was secured by the debtor's farming equipment. FSA filed a proper financing statement for each transaction, each time on the date the loan was made or a few days before. It also filed timely continuation statements for the first financing statement. In 2011, the debtors paid off the first and second loans but they remained obligated on the third loan, for approximately $428,000.

In 2005, the debtors borrowed approximately $500,000 from Commercial Capital Bank ("CCB"). Fifteen months later, the debtors granted CCB a security interest in their equipment. CCB perfected that security interest by filing a proper financing statement. In 2011, CCB brought an action against FSA, raising numerous arguments why FSA's perfection had lapsed.

The court ruled in favor of FSA. Citing § 9-322(a), it stated that priority between secured parties is based on "the date of perfection." The court then concluded that, even though the debtors had paid off the first loan, because the security agreement for that transaction covered future advances, the security interest created in that transaction secured the third loan. Hence the date of FSA's perfection for priority purposes was the date of the first loan.

The decision is correct but the fact that the security agreement covered future advances is immaterial. Priority among perfected secured parties is not, as the court indicated, based on the first to *perfect*, but the first to *file or perfect*, as long as there is no period thereafter when there is neither filing nor perfection. *See* § 9-322(a)(1). Thus, as long as the third loan was in fact secured – whether pursuant to a future-advances clause in one of the previous security agreements or pursuant to a new security agreement – priority would be based on the date of the first filing. Secured creditors such as FSA routinely file new financing statements for each transaction but, provided the financing statements cover the same collateral, there is no reason to do so. Financing statements identify the debtor, the collateral, and the secured party, not a particular loan or transaction. There is absolutely no need for a second, duplicative filing, provided the first is properly continued.

Variety Wholesalers, Inc. v. Prime Apparel, LLC, 2011 WL 6036084 (N.C. Ct. App. 2011)

This decision should be very distressing for lenders with a security interest in accounts generated from trademarked goods.

The dispute in the case began with the sale of trademarked apparel by Prime Apparel, Inc. to one of its wholesale customers. Quick Response Marketing, Inc. ("QRMI") claimed that it owned the trademark and instructed the customer to make payment to QRMI. The customer brought an interpleader action seeking a ruling on who was entitled to the payment and it deposited $235,000 with the court. CIT Group Commercial Services, Inc. ("CIT") intervened, claiming a perfected security interest in Prime's accounts and entitlement to the funds.

The trial court ruled for QRMI and CIT appealed. CIT argued that even if Prime had violated QRMI's trademark rights, QRMI had merely an unsecured claim for infringement, which would be subordinate to CIT's security interest in the account. In a very brief opinion, the appellate court affirmed. Its entire analysis consisted of the following syllogism:

(1) Prime's violation of QRMI's trademark meant that Prime had no right to the goods sold, nor any money generated from the sale of those goods.

(2) Prime therefore had no right in the account receivable to pass on to CIT.

(3) Thus, CIT had no security interest in the interpleader funds.

This analysis is simply wrong. The Lanham Act makes a trademark violator liable to the trademark owner, *see* 15 U.S.C. § 1125(a), but does not make all proceeds of the trademarked goods the property of the trademark owner. Nor should it, given that the damages for the trademark violation may have little relationship to the total sales price of the goods. Moreover, nothing in the Lanham Act imposes a constructive trust on all proceeds received for the trademarked goods. While a constructive trust *might* be an

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

IN RE: BEN MILLER and DEBBIE ANN MILLER,	)	
Debtors,	)	**Case No. 12-CV-02052**
STATE BANK OF ARTHUR,	)	
Appellant,	)	
v.	)	
IN RE: BEN MILLER and DEBBIE ANN MILLER,	)	
Appellees.	)	

OPINION

This is an appeal from an Order entered by the United States Bankruptcy Court for the Central District of Illinois (Bankruptcy Case No. 10–92570). This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a). This court has carefully reviewed both parties' arguments. Following this careful review, this court reverses the Order of the Bankruptcy Court.

FACTS[1]

Mr. and Mrs. Miller opened a personal banking account with the State Bank of Arthur ("Bank") on or about February 25, 1995, in the name of Bennie A. Miller ("Miller") and Debbie

[1] **All facts are taken from *Miller v. State Bank of Arthur*, Nos. 10-92570, 11-9055, 2012 WL 32664 (Bankr. C.D. Ill. Jan. 6, 2012).**

A. Miller. The Millers subsequently purchased Power Plus, a lawn equipment business based in Arthur, Illinois. During the period from January 2, 1999 until the time of this lawsuit, the Millers executed and delivered five promissory notes with different principal amounts to the Bank in which they promised to pay the Bank the note amounts plus interest. The Millers also executed and delivered five commercial security agreements and one mortgage as security for the notes; the commercial security agreements gave the Bank a security interest in most of the Millers' business assets. All of the loan documents were signed by Mr. Miller as "Bennie A. Miller." The Bank filed a UCC1 financing statement on January 7, 1999, and the statement identified the debtors as "Bennie A. Miller" and "Debbie A. Miller." Mr. Miller signed the financing statement as "Bennie A. Miller." Timely continuations of the original financing statement were filed on September 5, 2003, and July 21, 2008.

At trial, Mr. Miller testified that he has gone by the name "Bennie Miller" for much of his adult life, and that he is generally known by this name in the community. "Bennie A. Miller" is also the name listed on his unexpired driver's license, his Social Security card, the deed to the Millers' home, his federal income tax returns, the signature card he signed when the Millers opened their original account with the bank in 1995, all of the loan documents with the Bank, a Capital One credit card account, and the bill of sale from the purchase of the Power Plus business. In contrast, "Ben Miller" is the name listed on Mr. Miller's birth certificate, on a letter from another creditor, on two proofs of claim filed by Mr. Miller's accountant and his doctor, and on his American Express account.

On December 22, 2010, the Millers filed for Chapter 13 bankruptcy and listed the Bank as a secured creditor. On June 17, 2011, the Millers filed an adversary proceeding against the

Bank to avoid the Bank's security interest. The Millers argued that the Bank incorrectly identified Mr. Miller on its financing statement, as governed by Article 9 of the Uniform Commercial Code (UCC), as adopted by the Illinois Legislature, 810 ILCS 5/9-521, by listing the name, "Bennie A. Miller," and thereby failed to perfect its security interest.

Following an evidentiary hearing on October 24, 2011 at which both parties were asked to submit written closing arguments, the Bankruptcy Court filed a written Opinion and Order in which it ruled in favor of the Millers. The Millers were thus allowed to avoid the Bank's lien on Mr. Miller's one-half interest in the business assets. The Bank then timely filed this appeal.

STANDARD OF REVIEW

A federal district court reviews a bankruptcy court's conclusions of law *de novo* and its findings of fact only for clear error. *Freeland v. Enodis Corp.*, 540 F.3d 721, 729 (7th Cir. 2008). A finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Aiello v. Providian Fin. Corp.*, 257 B.R. 245, 248 (N.D. Ill. 2000). Mixed questions of law and fact are reviewed *de novo*. *In re Winer*, 158 B.R. 736, 740 (N.D. Ill. 1993). Finally, questions of statutory construction are considered questions of law and are also reviewed *de novo. LaSalle Nat'l Bank Ass'n v. Cypress Creek 1*, 242 Ill. 2d 231, 237 (Ill. 2011). Although the Millers argue that this case presents solely an issue of fact—that is, whether the financing statement was factually "seriously misleading," this court disagrees. As the present issue may best be characterized as an interpretation of 810 ILCS 5/9-101 *et seq.*, which tracked

the language of Article 9 of the UCC, the case presents at best a mixed question of law and fact. Accordingly, this court will review these proceedings *de novo*.

On issues of state law, in the absence of binding Illinois authority, a federal court must predict how the Illinois Supreme Court would rule and decide it the same way. *MindGames, Inc. v. W. Pub. Co., Inc.*, 218 F.3d 652, 655-56 (7th Cir. 2000); *In re My Type, Inc.*, 407 B.R. 329, 334 (Bankr. C.D. Ill. 2009) (bankruptcy). In bankruptcy cases, the federal court may refer to "all relevant data including state appellate decisions, state supreme court dicta, restatements of law, law review commentaries, and the majority rule among other states." *In re Giaimo*, 440 B.R. 761, 769 (B.A.P. 6th Cir. 2010).

ANALYSIS

The Bankruptcy Court reasoned as follows: (1) as the law currently exists in Illinois, a UCC1 financing statement must set forth the legal name of a borrower; (2) a debtor's legal name is the one indicated on his birth certificate, rather than the name on his driver's license or Social Security card; (3) Miller's name on his Indiana birth certificate is "Ben Miller"; (4) Miller has not changed his legal name to "Bennie Miller"; and (5) a search using the filing office's standard search logic for the legal name "Ben Miller" did not disclose a financing statement for him. Therefore, the Bankruptcy Court concluded that the Bank's use of the name "Bennie A. Miller" on its financing statement was "seriously misleading." Accordingly, that court held that the financing statement was insufficient to perfect the Bank's security interest in the collateral, and thus, the Bank was not entitled to receive Bennie Miller's 50% of the collateral, but rather, only Debbie Miller's 50% share.

However, neither Illinois law nor the UCC requires that a "legal name" be used on the financing statement in order to perfect a security interest. Instead, the UCC requires only a "correct name". Because the Bankruptcy Court created an additional requirement of law where none exists by mandating that lenders use the debtor's "legal name" on the financing statement and held that the name on a debtor's birth certificate takes priority over the name on his other commonly-accepted documents in defining the debtor's "legal name", this court must reverse.

I. No requirement of a "legal" name in Illinois

The financing statements were initially filed in 1999, with continuations filed in 2003 and 2008. The relevant Illinois statutes were amended to reflect certain UCC adoptions in 2001. Therefore, certain parts of this analysis will examine the pre-adoption statutes while others the modern version. Regardless, it is clear that the outcome is unaffected by the change in statutory language.

A financing statement must be filed to perfect the relevant security interest. 810 ILCS 5/9-302 (1999); 810 ILCS 5/9-310 (2012). In 1999, 810 ILCS 5/9-402 (1999) governed the formal requisites of a financing statement. That section allowed that "[a] financing statement is sufficient if it gives the names of the debtor and the secured party . . . ." In 2001, the Illinois legislature replaced the substance of Section 5/9-402 with Section 5/9-521. An Act in Relation to Secured Transactions, Public Act No. 98-893, effective July 1, 2001. After this amendment, 810

ILCS 5/9-501 (2001) *et seq.* governed the form and substance of a financing statement.[2] 810

ILCS 5/9-502(a) (2001) provides, in pertinent part:

> (a) Sufficiency of financing statement. [A] financing statement is sufficient only if it (1) provides the name of the debtor; (2) provides the name of the secured party or a representative of the secured party; and (3) indicates the collateral covered by the financing statement.

Additionally, 810 ILCS 5/9-503(a) (2001) provides, in pertinent part:

> (a) Sufficiency of debtor's name. A financing statement sufficiently provides the name of the debtor: . . . (4) in other cases: (A) if the debtor has a name, only if it provides the individual or organizational name of the debtor[.]

In exception to the above, 810 ILCS 5/9-402(8) (1999) provides, in pertinent part:

> (8) A financing statement substantially complying with the requirements of this Section is effective even though it contains minor errors which are not seriously misleading.

Similarly, 810 ILCS 5/9-506(a) (2001) provides, in pertinent part:

> (a) Minor errors and omissions. A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

Section 402(8) (1999) (and by analogy, § 9-506(a) (2001)) has been interpreted to mean that any deviation in the debtor's name, except those that are not seriously misleading, is sufficient to make the financing statement invalid and ineffective. *See, e.g., First Nat. Bank of Lacon v. Strong*, 663 N.E.2d 432, 435 (Ill. App. Ct. 1996).

As a safe harbor, 810 ILCS 5/9-506(c) (2001) provides:

> (c) Financing statement not seriously misleading. If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of

[2] Because this section has not been amended since 2001, citations will be to the 2001 version of the code. Incidentally, the Illinois legislature sent the 2010 Article 9 amendments to the governor for signing on June 22, 2012. S.B. 3764, 97th Gen. Assemb., Reg. Sess. (Ill. 2012). One of the amendments includes an "only if" clause providing that a UCC financing statement properly designates the name of an individual debtor only if it indicates the name that appears on the debtor's driver's license. Such a provision, had it been effective, would have controlled.

> the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading.

Finally, 810 ILCS 5/9-521 (2001) provides, in pertinent part:

> (a) Initial financing statement form. A filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format set forth in the final official text of the 1999 revisions to Article 9 of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, except for a reason set forth in Section 9-516(b).

Critically, while § 9-402 (1999) and § 9-503 (2001) both do not specify how a debtor's name should be determined, it is clear that neither requires that a financing statement contain the debtor's *legal* name, much less provides a legal definition of what would constitute a debtor's legal name. Therefore, as the two statutes are substantially similar in this respect, this opinion shall refer to the amended version where the text of the 1999 revision is not specifically relevant.

The one relevant source in which this court could find the phrase "legal name" is in the current Illinois UCC Financing Statement, field 1, which states, in pertinent part:

> 1. DEBTOR'S EXACT FULL LEGAL NAME - Insert only <u>one</u> debtor name (1a or 1b) - do not abbreviate or combine names

This text exists on the form that Miller completed for one of the other creditors in 2010 as appears in the record on appeal, as well as on the *current* UCC financing statement form and instructions available from the Illinois Secretary of State. *See* http://www.cyberdriveillinois.com/publications/pdf_publications/ucc1.pdf. Although this court was not provided with the actual UCC form as completed by the instant litigants in the record on appeal, when the Bank filed an initial blanket UCC financing statement on January 7, 1999, then-in-force 810 ILCS 5/9-402 (eff. Aug. 27, 1986) controlled the formal requisites of a financing statement. Section 5/9-402 neither referenced the UCC nor referred to a secretary of

state form. Instead, a financing statement was sufficient if it gave the "Names of debtor (or assignor)" and the "Name of secured party (or assignee)". 810 ILCS 5/9/402 (1999). The phrase "legal name" cannot be found in the 1999 version of Section 5/9-402.

Like Section 5/9-402 (1999), 810 ILCS 5/9-521 (2001) also does not directly require an "exact full legal name"; however, it does incorporate the UCC by reference:

> A filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format set forth in the final official text of the 1999 revisions to Article 9 of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

The official text of the UCC Financing Statement in § 9-521(a) of the 1999 revision of the UCC includes the title "1. DEBTOR'S EXACT FULL LEGAL NAME". This form has not been modified since. Regardless, the text of the UCC Financing Statement form is not binding authority; rather, the only sources of law are 810 ILCS 5/9-503(a)(4)(A), which requires the debtor's name, and 5/9-506(c), which makes a financial statement not seriously misleading if a search of the records under the debtor's correct name would disclose the relevant financing statement.

The Bankruptcy Court held that "as the law currently exists in the State of Illinois, a UCC1 financing statement must set forth the legal name of a borrower." *In re Miller*, No. 10-92570, 2012 WL 32665 at *4 (Bankr. C.D. Ill. Jan. 6, 2012). In support, the court cited to *In re Kinderknecht*, 308 B.R. 71 (10th Cir. BAP 2004); *In re Borden*, 353 B.R. 886 (Bankr. D. Neb. 2006); *Pankratz Implement Co. v. Citizens Nat'l. Bank*, 130 P.3d 57 (Kan. 2006); and *In re Larsen*, Nos. 09-00219, 09-30054, 2010 WL 909138 (Bankr. S.D. Iowa, Mar. 10, 2010). *Miller*, 2012 WL 32664, at *2-3. On appeal, the Bank argues that, rather than establishing a new

standard, these cases use the term "legal name" as a form of shorthand to mean a name that is not insufficient by law due to excessive informality or misspelling. *See generally*, Harry C. Sigman, *Individual Debtor Names Revisited Yet Again*, 44 UCC L.J. Art. 3 at II.D (July 2012). This court agrees with the Bank.

First, none of the cases cited by the Bankruptcy Court are binding on an Illinois court. Although they each refer to their respective enactments of the UCC, those opinions plainly interpret Kansas, Nebraska, and Iowa law, and accordingly, would be of low persuasive nature to the Illinois Supreme Court. Second, read closely, those cases do not create out of whole cloth a novel definition for an individual's "legal name" and require that this "legal name" be used in financing statements in order to perfect the security interest. Instead, the reasoning of each decision relies on the theory that if a potential debtor's proffered name on the financing statement cannot be associated with the individual's other financing statements following a search using the standard search logic (or in some situations, a diligent or prudent search), then that the name is "seriously misleading" and therefore not entitled to the protection of § 9-506(c).

In *Kinderknect* and *Borden*, the debtor used a nickname on the financing statement as compared with another name used on his official legal documents, including their driver's license and Social Security card. In *In re Kinderknecht*, the creditor filed financing statements listing the debtor as "Terry J. Kinderknecht" even though his "legal name" was "Terrance Joseph Kinderknecht". *Kinderknect*, 308 B.R. at 72. The Bankruptcy Appellate Panel held that "[f]or a financing statement to be sufficient . . . the secured creditor must list an individual debtor by his or her legal name, not a nickname." *Id*. at 73. Notably, however, the appellate panel neglected to indicate how the parties established the debtor's "legal name". The bankruptcy court below

found that "the name on the debtor's birth certificate, driver's license, and Social Security card and in the caption of his bankruptcy petition [was] 'Terrance J. Kinderknecht.'" *In re Kinderknecht*, 300 B.R. 47, 49 (Bankr. D. Kan. 2003) *rev'd*, 308 B.R. 71 (B.A.P. 10th Cir. 2004). The bankruptcy appellate panel ruled that because the financing statements listed the debtor by his nickname, "Terry", which did not match the name on his birth certificate, driver's license, and Social Security card, which was "Terrance", and because a search of the UCC filings under the debtor's correct name, "Terrance", using the office's standard search logic, did not match any financing statements under the name "Terrance", that the financing statements were seriously misleading. *Kinderknect*, 308 B.R. at 76-77. Both the bankruptcy court and the bankruptcy appellate panel were convinced that, at least in the case of confluence between the birth certificate, driver's license, and Social Security card, that the correct name (here, the "legal name") was the one shown in those documents. *See also In re Borden*, 353 B.R. 886, 887 (Bankr. D. Neb. 2006) *aff'd, appeal dismissed*, 2007 WL 2407032 (D. Neb. Aug. 20, 2007) (noting that the debtor's "legal name" of "Michael Ray Borden" or "Michael R. Borden" was the name listed on birth certificate, driver's license, real estate deeds, bank accounts, tax returns, and bankruptcy petition, in contrast to the name "Mike Borden", which was used on the financing statement); *In re Larsen*, 2010 WL 909138 (Bankr. S.D. Iowa Mar. 10, 2010) (unpublished) (noting that when the financing statement used the name "Mike Larsen", a UCC search entering the Debtor's legal name of "Michael D. Larsen" did not yield the result of the UCC of the Bank.)

In *Pankratz Implement*, the issue was fundamentally similar, although cast as a typographical error. There, the debtor "signed a note and security agreement in favor of [the creditor] using his correct name, Rodger House." *Pankratz Implement Co. v. Citizens Nat. Bank,*

130 P.3d 57, 59 (Kan. 2006). The creditor, however, listed the debtor's name as "Roger House" on the financing statement. *Id*. Later, a bank attempted to secure the same property but with the correct name. Because a search on the name "Rodger House" did not disclose the security interest filed by the creditor, *id*. at 60, among other reasons, the Kansas Supreme Court held that the financing statement was seriously misleading. *Id*. at 68.

To compare, in *First Nat. Bank of Lacon v. Strong*, a business incorporated under the name "E. Strong Oil Company" took out a loan from a bank, but the bank used the company's trade name, "Strong Oil Co." in the financing statement. *First Nat. Bank of Lacon v. Strong*, 663 N.E.2d 432, 433 (Ill. App. Ct. 1996). That court held that the name was seriously misleading under the rubric of § 5/9-402(8) (1999) because, at the time, the Secretary of State filed its financing statements alphabetically, and a diligent and prudent search using the correct incorporated name of "E. Strong Oil" would not likely have disclosed the bank's financing statement filed under "Strong Oil Co." *Id*. at 435. Applying this same logic, the court in *In re Paramount* found that although the debtor corporation changed its name from Paramount Attractions, Inc. to Paramount International, Inc., the new name was not seriously misleading because a search of the Secretary of State UCC database for the term "Paramount" and "Dundee" (the road name of the address in the financing statement) produced the filing statement of the creditor. *In re Paramount Int'l, Inc.*, 154 B.R. 712, 713, 716 (Bankr. N.D. Ill. 1993).[3]

[3] While *Lacon* and *Paramount* applied a different legal standard than that applicable to the instant case, the reasoning is analogous.

Thus, not only does the text of § 9-403 (1999) or § 9-503 (2001) not have the phrase "legal name", but there is no case law supporting that proposition. Had the drafters of the UCC meant to require a "legal name", they would have included this word in the provision and likely have defined it. Accordingly, this court holds that Illinois law does not require that the financing statements provide the debtor's "legal name".

II. A name on a driver's license and social security card is sufficient for § 9-503

Because Article 9 does not require the financing statement provide the debtor's "legal name" on the financing statement, but instead only use a name that is not seriously misleading, this court concludes that the use of the name "Bennie A. Miller" on the financing statement was sufficient for the financing statement to be effective. This was the name used on Miller's driver's license, Social Security card, and federal income tax returns, among other official documents.

Even if this court were to find that Article 9 requires a debtor's legal name, which, as discussed above, it does not, the requirement would still be met for three reasons. First, to the extent that Miller relies on cases creating a "legal name" requirement, as discussed above, those cases either do not specifically require that a debtor's "legal name" can only be defined by his or her birth certificate, or in fact allow the debtor's driver's license or Social Security card as one form of evidence of his or her "legal name".

Second, prior to July 1, 2010, an individual in Illinois could change his legal name "without resort to any legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth." *Reinken v. Reinken*, 184 N.E 639, 640 (Ill. 1933); *Thomas v. Thomas*, 100 Ill.App.3d 1080 (Ill. App. Ct. 1981) (citing

Reinken). The Illinois legislature made common law name changes invalid if assumed on or after July 1, 2010. 735 ILCS 5/21-105. However, Miller assumed the legal name "Bennie A. Miller" prior to this date. "Bennie A. Miller" is the name on his driver's license, his social security card, the deed to the Millers' home, his federal income tax returns, his Capital One credit card, and the bill of sale for the Millers' business. Additionally, Miller testified that he has gone by this name and that the community knows him by this name. Thus, even if this court were to assume that § 9-503 required a debtor's "legal" name, Miller had lawfully assumed the "legal" name "Bennie A. Miller" at the time the note was signed.

Third, non-UCC Illinois law defines the term "legal name." Both the Illinois Vehicle Code and the Illinois Identification Card Act define a "legal name" as the "full given name and surname of an individual as recorded at birth, recorded at marriage, or deemed as the correct legal name for use in reporting income by the Social Security administration or the name as otherwise established through legal action that appears on the associated official document presented to the Secretary of State." 625 ILCS 5/1-137.5; 15 ILCS 335/1A. By analogy, and because the Illinois UCC statutes do not directly define "legal name", if this court were to assume that a "legal" name is required, "Bennie A. Miller" is the name listed on an official document presented to the Secretary of State (his driver's license), making it a cognizable "legal" name under non-UCC Illinois law.

Here, Miller provided a name that he used regularly for many years and that was listed on several official and personal documents. When a search was performed on that name, "Bennie A. Miller", five of the six secured creditors that filed financing statements showed up in the database. Because (1) there is no requirement pursuant to statutory, regulatory, or judge-made

law that a "legal name" be used on a financing form; (2) no requirement that a birth certificate is a more reliable or valid source of an individual's current name than his or her driver's license and Social Security card; and (3) the great majority of the creditors did in fact identify Debtor as "Bennie A. Miller", and, more to the point, would have been able to find any prior filing under that name, it is clearly erroneous to posit that the name "Bennie A. Miller" either fails to provide sufficiently the name of the debtor or is misleading. Furthermore, the policy behind the secured transactions article of the UCC is to ensure certainty for creditors and provide notice of security interests to third parties. 68A Am. Jur. 2d Secured Transactions § 259; *Octagon Gas Sys., Inc. v. Rimmer*, 995 F.2d 948, 957 (10th Cir. 1993); *Pankratz Implement Co. v. Citizens Nat. Bank*, 130 P.3d 57, 67 (Kan. 2006). The Bank was the first creditor to file on January 7, 1999. GE Commercial Distribution Finance filed on February 18, 1999, American Honda Finance filed on December 27, 2000, Textron Financial filed on November 15, 2001, and Red Iron Acceptance filed on February 9, 2010. If any financing statement were to have a name that was seriously misleading, it should have been the filing for Crader Equipment, which filed on January 11, 2010 using the name "Ben Miller" and would hypothetically have been the only creditor that could not be found by the other creditors or by subsequent potential creditors. In fact, were this court to affirm, it would implicitly rule that the other five of the six creditors, which did use the name "Bennie A. Miller", had improperly filed financing statements.

III. Public policy

This outcome is supported both by common sense and public policy. The fundamental legal issue here is not whether a legal name is required on a financing statement, or how close

the name on the financing statement must be to the debtor's "correct" or "legal" name, or even what constitutes the debtor's legal name, but rather whether the name on an individual's birth certificate trumps the name on his or her driver's license and Social Security card. The answer to that question ought to be clear.

Appellee cites *In re Berry* in support of the argument that the name on a debtor's birth certificate is the best evidence of a debtor's correct name when legal documents contain conflicting names. *In re Berry*, Nos. 05-14423, 05-5755, 2006 WL 2795507, at *1 (Bankr. D. Kan. 2006) ("In most cases, the name on the debtor's bankruptcy petition, a driver's license, or Social Security card will be the best evidence of the debtor's legal name. If there is a conflict among these documents, the debtor's birth certificate *may* be the best evidence.'") (emphasis added). The decision is not binding; there was no conflict between the two documents in that case, so the notation is dictum; and last, the passage is not exactly the most ringing endorsement.

In contrast, there are three reasons why the driver's license is a better reference for an individual's name. First, a person's driver's license is most likely to reflect his or her current and accurate name. For example, Illinois requires that a person who changes his or her name apply for a corrected driver's license within 30 days after changing the name, but this court could find no such requirement for his or her birth certificate. 625 ILCS 5/6-116(b). It is also rare to see an individual change their surname on their birth certificate in addition to or instead of their driver's license in response to a precipitating legal event such as marriage. A driver's license must also have a (reasonably current) photograph, whereas a birth certificate has none, allowing a creditor an additional method to confirm the debtor's identity. 92 Ill. Admin. Code tit. 92, § 1030.90 (2012). *Cf.* Barkley Clark & Barbara Clark, *Clarks' Secured Transactions Monthly* (Feb. 2012)

(noting that the Bankruptcy Court's preference for the debtor's birth certificate was analogous to a corporate debtor's name as it appears in the articles of incorporation (an entity's "birth certificate"), the Article 9 standard for the names of entity debtors.)

Second, a person's driver's license is typically more readily accessible than a birth certificate. As many people drive a vehicle and as a motor vehicle operator must carry a driver's license in his or her immediate possession, many people carry a driver's license. 625 ILCS 5/6-112. Because carrying a birth certificate is not required to drive a vehicle, it is a far less commonly carried form of identification.

Third, one commentator has noted that "the lending community is strongly in favor of a driver's license solution and they are presumably best-positioned to undertake the cost-benefit analysis." Darrell W. Pierce, *The Revised Article 9 Filing System: Did It Meet Its Objectives?,* 44 No. 1 UCC L.J. Art. 1 (Dec. 2011). If the Illinois implementation of Article 9 required the name on a debtor's birth certificate, a burden would be imposed on creditors retarding lending and commerce, contrary to one of the goals of Article 9.[4]

[4] *See generally* Joshua L. Edwards, *Meet the New Test, Same As the Old Test: In Re Spearing Tool's Rejection of the Revised Article 9 Rules Means Secured Creditors Will Get Fooled Again*, 59 Okla. L. Rev. 657, 665 (2006); Steven L. Harris, Charles W. Mooney, Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 Am. Bankr. Inst. L. Rev. 85, 114 (2001). While the initial allocation of rights and burdens may be inconsequential in the absence of transactional costs, it is not inconceivable that prioritizing the name on a birth certificate over other official documents could drastically increase the transactional costs of making and receiving loans, including, for example, the time and monetary cost of updating a birth certificate to match the other legal documents.

It seems absurd that a debtor could provide his driver's license, Social Security card, and federal income tax returns when securing a loan, and then later have the privilege to assert that the creditor was not entitled to the security because the name on the debtor's birth certificate did not match. Placing an additional burden on the creditor to confirm that the name on the birth certificate matched the name on other documents may result in a reduction of the number of loans offered in the market due to the difficulty of perfecting a security interest.

IT IS THEREFORE ORDERED THAT:

(1) The Order of the Bankruptcy Court entered on January 6, 2012, is REVERSED. This case is remanded to the Bankruptcy Court for proceedings consistent with this opinion.

(2) This case is terminated in the district court.

ENTERED this 17th day of August, 2012

s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the
Central District of Illinois

STATE BANK OF ARTHUR	)	
APPELLANT	)	
	)	
vs.	)	Case Number: **12-2052**
	)	
	)	
BEN MILLER	)	
DEBBIE ANN MILLER	)	
APPELLEES		

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Order of the Bankruptcy Court entered on January 6, 2012, is REVERSED . This case is remanded to the Bankruptcy Court for proceedings consistent with this opinion. This case is terminated in the district court.

Dated: August 17, 2012

s/ Pamela E. Robinson
Pamela E. Robinson
Clerk, U.S. District Court

C

West's Annotated Mississippi Code Currentness
Title 75. Regulation of Trade, Commerce and Investments
Chapter 4A. Uniform Commercial Code--Funds Transfers
Part 1. Subject Matter and Definitions

→→ § 75-4A-108. Exclusion of Consumer Transactions Governed by Federal Law

This chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728,15 U.S.C. 1693 et seq.) as amended from time to time.

CREDIT(S)

Laws 1991, Ch. 316, § 1, eff. July 1, 1991.

UNIFORM COMMERCIAL CODE COMMENT

The Electronic Fund Transfer Act of 1978 is a federal statute that covers a wide variety of electronic funds transfers involving consumers. The types of transfers covered by the federal statute are essentially different from the wholesale wire transfers that are the primary focus of Article 4A. Section 4A-108 excludes a funds transfer from Article 4A if any part of the transfer is covered by the federal law. Existing procedures designed to comply with federal law will not be affected by Article 4A. The effect of Section 4A-108 is to make Article 4A and EFTA mutually exclusive. For example, if a funds transfer is to a consumer account in the beneficiary's bank and the funds transfer is made in part by use of Fedwire and in part by means of an automated clearing house, EFTA applies to the ACH part of the transfer but not to the Fedwire part. Under Section 4A-108, Article 4A does not apply to any part of the transfer. However, in the absence of any law to govern the part of the funds transfer that is not subject to EFTA, a court might apply appropriate principles from Article 4A by analogy.

LIBRARY REFERENCES

Banks and Banking 188.5.
Westlaw Topic No. 52.
C.J.S. Banks and Banking §§ 445 to 451.

UNITED STATES CODE ANNOTATED

Electronic fund transfer, see 15 U.S.C.A. § 1693 et seq.

Miss. Code Ann. § 75-4A-108, MS ST § 75-4A-108

Current through End of 2011 Regular Session.

ABA UCC/
Uniform Law News

American Bankers Association

Vol. 9, No. 5 May 23, 2012

In this issue:

Permanent Editorial Board for UCC Recommends Amendment to UCC Article 4A (Funds Transfers)

Please be aware that the Permanent Editorial Board for the Uniform Commercial Code has recently recommended an amendment to UCC Section 4A-108 and its comments. The matter is scheduled to be considered at the American Law Institute Annual Meeting (May 21-23, 2012). Plans are for the Uniform Law Commission Executive Committee to evaluate the proposed changes at the ULC Annual Meeting in July. If approved, the amendment will likely go to state legislatures for consideration.

The opening paragraph of a 5/4/12 memorandum succinctly outlines the subject at issue:

"Among the changes brought about by the Dodd-Frank Wall Street Reform and Consumer Protection Act is an amendment to the federal Electronic Funds Transfer Act (EFTA) that will have an important impact on the scope of Article 4A of the Uniform Commercial Code. The impact could result in legal uncertainty for a class of transactions currently governed by Article 4A unless Section 4A-108 is amended. Thus the Permanent Editorial Board for the Uniform Commercial Code is recommending the attached amendment to Section 4A-108 and its comments." The wording of the proposed amendment to Section 4A-108 follows:

Sec. 4A-108. Relationship to Electronic Fund Transfer Act.

(a) Except as provided in subsection (b), this Article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. Sec. 1693 et seq.) as amended from time to time.

(b) This Article applies to a funds transfer that is a remittance transfer as defined in the Electronic Fund Transfer Act (15 U.S.C. Sec. 1693o-1) as amended from time to time, unless the remittance transfer is an electronic fund transfer as defined in the Electronic Fund Transfer Act (15 U.S.C. Sec. 1693a) as amended from time to time.

(c) In a funds transfer to which this Article applies, in the event of an inconsistency between an applicable provision of this Article and an applicable provision of the Electronic Fund Transfer Act, the provision of the Electronic Fund Transfer Act governs to the extent of the inconsistency.

The 5/4/12 memorandum referenced above, which provides additional background and details, can be found at http://www.ali.org/doc/UCC4A-108.pdf. If you have questions or comments, please contact ABA's L.H. Wilson at (202) 663-5030 or lwilson@aba.com.

ABA UCC/
Uniform Law News

American Bankers Association

Vol. 9, No. 7 July 27, 2012

In this issue:

ULC Wraps Up 121st Annual Meeting

At its recently-concluded 2012 Annual Meeting in Nashville, Tennessee, the Uniform Law Commission approved five new acts. After an act is approved by the ULC, it frequently is submitted to state legislatures for consideration.

Now in its 121st year, the Commission comprises more than 350 practicing lawyers, governmental lawyers, judges, law professors, and lawyer-legislators from every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Commissioners are appointed by their states to draft and promote enactment of uniform laws.

One act debated at this year's Annual Meeting -- the Uniform Manufactured Housing Act -- continues to be quite controversial. Ultimately, it was approved by the ULC despite widespread industry opposition. On a more positive note, a Uniform Asset Freezing Orders Act was given final approval, and ABA hopes that it will assist our industry. The goal of the Act is to prevent dissipation of assets pending judgment. Highlights of these two acts are in stories below.

Other acts were reviewed at the ULC Annual Meeting with drafting committees to continue their work over the next year. One such project is aimed at creating a Powers of Appointment Act. According to the Commission, "[t]he power of appointment is a core device in modern estate planning practice, and powers of appointment are routinely included in trusts both for tax reasons and to add flexibility to the property arrangements. Only a few states have enacted powers of appointment legislation, but the Restatement (Third) of Property, approved by the American Law Institute in 2006, contains extensive provisions on powers of appointment."

ULC press releases provide more information on significant actions taken at the 2012 Annual Meeting (see http://www.uniformlaws.org/News.aspx).

ULC Approves Manufactured Housing Act Despite Widespread Industry Opposition

At its 2012 Annual Meeting, the Uniform Law Commission finalized a measure aimed at creating a Uniform Manufactured Housing Act. The controversial Act was given approval by the ULC despite overwhelming industry opposition. Fortunately, the Act is far from being a "uniform law." Before the measure can become the law in a state, it must be approved by that state's legislature. Several ULC Commissioners and others have voiced their lack of support for the controversial Act.

One objective of the Act is to provide an "efficient and effective method for having a manufactured home classified as real property at the time of the first retail sale." From a practical standpoint, the Act fails to accomplish this objective. The Act allows a manufactured home to become real property without the

home being permanently affixed to land. Proponents reasoned that if a manufactured home was simply labeled "real property," it would result in increased availability of lower-cost, longer-term mortgage loan financing.

Following this reasoning, one ULC Commissioner commented wryly that a state might enact a law labeling automobiles as "real property." After all, wouldn't such action encourage lenders to make long-term car loans at low rates for a term well beyond the vehicle's useful life?

It was noted that a senior officer at Freddie Mac advised that the agency will not buy loans secured by manufactured homes that do not conform to Single Family Guide requirements -- *i.e.,* the home must be affixed to a foundation on land owned by the homeowner. Thus, the Act will be counterproductive to its objective of increasing the availability of affordable financing for manufactured homes.

Over two years ago, ABA formed a Working Group on Manufactured Housing to provide input to the ULC Drafting Committee. Our Group is composed of financial institution loan officers, bank attorneys, and state bankers association professionals who lobby state legislatures on behalf of their members. The ABA Working Group has held numerous conference calls during the two-year drafting process to discuss in detail the provisions of the multiple drafts produced by the ULC Drafting Committee. Comment letters have been filed, and members appeared before the ULC Drafting Committee to advocate our views.

More recently ABA joined over 60 industry organizations in signing a letter of opposition to the ULC 2012 Annual Meeting Draft of the Act. The letter and an accompanying memorandum prepared by ABA Working Group member Marc J. Lifset detail the industry's objections. To be sure, revisions to the draft were made at the ULC Annual Meeting, but these changes do not overcome our fundamental objections.

In addition, ABA is concerned with potential liability to lending institutions under the Act. For example, Section 10 provides that a person injured by another's failure to comply with the Act "may be awarded damages and obtain other relief." Moreover, the section specifically provides that it "does not limit other remedies of an injured person."

The Annual Meeting-approved text of the Act (which does not include comments and is still subject to revision by the ULC Style Committee) can be found at http://www.uniformlaws.org/shared/docs/manufactured_housing/2012am_mha_approvedtext.pdf.

The industry letter opposing the Act and accompanying memo detailing objections (referenced above), are available at http://www.aba.com/Members/Legal/Documents/IndustryLetter070512.pdf and http://www.aba.com/Members/Legal/Documents/LifsetLetter062912.pdf.

Should you have questions or comments, feel free to contact ABA's L.H. Wilson at (202) 663-5030 or lwilson@aba.com.

Uniform Asset Freezing Orders Act Approved at ULC Annual Meeting

Another act approved by the Uniform Law Commission at its 2012 Annual Meeting creates a uniform process for issuance of asset freezing orders -- *in personam* orders freezing the assets of a defendant in order to prevent a party from dissipating assets prior to a judgment.

For background on this drafting project, please see the 4/26/12 issue of *ABA UCC/Uniform Law News,* available at http://www.aba.com/aba/documents/GeneralCounsel/UniformLawNews/April2012.pdf.

This new Act is important to our industry because an asset freezing order might affect banks in different ways. Banks might be on both sides of the coin. For example, an order might be sought by a bank against another person to prevent dissipation of assets. An order might also impact banks when they have custody or control of the assets of a party against whom an asset freezing order is entered.

Section 3 of the Act contains key provisions. These provisions address the Act's applicability and specify situations where it does not apply.

A ULC press release provides highlights of the Act:

"An asset freezing order is, by its very nature, an extraordinary remedy with potentially significant impact on the debtor whose assets are frozen and on third-parties holding those assets. Accordingly, it is extremely important that there be rigorous standards which must be met before such an order can be issued, which the Uniform Act provides.

The Uniform Act provides a rigorous process for the issuance of an asset-freezing order with notice. It draws heavily on the currently existing American law concerning temporary restraining orders and preliminary injunctions and currently existing English and Canadian law concerning asset-freezing orders. Under the provisions of the Act, a party can obtain an asset-freezing order only if it establishes that there is a substantial likelihood that the assets of a party against which the order is sought will be dissipated so that the party seeking the asset freezing order will be unable to receive satisfaction of the judgment.

The Act provides additional safeguards, authorizing a court to relieve a party of its obligations under an asset-freezing order by permitting that party to post a bond or other security. The Act also entitles a party against which an asset freezing order is entered to an order from the court allowing the use of assets to meet normal living or business expenses and the cost of defending the action.

Since asset freezing orders also impact non-parties, the uniform act sets out with specificity the obligations of non-parties. Under the provisions of the Act, nonparties served with an asset-freezing order shall promptly freeze the assets held on behalf of the party against which the order is issued. The nonparty is provided significant protection because a court, assessing the promptness of a nonparty's response to an asset-freezing order under this section, must take into account the manner, time of service and other factors that reasonably affect a nonparty's ability to comply.

Lastly, the uniform act also contains a mechanism for recognition and enforcement of asset freezing orders issued by other states and from courts outside the United States."

The Annual Meeting-approved text of the Act (which does not include comments and is still subject to revision by the ULC Style Committee) can be found at http://www.uniformlaws.org/shared/docs/Asset_Freezing_Orders/2012am_afo_approvedtext.pdf.

Should you have questions or comments, please contact ABA's L.H. Wilson at (202) 663-5030 or lwilson@aba.com.

State Legislation on PEB-Recommended Amendment to UCC Article 4A (Funds Transfers)

The lead article of the 5/23/12 issue of the *News* provides information on an important Permanent Editorial Board for the Uniform Commercial Code-recommended amendment to UCC Article 4A (Funds Transfers) -- see http://www.aba.com/Members/Legal/Documents/May2012.pdf.

Please be aware that the two sponsoring organizations of the Uniform Commercial Code -- the American Law Institute and the Uniform Law Commission -- have now approved the amendment, the wording of which is also contained in the 5/23/12 issue of the *News*.

A 5/4/12 memorandum (available on the American Law Institute website, see http://www.ali.org/doc/UCC%204A-108.pdf) outlines reasons for the amendment. The impetus for this amendment to UCC Article 4A can be traced to the Dodd-Frank Act. The opening paragraph of the 5/4/12 memorandum provides more details:

"Among the changes brought about by the Dodd-Frank Wall Street Reform and Consumer Protection Act

is an amendment to the federal Electronic Funds Transfer Act (EFTA) that will have an important impact on the scope of Article 4A of the Uniform Commercial Code. The impact could result in legal uncertainty for a class of transactions currently governed by Article 4A unless Section 4A-108 is amended. Thus the Permanent Editorial Board for the Uniform Commercial Code is recommending the attached amendment to Section 4A-108 and its comments." (ABA understands that revision of the comments is being considered.)

The 5/4/12 memorandum also highlights the role of the Consumer Financial Protection Bureau and the Bureau's final rule, **which is effective February 7, 2013**:

"The Consumer Financial Protection Bureau has acknowledged that a consequence of covering remittance transfers under EFTA could be legal uncertainty under the UCC for certain remittance transfer providers. The CFPB has declined to resolve that uncertainty, however, suggesting that 'the best mechanisms for resolving this uncertainty rests with the states, which can amend their respective versions of UCC Article 4A, with the purveyors of rules applicable to specific wire transfer systems, which can bind direct participants in the system, and with participants in wire transfers who can incorporate UCC Article 4A into their contracts.' As noted by the CFPB, 'before the final rule becomes effective, states have the opportunity to amend UCC Article 4A to the extent needed or appropriate to address its application to consumer international wire transfers [*i.e.,* remittance transfers].'"

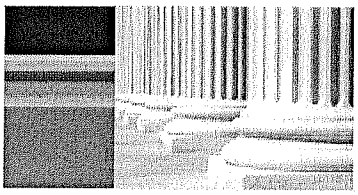
ABA urges your careful consideration of the above. The Consumer Financial Protection Bureau rule relating to this matter can be found at http://www.gpo.gov/fdsys/pkg/FR-2012-02-07/pdf/2012-1728.pdf (also see http://www.gpo.gov/fdsys/pkg/FR-2012-07-10/pdf/2012-16245.pdf). **Again, the CFPB rule is effective February 7, 2013**.

Please be aware that UCC Article 4A legislation is being considered in at least three states -- California (CA SB 708), New York (NY SB 7493), and Pennsylvania (PA HB 2485).

Feel free to contact ABA's L.H. Wilson at (202) 663-5030 or lwilson@aba.com should you have questions.

Baker, Cheryn

From: ABA UCC/Uniform Law News (L.H. Wilson) [uccnews@aba.com]
Sent: Thursday, August 30, 2012 3:41 PM
To: Baker, Cheryn
Subject: ABA UCC/Uniform Law News -- August 30, 2012



ABA UCC/ Uniform Law News

American Bankers Association

Vol. 9, No. 8 August 30, 2012

In this issue:

Update: PEB-Recommended Amendment to UCC Article 4A (Funds Transfers)

Earlier this year the Permanent Editorial Board for the Uniform Commercial Code (PEB) recommended an amendment to Section 4A-108 of the UCC. The purpose of the amendment is to clarify the relationship of the scope of the federal Electronic Fund Transfer Act (EFTA) to the scope of UCC Article 4A in the context of "remittance transfers."

According to the PEB, "[t]he amendment was necessitated by an amendment to EFTA included in the Dodd-Frank Wall Street Reform and Consumer Protection Act." Previous issues of *ABA UCC/Uniform Law News* provide background on the UCC Article 4A amendment (see http://www.aba.com/Members/Legal/Documents/July2012.pdf and http://www.aba.com/Members/Legal/Documents/May2012.pdf).

Please be aware that in an 8/14/12 memorandum the PEB released a draft of a revised Official Comment to UCC Section 4A-108 (see http://www.ali.org/doc/UCC4A-108.pdf). As explained in the PEB memorandum, comments should be received by 9/14/12 and sent to the person indicated. The PEB memorandum also contains the recommended amendment to UCC Section 4A-108.

New York recently enacted an amendment to its UCC Article 4A, apparently becoming the first state to adopt some form of the amendment (see NY SB 7493). Legislation on the subject is also being considered in California (CA SB 708) and Pennsylvania (PA HB 2485).

Again, the impetus for this UCC Article 4A amendment can be traced to the Dodd-Frank Act. The Consumer Financial Protection Bureau (CFPB) remittance rule also has an important impact on this matter. **That rule is effective February 7, 2013.** Please see the article below for an update on developments relating to the CFPB rule.

Update: CFPB Remittance Rule

Key provisions of the Dodd-Frank Act and the Consumer Financial Protection Bureau (CFPB) remittance transfer rule have prompted a recommended amendment to UCC Article 4A (Funds Transfers). For a story on this subject, please see the above article.

The CFPB remittance transfer rule continues to be controversial. As reported in the 8/8/12 *ABA Daily Newsbytes,* the Bureau recently revised its final remittance transfer rule to exempt institutions that do not

provide remittances in the "normal course of business" -- which the Bureau defines as those making 100 or fewer cross-border transactions a year. The revised rule also provides additional guidance for transfers scheduled in advance.

The new threshold is an increase over the Bureau's originally proposed threshold of 25 transfers per year, which ABA and others argued was far too low. ABA experts maintain that this final threshold is still too low and could result in many banks refusing to offer remittance transfer services because of the difficulty and expense of meeting the compliance requirements.

The rule -- **which was mandated by the Dodd-Frank Act** -- requires remittance-transfer providers to disclose information on fees, the exchange rate and the amount that will be received. This can be problematic for banks using open networks since it requires them to provide information they do not have and cannot readily obtain.

Because significant compliance problems remain, ABA continues to support Congressional efforts to have the CFPB extend the rule's effective date, **which is currently set for February 2013**. ABA and other trade groups have urged House members to sign on to a letter urging the Bureau to delay the rule until February 2015.

Please be aware that in an 8/16/12 letter to CFPB Director Richard Cordray, a bipartisan group of 32 U.S. House Members urged the Bureau to delay by two years -- until February 2015 -- the effective date of the remittance rule and to conduct a study of the regulation's impact to avoid "irreparable harm" to consumers.

The rule will impose arbitrary, unworkable requirements on international transfers of all sizes and purposes that will drastically curtail their availability for consumers, the lawmakers said in the letter.

"We are very concerned that whatever price-certainty and transparency that the final rule imparts will come at the cost of a significantly higher price and drastically reduced product availability," they said.

Links to the CFPB rule and related materials can be found at http://www.consumerfinance.gov/regulations/final-remittance-rule-amendment-regulation-e/.

ABA materials on the subject are available at http://www.aba.com/Issues/Regulatory/Pages/gr_Remittance2012.aspx.

Updated ABA Paper Highlights Significant UCC Article 9 (Secured Transactions) Issue

With the legislatures in several states having adjourned for 2012, it is a good time to consider the status of the recent Amendments to UCC Article 9 (Secured Transactions) and refocus on a key issue. These Amendments were approved by the Uniform Commercial Code's sponsoring organizations -- American Law Institute and Uniform Law Commission -- in 2010, but they do not become law in a particular state until enacted by that state's legislature.

ABA has updated a paper which highlights a significant issue relating to the name of an individual debtor and outlines the states which have adopted the Amendments in some form. The initial paragraphs of the paper follow:

The effective date is July 1, 2013, and the time now is August 2012. Many states have taken action while others are still considering or reconsidering their course. The issue: the 2010 Amendments to UCC Article 9 (Secured Transactions) and Alternative A and Alternative B.

At this point our legislative service reports that the Amendments have been enacted in some form in at least 29 states -- CO, CT, FL, HI, ID, IL, IN, IA, KS, KY, LA, MD, MI, MN, NE, NV, NH, NC, ND, OH, OR, RI, SD, TN, TX, VA, WA, WV, and WI. Most of these states generally use the Alternative A approach.

Colorado, Connecticut, New Hampshire, Oregon, and Washington generally use the Alternative B approach.

Clearly state legislatures are overwhelmingly adopting Alternative A – the "Only If Approach." As leading UCC authority Barkley Clark notes, "[t]he more states that enact Alternative A, the more 'uniform' the

Uniform Commercial Code will be."

We hope the paper and its links to resources will be useful to bankers, state bankers associations, policymakers, and others as the UCC Article 9 Amendments continue to be considered in the states.

The updated ABA paper can be found at http://www.aba.com/Members/Legal/Documents/WhatsInAName082012a.pdf. Should you need additional information, please feel free to contact ABA's L.H. Wilson at (202) 663-5030 or lwilson@aba.com.

ULC Releases Report on June Meeting of Drafting Committee on Mortgage Foreclosure

Please be aware that the Uniform Law Commission has released a report on the June meeting of its Drafting Committee on Residential Real Estate Mortgage Foreclosure Process and Protections. The report can be found at http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/2012jul06_mfa_report.pdf.

As the report indicates, many provisions on the broad ULC issues list remain under consideration, and further work will be necessary to determine how they should be addressed. The next meeting of the Drafting Committee is scheduled for November 2-3, 2012, in Washington, DC.

The lead article in the 6/20/12 issue of the *News* highlights points made by ABA at the June ULC Drafting Committee meeting (see http://www.aba.com/Members/Legal/Documents/June2012b.pdf).

To provide input to the ULC Drafting Committee, ABA formed a Working Group on Mortgage Foreclosure. Our Group is composed of bankers, financial institution attorneys, and state bankers association professionals who lobby legislatures on behalf of their members. The Group generally meets by conference call on an as-needed basis. If you would like to join the ABA Group or would like to receive more information, please contact ABA's L.H. Wilson at (202) 663-5030 or lwilson@aba.com.

MEMORANDUM

August 14, 2012

From: John A. Sebert, Chair, Permanent Editorial Board for the Uniform Commercial Code

Re: Proposed Official Comment to Revised Uniform Commercial Code Section 4A-108

Pursuant to a recommendation of the Permanent Editorial Board for the Uniform Commercial Code (PEB), the American Law Institute and the Uniform Law Commission have promulgated an amended text of Section 4A-108 of the Uniform Commercial Code. The amendment clarifies the relationship of the scope of the federal Electronic Funds Transfer Act (EFTA) to the scope of UCC Article 4A in the context of "remittance transfers" (*i.e.,* the electronic transfer of funds requested by a consumer to a person located in a foreign country that is initiated by a person or financial institution that provides remittance transfers for consumers in the normal course of its business). The amendment was necessitated by an amendment to EFTA included in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Inasmuch as all sections of the Uniform Commercial Code are accompanied by Official Comments, the PEB has prepared a draft of a revised Official Comment to Section 4A-108 to reflect the amendment to that section. The draft revised Official Comment explains the interaction between the coverage of EFTA and that of Article 4A and provides several examples illustrating that interaction. Revised UCC Section 4A-108 and the draft revised Official Comment are attached to this memorandum.

In light of the importance of the matters addressed in Revised UCC Section 4A-108, the PEB is distributing the draft revised Official Comment for public comment. Please send any comments you may have with respect to the draft revised Official Comment comments to Deanne Dissinger, Associate Deputy Director of the American Law Institute, at ddissinger@ali.org. When submitting comments please identify your representation of, or affiliation with, stakeholders with respect to this topic. Comments should be received by September 14, 2012.

Sec.4A-108. Relationship to Electronic Fund Transfer Act.

(a) Except as provided in subsection (b), this Article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. Sec. 1693 et seq.) as amended from time to time.

(b) This Article applies to a funds transfer that is a remittance transfer as defined in the Electronic Fund Transfer Act (15 U.S.C. Sec. 1693o-1) as amended from time to time, unless the remittance transfer is an electronic fund transfer as defined in the Electronic Fund Transfer Act (15 U.S.C. Sec. 1693a) as amended from time to time.

(c) In a funds transfer to which this Article applies, in the event of an inconsistency between an applicable provision of this Article and an applicable provision of the Electronic Fund Transfer Act, the provision of the Electronic Fund Transfer Act governs to the extent of the inconsistency.

Official Comment

1. The Electronic Fund Transfer Act (EFTA), implemented by Regulation E, 12 C.F.R. Part 1005, is a federal statute that covers aspects of electronic fund transfers involving consumers. EFTA also governs remittance transfers, defined in 15 U.S.C. Sec. 1693o-1, which involve transfers of funds through electronic means by consumers to recipients in another country through persons or financial institutions that provide such transfers in the normal course of their business. Not all "remittance transfers" as defined in EFTA, however, qualify as "electronic fund transfers" as defined under the EFTA, 15 U.S.C. Sec. 1693a(7). While Section 4A-108(a) broadly states that Article 4A does not apply to any funds transfer that is governed in any part by EFTA, subsection (b) provides an exception. The purpose of Section 4A-108(b) is to allow this Article to apply to a funds transfer as defined in Section 4A-104(a) (see Section 4A-102) that also is a remittance transfer as defined in EFTA, so long as that remittance transfer is not an electronic fund transfer as defined in EFTA. If the resulting application of this Article to an EFTA-defined "remittance transfer" that is not an EFTA-defined "electronic fund transfer" creates an inconsistency between an applicable provision of this Article and an applicable provision of EFTA, as a matter of federal supremacy, the provision of EFTA governs to the extent of the inconsistency. Section 4A-108(c). Of course, applicable choice of law principles or enforceable choice of law provisions in an applicable agreement will also affect whether Article 4A will apply to all or part of any funds transfer, including a remittance transfer. See Section 4A-507. The following examples assume that choice of law principles or an enforceable choice of law provision will lead a court to examine the applicability of Article 4A to the funds transfer.

2. The following examples illustrate the relationship between EFTA and this Article pursuant to Section 4A-108.

Example 1. A commercial customer of Bank A sends a payment order to Bank A, instructing Bank A to transfer funds from its account at Bank A to the account of a consumer at Bank B. The funds transfer is executed by a payment order from Bank A to an intermediary bank and is executed by the intermediary bank by means of a clearinghouse credit entry to the consumer's account at Bank B (the beneficiary's bank). The transfer into the consumer's account is an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7). Pursuant to Section 4A-108(a), Article 4A does not apply to any part of the funds transfer because EFTA governs

part of the funds transfer. The funds transfer is not a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1 because the originator is not a consumer customer. Thus Section 4A-108(b) does not apply.

A court might, however, apply appropriate principles from Article 4A by analogy in analyzing any part of the funds transfer that is not subject to the provisions of EFTA or other law, such as the obligation of the intermediary bank to execute the payment order of the originator's bank.

Example 2. A consumer originates a payment order that is a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1 by providing the remittance transfer provider (Bank A) with cash in the amount of the transfer plus any relevant fees. The funds transfer is routed through an intermediary bank for final credit to the designated recipient's account at Bank B. Bank A's payment order identifies the designated recipient by both name and account number in Bank B, but the name and number provided identify different persons. This remittance transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because it is not initiated by electronic means from a consumer's account, but does qualify as a funds transfer as defined in Section 4A-104. Both Article 4A and EFTA apply to the funds transfer. Sections 4A-102, 4A-108(a), (b). Article 4A's provision on mistakes in identifying the designated beneficiary, Section 4A-207, would apply as long as not inconsistent with the governing EFTA provisions. Section 4A-108(c).

Example 3. A consumer originates a payment order from the consumer's account at Bank A to the designated recipient's account at Bank B located outside the United States. Bank A uses the CHIPS system to execute that payment order. The funds transfer is a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1. This transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because of the exclusion for such types of transfers in 15 U.S.C. Sec. 1693a(7)(B), but qualifies as a funds transfer as defined in Section 4A-104. Under Sections 4A-102 and 4A-108(b), both Article 4A and EFTA apply to the funds transfer. The EFTA will prevail to the extent of any inconsistency between EFTA and Article 4A. Section 4A-108(c). For example, suppose the consumer subsequently exercised the right to cancel the remittance transfer under the right given under EFTA and obtain a refund. Bank A would be required to comply with the EFTA rule concerning cancellation even if Article 4A prevents Bank A from cancelling or reversing its payment order it sent to its receiving bank. Section 4A-211.

Example 4. A person fraudulently originates an unauthorized payment order from a consumer's account through use of an online banking interface. Assuming that the funds transfer as conducted is governed by EFTA and satisfies EFTA's definition of "electronic fund transfer" (15 U.S.C. § 1693a(7)), the funds transfer is not governed by Article 4A. Section 4A-108(a). Whether the funds transfer also qualifies as a remittance transfer under 15 U.S.C. Sec. 1693o-1 does not matter to the application of Article 4A.

Example 5. A person fraudulently originates an unauthorized payment order from a consumer's account at Bank A through forging written documents that are provided in person to an employee of Bank A. This funds transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because the fund transfer from the consumer's account is not initiated by electronic means, but the funds transfer qualifies as a funds transfer as defined in Section 4A-104. Article 4A will apply to this funds transfer regardless of whether the funds transfer also qualifies as a remittance transfer under 15 U.S.C. Sec. 1693o-1. If the funds transfer is not a remittance transfer, the provisions of Section 4A-108 are not implicated because the funds transfer does not fall under EFTA, and the general scope provision of Article 4A governs.

Section 4A-102. If the funds transfer is a remittance transfer, and thus governed by EFTA, Section 4A-108(b) provides that Article 4A also applies. The provisions of Article 4A will allocate the loss arising from the unauthorized payment order as long as those provisions are not inconsistent with the provisions of the EFTA applicable to remittance transfers. Section 4A-108(c).

3. Regulation J, 12 C.F.R. Part 210, of the Federal Reserve Board addresses the application of that regulation and EFTA to fund transfers made through Fedwire. Fedwire transfers are further described in Official Comments 1 and 2 to Section 4A-107. In addition, funds transfer system rules may be applicable pursuant to Section 4A-501.

Legislative Note

In some states deference to possibly changing federal law, as in "the Electronic Fund Transfer Act of 1978 as amended from time to time," may constitute an unlawful delegation of legislative power, or the issue may be unresolved. In such instances, the references to "as amended from time to time" may be deleted. In these cases, if the federal law is changed, the legislature will have to amend the state law as necessary or, if permitted by state law, power may be delegated to a state agency to amend the statute by appropriate means.

Section 9-311 Perfection of security interests in property subject to certificates of title. Legislative note at end of 2010 amendments says assumption in 2010 amendment change is that a security interest in a certificate of title is perfected when certificate of title is delivered to state, and that statute should be amended if a security interest in a certificate of title is perfected at different time. Under Miss. Code Ann. § 63-21-43, the certificate of title is perfected when the certificate is delivered to designated agent. Our current version of Section 75-9-311 recognizes this. So no change from uniform version of the 2010 amendment is needed.

Section 9-406 Assignments of accounts and payment intangibles. We have non-uniform language regarding assignments in Section 75-9-406(j) that needs to be preserved in the 2010 amendments.

Section 9-408 Assignments of general intangibles. We have non-uniform language regarding assignments in Section 75-9-408(e) that needs to be preserved in the 2010 amendments.

Section 502(c) Contents of fixture filings. A legislative note at the end of this section in the 2010 amendments states that if we should adopt the changes only if we adopt Alternative A regarding the name of individuals. This change would solve the problem of the debtor having different names in the real estate title and on his driver's license.

Section 503 Name of debtor. Legislative note 3 states that we need to substitute "driver's license or identification card" for "driver's license" regardless of whether we adopt Alternative A or Alternative B, since (according to DPS) a person cannot have both a driver's license and an ID card in MS.

Section 9-518 Claims concerning wrongfully filed records. There is an Alternative A and B for subsections (b) and (d) that deal with fixture filings. We already use Alternative B in both circumstances, and I don't see any reason to change this.

Section 9-521 Forms. These are revised forms of financing and amendment statements. As you probably already know, Mississippi historically has not published approved forms, but has stated that a filing office will not refuse to accept the forms set forth in the official texts. The forms posted on the Secretary of State's website vary slightly from the national forms, so we should check with Tom Riley about this.