



DELBERT HOSEMANN
Secretary of State

2012 Business Law Reform Study Groups
Minutes of the UCC Study Group
Meeting #2
September 14, 2012

This meeting of the Uniform Commercial Code (UCC) Study Group (hereinafter the “Study Group” or the “Committee”) was called to order on Friday, September 14, 2012 at 11:01 A.M. at the Office of the Secretary of State, 401 Mississippi Street, Jackson, Mississippi. A list of the participants is attached as Exhibit A.

Welcome

Drew Snyder, Assistant Secretary of State for Policy and Research, welcomed the group and thanked them for their continued participation. Mr. Snyder reviewed the goals of the meeting: (1) determining whether to recommend Alternative A, Alternative B, or neither; (2) reviewing several technical amendments; (3) deciding whether to adopt an amendment to Section 4A-108. Group members were introduced and Mr. Snyder began the discussion of the two alternatives in UCC Article 9.

Alternative A vs. Alternative B

Approximately 24 states have adopted Alternative A. Five have adopted Alternative B. From information gathered through the Bankers’ Association, several states who originally adopted Alternative B are now considering changing to Alternative A. Mr. Snyder asked the group which Alternative should be adopted in Mississippi.

Rod Clement stated that he felt Mississippi would be an outlier if it adopted Alternative B. Also, he was aware that Alabama initially looked at Alternative B but is now going back to consider Alternative A. Mr. Clement stated that Alternative A is becoming the standard.

Cliff Harrison stated the American Bankers’ Association and other UCC experts are strongly in favor of Alternative A. While Alternative A may not be perfect, and the driver’s licenses are not perfect, the level of certainty adds some protection or helps lenders more easily protect themselves on the search end. Mr. Clement stated that Alternative B could make it easier on the perfection side, but neither is perfect because, for example, a federal tax lien could be filed using something other than the driver’s license name. That problem continues under either alternative, but Mississippi will be an outlier if it goes with Alternative B.

John Tucker asked if DPS data is searchable in Mississippi, which would allow lenders to check if someone does have a driver's license. Members were not aware of such a search system in Mississippi. Mr. Harrison stated he felt few lenders would take that step to confirm the driver's license. Lenders currently confirm identity using a driver's license and no one checks behind that now. Some additional discussion took place on identifying individuals and confirming identity.

Les Alvis asked how many potential borrowers may lack a driver's licenses. Mr. Snyder estimated less than two percent (2%) lack a driver's license. Mr. Tucker confirmed that it is not a huge number of individuals without driver's licenses, but they have had some customers without a license. Members also discussed suspended and revoked licenses. Mr. Snyder's understanding is that a revoked driver's license is usually taken from the individual. A suspended license is more likely to remain in the possession of the cardholder. Mr. Snyder was not aware of any publicly-available tools to allow a lender to verify the status of a Mississippi driver's license.

The group then discussed how a lien is treated if a license that is valid when the filing is made later expires or is suspended. Could this result in a name being seriously misleading or is it valid regardless of the underlying license? Mr. Harrison stated that more likely the license name will change, e.g., when someone gets married. The lien remains valid, but after four months it will no longer cover after-acquired collateral.

Mr. Snyder polled the participating members on their preference between Alternatives A and B. The majority voted for Alternative A (7 to 1). Mr. Snyder offered to have the Policy and Research Division put together the first draft of the bill and then circulate it to the group for editing. Some discussion took place on name details such as double names, use of "Jr.," etc. Mr. Clement stated that there is some guidance in the comments which may be useful. Jerry Hafter stated he has seen lenders, in major personal loans, make multiple filings under any possible name. He asked if anyone at the table had seen this done. Mr. Harrison stated he had not seen that done in personal loans, but he does still see lenders file using trade names.

The discussion then turned to the transition period and how current filings would be treated. When doing a continuation the lender will have to check to see that the name on the filing matches the driver's license name.

Remittance Transfers

Mr. Clement next addressed a needed update on remittance transfers. Mississippi's current statute excludes transfers covered by the Electronic Transfers Act. In the Dodd-Frank Act, the law was changed and some transfers do now qualify under the UCC (4A-108). This is a technical change to indicate that some transfers will fall under the UCC. This should be uncontroversial and is supported by numerous groups. Mr. Snyder asked if members had any reservations about adopting this amendment. No opposition was voiced.

Comments by Rod Clement on Technical Issues

Mr. Clement directed the group's attention to a list of provisions identified in the meeting materials. In sections 9-406 and 9-408 Mississippi has non-uniform language that needs to stay in the UCC. In section 9-503 we need to include driver's licenses and identification cards since Mississippi uses both. Next, Alternative A should be adopted in section 9-502(c). Finally, regarding section 9-521, Mr. Clement stated we generally do not publish the filing form in the code. Some discussion occurred on the forms used by the Secretary of State's office. Tom Riley, Assistant Secretary of State of Business Services, stated that his division is working to have institutions use the Secretary of State online filing form, but several companies still use independent systems that print their own UCC form.

Additional discussion occurred on electronic and paper filings and the format of the form to be used. Mr. Riley stated that they are working to provide software to companies to make their system compatible with the Secretary of State's online form. It was suggested that rather than require online filing only, the state could possibly charge more for the paper filings due to the extra time needed to enter those filings.

Mr. Clement addressed two additional sections. Section 9-311 does not require a change and should be left as it currently is. In section 9-518 two alternatives are provided. Because Mississippi searches using grantor/grantee, the current language is sufficient.

Fraudulent UCC Filings

Mr. Riley discussed examples of fraudulent UCC remedies in other states. Under the current statute, if the form is correctly filled in it must be accepted. There are several common themes to these filings, such as the zip code being placed in parenthesis or the debtor and secured party being the same individual.

Mr. Riley stated that his office needs the ability to refuse the fraudulent filing. Currently the only remedy is for the victim to obtain a court order to have the filing removed. In addition to the ability to refuse the filing, adding a post-filing administrative remedy – be it a hearing or by affidavit – is needed. Some states have also looked to expedited court relief where there is no filing fee and a judge will enter an order on an expedited basis. Finally, criminal penalties are an option. There is a federal statute for filings made against a federal official. Utah classifies a fraudulent filing as a third degree felony and subsequent offenses are considered a second degree felony. Civil penalties have also been utilized in some states. A group member suggested that a monetary penalty may not deter a filer who lacks the money to pay the fine.

Secretary Hosemann thought that adopting pre-filing and post-filing administrative remedies may be more appropriate than a criminal penalty at this time. He also wanted to make sure if legislation gave the Secretary of State discretion to reject a fraudulent filing, it would not be unlimited discretion. Mr. Clement stated that some statutes give discretion, but also guidance such as allowing refusal where an individual is listed as a transmitting utility. Secretary Hosemann also stated that he felt this could be addressed by the court in an ex parte proceeding, so judicial relief is also an option.

Closing

Mr. Snyder stated the Policy and Research Division will circulate a draft Article 9 bill and a bill addressing bogus/fraudulent UCC filings. Remittance transfer amendments will also be circulated, although it still must be determined whether to include them in the Article 9 bill or separate legislation. Mr. Snyder thanked members for their excellent work. The meeting was adjourned at 12:13 p.m.

EXHIBIT A
UCC Study Group, Meeting # 2
September 14, 2012

Participants

Members:

1. Les Alvis (phone)
2. Cheryn Baker (phone)
3. Rod Clement
4. Gordon Fellows
5. Jerome Hafter
6. Cliff Harrison
7. Jeff Stancill
8. John Tucker

Secretary of State's Office:

1. Delbert Hosemann, Secretary of State
2. Justin Fitch, Senior Attorney, Division of Policy and Research
3. Preston Goff, Attorney, Division of Policy and Research
4. Tom Riley, Assistant Secretary of State of Business Services
5. Drew Snyder, Assistant Secretary of State of Policy and Research
6. Nathan Upchurch, Special Assistant