

ALERTS

Finance, Insolvency & Restructuring Alert - A Debtor By Any Other Name...Changes To Article 9 Of Indiana's Uniform Commercial Code, Effective July 1, 2013

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On July 1, 2013, important amendments to Indiana's UCC Article 9 will take effect. These amendments largely track recommended changes that the Uniform Law Commission and the American Law Institute promulgated in 2010. The changes address filing issues and other concerns that have arisen during several years of experience with the last overhauled version of Article 9, effectuated in 2001. What follows is a summary of the more significant changes, along with a brief synopsis of secured party considerations:

Individual Debtor Name on Indiana Financing Statements

Amended IC § 26-1-9.1-503(a) provides enhanced guidance on how to determine an individual debtor name that is to appear on a financing statement filed in Indiana. Instead of requiring the "individual name" of an individual debtor, after July 1, a financing statement will sufficiently provide the name of an individual debtor only if it provides the name that is shown on the debtor's most recently issued, unexpired Indiana driver's license or, if the debtor does not have an unexpired Indiana driver's license, the name that is shown on the debtor's most recently issued, unexpired Indiana identification card for non-drivers; but, if the debtor has neither an unexpired Indiana driver's license nor an Indiana identification card, only if the financing statement provides the individual name of the debtor or the surname and first personal name of the debtor. Note that this change (known as the "only-if" rule) represents "Alternative A" of the Uniform Law Commission's recommended amendments to Article 9; a smaller number of states have elected instead to adopt "Alternative B," which provides a less restricted approach to determining an individual debtor's name.

To illustrate the application of Alternative A, suppose an individual, whose principal residence is located in Indiana, obtains a loan on Sept. 1, 2013 from ABC Bank that is secured by certain described personal property. The borrower's name, as it appears on his unexpired Indiana driver's license, is Jim Spaulding, and this name is the debtor name that appears on the related financing statement filed with the Indiana Secretary of State on Sept. 1, 2013. So far, so good. However, in the year 2014 and before Jim repays the loan, his Indiana driver's license expires, he does not renew it, he does not obtain an Indiana identification card, and he continues to reside (principally) in Indiana. Now, as long as his name on the financing statement is also his individual name or his surname and first personal name, then his name on the financing statement is sufficient. Article 9 does not define an "individual name" or "surname and

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first personal name” nor does it provide specific guidance on how to determine an individual name or surname and first personal name. If Jim has a government-issued birth certificate that shows his name as James Michael Spaulding, a social security card that shows his name as James M. Spaulding, and a passport that shows his name as James Spaulding, Jr., then the perfection of ABC Bank’s security interest in this loan would be best protected by filing, before a continuation statement would otherwise be required to be filed (with the continuation statement to be filed up to six months prior to Sept. 1, 2018), a Financing Statement Amendment and a Financing Statement Amendment Additional Party form reflecting each of Jim’s three names contained in the three official documents. Retaining the name Jim Spaulding on the financing statement would likely be unnecessary because nicknames are generally never sufficient or effective. The only exception would be if the individual managed to get his or her nickname used on his or her driver’s license (or government-issued identification card) as was the case in this illustration.

Note, though, that the driver’s-license-or-identification-card requirement does not apply to individual debtor names contained in Indiana mortgages that are to serve as fixture filings or as financing statements covering as-extracted collateral or timber to be cut. For these recordings, either the debtor’s individual name or surname and first personal name is sufficient.

Change in Filing Jurisdiction and Perfection of Security Interests in After-acquired Collatera

Prior to July 1, 2013, Indiana’s Article 9 automatically recognized perfection of a security interest for up to four months after the debtor’s change in filing jurisdiction, but only with respect to collateral in which the security interest had attached and was perfected at the time the debtor changed filing jurisdictions. Amended Article 9 now also automatically recognizes the perfection of a security interest in collateral acquired up to four months after the change in filing jurisdiction. The situations in which this enhanced protection applies include: (1) the debtor, which is a registered organization, reincorporates under the laws of a different jurisdiction; (2) the debtor is an organization other than a registered organization and moves its chief executive office to a different jurisdiction; (3) the debtor is an individual and moves his or her principal place of residence to another jurisdiction; and (4) a new debtor, located in a different jurisdiction from the original debtor, becomes bound by the original debtor’s security agreement. This latter situation typically occurs when the original debtor merges into the new debtor; the new debtor otherwise becomes generally liable for the obligations of the original debtor and acquires or succeeds to all, or substantially all, of the assets of the original debtor; or when the new debtor contractually assumes the original debtor’s obligations under the original debtor’s security agreement. The importance of this enhanced protection increases where there is a strong likelihood that the debtor or, as applicable, the new debtor, will be acquiring substantial new collateral during the pertinent grace period described above. The secured party’s failure to file a new financing statement in the new filing jurisdiction within the applicable grace period automatically results in such secured party’s security interest in the after-acquired collateral not only being unperfected, but also being deemed to never have been perfected as against a purchaser of the collateral for value (which includes a competing secured party in the same collateral).

To illustrate a debtor's change in filing jurisdiction where the debtor also periodically acquires substantial collateral that is to be part of a secured party's perfected security interest, suppose an Indiana corporation, Jan's Confectionery, Inc., obtains a loan on Aug. 1, 2013 that is secured by all of the confectionery's inventory. The creditor (XYZ Bank) promptly files a financing statement with the Indiana Secretary of State that perfects XYZ Bank's security interest in all of the confectionery's inventory. Jan decides to reincorporate her business under the same name under Delaware law and does so on Feb. 1, 2014. In order for XYZ Bank's security interest to be perfected in the confectionery's inventory to which XYZ Bank's security interest attaches after May 31, 2014 (generally, attachment coincides with the confectionery's acquisition of the inventory), XYZ Bank will need to file a new financing statement in Delaware against the confectionery's inventory by May 31, 2014. If XYZ Bank does not do so, then XYZ Bank's security interest in any inventory acquired by the debtor after May 31, 2014 will be unperfected, and XYZ Bank's secured interest in that inventory will be subordinate to any other secured party's perfected security interest in such inventory.

Information Statement; Amended Forms

Under amended Indiana Article 9, not only a debtor, but also a secured party of record, is authorized to file an Information Statement (formerly, a "Correction Statement"). An Information Statement may be filed if a party believes a financing statement record is inaccurate or was filed by a person who was not entitled to do so. As with the prior Correction Statement, an Information Statement provides public notice that a filed record's efficacy is in dispute, but it does not change the legal effect of the disputed record. In addition to renaming Form UCC5 an "Information Statement," the Indiana Secretary of State's office has revised other forms in keeping with the new law; namely, Indiana's UCC Financing Statement and related forms (Forms UCC1, UCC1Ad, and UCC1AP) and Indiana's UCC Financing Statement Amendment and related forms (Forms UCC3, UCC3Ad, and UCC3AP). The Indiana Secretary of State's office has also issued a new Information Request form (Form UCC11). Note that financing statements no longer require information regarding an organizational debtor's (1) type of organization, (2) jurisdiction of organization, and (3) organizational identification number. The burden of providing this information did not appear to be offset by the marginal benefit of distinguishing between similarly-named debtors when there are already other checks in place.

Rejection of Fraudulent Financing Statements

In response to recent abuses of the UCC filing process, the Indiana legislature recently added non-uniform sections 901 and 902 to Indiana's Article 9, effective April 24, 2013. These new provisions allow the Indiana Secretary of State's office (but not a county recorder) to reject financing statements that the Secretary of State's office determines are not required or authorized to be filed with the Secretary of State, or that the office has reasonable cause to believe are materially false or fraudulent. Fraudulent financing statements include statements (1) in which the same name is listed as both the secured party and the debtor, (2) in which an individual debtor is designated as a transmitting utility, (3) that appear to be submitted for an improper purpose or are forged, or (4) that are submitted without (i) the consent or participation of the person named as the obligor, the debtor, and the owner of the collateral, or (ii) the consent of the

secured party. This new law also provides for judicial review if a person believes that a filed financing statement is fraudulent. If a financing statement is determined to be fraudulent, a court may declare it ineffective and order it terminated or purged by the office or agency that has possession of the financing statement. A related provision that also became effective on April 24, 2013 prohibits an Indiana county recorder (but not the Indiana Secretary of State's office) from recording an instrument contaminated by, or that appears to be contaminated by, blood or another bodily fluid.

Transition Period Consideration

2013 amendments causing change in the debtor name or filing jurisdiction

The new law does not require secured parties to take any immediate action. Financing statements in which the new law affects the name of the debtor but does not affect the filing jurisdiction remain effective until the normal lapse date if filed in Indiana, or until the earlier of the normal lapse date or June 30, 2018 if filed in another jurisdiction. However, if a financing statement is intended to perfect a security interest in after-acquired collateral (and there is no change in the filing jurisdiction), then an amendment to the original financing statement should be filed that corrects the debtor's name before the earlier of the normal lapse date for the financing statement or Nov. 1, 2013. Otherwise, any collateral acquired after the end of the four-month period (or earlier lapse date), but before the filing of the amendment, will be perfected, but with a perfection date that is the date the amendment was filed. Similarly, if there is a change in filing jurisdiction (which should apply rarely and only to a debtor that is (1) a business trust, (2) created by legislation, or (3) created by a government charter, and the debtor is now considered a "registered organization" based on the filing of a "public organic record" in a state different from where the original financing statement was filed), then an in-lieu financing statement should be filed in the new jurisdiction before the earlier of the normal lapse date for the financing statement or Nov. 1, 2013.

Additional considerations

As of this writing, almost all states have either introduced legislation or adopted some form of the recommended amendments. However, not all of the states that have passed legislation are following the Uniform Law Commission and American Law Institute's proposed effective date of July 1, 2013. Regardless, secured parties can protect themselves by requiring individual debtors to agree to provide updated information should their name change on their driver's license or identification card, if the card or license at issue expires and is not renewed, or if they change their state of residence. For debtors that are not registered organizations under Article 9 prior to July 1, 2013, but become registered organizations after July 1, a secured party may wish to file or search in any state in which the debtor is located under current Article 9 and where it would be deemed located once the July 1, 2013 amendments take effect. After July 1, 2013, there is a limited window of four months (or less if the normal lapse date of the original financing statement precedes the end of the four-month window) to file a new financing statement, if required, so filings should be made in the new jurisdiction against the applicable debtor as soon as possible.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work or Edward A. Keirn at (317) 231-7273 or edward.keirn@btlaw.com.

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