

# One Hundred Second Legislature - First Session - 2011

## Introducer's Statement of Intent

### LB90

---

**Chairperson: Senator Rich Pahls**

**Committee: Banking, Commerce and Insurance**

**Date of Hearing: February 01, 2011**

The following constitutes the reasons for this bill and the purposes which are sought to be accomplished thereby:

LB 90 would adopt revisions to Uniform Commercial Code (UCC) Article 9, recently approved and recommended for adoption by a Joint Review Committee of the Uniform Law Commissioners and the American Law Institute.

The key changes to UCC Article 9 contained within LB 90 are as follows:

#### **I. Section 2-Amendments to Definitions:**

1. **“Authenticate”**. The definition of “authenticate” under UCC 9-102(a)(7) is clarified to accommodate the use of electronic signatures and to achieve consistency with the provisions of the UCC, the Uniform Electronic Transactions Act and the Federal Electronic Signatures in Global and National Commerce law.
  
1. **“Certificate of Title”**. The definition of “certificate of title” under UCC 9-102(a)(10) is broadened to accommodate electronic lien notation systems and to make it clear that a security interest in a titled vehicle is perfected upon delivery of the application and fee.
  
1. **“Public Organic Record”**. The proposed amendments add a new definition of “public organic record” under §9-201(a)(68) to clarify which public record is relevant to determine the name of a debtor that is a “registered organization”, which is important for filing purposes.
  
1. **“Registered Organization”**. The term “registered organization” under UCC §9-102(a)(71) is amended to clarify that the term includes organizations (1) formed or organized, (2) by (a) the filing or issuance of a

public organic record, or (b) by legislative enactment, even if such organizations are created without the need for public a organic record. The term would also include “business trusts.”

## **II. Section 3-Control of Electronic Chattel Paper**

An amendment to UCC §9-105 adds a general rule for determining control of electronic chattel paper. This amendment should facilitate financing of electronic chattel paper – a growing type of secured transaction. (Electronic chattel paper is chattel paper evidenced by a record or records consisting of information stored in electronic medium).

## **III. Section 5-Location of Debtor**

UCC §9-307 provides the rules for determining a debtor’s location, and thus the place in which a financing statement naming that debtor must generally be filed to be effective. The amendments to §9-307 clarify that if the location of a registered organization is designated by the debtor in accordance with federal law, that the designation by the registered organization of its main office, home office or other comparable office constitutes the designation of its location.

## **IV. Section 8-Expanded Rights of the Secured Parties Based on Post-Filing Changes**

**A. Debtors Change of Location-**UCC §9-316 is amended to expand the rights of secured parties when a debtor (individual organization) moves to a new jurisdiction. UCC Article 9 currently provides that perfection by filing continues for a period of four months after the jurisdiction in which the debtor is located changes. However, the temporary period of perfection applies only with respect to collateral owned by the debtor at the time of the change in location. Even if the security interest attached is to after-acquired collateral, there is currently no perfection with respect to such new collateral unless and until the secured party perfects pursuant to the law of the new jurisdiction. The amendment revises this rule by giving the filer perfection for a period of four months in collateral acquired after moving to a new jurisdiction.

**B. Collateral Acquired by a New Debtor-**A similar change is made with respect to a new debtor that is a successor by merger. The new rule provides for temporary perfection in collateral owned by the successor before the merger or collateral acquired by the successor within four months after the merger.

## **V. Sections 11 and 12-Assignment of Receivables/Rights of Third Parties**

Under current Article 9, UCC §§406 and 408 differ on whether an assignee may enforce the assigned receivables against the account debtor or another obligor notwithstanding a contractual restriction on assignability. If the right to payment is evidenced by accounts or chattel paper, it is clear that the assignee can enforce the right despite any contractual restriction. However, if the right to payment is evidenced by an instrument, or is a payment intangible, the assignee can enforce payment despite contractual restrictions, if the assignment is made for security, but not if the assignment constitutes an outright sale. As a result, if a lender engages in strict foreclosure or conducts a foreclosure sale of the collateral, the foreclosure purchaser cannot enforce the receivables against the account debtors. LB 90 amends UCC §9-406 and §9-408 to provide that the

account-debtor protection rules don't apply to foreclosure sales under UCC §9-610 or strict foreclosure under UCC §9-620.

## VI. Section 14-Name of Debtor

The amendments to UCC §9-503 make significant changes to the manner in which the debtor's name is to be determined for purposes of perfecting a security interest:

1. **Registered Organizations**-The amendments clarify that the name of a registered organization is that which is reflected on the "public organic record" most recently filed with or issued by or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name.
  
1. **Decedents and Their Estates**-The name of the debtor, if the collateral is being administered by the personal representative of a decedent, is sufficient only if the financing statement provides, as the name of the debtor, the name of the decedent and, in a separate part of the financing statement, indicates that the collateral is being administered by a personal representative.
  
1. **Collateral Held in Trust**-The name of the debtor, if the collateral is held in a trust that is not a registered organization, is sufficient only if the financing statement provides as the name of the debtor, (1) if the organic record of the trust specifies a name for the trust the name specified; or (2) if the organic record of the trust does not specify a name for the trust, the name of the settlor or testator; and in a separate part of the financing statement, indicates that the collateral is held in a trust or if the name provided is the name of the settlor or testator, provides additional information sufficient to distinguish the trust from other trusts having one or more of the same settlors or the same testator and indicates that the collateral is held in a trust.
  
1. **Individual Debtors Name-"Only If" Approach**-Under current law, a lender perfecting a security interest against an individual debtor must use the "correct" name of the debtor. Failure to do so, renders the financing statement "seriously misleading" and thus ineffective, unless a search under the "correct" debtors name utilizing the primary search logic of the Secretary of State happens to uncover the financing statement.

Under the "only if" approach, if the debtor is an individual to whom the state has issued an unexpired driver's license, a financing statement sufficiently provides the name of the debtor *only if* it provides the name of the individual as shown on the license. If the debtor does not hold an unexpired driver's license issued by the state of his or her principal residence, the financing statement is sufficient if it provides (1) the "individual name" of the debtor (i.e., the standard under current law), or (2) the debtor's surname or the first personal name.

## VII. Section 19-Information Statements

Under current UCC Article 9, a debtor may file a correction statement to express the belief that a UCC filing statement is inaccurate or unauthorized. The filing of a correction statement, however, does not affect the

effectiveness of the filing of the financing statement or amendment. The correction statement must provide the basis for the debtor's belief that the public record should be corrected.

The revisions to UCC Article 9 add new provisions to UCC §9-518 that gives an aggrieved secured party of record the same right. These amendments address situations in which a third party may file a termination statement without being authorized to do so. Termination statements may be filed fraudulently by a debtor, or pursuant to error by a competing secured creditor who mistakenly believes that the other creditor has been paid off or transposes the filing number on the original financing statement.

A secured party is not required to file an information statement to dispute the record, but it may do so to provide public notice that it disputes the effectiveness of the termination statement. In this respect, the general rule is that "if the person filing the record was not entitled to do so, the filed record is ineffective, regardless of whether the secured party of record files an information statement." Likewise, if the person filing the record was entitled to do so, the filed record is effective, even if the secured party of record files an information statement.

#### **VIII. Section 20-Uniform Form of Written Financing Statement and Amendment**

UCC §9-521 creates a statutory form of a written financing statement and amendment that will be utilized by secured parties in perfecting security interests.

#### **IX. Section 22-Operative Date**

In an effort to have a uniform effective date in all enacting jurisdictions, a delayed operative date of July 1, 2013 is proposed under LB 90.

#### **X. Section 24-29-Transition Rules**

These amendments provide a five-year transition period following the operative date of LB 90 during which filings made prior to the operative date must be conformed to the amendments to the UCC in order to remain effective.

The amendments add a new Part 8 to UCC article 9 which governs transition; these rules generally parallel the transition rules that applied to the 1998 revisions to UCC Article 9 which are found in Part 7.

The major issues addressed by the "transition rules" arise from (1) changes in the location of filing for some organizations and (2) changes to UCC §9-503 concerning the name of the debtor that must be used in a financing statement to perfect a security interest.

Because certain debtor entities that are not currently classified as “registered organizations” will be within this category under the revised definition of “registered organization”, the place of filing could be changed from the state where the organization’s chief executive office is located (the current rule for nonregistered organizations), to the state where the entity was organized (the rule for registered organizations). Pursuant to the transition rules, the secured creditor under these circumstances would have five years from the operative date of the Act (July 1, 2013) to change the place of filing. With respect to the new rules regarding the name of individual debtors, a financing statement filed under the name of an individual prior to the operative date of the Act that is different from the name on his or her drivers license (under the “only-if” rule), would require a refiling to be made under the debtor’s name as it appears on his driver’s license within five years of July 1, 2013.

Mirroring current law, the transition rules contemplate the use of in-lieu financing statements to be filed when a place of filing changes because of the expanded definition of “registered organization.” The comments to this section make it clear that “minor errors not seriously misleading” do not invalidate in-lieu financing statements.

**Principal Introducer:** \_\_\_\_\_

**Senator Burke Harr**