

Amendments to UCC Code Being Studied. What You Can Do Now to Prevent Additional Work in the Future

Safe Harbors or Treacherous Waters, Debtor Name Issues, and the Changes Ahead

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The enactment of revised Article 9 of the Uniform Commercial Code resulted in filers everywhere breathing a sigh of relief. The days of conducting multiple searches and attempting to guess what debtor name variations could have been used to meet the “reasonably similar” standard was frustrating. Worse yet was the plethora of non-standard filing rules that existed, or numerous filing offices that required searching. The revisions to the commercial code was to reign in the storm of UCC filing rules that had come into existence. The revised code was intended to:

- Create clear rules to determine a debtor’s names
- Create a litmus test for debtor names
- Create a penalty for not getting the name right
- Create a uniform rule for where to file
- Reduce the cost of research required

It has been nine years since the revisions to the Uniform Commercial Code went into effect. Given litigation, and issues surrounding debtor names, changes are in the works to clarify some of the issues. To discuss the changes that are coming, we have to look at why changes are necessary, how these changes will affect you and finally what can you do now to prevent additional work at a later date. As all states moved to the revised code, questions and issues began to be asked such as:

- What is the definition of “public record”?
- How do you determine the name of an individual?
- How do you determine the name of a trust?
- What is the debtor name of a business trust? (Organizational or Individual)
- What do you do when a name exists for a trust?

Lawsuits began, in the chaos created; the Uniform Commercial Code was once again becoming non-uniform. Something needed to be done, but what should be done was not so clear. Some states began to look at amendments to answer these questions. This set the wheels of change into motion and put the idea of uniformity at risk.



In 2007 it was recommended to the National Conference of Commissioners on Uniform State Laws (NCCUSL) that the permanent editorial board (PEB) should consider amending the commercial code.

Texas, however, had already taken up the issue of individual debtor names and was in the process of taking action. Texas passed legislation that created a Safe Harbor for any filer that relied on a driver's license or state issued identification card to determine the name of an individual. Unfortunately the legislation remained silent on the issue of organizational debtors and trusts.

By 2008 Tennessee was also creating an amendment to §9-503 to define Individual debtor names. In 2008 an amendment went into effect whereby one of five pieces of identification would be acceptable to determine an individual's name for a financing statement. The five approved documents were:

1. Drivers license
2. State identification card
3. Passport
4. Birth certificate
5. Military identification card

The law created safe harbors for any filer relying on any one of these documents used to determine a debtor's name that was an individual. The Tennessee amendment resulted in a system where there was not one type of document that could be relied upon but rather five debtor names to possibly search, because no system was put into place as to what to do when conflicting names were provided on the documents. By this time the Texas amendment had been in effect for about a year and Virginia was getting close to enacting an amendment.

States often look to one another to solve legal issues and the problem of individual debtor names was no different. Desiring to not create a different system for determining a debtors name another amendment was passed by Tennessee to

reduce the documents acceptable for safe harbor to two, the drivers license or state issued identification card. Virginia enacted similar legislation that took effect on July 1, 2009, that also defined that only the drivers license or state issued identification card would provide the legal name of the debtor and create a safe harbor for filers.

By 2010 we had 3 states that have amended §9-503 to defining legal name for debtors who are individuals. In 47 other states (and the District of Columbia) the standard remains as the version originally enacted. Thereby leaving the issue unanswered. So what is the legal name of a debtor that is an individual?

The Permanent Editorial Board (PEB) of the Uniform Commercial Code actually began working on this issue in 2008 along with other housekeeping items in Revised Article 9. The revisions being recommended for debtor names cover much more than debtor name amendments that have been enacted thus far. In the changes

being proposed, debtor names will be thoroughly defined in an attempt to create little question as to what documentation should be relied upon. In addition unlike the state legislation passed in Texas, Tennessee and Virginia, the PEB version addresses the issue of debtor names when the debtor is an Organization or Trust.

Policies implemented now can not only better position your filings for future name rules, but will also prevent challenges under §9-503 and the effectiveness should a debtors name issue arise in court.

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The changes by debtor type are outlined below:

ORGANIZATIONAL NAMES – Since 2001 many filers have forgone official documents to determine a debtor name opting instead for a name from internet searches on a state’s website. Under the proposed recommendations for §9-503 The debtor name provisions remain mostly intact, however the drafters are inserting a definition into §9-102 to codify that “the name as it appears in the public record is defined as ‘a record filed with or issued by the state or the United States of America in the organic public record of the debtors jurisdiction of organization, or any amendment, restatement or additional records if the records are available for public inspection.’ As a result of this definition, the name provided should only be derived from the documents used to form, organize or otherwise amend the name of the organization. As a result those filers that obtain debtor names specifically from these documents will be in a better position under §9-506.

REGISTERED BUSINESS TRUSTS - If a business trust exists, the debtor name requirements would mimic those of the organizational names requirements. Only the organic document that exists in an official state registry should be relied upon to obtain the debtor’s name, including any amendments, restatements or any additional documents available, and indicates that the organization is a trust.

INDIVIDUAL NAMES – Only the name as it appears on the Drivers License or State Issued Identification Card should be used to determine a

debtor’s legal name. Issues continue to plague individual debtor names as the name of a person is much more fluid than those of organizations. Filers must be extremely cautious when dealing with individual debtors and consider:

Multiple Forms of Identification
- The proposed amendment has language that states if a person has both a drivers license and state issued identification card only the name that appears on the “last document issued” (most current) should be used. As a result you may consider implementing a policy where debtors are asked for both drivers licenses and identification cards.

Middle Names or Middle Initials - About 11 states do not include middle names or initials on a drivers’ license or state issued identification card. The proposed amendment is silent on the issue at this time. Since this is an area of concern, you may consider implementing policies whereby debtor names are documented on the filing in multiple ways so that they are indexed not only as to the name appearing on the identification or drivers license, but also include a middle initial or middle name.

e.g. SMITH, James
SMITH James A.
Smith James A (note no period)
SMITH James Alexander

The same would also be true if you were adding additional name information such as III, Jr., Sr., etc.

TRUSTS – In the proposed amendment, trusts are broken down in several areas to assist in obtaining the proper name to list on the trust

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document. You may consider developing policies to address each type of trust mentioned below:

DECEDENT’S ESTATE - The proposed amendment states the name of this type of trust shall be 1) The name of the Decedent and 2) The box marked indicating the Debtor is an Estate. Indexing rules for determining the debtor name when the name is an individual should be reviewed in the section of this article that addresses individual names.

NON REGISTERED OR A TRUSTEE ACTING IN RESPECT TO PROPERTY HELD IN TRUST FOR THE BENEFICIAL OWNER OF A TRUST THAT IS NOT A REGISTERED ORGANIZATION

– The name of the debtor should be documented as the name specified in the trust documents. If no name is specified in the trust documents, the name of the Settlor(s) and additional information to distinguish the debtor on the record from other trusts having

one or more of the same settlers must be used. In addition the filing must indicate it is a trust or trustee acting in respect to property held in trust. Using the same guidelines for Individual or Organization names should be utilized to document the debtor’s name.

Unfortunately the proposed amendment does not specify how, or where information to “distinguish the debtor on the record” should be documented on the form.

REGISTERED TRUST ACTING IN RESPECT TO PROPERTY HELD IN TRUST FOR THE BENEFICIAL OWNER OF A TRUST THAT IS A REGISTERED ORGANIZATION

– The debtor name must be provided as indicated on the records of the jurisdiction in which the trust is registered [This is the same as a registered Organization Name as stated in the organic documents and all changes thereto (amendments, restatements, or other documents) and indicates the filing is a trust acting with respect to property held in trust.]

ALL OTHER CASES – If the debtor has a name, only if it provides the name of the debtor, or if the debtor does not have a name, only if it provides the names of the partners, members, associates or other persons comprising the debtor. Regardless if the debtor is an individual or organization the name should be set forth under the guidelines provided above for organizational or individual names.

Finally, you should never rely on names located on legal online systems or state internet sites. Even now, before the proposed changes are put into effect doing so places your filing in peril for a couple of reasons. Unlike the Uniform Commercial Code there is no requirement that a debtor name must be keyed as listed on a corporate document. Many states have a history of abbreviating names due to system limitations. As a result the name on an online search will not be the name as listed on the organic document. When these changes go into effect only names that match the organic document will be effective unless they are found using the standard search logic of the states’. The reason for not wanting to rely on the states system is two-fold. First a debtors name should be entered *EXACTLY* as it appears on the document from which you obtained the name. There is a substantial amount of case law that shows spacing, periods, and abbreviations have rendered filings ineffective. Therefore if you’re entering a name exactly as listed in the organic document you do not need to be concerned about standard search logic as your name is guaranteed to be located.

Massachusetts is currently accepting public comment on a proposed change

to their search logic rules. If the Massachusetts change is implemented there will be no noise words and only the name searched would return results in the official search. Using the exact name of the debtor as listed in the organic document would prevent such a name challenge from ever occurring.

The good news is that Massachusetts is one of few states that require notice to filers to change search logic rules. Such a change has the most severe consequences for any filer that relied on the §9-506 “escape hatch” provision that the name would not be seriously misleading because it could be located in the state’s search logic. The reason that every filer should be concerned is that most other states can change search logic without providing any notice. Therefore relying on §9-506 is playing with fire! As a result, following recommendations such as the ones contained in this document would prevent unwelcome debtor name surprises and protect your filings from becoming ineffective under §9-506.

Using only drivers licenses or state issued identification cards as the debtor’s legal name could protect you from cases like the In Re: *Kinderknecht* decision (*Clarke v. Deere and Co.*, 308 B.R. 71(10th Cir. B.A.P. 2004). Although the court did not specifically name a document to be relied upon to determine an individual’s name they did find that “the Legal Name not a nickname was required.” Obviously the trend the states have adopted thus far, and the PEB is looking to adopt is the use of drivers licenses to determine

the name of the debtor when they are an individual.

Although three states have created “Safe Harbors” for individual debtor names, the waters still appear to be treacherous with such issues as middle names, initials and suffixes not being addressed. Always getting the name from the correct location and filing with the exact legal name greatly increases the effectiveness of your filing, while making it more difficult for a challenge under §9-506.

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