

**ABA Section on Business Law**  
**Joint Task Force on Filing Office Operations & Search Logic**

**States Ring in the New Year by Amending UCC Article 9**

It's early in the year, yet some states have already started significant non-uniform Article 9 legislative initiatives. Some of the new laws and pending legislation could have an impact on how legal professionals search and file UCC records.

Michigan recently enacted significant amendments to Article 9 that expand its filing office's authority to reject UCC records and grant the office authority to terminate some active records. The new amendments to Article 9 were contained in 2008 Mich. Pub. Acts 381 and 383. These laws will take effect on March 30, 2009.

When the new Michigan laws take effect the secretary of state will have authority to terminate financing statements under certain conditions. A record terminated under the secretary of state's new authority becomes void and ineffective. In addition, the new laws grant the secretary of state broad discretion to reject a UCC record upon determination that the record is not required or authorized to be filed or is being filed for a purpose outside the scope of Article 9 or if there is reasonable cause to believe the record is materially false or fraudulent.

The Michigan Article 9 amendments also require the filing office to reject any financing statement that indicates an individual debtor is a transmitting utility. Active financing statements that indicate an individual debtor is a transmitting utility cannot be continued and will lapse five years from the file date. That provision of the law may cause some transmitting utility financing statements filed before March 30, 2004 to lapse retroactively.

Another feature of the Michigan Article 9 legislation is that it imposes a new investigative duty on its secretary of state. If a correction statement alleges the record to which it relates was wrongfully filed, the secretary of state must determine whether the contested record was, in fact, filed without authorization. To make its determination, the filing office may require the parties involved to provide additional relevant information, including an original copy of the security agreement.

All of these changes to Michigan's Article 9 were designed to address just one problem, bogus lien filing. Most legal professionals may not be aware of just how widespread the bogus UCC filing problem really has become. State-level filing offices receive thousands of bogus UCC records every year.

Bogus UCC filers generally have one of two objectives, harassment or fraud. Harassment UCC filings typically name a public official as the debtor in retaliation for some perceived injustice. Bogus UCC filings are sometimes also used in an attempt to mislead third parties as part of various fraudulent schemes.

Regardless of purpose, nearly all bogus UCC financing statements share one common characteristic. They usually indicate that the debtor is a transmitting utility. The filer makes this indication to ensure that the financing statement remains on file indefinitely. Under UCC Section 9-515(f), transmitting utility filings do not lapse.

The uniform text of Article 9 does not give filing offices the authority to reject even obviously bogus UCC records if they otherwise satisfy the filing requirements. Michigan is neither the first nor the only state to enact special laws to deal with bogus filings. In fact, the new Michigan laws include elements drawn from bogus filing measures enacted in North Carolina and Illinois. However, the Michigan legislation grants the filing office much broader power than provisions in other states.

The Michigan UCC filing office has stated its intention to exercise restraint and apply the new discretionary powers only when a UCC record is clearly bogus on its face. Nevertheless, some of the new provisions will affect legitimate records and there are still questions about how the filing office will apply the new laws to electronically filed UCC records. The filing office intends to develop and implement procedures to address any unresolved issues before the law takes effect on March 30, 2009.

There also was legislation recently proposed in Michigan that, if enacted, would place a substantial new burden on both UCC filers and the filing office. Michigan House Bill 6647, introduced on November 12, 2008, would have reestablished the debtor signature requirement. The bill made no progress in 2008 and the future of this initiative is uncertain.

Other states have Article 9 legislation pending as well. South Dakota introduced a bill on January 5, 2009 that could create significant problems for filers, searchers and the filing office. House Bill 1036 would require the filing office to reject financing statements that do not provide the “complete” name of an individual or organization debtor. It is unclear how the filing office could determine the completeness of a debtor name, especially for individuals.

Another concerning issue with HB 1036 is that it requires the filing office to apply a different standard to debtor names provided on amendments. The filing office would be required to reject an amendment that does not provide the “legal name” of an individual debtor. Again, how the filing office will determine the legal name of an individual debtor or certain types of organizations is unknown. Even the courts continue to struggle with the individual debtor name issue.

Yet another significant feature of the South Dakota bill is that the filing office must refuse to accept an amendment if the initial financing statement had been terminated. Currently, nearly all filing offices will accept subsequent related records after the filing of a termination statement. There is good reason for this practice. There are frequently circumstances where an allegedly “terminated” financing statement remains perfectly effective. For example, a termination statement filed without authorization is ineffective.

Yet, the financing statement to which it relates will appear as terminated in the filing office records.

Purportedly terminated financing statements may need to be amended, assigned or continued. Under HB 1036, the filing office must reject any subsequent amendments after a termination statement has been filed, including continuations. The result of this legislation could be a large number of hidden liens.

Michigan and South Dakota are not the only states with non-uniform Article 9 initiatives in 2009. Maryland, Virginia, North Dakota and Nebraska have also introduced legislation to amend Article 9 this year. More states are likely to follow. The Joint Task Force on Filing Office Operations & Search Logic will continue to monitor new legislation that may affect the UCC search and filing process and provide updates as warranted.

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