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CONTRAST IN STYLES: Retired Deputy Bank Commissioner Don Clark, left, and Assistant Deputy Bank Commissioner Richard Buzbee write about how examination procedures have changed over time. **Articles on pages 8 and 9.**

Community banks focus of gathering

Goals include improved policy

EDITOR'S NOTE: The author, Michael L. Stevens, is Senior Executive Vice President of the Conference of State Bank Supervisors, based in Washington, D.C.

The inaugural Community Banking in the 21st Century research conference will kick off this week in St. Louis.

Hot Topic

Co-hosted by the Conference of State Bank Supervisors (CSBS) and the Federal Reserve, this conference is critical to understanding the challenges and opportunities facing community banks and to encouraging more research on the role and value of community banking to the economy.

This will put us on a path toward a better policy outcome.

To prepare for the conference, 28 state regulators held a series of 52 "town hall"

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Provisions added to perfect interest in personal property

Fundamental to the concept of taking a security interest is the ability of a secured party to remain perfected in its collateral. The Arkansas General Assembly recently passed Act 138 of 2013 ("Act"), which became effective on July 1, 2013, revising certain portions of Article 9 of the Uniform Commercial Code, the body of law governing the priority and perfection of security interests in personal property.

This article will provide an overview of the more significant changes

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Predecessors laid strong foundation

The Commissioner's View

Throughout this year, as we celebrate the 100-year anniversary of our State Bank Department, I have recalled various events during my career here and the former Bank Commissioners with and for whom I was fortunate to work.

Since I was hired in 1980, I have had the opportunity to work for five Commissioners, all with distinctive personalities and different methods of administration, and each one a pleasure to work with.

Beverly J. Lambert Jr., a former banker from West Memphis and Crossett, hired me as State Bank Department Attorney. Hiring a 26-year-old female attorney was quite a step in those days. Two months prior, Mr. Harry Meek, at

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brought about by the Act as well as provide a general set of principles to follow in order to remain perfected in security interests arising both prior to and subsequent to the effective date of the Act.

I. Debtor's Correct Name

The first and perhaps most important amendment brought about by the Act involves the name of the debtor. In order to properly perfect a security interest in a debtor's property, the correct name of the debtor must be used. If an incorrect name is used, although the security interest may have attached pursuant to an executed security agreement, the financing statement will not be effective to perfect the security interest as against a third-party creditor who has properly perfected or a bankruptcy trustee.

The correct name of the debtor differs depending on the type of debtor at issue.

For a registered organization (i.e., limited liability company, limited partnership, corporation, etc.), the correct name is the name that appears in the "public organic record" maintained by the state where the debtor is organized.

Examples of public organic records include, but are not limited to, articles of incorporation, articles of organization, and certificates of limited partnership.

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It is important to note that the public organic record must be the formation or creation document of the registered organization. Thus, although a certificate of good standing may be beneficial to obtain, it is not considered a public organic record and would not constitute the correct name of the debtor unless such name was also found in the organizational documents. For example, if the debtor is an Arkansas corporation with the name XYZ, Inc. in its articles of incorporation, then XYZ, Inc. should be used verbatim on the financing statement to meet the correct name requirement under the Act.

For individuals, the correct name of the debtor is the name of the debtor as it appears on the debtor's most recent unexpired driver's license issued by the state of the debtor's residence. In the event the debtor does not have an unexpired driver's license, an unexpired identification card issued by the state is also valid. For example, if the unexpired driver's license or identification card of the debtor read Mike Allen Smith, then Mike A. Smith or Mike Smith would not suffice as the correct name of the debtor.

If the debtor possesses neither an unexpired driver's license nor an unexpired identification card, the correct name shall be the debtor's individual name or the surname and first personal name of the debtor.

If collateral is held in trust, the correct name of the debtor is the name of the trust as specified in the trust instrument. If the trust instrument does not specify a name of the trust, the name of the settlor as it appears in the trust instrument should be used as the correct name of the debtor, and additional information should be provided to distinguish such trust from other trusts created by the same settlor (i.e., Declaration of Trust dated 8/13/98).

In addition to the name of the debtor, the financing statement for a debtor holding property in trust must also indicate that the collateral is being held in trust.

If collateral is held by an estate and being administered by a personal representative, the correct name of the debtor is the name of the decedent as it appears on the court order appointing the personal representative, and the financing statement should also indicate the collateral is being administered by a personal representative.

If the debtor is an organization that is not a registered organization (e.g., a general partnership or unincorporated association), the correct name should be the organizational name if such name actually exists. If the organization lacks a name, the names of the partners, members, associates, or other persons comprising the debtor should be used in accordance with the applicable rules provided above. Good policy would be to obtain a copy of any partnership agreement or other document creating or governing the debtor and have it certified by a representative of the debtor in order to accurately obtain the correct name of the debtor.

II. Changes in Debtor's Correct Name

If the debtor's name changes (i.e., a change in the public organic record or an issuance of a new driver's license with a different name), a financing statement effective prior to the change remains effective as to collateral owned

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by the debtor at the time of the change as well as to collateral acquired four months thereafter, but not as to collateral acquired by the debtor more than four months after the change.

In order to remain perfected, a secured party should amend the financing statement in accordance with the Act prior to the expiration of the four-month period.

For registered organizations, it would be prudent to obtain a copy of the debtor's organizational documents prior to closing any loan so as to properly ascertain the correct name of the debtor. For individuals, good policy would be to require an individual to present a copy of an unexpired driver's license or identification card along with any loan application or renewal, and the debtor should certify to the secured party that is it the most recently issued driver's license of the debtor.

III. Transition Rules

Notwithstanding anything to the contrary in this article, the Act provides for transition provisions which govern security interests perfected prior to the effective date of the Act.

A financing statement that was effective before the Act is not rendered ineffective by the Act and continues to be effective until the end of the standard five-year effective period for financing statements. Thus, even though the correct name of the debtor may not technically comply with the Act, such financing statement shall nevertheless be valid for perfection until the expiration of the initial five-year period so long as the financing statement was properly perfected under the previous Article 9 rules.

For example, a security interest in all existing and after-acquired property of the debtor that was properly perfected prior to the effective date of the Act shall remain effective until the expiration of the five-year period without any further action required by the secured party. In order to properly continue perfection in a security interest that was perfected prior to the Act, the initial financing statement must be amended to comply with the Act prior to filing a continuation statement.

Because the transition rules allow for previously perfected security interests to remain perfected beyond the effective date of the Act, it would be beneficial to conduct UCC searches with multiple variations of a debtor's name as required by both the previous Article 9 rules as well as the Act in order to accurately locate any existing financing statements which may have been filed on the debtor under the previous Article 9 rules and the Act.

If a secured party desires to add or delete collateral, continue or terminate the effectiveness of a financing statement, or otherwise amend any other information in a financing statement, this can be done only in accordance with the Act. If a security interest perfected other than by the filing of a financing statement (i.e., possession or control) fails to satisfy the perfection requirement under the Act, the secured party has one year in which to meet the requirements of the Act.

IV. Changes in Debtor's Location

In addition to the correct name of a debtor, other amendments made by the Act concern continuing perfection issues arising on after-acquired property when a debtor moves to a new jurisdiction.

The previous Article 9 rules provided that perfection by filing a financing statement continues for four months after the jurisdiction in which the debtor is located changes. However, this temporary period of perfection applied only with respect to collateral owned by the debtor at the time of the change and did not extend to property acquired during the four-month period. The amendments change this by giving the secured party perfection for four months in collateral acquired post-move.

If a secured party wishes to remain perfected beyond the four month period, the secured party must comply with the perfection rules of the new jurisdiction prior to the expiration of such four-month period. The Act also provides for a similar change with respect to a new debtor that is a successor by merger if the name of the successor is different from the name of the original debtor, or if the successor is located in a different jurisdiction.

The new rule under the Act nevertheless 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. However, the secured party must amend the financing statement to change the name of the

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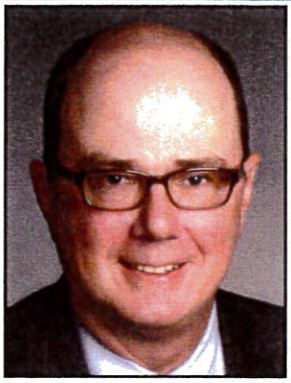

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debtor or file in the new jurisdiction, as applicable, within the four-month period if the secured party wishes to remain perfected in the collateral after the expiration of such four-month period.

V. Miscellaneous Amendments

Perfecting a security interest in electronic chattel paper is another issue addressed by the Act. Electronic chattel paper is chattel paper stored in an electronic medium.

Prior to the Act, a secured party had to meet a cumbersome six-factor test in order to have control over electronic chattel paper. The Act amends this rule by allowing the secured party to have control over electronic chattel paper if the secured party has a system employed for evidencing the transfer of interests in the chattel paper which reliably establishes the secured party as the person to which the chattel paper was assigned.

For example, assume a borrower electronically signs a financing and security agreement to purchase a vehicle and a digital copy of the executed agreement is sent to an "electronic vault" on a secure server. The act of sending the digital agreement to the electronic vault would constitute the requisite control requirement needed to perfect the security interest in the electronic chattel paper under Article 9.

This amendment takes into account advances in emerging systems and innovations in technology which shall give secured parties more discretion to develop reliable systems for keeping track of and controlling electronic chattel paper. The six-factor test mentioned above will now become the statutory "safe harbor" to meet the definition of control for electronic chattel paper.

The Act also makes changes to the rule determining the location of federally organized debtors (e.g., federally chartered banks). Typically, while a debtor is located in a particular jurisdiction, the local law of that jurisdiction governs perfection and priority of a given security interest. For purposes of determining the applicable jurisdiction rules governing perfection and priority of a security interest, federally organized debtors may now be considered located in a jurisdiction which such debtor designates as its main office, home office, or other comparable office.

This change does not affect the location rules for individuals or entity debtors that are not federally organized. Thus, an individual will continue to be located at the individual's principal residence and a registered organization organized under the law of a particular state will be deemed located in such state.

Under the previous Article 9 rules, a financing statement could be rejected if it failed to state the debtor's type of organization, jurisdiction of organization, and organizational identification number. The intent behind the law was to assist searchers in eliminating filings that appear to relate to the intended debtor but instead relate to other similarly named unintended debtors.

Because Arkansas already has laws precluding the use of duplicative or deceptively similar names for organizations, the General Assembly was of the opinion that having these requirements in a financing statement would be redundant and unnecessary. As such, the foregoing requirements are no longer required to be placed in a financing statement of an organizational debtor.

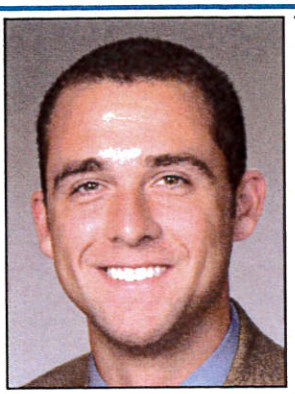
This change should eliminate the possibility of a financing statement being rejected (i.e., no perfection) for failure to accurately record the debtor's type of organization, jurisdiction of organization, or organizational identification number.

VI. Conclusion

In conclusion, the recent changes made to Article 9 are rather significant. Having the correct name of the debtor on a financing statement should be of the utmost importance to a secured party. As such, it is crucial that secured parties be proactive in taking inventory of their current financing statements, and any subsequent amendments made thereto should be in accordance with the Act in order to continue perfection.

Although the effective date of the Act itself will not render a previously perfected security interest ineffective, amending these pre-effective date financing statements to conform with the Act would not only be a great proactive measure to undertake, but will also be required prior to filing any continuation statement if the secured party wishes to remain perfected.

Furthermore, any new financing statement filed after the effective date of the Act must be in compliance with Act to ensure perfection in the debtor's collateral.



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