

Filings Against Trusts and Trustees under the Proposed 2010 Revisions to Current Article 9 — Thirteen Variations

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AUTHOR'S NOTE

Uniform Commercial Code Article 9 (“Current Article 9”), as promulgated in 1998 by the Uniform Law Commissioners (the “ULC”) and The American Law Institute (the “ALI”), has been enacted in all fifty states, the District of Columbia, and the U.S. Virgin Islands, and generally took effect on July 1, 2001. From 2008 to 2010, a committee convened by the ULC and the ALI considered certain issues, ultimately recommending amendments to the official text of, and official comments to, Current Article 9 (the “2010 Amendments”). While most are unremarkable and simply clarify existing

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text, some are noteworthy, including amendments relating to the naming of trusts and trustees as debtors. Writing in these pages in 2002, I attempted to provide clarity with respect to the seemingly ministerial tasks of filling out and filing financing statements in transactions in which trusts or trustees are debtors.¹ The 2010 Amendments include changes intended to simplify the filling out, if not the filing, of such financing statements. This article considers the 2010 Amendments, and so updates and in time may replace the original article on which it is based. Readers are cautioned that although the 2010 Amendments contemplate an effective date of July 1, 2013, they will only become law in any jurisdiction when and as enacted by its legislature or comparable body. Unless otherwise noted, all citations in this article are to Current Article 9.

WHERE TO FILE

A key issue in determining where to file against trusts and trustees is who is the “debtor.” Except with respect to filings relating to fixtures (§ 9-301(3)(A)), timber to be cut (§ 9-301(3)(B)), and as-extracted collateral (§ 9-301(4)),² Current Article 9 provides for filing in the debtor’s location, without regard to the location of the collateral to which the filing relates (§ 9-301(1)). Section 9-307 sets forth the rules for determining a debtor’s location. A threshold question in filings against trusts and trustees is who, in fact, is the debtor. Section 9-102(a)(28) defines the term debtor as, among other things, “a person having an interest . . . in the collateral . . .” Because the answer to this question is beyond the scope of both Current Article 9 and the Uniform Commercial Code generally, the inquiry begins with the analysis, under law other than the Uniform Commercial Code, of who holds an “interest” in the trust estate. There would appear to be several possible answers, depending on the relevant law (i.e., the law governing the creation and existence of the trust, and in particular the law governing those aspects of the trust relevant to who holds an interest in the trust estate).

¹See *Filings Against Trusts and Trustees Under Revised Article 9 — Thirteen Variations*, 35 UCC L.J. 91 (2002).

²Security interests in goods covered by a certificate of title (§ 9-303), deposit accounts (§ 9-304), and letter-of-credit rights (§ 9-306) are perfected by methods other than filing.

Trust Is Debtor and Is a Registered Organization

Certain trusts, such as Delaware statutory trusts,³ are separate legal entities distinct from their settlors and trustees, and under applicable law generally hold legal title to the trust estate (see Delaware Statutory Trust Act, 12 Del. C. §§ 3801(a), 3805(f)). In such cases, the debtor is the trust, the trust may be (and in the case of a Delaware statutory trust, is) a registered organization, and the filing should be made in the trust's location as determined under the applicable subsection of § 9-307 (subsection (e) in the case of a Delaware statutory trust). The location of the settlor, trustee, or any other party is irrelevant.

Trustee Is Debtor

Certain trusts, such as Delaware common law trusts, do not feature the same separate legal entity status as Delaware statutory trusts and, under applicable law, the trustee generally holds legal title to the trust estate, in trust for the benefit of the designated beneficiary. In such cases, the trustee is the debtor, for the reason that it has the relevant and requisite interest in the trust estate (see § 9-102(a)(28)), and the filing should be made in the trustee's location as determined under the applicable subsection of § 9-307.⁴ A trustee that is a registered organization organized under state law is located in the state under whose laws it is organized (§ 9-307(e)). For example, Wilmington Trust Company, a Delaware banking corporation, is located in Delaware pursuant to § 9-307(e). A trustee that is a registered organization organized under federal law is located in the jurisdiction designated by the federal law under which it is formed (§ 9-307(f)(1)), the jurisdiction designated by the trustee in accordance with the federal law under which it is formed (§ 9-307(f)(2)), or in the District of Columbia, if neither of the foregoing applies (§ 9-307(f)(3)). For example, U.S. Bank Trust National Association, a national banking association, is located in Delaware by reason of its designa-

³The entity formerly known as a "Delaware business trust" is now known as a "Delaware statutory trust" existing under the Delaware Statutory Trust Act, 12 Del. C. §§ 3801 et seq., which was formerly known as the "Delaware Business Trust Act" (see 73 Del. Laws 329 (2002)).

⁴Note that a trustee can have but one location under Current Article 9. That is, a trustee is located in one jurisdiction notwithstanding that it may administer various trusts from a number of offices in multiple jurisdictions.

tion of Wilmington, Delaware as its main office in its Articles of Association filed with the Office of the Comptroller of the Currency in accordance with 12 U.S.C. § 21, pursuant to § 9-307(f)(2).⁵ A trustee that is an organization but not a registered organization organized under either state or federal law is located in its place of business if it has only one place of business (§ 9-307(b)(2)), or its chief executive office if it has more than one place of business (§ 9-307(b)(3)). A trustee that is an individual is located at the individual's principal residence (§ 9-307(b)(1)).

Trust Is Debtor and Is Not a Registered Organization

Certain trusts, while not registered organizations, may nevertheless hold legal title to the trust estate. In such cases, the debtor is the trust, and the filing should be made in the trust's location as determined under § 9-307(b). If the trust has only one place of business, the trust is located at its place of business (§ 9-307(b)(2)). If the trust has more than one place of business, the trust is located at its chief executive office (§ 9-307(b)(3)).

⁵Current Article 9 provides that such entities are "located" in the states they designate, begging the question whether designation of a main office, home office, or other comparable office is tantamount to designation of a location within the contemplation of § 9-307(f)(2). When it initially enacted Current Article 9, Delaware included a non-uniform clarifying sentence in § 9-307(f), which provides, "For purposes of paragraph (2) [of § 9-307(f)] above, if a registered organization designates a main office, a home office, or other comparable office in accordance with the law of the United States, such registered organization is located in the state that such main office, home office, or other comparable office is located." Modifications to the Official Comments to Current Article 9 approved in December 2001 by the Executive Committee of the National Conference of Commissioners on Uniform Laws, Permanent Editorial Board for the Uniform Commercial Code, likewise attempted to remove any doubt as to whether designation of a main office, home office, or other comparable office constitutes designation of state of location for purposes of § 9-307(f)(2). The 2010 Amendments include new text at the end of Section 9-307(f)(2) to like effect (such an entity is located in the state it designates "including by designating its main office, home office, or other comparable office"). The Reporter's Note indicates this new statutory text is intended to "remove any doubt" and should not be understood as a change in existing law.

**HOW TO PROVIDE DEBTOR-RELATED
INFORMATION ON THE UCC1 FINANCING
STATEMENT**

Section 9-503 sets forth the rules for providing the debtor's name on the financing statement. These rules would be revised, and their interrelation clarified, by the 2010 Amendments. Section 9-503(a)(1) continues to provide the rule applicable where the debtor is a registered organization, and requires that the debtor's own name be used. The 2010 Amendments clarify that Section 503(a)(1) is controlling where collateral is held in a trust that is a registered organization (regardless of whether the trust or its trustee is the "debtor"). In a move toward simplification, the 2010 Amendments provide rules applicable where collateral is held in a trust that is not a registered organization. Unlike their analogs in Current Article 9, these rules no longer turn on the question of whether the debtor is the trust or a trustee.⁶ If the organic record of the trust specifies the name of the trust, § 9-503(a)(3)(A)(i) requires that such name be used. If no name is so specified, § 9-503(a)(3)(A)(ii) requires that the settlor's or testator's name be used. The 2010 Amendments include a new Section 9-503(a)(3)(B) clarifying the requirement for additional and distinguishing information, and emphasizing that such information should not appear in the portion of the financing statement indicated for designation of the debtor's name. In the case of a named trust to which Section 9-503(a)(3)(A)(i) is applicable, the financing statement must indicate that the collateral is held in a trust. In the case of an unnamed trust to which Section 9-503(a)(3)(A)(ii) is applicable, the financing statement must provide additional information sufficient to distinguish the trust from other trusts having one or more of the same settlors or the same testator and, unless the additional information so indicates, must indicate that the collateral is held in a trust. Thus, under the 2010 Amendments the name of the debtor is determined and provided without regard to the question of whether, under applicable non-UCC (e.g., trust) law, the trust or the trustee has rights in the collateral and thus meets the definition of "debtor" in Section 9-102(a)(28). Consistent with their new focus on whether the collateral is

⁶This simplification notwithstanding, the 2010 Amendments in no way change the requirement that to be effective a financing statement generally must be filed in the debtor's location — see *Where to File* above.

held in a trust, rather than whether the trust or trustee has rights in the collateral and thus meets the definition of “debtor” in Section 9-102(a)(28), the 2010 Amendments include a revised form of UCC1 financing statement. The first check box in box 5 of the revised form should be checked to indicate when collateral is held in a trust, and is thought to be simpler for users than the approach under the forms appearing in Section 9-521 of Current Article 9, wherein filers were invited to check the appropriate check box in box 17 of the UCC1 financing statement addendum to indicate either that the debtor is a trust or that the debtor is a trustee acting with respect to property held in a trust, as appropriate.

In the time since Current Article 9 took effect, a number of jurisdictions have enacted or considered enacting non-uniform provisions applicable to the identification of individual debtors on financing statements.⁷ The 2010 Amendments, reflecting a variety of views on the matter, offer two alternatives: requiring, or (merely) permitting, that an individual debtor’s name be rendered as indicated on the individual’s driver’s license (or other specified document). As revised by the 2010 Amendments, Section 9-503(a)(3)(A)(ii) requires use of individual’s names where collateral is held in a trust that is not a registered organization and the organic record of the trust does not specify a name for the trust. As noted above, the name required is that of the settlor or testator, not the name of the debtor (which, as suggested above, under applicable non-UCC law may be either the trust or the trustee, but is unlikely to be either the settlor or the testator). Section 9-503(h) provides guidance on how such names are to be rendered. Where the settlor is a registered organization, its name is determined and rendered in the usual manner. In other cases, its name is rendered as indicated in the trust’s organic record — the rendering of any individual’s name on his or her driver’s license is irrelevant.

The remainder of box 1 would be streamlined by the 2010

⁷These include Texas, which by non-uniform text in 9-503 requires use of the name shown on an individual’s driver’s license or identification certificate. Delaware was in some sense the first state to recognize the issue, and chose in its initial enactment of Current Article 9 to address it not by non-uniform text in Section 9-503, but rather by excepting financing statements naming individual debtors from the strict search logic test of Section 9-506(b).

FILINGS AGAINST TRUSTS AND TRUSTEES UNDER THE PROPOSED 2010 REVISIONS TO CURRENT ARTICLE 9 — THIRTEEN VARIATIONS

Amendments, retaining box 1c (debtor's mailing address), but omitting boxes 1d through 1g (taxpayer or employer identification number, type of organization, jurisdiction of organization, and organizational identification number). These changes conform to the 2010 Amendment's deletion of Section 9-516(b)(5)(C), eliminating failure to provide the latter three informational items as a basis for rightful rejection of a record by the filing office to which it is tendered. As a practical matter, in any instance in which Current Article 9 requires that box 1a or 1b contain a name that might not be readily associated with the address which follows in box 1c, consider completing box 1c so as to specify a "care of" address. Thus, communications addressed to the trust by name or, if it has none, to the settlor or testator, would be sent in care of the person readily associated with the address appearing in box 1c (e.g., the trustee), better assuring proper delivery and routing than might occur should communications arrive at such address without such person's name.⁸

TRANSITION PERIOD

The 2010 Amendments contemplate an effective date of July 1, 2013 (§ 9-801), but of course will only become effective in any jurisdiction when and as enacted by its legislature or similar body. Under the transition rules of the 2010 Amendments, financing statements properly filed under Current Article 9 generally remain effective until the earlier of the time they would have ceased to be effective under the law of the jurisdiction in which they were filed, or June 30, 2018 (§ 9-805(b)). Thus, an otherwise proper filing which does not identify the debtor in the manner required by the 2010 Amendments to § 9-503 need not be cause for immediate alarm. But such a financing statement must be amended so as to meet the requirements of § 9-503 as in effect in the relevant jurisdiction at such time as the financing statement is otherwise amended or is continued (§ 9-807(b)).

Under Current Article 9 a financing statement must indicate, whether in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in a trust, except in instances where a trust is the

⁸This suggestion is intended to avoid the confusion and delay which could accompany attempted delivery at the trustee's address of correspondence identifying only the settlor or testator as addressee.

debtor and is a registered organization. § 9-503(a)(3)(B). This indication was often provided by checking the first (if a trust) or second (if a trustee) check box in financing statement addendum box 17. By contrast, the 2010 Amendments require in such circumstances an indication that the collateral is held in a trust. 2010 Amendments § 9-503(a)(3)(B). As suggested elsewhere in this article, filers may wish to provide such information by checking the first item in box 5 of the financing statement form as revised by the 2010 Amendments. The last sentence of Section 9-805(e) (a transition rule) provides explicitly that “A financing statement that indicates that the debtor is a trust or is a trustee acting with respect to property held in a trust indicates that the collateral is held in a trust within the meaning of Section 9-503(a)(3) as amended by this [Act],” with the consequence that this change in law does not, by itself, necessitate amendment of existing filings made in compliance with Current Article 9.

THIRTEEN VARIATIONS SUMMARIZED

The chart appearing below summarizes and provides step-by-step guidance for the completion of UCC1 financing statements relating to trusts and trustees as debtors in jurisdictions where the 2010 Amendments have been enacted without non-uniform text. It includes nine variations where a trustee is the debtor, three variations where a trust which is not a registered organization is the debtor, and a single variation where a trust which is a registered organization is the debtor. Finally, the chart indicates where UCC1 financing statements prepared in each of the thirteen variations should be filed.

FILINGS AGAINST TRUSTS AND TRUSTEES UNDER THE PROPOSED 2010 REVISIONS TO CURRENT ARTICLE 9 — THIRTEEN VARIATIONS

Filings Against Trusts and Trustees Under The Proposed 2010 Amendments to Current Article 9 – Thirteen Variations

UCC 1 Financing Statement Box	Trust is Debtor and is a Registered Organization	Trustee is Debtor										Trust is Debtor and is not a Registered Organization			
		Trust with a Name					Trust without a Name					Trust with a Name		Trust without a Name	
		Individual Trustee	Registered Organization Trustee	Organization Trustee (other than Registered Organization)	Individual Trustee		Registered Organization Trustee		Organization Trustee (other than Registered Organization)		Individual Trustee	Registered Organization Trustee	Organization Trustee (other than Registered Organization)	Individual Settlor or Testator	Organization Settlor
					Individual Settlor or Testator	Organization Settlor	Individual Settlor or Testator	Organization Settlor	Individual Settlor or Testator	Organization Settlor					
Box 1a	A	A	A	A	N/A	H	N/A	H	N/A	H	A	N/A	H		
Box 1b	N/A	N/A	N/A	N/A	H	N/A	H	N/A	H	N/A	N/A	H	N/A		
Box 1c	B	C	C	C	C	C	C	C	C	C	B	B	B		
Box 5	N/A	K	K	K	K	K	K	K	K	K	K	K	K		
Addendum Box 10	N/A	N/A	N/A	N/A	J	J	J	J	J	J	N/A	J	J		
Where to File	D	E	G	F	E	E	G	G	F	F	I	I	I		

KEY	
A Name of trust per RA-9 § 503(a)(1) or (a)(3)(A)(i)	G Trustee's location per RA-9 § 307(e) or (f)
B Mailing address of trust*	H Name of settlor or testator indicated in trust's organic record per RA-9 § 503(h)(1) or (2)
C Mailing address of trustee*	I Trust's location per RA-9 § 307(b)(2), (b)(3), or (c)
D Trust's location per RA-9 § 307(e)	J Information to distinguish debtor (whether trust or trustee) from other trusts with same settlor or trustor per RA-9 § 503(a)(3)(B)(i)
E Trustee's location per RA-9 § 307(b)(1) or (c)	K Check first item (Collateral is held in a Trust)
F Trustee's location per RA-9 § 307(b)(2), (b)(3), or (c)	

* Where the name in box 1a or 1b is not commonly associated with the address in box 1c, consider specifying the address in box 1c "in care of" or "c/o" a name commonly associated with such address, e.g., the trustee's name.