

Revised Article 9 of the Uniform Commercial Code

Report Addendum 1: March 14, 2001 Letter to Honorables Helene Weinstein and James Lack

March 14, 2001

Honorable James J. Lack
Chair, Senate Judiciary Committee
State Capitol, Rm. 413
Albany, NY 12247

Honorable Helene Weinstein
Chair, Assembly Judiciary Committee
Legislative Office Bldg., Rm. 831
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Dear Senator Lack: *

Dear Assemblywoman Weinstein:

Under separate cover, we have sent you a copy of the Commission's 2001 Report on Revised UCC Article 9—Secured Transactions. We have also been advised that you have our proposed bill which reflects all of the recommendations detailed on pages 13-46 of the report. Let me just highlight a few areas that may be of special interest.

First, the revision of UCC Article 9, proposed by the National Conference of Commissioners on Uniform State Law and the American Law Institute, does not address secured transactions with respect to commercial and residential cooperative apartments because coops are not a national phenomenon. Starting on page 168 to the end of the report, we have presented a comprehensive legislative scheme addressing security interests in cooperatives. Instrumental in the drafting process were The Council of New York Cooperatives and Condominiums, as well as an informal consortium of members of the City Bar's Cooperative Committee and the State Bar's Real Estate Committee, as well as other lawyers who represent buyers, sellers, and those who finance cooperative transactions.

On another matter, the impact of Revised Article 9 on individual consumers should not cause concern. This is so because sections 9-201(b) and 9-406(h) expressly subject Revised Article 9 to any New York rule of law (common law, statutes, or administrative rules or regulations) that establishes a different rule for consumers with respect to "consumer transactions," which is defined in section 9-102(a)(26).

Also of interest is section 9-406, by which the Uniform State Law Commissioners sought, in the secured transaction setting, to nullify all existing case law statutes and administrative rules and regulations, to the extent that they limit, prohibit or restrict assignments of accounts and chattel paper, as well as laws that limit, restrict or prohibit the creation of security interests with respect to that property. Believing that a wholesale repeal was unsound, the Commission scaled back considerably the breadth of the Uniform Law Commission's proposals. See UCC § 9-406, discussed at pages 19-23 of the report. Section 9-408 is also designed to limit the effect of anti-assignment statutes, but in a much narrower fashion. See Report: 24-25. We have recommended adoption of this section, but with a delayed date of application to assure timely input from governmental agencies. See Report: 25.

Finally, your attention is directed to section 9-523(d). In relevant part, that section addresses the duties of a filing office, including the Department of State. Upon request, the filing office must communicate information by issuing a written certificate. A written certificate issued by a filing officer performs two distinct functions. First, the filing office can issue a certification that a particular document is on file. Second, the filing office can also certify that specified documents constitute a complete filing record. This second function requires that the filing office do a search of its own records.

The Department of State's version of Revised Article 9 contained in the Governor's budget bill would require local filing officers, when requested, to certify both that a particular document is on file with it and that it has conducted a search, and the results of that search. The Department's proposal is still silent on whether it will still be required to certify a copy of particular documents on file with it. The Department of State, under its proposal, also would not be required to conduct a search and to certify that it has searched its records, and that what it found constitutes a complete record of the filings with respect to a particular debtor. Instead, the Department plans on making all of its records available on the internet, thereby permitting anyone to conduct a search. The Department envisions that non-governmental entities would undertake the search function and then certify the results of that search.

We did not become aware of the Department of State's proposal until the very late stages of drafting the report, and well after we had decided to continue present law that requires all filing offices to conduct and certify the result of searches. We have no position with respect to the Department of State's proposal, but would offer the following observations.

Whether the Department of State should be relieved of the search obligation involves consideration of fundamental public policy involving the nature of a public filing office. Moreover, there are budgetary implications both on the revenue and the expense side. As noted, we were unaware of the Secretary of State's proposals until late in the drafting of this Report, and thus were not in a position to make an informed recommendation. In any event, we believe the matter is best left to resolution by the executive and the legislature.

We do, however, believe that if the Department is relieved of its search obligations, Revised Article 9 should nonetheless contain a provision requiring the Department to issue written certifications that a particular document has been filed with the Department. The Commission also believes that a statute giving legal effect to a non-filing office certification concerning the completeness of a search would have to be enacted.

With respect to non-governmental certification, the Department's bill also includes a provision that would give a written certificate of a title insurance, abstract, or searching company "the same legal effect as" the written certificate of a filing officer. This proposal parallels an existing law concerning certifications of records for real property found in CPLR § 4523, and is absolutely necessary if the Department is no longer to be in the search and certification business. The Commission recommends, however, that any provision concerning the legal effect of non-filing office certifications belongs in the CPLR rather than Revised Article 9.

We have not, however, had sufficient time to study the matter completely to determine whether there is any difference between real and personal property records and the searches required to discover them. Notably, in this regard, real property records are filed against specifically described property, while personal property records are indexed against the name of the debtor. The personal property filing system may create unique risks for the certifying-searcher of personal property records. Sometimes individuals use middle initials, or formal or informal versions of their first name, and this leads to the possibility that records of liens against a single individual can be recorded under two or more names. Depending on the scope of their search, different searchers could produce certifications that differ in their content. This may cause some concern, as each of the certifications would have "the same legal effect as" the written certificate of a filing office. The possibility of conflicting search certifications is one issue, among others, that should be resolved before giving legislative recognition to non-filing office certifications.

As noted above, the Commission takes no position with respect to the Department of State continuing to be in the search business. In order to present the Legislature a complete statute, and only for that purpose, our proposal follows the uniform text, containing language that leaves the Secretary of State in the search business.

Should it be concluded that the Department of State will no longer be in the search result-certifying business, and that searches and certifications of them will be made by non-governmental entities, the Commission recommends that the language specified below be substituted for the text of Section 9-523(d), which appears in the draft statute accompanying this Report:

(d) Medium for communicating information. In complying with its duty under subsection (c), the filing office specified in Section 9-501(a) may communicate information in any medium. However, if requested, the filing office specified in Section 9-501(a) shall communicate information by issuing its written certificate. The filing office specified in Section 9-501(b) shall, if requested, certify by a written certificate that a particular document is on file with that office.

Finally, assuming the Department of State will no longer be in the search business, the following provision should be added to the CPLR as § 4523-A:

A search of financing statements filed under article nine of the uniform commercial code, when made and certified to by a title insurance, abstract or searching company organized under the laws of this state, may be used in place of, and with the same legal effect as an official search and certification.

The Commission's task with respect to revised UCC Article 9 has proven prodigious, and could not have been completed without the herculean effort and commitment of our consultant, Paul Shupack. We are also indebted to Commissioner Stephen Glos Nordquist for his significant contribution in helping to assure the physical integrity of the report.

Over the next few weeks, we will review both the report and the bill. Moreover, as noted earlier, the Commission decided against the section 9-406 wholesale repeal of all anti-assignment-creation of security interest statutes, as recommended by the Uniform State Law Commissioners. Instead, we are in the process of reviewing each statute individually in order to make a more tailored response to the nullification issue. Hopefully, we can complete this review in time for chapter amendments, if Revised Article 9 is enacted.

We believe and hope you will find that the proposed bill and report greatly facilitate the legislative process and timely enactment of Revised Article 9. Of course, we stand ready to assist that process in any way we can; please feel free to call upon us.

Respectfully submitted,

Robert M. Pitler

RMP:ck

cc: Interested Parties

*Letter was sent under separate cover to Senator Lack and Assemblywoman Weinstein