BANKRUPTCY LAW NEWSLETTER

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Transition to New Article 9

If all goes well, Revised Article 9 will go into effect nationwide on July 1, 2001. Since the rules for perfection will change markedly under new Article 9, it is important to understand the transition rules, that is, the rules which govern the status of existing security interests perfected prior to the adoption of the new rules.

General Rule. As a general rule, existing security interests, which would not otherwise expire and have not been terminated, will remain perfected for at least one year following adoption of new Article 9. Whether a security interest will remain perfected after the initial year will depend on whether it would also be perfected under new Article 9. A security interest which is perfected under prior law and is also perfected under new Article 9, will generally remain perfected thereunder. On the other hand, a security interest which is perfected under prior law, but which would not be perfected under new Article 9, will require further action by the secured party to remain continuously perfected.

Differences Leading to Non-perfection under New Article 9. There are several reasons why a security interest which is perfected under the old rules may not remain so after expiration of the initial one-year grace period:

The collateral description may be inadequate under new Article 9

The method by which a particular security interest has been perfected is changed by new Article 9

The original security interest was perfected outside Article 9 but, would be subject to new Article 9 (for example, a security interest in a commercial tort claim)

Continuing your perfected status if the one-year rule applies. A perfected secured creditor who satisfies the new rules for creating and perfecting a security interest during the transitional year will continue to be perfected. New Article 9 looks to the intent of the parties for the scope of collateral descriptions in a security agreement. Thus a collateral term defined differently under the old and new rules would be assumed to have the meaning in the UCC at the time the security agreement was executed. A financing statement filed before July 1, 2001 in connection with that security agreement, however, would perfect a security interest in collateral covered by the newly expanded definitions.. "Parties who want their security agreement to straddle" the old and new rules, should use terminology such as "[collateral description] as presently or hereafter defined in the UCC." Effective July 1, 2001, the new definition would automatically apply.

Attachment. As with perfection, a security interest which is attached and enforceable under old Article 9, but which has not attached under new Article 9, will remain attached and enforceable for one year. It remains enforceable after the one-year transition period if the secured party acts to attach under the new rules before or within one year after July 1, 2001, or if attachment would occur automatically under the new rules.

There are some instances in which no further action will be needed. For example if a secured party has used a collateral description incorporating both the old and new definitions, and the state of incorporation of the debtor is the state where the secured party has filed its financing statement under the old rules (e.g., filing against a Michigan corporation, for collateral located in Michigan, filed with the Michigan Secretary of State), no new filing will be required.

How Long are you Perfected? A financing statement which is effective under both the old and the new rules remains effective until the earlier of the date on which it would otherwise lapse (usually 5 years after filing) or five years after July 1, 2001. If the state in which a financing statement was originally filed under the old rules is the same state in which it would be filed under new Article 9, the usual form of continuation statement is sufficient to continue perfection.

A financing statement which would not be effective under new Article 9 must be continued by means of an initial financing statement in lieu of a continuation statement. Such an "in lieu" continuation must be filed in accordance with the new rules, make reference to the old financing statement, and update that statement in accordance with new Article 9. *If an initial financing statement is not filed "in lieu", it will not continue the existing security interest, but will date from its actual filing date for priority purposes.* To

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Editor's Note

A public word of appreciation is due Steve Rayman for his hard work editing past newsletters. I'll do my best to live up to the high standards Steve demanded. I have changed the format and intend to issue the newsletter quarterly. Your questions, comments, suggestions and above all, assistance, is welcome.

Stephen Grow

Transition to New Article 9

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terminate a financing statement which has been continued "in lieu," a termination statement must be filed in the new Article 9 state.

With the comprehensive changes in Article 9, it is easy to lose sight of the big picture. Here it is:

1. Get the location right.

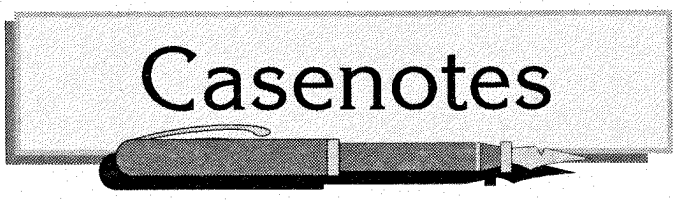
- ⇨ Financing statements must be filed where the debtor is located (**not** where the collateral is located)
- ⇨ A debtor that is an entity is located in the state where it is organized (**not** where its headquarters are)
- ⇨ Example: A distributor's principal office and business operations are located in Florida. The distributor is incorporated in Delaware
  Current law: File in Florida.
  New law: File in Delaware.
- ⇨ With the exception of fixture filings, local county filings are generally no longer necessary
- ⇨ Changes in filing requirements means that, until June 30, 2006, UCC searches must be performed in **both** the state where the collateral is located and the state where the debtor is organized

2. Get the Debtor's name right

- ⇨ Secured Parties must use the **exact** entity name of a debtor on UCC filings. Financing statements that don't show up in a computer search of the debtor's correct name are ineffective as a matter of law.
- ⇨ Tradenames or d/b/a's of the debtor are **not** valid on UCC filings
- ⇨ Reviewing certified copies of debtor's articles of incorporation is the most reliable method of confirming the debtor's name, although other searches are available (e.g., Lexis, *www.knowx.com*)

3. Other Changes

- ⇨ A debtor's signature is no longer needed on UCC filings, so long as the debtor has "authorized" the filing "in an authenticated record." A debtor is deemed to have authorized filings consistent with the security interest granted in a security agreement.
- ⇨ The Debtor's signature (or authentication) is still required on a security agreement
- ⇨ A generic description of assets on financing statements (i.e., "all assets" or "all personal property") is allowed. A generic description, however, **cannot** be used in a security agreement.
- ⇨ Paper signatures are no longer required. New Article 9 requires "records" that are "authenticated." To "authenticate" means to sign or to adopt a symbol, or encrypt or process a record, with the present intent of adopting or accepting the record.



The Sixth Circuit in In re M.J. Waterman & Associates, Inc., 227 F.3d 604 (6th Cir. 2000) reaffirms the informal proof of claim doctrine. A valid proof of claim must: (1) be in writing, (2) contain a demand by the creditor on the debtor's estate, (3) express an intent to hold the debtor liable for the debt, and (4) be filed with the Bankruptcy Court. If an informal proof of claim must these standards, the court must then examine whether allowance of the informal claim would be equitable under the circumstances.

The "date of honor rule" applies under 11 U.S.C. 549. In re Oakwood Markets Inc., 203 F.3d 406 (6th Cir. 2000). The court held that rent checks received prepetition, but honored postpetition and before entry of the order for relief, were subject to avoidance under 11 U.S.C. 549(a).

In In re Keeney, 227 F.3d 679 (6th Cir. 2000), citing the "continuing concealment doctrine," the court affirmed the bankruptcy court's ruling that a transfer made and recorded more than a year prior to a filing may be grounds to deny a debtor's discharge under Section 727(a)(2)(A). The debtor in Keeney, lived on and paid the mortgage on property titled in his parents' name. According to the court, under the continuing concealment doctrine " a transfer made and recorded more than a year prior to filing may serve as evidence of the requisite act of concealment where the debtor retains a secret benefit of ownership in the transferred property within the year prior to the filing." The fact the statute of limitations barred creditors from avoiding the transaction was irrelevant because "proof of harm is not a required element of a cause of action under Section 727."

In In Re Nolan, 232 F.3d 528 (6th Cir. 2000) the Sixth Circuit ruled that a confirmed plan cannot be modified under Section 1329(a)(1) to allow the debtor to surrender a car and treat any deficiency as unsecured claim under Section 506(a). The Sixth Circuit ruled that Section 1329(a)(1) only affords the debtor a right to request alteration of the amount and timing of specific payments. The debtor's proposed modification would violate Section 1325(a)(5)(B), which requires that a secured claim be fixed in amount and be paid in full once it has been allowed, and Section 1327(a) by postulating "an unlikely congressional intent to give debtors the option to shift the burden of depreciation to a secured creditor by reclassifying the claim and surrendering the collateral and the debtor no longer has any use for the devalued asset."

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Legislative Update

The Senate and House have now approved legislation that will overhaul the Bankruptcy code. Despite passage by both houses, and President Bush's commitment to sign reform, immediate enactment seems unlikely. Democratic lawmakers have promised to defeat the bill in conference and lawmakers are at an impasse over the makeup of the conference committee. In the meantime, the Senate has passed legislation extending Chapter 12 though the end of May.

Notice of Change in Noticing of Chapter 13 Cases

The office of the standing Chapter 13 Trustees has announced that, effective March 19, the Bankruptcy Court Clerk's Office began noticing Chapter 13 cases for section 341 hearings held in Grand Rapids, Muskegon and Traverse City. The Chapter 13 Trustee will therefore no longer serve a summary of the plan because the Clerk's office will now transmit a copy of the entire plan with the section 341 notices. **Please include an additional Chapter 13 plan with your filing.** The provisions of the Court's Policy on Service of Notices & Orders (as amended 2/12/99) still apply.

The Court will serve 341 meeting notices only to those creditors and parties listed on the matrix filed with the petition and will only serve a copy of the plan on creditors if the plan is also filed with the petition.

Attorneys who file an amended matrix or amended schedules adding creditors to cases must serve copies of the first meeting notice, the plan if filed, and a notice of an adjournment first meeting or confirmation date, if pending, to such creditors and provide a proof of service to the Court and the Chapter 13 Trustee.

If the first meeting notice served by the Court was mailed without a copy of the plan, then the plan must also be served by the Debtor's Attorney on all creditors and a proof of service provided to the Court and the Chapter 13 Trustee.

The Chapter 13 Trustees urge the filing of complete schedules, a complete matrix and a plan at the initial filing of each case so that creditor's meetings are not unnecessarily delayed and to insure a prompt and accurate notice can be given to all interested parties.

General Announcements

Brett N. Rodgers will be moving to his new office in The Frey Building the week of March 26, 2001. Listed below are his new address and phone number. Please note that the payment address is NOT changing. Brett Rodgers handles Ch 13 Bankruptcty cases for: Judge Stevenson in Grand Rapids and **all** Ch 13 Bankruptcy cases for Traverse City and Marquette. Trustee Rodgers also handles a limited number of Ch 12 Bankruptcy cases.

Brett Rodgers' new office has no specified parking area; however, some parking is available across the street under the Calder Plaza. Please bring appropriate monies for your parking needs.

Brett N. Rodgers, Trustee
300 Ottawa NW, Suite 210
Grand Rapids, MI 49503
Phone: 616-454-96383
Fax: 616-454-9798

Chapter 13 Payment Address:
Brett N. Rodgers
Chapter 13 Trust Account
PO Box 3538
Grand Rapids, MI 49501-3538

Mark Your Calendars

August 3 to August 5
F B A Bankruptcy Seminar
Crystal Mountain Resort

Registration materials will be mailed shortly.

Casenotes

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Judge Gregg reached the same conclusion in Ronald L. Goos et al., Case No. GG-97-10672 (September 28, 2000). Judge Gregg ruled that the statutory language in Section 1329(a) does not permit such a modification by the Chapter 13 debtors. Rejecting the rationale that this would be the result if a debtor converted the Chapter 13 case to a Chapter 7 case, the court observed that "what could be and what is are different." The court noted that confirmation is a two-edged sword, and bars a secured creditor from seeking reevaluation of collateral by fixing the respective rights of the debtor and creditor.

In an opinion dated April 25, 2000, Judge Hughes has ruled that 11 U.S.C. 1329(a) does not permit debtors in Chapter 13 proceedings to amend their confirmed plans to add creditors who were not listed in the debtor's original schedules and who did not otherwise file proofs of claim. Judge Hughes reasoned that Congress intended that Section 1329(a), which allows post-confirmation modification to increase or reduce the amount of payments on claims, extend or reduce the time for such payments, or alter the amount of distribution to a creditor to the extent necessary to take count of any payment of such claim other than under the plan, sets forth an exclusive list of permitted post-confirmation modifications. The court noted that the Section 1322(b) offers ample opportunity to address this problem in the plan itself. Chapter 13 debtors also have the option of dismissing the Chapter 13 and refiling. Where the confirmed plan contemplates a distribution to all unsecured creditors having allowed claims, debtors have the option of either requesting the omitted creditors to file tardy proofs of claim subject to the objection by existing creditors or filing a motion themselves under Fed. R. Bankr. P. 9006(b) to enlarge the time in which to file protective claim and overcome whatever objections parties in interest may have to a protective claim. Where the confirmed plan limits distributions to creditors with timely allowed claims, the debtor can only add creditors by filing a motion under Rule 9006(b) to enlarge the time period within which to file a protective claim.

In Thomas A. Roberts, Case No. HK-99-00569 (May 22, 2000), Judge Hughes held that a secured party's consent to a sale of property of the estate free and clear of liens may not be implied under Section 363(f)(2). "Consents," and "fails to object" are not synonymous, the court reasoned. Section 363(f) obligates a trustee to approach a lienholder to secure the lienholder's assent if the trustee wishes to sell property free and clear of the liens under Section 363(f).

Steering Committee
FBA
Bankruptcy Section

Dave Andersen	(616) 784-1700 andersenpc@aolcom	Tom Sarb	(616) 831-1748 sarbt@mjsc.com
Dan Casamatta	616-456-2002 daniel.j.casamatta@usdoj.gov	Tom Schouten	(616) 538-6380 dsslaw@iserv.net
Tim Curtin	(616) 336-6000 tjcurtin@vrsh.com	Peter Teholiz	(517) 886-7176 pteholiz@hubbardlaw.com
Stephen Grow	(616) 752-2158 sgrow@wnj.com	Norm Witte	(517) 485-0070 ncwitte@voyager.net
Mary Hamlin	(616) 343-0305 mkvh@raymanhamlin.com	Bob Wright	(616) 454-8656 ext. 7079 wright.r@millercanfield.com
Hal Nelson	(616) 459-1971 hnelson@pfr.com	Steve Carpenter	(616) 451-9972 carpste@aol.com
Steve Rayman	(616) 345-5156 slr@raymanhamlin.com	Marcia Meoli	(616) 396-1245 meoli@triton.net
Tom Riegler	(616) 393-4978 tlr@i2k.com	Dan Kubiak	(616) 459-3200 dkubiak@mmbjlaw.com
Brett Rodgers	(616) 956-7854 brett@rodgersch13.com	Rob Wardrop	(616) 459-1225 robbowardroplaw.com

State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2083