

IN THIS ISSUE

[MARK YOUR CALENDARS](#)

[FEATURED NOTES](#)

[FEATURED ARTICLES](#)

- [RECENT DEVELOPMENTS: THE WHOLE NINE YARDS: 9 THINGS EVERY BUSINESS LAWYER SHOULD KNOW ABOUT THE 2010 AMENDMENTS TO UCC ARTICLE 9](#)
By [Shadi J. Enos](#) and [Hilary Sledge](#)
- [AN ATTEMPT TO "DEMYSTIFY" QUEBEC SECURED TRANSACTIONS LAWS \(PART III\)](#)
By [Kiriakoula Hatzikiriakos](#)
- [NON-UNIFORM FILING RULES WILL REMAIN DESPITE THE 2010 AMENDMENTS TO UCC ARTICLE 9](#)
By [Paul Hodnefield](#)
- [ARBITRATION CLAUSES CREATED THROUGH DATA-PASS MARKETING PROGRAMS AND SHRINK-WRAP PRESENTATIONS MAY CREATE ENFORCEABILITY ISSUES](#)
By [Anjanette H. Raymond](#) and [Elizabeth Simos](#)

Joint Report from the Chairs

For those of us in the Northeast who have endured a never-ending snowstorm, Spring cannot come soon enough, and with Spring comes our Spring Meeting in Washington, D.C. This year, our Spring Meeting will feature outstanding programs, CLE sessions, and subcommittee meetings.

For those of you who have not already registered, the Spring Meeting will take place from April 4-6 in Washington, D.C. Our headquarters will be the Washington Hilton at Dupont Circle. Both the UCC and Commercial Finance Committees have an outstanding series of programs and subcommittee meetings for your education and enjoyment. Our collective CLE programs are as follows:

1. Current State of the Syndicated Loan Market (Thursday, April 4, 10:30 a.m. -12:30 p.m., Jefferson East, Concourse Level)
2. Time to Play the Name Game: A Practical Guide to UCC Filing Under the 2010 Amendments to Article 9 (Thursday, April 4, 2:30 p.m. - 4:30 p.m., Jefferson East, Concourse Level)
3. The Lender Asked for What? -- Understanding Financing Documents From the Borrower's Perspective (Friday, April 5, 8:00 a.m. - 10:00 a.m., Jefferson West, Concourse Level)
4. Regulations U and X: Ignorance is Not Bliss; How These Margin Regulations Could Affect Transactional Lawyers (Friday, April 5, 2:30 p.m. - 4:30 p.m., Monroe, Concourse Level)
5. Commercial Law Developments 2012-2013 (Saturday, April 6, 8:00 a.m. - 10:00 a.m., Lincoln East, Concourse Level)
6. The Alphabet Soup of Electronic Transfers of Funds: CHIPS, NACHA, ECCHO, Fedwire, the FFIEC and the UCC (Saturday, April 6, 2:30 p.m. - 4:30 p.m., Lincoln West, Concourse Level)

These will be outstanding programs and we encourage all to attend. We thank the Program Chairs and panelists for their hard work in putting these programs together.

In addition to the six programs mentioned above, Com Fin and UCC are jointly sponsoring another program as part of the Institute for the Young Lawyer. "More than IOU: Understanding, Drafting and Negotiating Credit Agreements" will run on Saturday, April 6, 9:00 - 10:30 a.m., Gunston East, Terrace Level.

Our UCC/ComFin Joint Dinner will be held on Thursday, April 4 at 8:00 p.m. at the Event Center at The Willard Hotel, with food provided by Occidental Restaurant. Tickets are available on either the UCC or ComFin website, or the ABA Business Law Section website. Our UCC/ComFin joint meeting will be held on Thursday, April 4 from 8:00 a.m. - 9:30 a.m. in the Monroe Room, Concourse Level.

- [FILINGS AGAINST TRUSTS AND TRUSTEES UNDER THE 2010 REVISIONS TO ARTICLE 9 – THIRTEEN VARIATIONS](#)
By [Norman M. Powell](#)

[UCC SPOTLIGHT](#)

[USEFUL LINKS AND WEBSITES](#)

[ENDNOTES](#)

[ENACTMENT STATUS OF 2010 AMENDMENTS TO ARTICLE 9](#)

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April 4, 2013 – 10:30 a.m. to 12:30 p.m. EDT – Current State of the Syndicated Loan Market – Jefferson East, Concourse Level of the Washington Hilton Hotel at the ABA Business Law Section Spring Meeting. To learn more about the implication of swap regulations for loan documents and other hot topics, please attend this panel moderated by [Bridget Marsh](#).

April 4, 2013 – 1:00 p.m. to 2:30 p.m. EDT – M&A Financing and Acquisition Documents in Leveraged Acquisitions. (CLE Webinar) Click [here](#) for more information.

April 5, 2013 – 2:00 p.m. to 3:00 p.m. EDT – Syndications and Lender Relations Subcommittee of the Commercial Finance Committee – Columbia 2, Terrace Level of the Washington Hilton Hotel at the ABA Business Law Section Spring Meeting. Please join [Tess Virmani](#) and [Ashely Gregory](#) for a discussion of the implications of swap regulations from the borrower’s perspective.

April 9, 2013 – 1:00 p.m. to 2:30 p.m. EDT – Bankruptcy Remoteness and Single-Asset Real Estate Cases.

Our Subcommittees and Task Forces continue to remain active and are always looking for new and interested volunteers. We continue to be interested in volunteers for our Revised Article 9 Enactment Task Force, which is working to ensure the enactment of the recently proposed amendments to Article 9 in the fifty states, our Model Intellectual Property Security Agreement Task Force, which will produce a “standard form” intellectual property security agreement, our commercial law terms “wiki” Task Force, and our new Task Force on Security Interests in Limited Liability Company Membership Interests. Please go to the Com Fin or UCC website for more information on these Task Forces. We congratulate our Task Force on Survey of the Law of Guarantees, which recently produced an outstanding book entitled “The Law of Guarantees - a Jurisdiction-by-Jurisdiction Guide to US and Canadian Law.”

We continue to seek new members, and in particular new members who would like to become active in the work of a committee. If you would like to give a speech, participate in panels, or become active in the work of a subcommittee or task force, please contact either Norm Powell (npowell@ycst.com) or Jim Schulwolf (jschulwolf@goodwin.com). There is plenty of work to be done and there are plenty of great people to meet and work with.

Our 2013 Annual Meeting will take place from August 9-11 in San Francisco. Details will be available on the ABA Business Law Section website, and, as always, the meeting will be full of informative educational panels.

We look forward to seeing you in Washington.

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[Norman M. Powell](#)
UCC Committee Chair
NPowell@ycst.com

Featured Notes

Please join us at our Spring meeting in Washington, D.C. The Commercial Law Newsletter Editors will be holding a meeting on Friday, April 5, 2013, from 12:30 pm -1:00 pm. in the Northwest room on the Lobby Level of the Washington Hilton Hotel at the Spring Meeting. Current members of the Articles Advisory Board, as well as anyone interested in becoming involved with the Commercial Law Newsletter, whether suggesting topics, writing articles or assisting with publication, are invited to attend. If you cannot attend in person, please consider joining us by phone. The US dial-in number for our meeting will be (866) 646-6488. The international dial-in number will be (707) 287-9583. The conference code will be 3800533645.

SWAP REGULATIONS’ IMPLICATIONS FOR LOAN DOCUMENTATION

By [Tess Virmani](#)

In an unexpected turn of events, secured bank financings have been recently impacted by the Commodity Futures Trading Commission (the “CFTC”)’s final swap regulations. When the CFTC and the Securities Exchange Commission jointly issued [rules further defining the term “swap”](#)¹ last year, the CFTC established that the guarantee of a swap is itself a “swap” for purposes of Title VII of the Dodd-Frank Act (“Dodd-Frank”), the portion of Dodd-Frank designed to provide a framework for the regulation of the over-the-counter swaps markets. Title VII of Dodd-Frank amended Section 2(e) of the Commodity Exchange Act (“CEA”) to make it illegal for any person other than an “eligible contract participant” (“ECP”)² to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated by the CFTC as a contract market under Section 5 of the CEA. As a result, the guarantee of a swap by a guarantor that is not an ECP—even if the direct counterparty to the swap is an ECP—raises significant issues. In particular, the [CFTC Office of General Counsel \(“OGC”\) has stated](#) that absent certain conditions that provide no action relief, the OGC “interprets CEA section 2(e) as requiring that each guarantor of a

(CLE Webinar) Click [here](#) for more information.

April 11, 2013 – 1:00 p.m. to 2:30 p.m. EDT – Hedge Fund Enforcement: Understanding the New Regulatory Landscape. (CLE Webinar) Click [here](#) for more information.

April 30, 2013 – 1:00 p.m. EDT – ABA Business Law Section “In The Know” Series on Commercial Law Developments. (CLE Webinar) Click [here](#) for more information.

May 2-3, 2013 – ALI Commercial Lending Today. (Various CLE Video Webcasts) Click [here](#) for more information.

May 5-7, 2013 – Legal Forum of the Equipment Leasing and Finance Association – Francis Marion Hotel in Charleston, South Carolina. Click [here](#) for more information.

August 9-11, 2013 – ABA Annual Meeting – The Fairmont in San Francisco, California. Click [here](#) for more information.

November 13, 2013 – Commercial Finance Committee and Uniform Commercial Code Committee Joint Meeting – JW Marriott Los Angeles at L.A. LIVE in Los Angeles, California. Save the date!

swap must be an ECP”.³ It should be borne in mind that while the extraterritorial application of Title VII of Dodd-Frank is not entirely clear, the CFTC is asserting broad jurisdiction and accordingly one should not assume that these rules do not apply simply because the swap provider and/or its counterparty are not U.S. persons.

What does this mean for secured bank financings and credit support structures? Frequently, lenders enter into both a credit facility and (either directly or through an affiliate) one or more swaps with a borrower. In such circumstances, swap obligations and loan obligations generally are secured under the same document, which may be the credit agreement or a separate related security or pledge agreement. It is common in such loan transactions for each of the borrower’s subsidiaries (and often other affiliates of the borrower) to guarantee not only the loans but also swaps entered into with lenders or affiliates of lenders, and for this to be documented in a single guarantee. Under the new rules requiring that swaps involving non-ECPs be entered into on an exchange, if any subsidiary is not an ECP when the swap is entered into or, if later, when the subsidiary becomes a guarantor, then the guarantee of the swap by such subsidiary would not be enforceable. Amendments to existing swaps and/or guarantees may raise similar issues in this respect. As described in the [Loan Syndications and Trading Association \(“LSTA”\)’s market advisory dated February 15, 2013](#) (“LSTA Advisory”)⁴, this regulatory development should be addressed in loan documentation.

Swap documentation often is negotiated separately from and by different borrower and/or lender personnel than the credit facility. Lender personnel negotiating swap documentation would be expected to obtain confirmation of ECP status both for the direct counterparty and for any guarantor specifically identified in the swap documentation. The credit agreement and security documents, however, may include guarantees and pledges of guarantor assets from entities that are not executing separate guarantees of the swap. Because borrowers do not need to be ECPs to enter into loan transactions, and their affiliates do not need to be ECPs to guarantee loan obligations, representations as to ECP status may not be obtained on the lending side. In addition, as the rules test ECP status each time a swap is entered into, and swaps are frequently entered into after the date of the credit agreement, obtaining representations as to ECP status for each guarantor at closing is only a partial solution.

To address these issues, lenders should ensure that the guarantee is properly drafted to exclude any guarantee of swap obligations by an entity that is not an ECP at the time the swap is entered into. Some borrowers have argued that guarantees should be excluded if the guarantor is not an ECP when the guarantee is enforced, but this is not the correct timing for the determination and unnecessarily restricts such guarantees. Although it is possible that the fact that the guarantee of the swap is unenforceable may be confined to the swap obligation, it is important to eliminate the risk that the guarantee as it applies to the loan obligations is also tainted. Additionally, the application of these rules to security interests is uncertain, and lenders should consider the need to limit the obligations secured by any grant of a security interest by a non-ECP guarantor so that it only secures the loan obligations and not the swap obligations. Loan documentation should be drafted so that lawyers for the borrower do not need to take any carve-outs to their enforceability opinions relating to these guarantees. Suggested language for that purpose is supplied in the [LSTA Advisory](#) and should be included in all guaranty and security agreements that provide credit support for swap obligations.

In addition, some market participants are also including in their guaranty agreements “keepwell” arrangements pursuant to which ECPs can effectively confer ECP status on non-ECPs. For example, assume an enterprise includes a parent holding company, an operating company borrower, and a number of other operating company subsidiaries, all of which are ECPs, as well as other operating company subsidiaries that are non-ECPs. The borrower and/or one or more of the other ECP operating companies enter into swap agreements from time to time. The parent holding company and its ECP subsidiaries can provide keepwells to the non-ECP subsidiaries to allow them to act as guarantors of the operating companies’ swaps. Depending on the facts and circumstances, the existence of the keepwell can confer ECP status on an otherwise non-ECP entity, thereby making it

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eligible under Dodd-Frank to guaranty swap obligations.

Finally, care should be taken to assure that the waterfall and sharing provisions contained in credit documentation are clear that proceeds of guarantees and collateral are allocated only among holders of the loan obligations and such other obligations as are supported by such guarantees and collateral (*i.e.*, swap providers cannot share in the proceeds of guarantees made by parties who are not ECPs or in the proceeds of collateral of parties who are not ECPs). In the event an intercreditor agreement, or other arrangement or agreement governing the relative rights of the swap providers (on the one hand) and the lenders (on the other), contains a provision to the effect that the collateral for the swaps and the loans be identical, an explicit exception should be taken to permit the loans to be secured by collateral provided by non-ECPs despite the fact that such collateral does not secure the swap obligations.

Tess Virmani is Assistant General Counsel of the Loan Syndications and Trading Association. Ms. Virmani works with the LSTA's Primary Market Committee and Trade Practices and Forms Committee on legal projects for the development, standardization and revision of the LSTA's documentation and is also involved in resolving secondary loan market trading disruptions.

A SUPPLIER'S GUIDE TO REQUIREMENTS CONTRACTS

By [Joseph W. Martini](#) and [Matthew C. Brown](#)

Long-term requirements contracts are a way of life for manufactures in supply chain driven markets particularly in the aerospace, transportation, and agricultural industries. These markets, which often involve complex production cycles and numerous contracting parties, are full of upstream component suppliers regularly locking-in their middle-link buyers over the long term with promises of lower prices and economies of scale. Middle-link buyers stand on firm contracting ground as well; they freely negotiate on price generally because they can send their suppliers attractive volumes over the long term. And the Original Equipment Manufacturers, positioned at the end of the buying spectrum, who are generally responsible for creating the upstream orders, get the benefit of a relatively cost effective product received according to their specifications, so that they too may keep their customers coming back for more.

Suppliers should know, however, about the uncertainty in the law governing these seemingly beneficial agreements. What happens when your buyer intentionally reduces its requirements to zero? What happens when the market dries-up, or when buyers simply want to replace suppliers with lower cost alternatives regardless of motive? Given this uncertainty, we offer practical tips for how manufacturing suppliers may protect themselves in negotiating long-term requirements contracts.

The Uniform Commercial Code Section 2-306 governs requirements contracts. The statute provides in relevant part that:

[a] term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

On its face, application of the statute seems relatively straightforward. Buyers must place their orders for amounts determined in good faith or in close proximity to a stated estimate if one exists in the requirements agreement.

In practice, however, this simplicity is elusive. Courts around the country have applied the statute in several distinct ways. Some, as in *Simcala, Inc. v. Am. Coal Trade, Inc.*, 821 So.2d

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197 (Ala. 2001), follow the plain meaning rule. Under the plain meaning rule, a stated estimate in the parties' requirements contract is a center around which a court should measure buyer variations. That is, it does not matter whether the buyer's purchases were reduced in good or bad faith, including legitimate business reasons. What matters is the bargained for stated estimate in the parties' agreement and whether buyer reductions are reasonably proportionate to it. Courts following this approach rely heavily on stated estimates, viewing them as a reflection of the parties' intent over expected purchases.

A different approach is embodied in the reasoning of Judge Posner's decision in *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988). There, the Seventh Circuit ruled that stated estimates have different meanings with respect to increases and decreases in buyer requirements. The standard of reasonable proportionality governs increases, and the mercurial standard of good faith governs decreases. Posner's interpretation, followed by a majority of courts, poses problems for sellers relying too much on existing market conditions, or their stated estimates, because courts have ruled that decreases in production, changes in technology, and the emergence of generic product alternatives, are all good faith reasons for buyers to reduce their requirements.

Protecting Yourself

What can suppliers do to protect themselves against losses caused by a reduction to zero, or near zero? Consider the following tips:

1. *Have a Stated Estimate*
Having a stated estimate in your contract is smart regardless of the state of the law. If the court interprets Section 2-306 according to its plain meaning, a stated estimate will mark the center around which reasonably proportionate variations should occur. If the court adopts the *Empire Gas* model, a stated estimate should nevertheless serve as an indication of party intent, and a starting point to compare buyer reductions. While your buyer may attempt to argue that the reduction was for a valid business reason, the court will have a reference point from which to measure that reduction, together with the size and reasons for it.
2. *Include a "Notice of Requirements Reduction" Provision*
Why not include a notice provision in your agreement? As practical matter, buyer notice could give suppliers sufficient warning to at least minimize loss and look for other opportunities. Calculate the amount of time your business needs to prepare for a drop in estimated requirements; consider using your lead time. If you receive notice of an anticipated drop in demand that is equivalent to or greater than this time, then you may halt production and prevent overinvestment in the contract. Moreover, the inclusion of a notice provision will arguably function as another measure of buyer good faith.
3. *Be Explicit: Write a Contract that Addresses Anticipated Problems*
A seller can explicitly account for problem situations in the contract. For example, if it appears likely that a generic lower-cost alternative product is coming down the pike, then contract for this specific situation. Consider language that obligates your buyer to still buy your more expensive, non-generic, product. Think ahead, be as specific as possible, and leave as few outs as you can in your agreement.
4. *Know Your Buyer, and Adjust Your Contract Accordingly*
Requirements contracts work best between sophisticated parties likely to have an ongoing business relationship. These parties have an incentive to put forth their best efforts and maintain a good reputation within their industry. In a context where parties interact frequently, it is less likely that buyers will reduce their requirements to zero without an actual legitimate business reason. Given the fact that sellers take on the risk of market fluctuations, at least under a good faith standard, it is imperative that the supplier trust the buyer. If the buyer is unfamiliar to the supplier, or an infrequent business partner, it is perhaps better to

choose a less uncertain form of agreement by shifting risk of market fluctuation to the buyer, or contracting for guaranteed minimum purchases.

Also, for those of you looking for good pro bono/volunteer opportunities, the ABA Business Law Section and Junior Achievement are partnering to promote youth financial literacy. Business lawyers often witness firsthand the high cost of ignorance about personal finances. Volunteer yourself and your firm to provide personal finance instruction to high school students within the Junior Achievement program. Check [here](#) for more information about the Section's efforts.

Featured Articles

RECENT DEVELOPMENTS: THE WHOLE NINE YARDS: 9 THINGS EVERY BUSINESS LAWYER SHOULD KNOW ABOUT THE 2010 AMENDMENTS TO UCC ARTICLE 9

By [Shadi J. Enos](#) and [Hilary Sledge](#)

Article 9 of the Uniform Commercial Code will be getting a facelift in 2013 thanks to the Uniform Law Commission (“ULC”) and the American Law Institute (“ALI”), who drafted the 2010 Amendments. While the 2010 Amendments are comprehensive (see the 122 pages of Official Text with Comments⁵), they are primarily designed to clarify and address ambiguities in the existing revised Article 9. Unlike the 1998 revisions that were a substantive overhaul of Article 9, the 2010 Amendments are intended to smooth out the wrinkles that practitioners and scholars have identified since the enactment of the 1998 amendments. In that way, the 2010 Amendments can be thought of as a facelift – a facelift, however, that all business lawyers should be aware of and understand. This article provides business lawyers with a cheat sheet of the top 9 things to know about the 2010 Amendments.

1. The 2010 Amendments are Effective July 1, 2013

For the states that choose to adopt them, the 2010 Amendments will be effective July 1, 2013⁶ (except in Puerto Rico, where the 2010 Amendments are already effective⁷ and Arizona, where the current senate bill calls for a delayed enactment of September 1, 2013⁸). The drafters took great care to ensure a uniform effective date since the 2010 Amendments alter the jurisdiction in which a secured party is required to file in order to perfect its security interest in certain collateral. If the effective date of the amendments varied by state, “the status of a particular security interest as perfected or unperfected would depend on whether the matter was litigated in a State in which the amendments were in effect or a State in which the amendments were not in effect.”⁹

While the 2010 Amendments will take effect July 1, 2013, there will be a five year transition period ending June 30, 2018.¹⁰ During the transition period, a security interest perfected before the effective date that complies with the 2010 Amendments will remain effective.¹¹ However, a security interest perfected before the effective date that *does not* comply with the 2010 Amendments will need to be amended at the time such financing statement is up for renewal.¹² Accordingly, secured parties will not be required to inventory the slew of financing statements they filed prior to the effective date to ensure compliance with the 2010 Amendments; rather, as each of the previously filed financing statements is up for renewal during the transition period, secured parties can file an amendment along with the continuation statement to revise any portions of the financing statement that are noncompliant under the new law. After the transition period, all new and previously perfected security interests will be required to adhere to the 2010 Amendments.

2. Not All Jurisdictions Have Adopted the 2010 Amendments

Because the 2010 Amendments are only proposed revisions to the UCC, each state's legislature must enact a bill setting forth the specific text of the revisions before the revisions are effective in that jurisdiction. While the goal of the ULC and the ALI is to have each state and territory enact a version of the 2010 Amendments, as of March 15, 2013, only 32 jurisdictions have done so; 18 jurisdictions have a legislative bill introduced or pending, and 3 jurisdictions have no bill pending or enacted. The chart at the end of the newsletter summarizes the enactment status of the 2010 Amendments by jurisdiction and identifies whether each jurisdiction has elected Alternative A or B in connection with the revisions to § 9-503(a). For future updates to the enactment status, see the ABA webpage: http://apps.americanbar.org/buslaw/committees/CL710043pub/updates_by_state.shtml

3. Jurisdictions May Choose Between “Alternative A” and “Alternative B”

One of the most noteworthy revisions proffered by the 2010 Amendments relates to whether a secured party has sufficiently identified an individual debtor's name on a UCC financing statement. Under the existing § 9-503(a), a financing statement is sufficient with

respect to an individual debtor's name if it simply "provides the individual . . . name of the debtor." This rule proved difficult to apply in practice, however, as secured parties struggled with identifying the individual name of certain debtors. Case law is replete with examples of courts invalidating UCC financing statements on the basis that the secured party failed to correctly identify the individual's name. For example, filings under nicknames (such as Terry instead of Terrance) have been, but are not always, deemed seriously misleading.¹³ Even filings omitting a middle name and suffix have been found to be seriously misleading, leaving secured parties confused and concerned about the sufficiency of their filings.¹⁴

Drafters of the 2010 Amendments recognized the need to clarify § 9-503 but were unable to settle on a uniform approach. Instead, the 2010 Amendments permit each jurisdiction to choose between "Alternative A" and "Alternative B."¹⁵ Under Alternative A (also known as the "Only if" option), if a debtor has an unexpired driver's license issued by the state where the debtor resides, a financing statement against such debtor is sufficient only if it provides the name as indicated on the driver's license.¹⁶ A somewhat counterintuitive corollary to this rule is that where a debtor has a valid driver's license but the spelling of the debtor's name on the license is incorrect, the UCC financing statement must mirror the incorrect spelling. For example, if the license reads "Terry" instead of "Terrance," the secured party must file under Terry. If the individual does not have a driver's license meeting the Alternative A requirements, the financing statement is sufficient only if it "provides the individual name of the debtor or the surname and first personal name of the debtor."¹⁷

Under Alternative B (also known as the "Safe Harbor Approach") a financing statement is sufficient if it provides any one of the following: (i) the individual name of the debtor, (ii) the surname and first personal name of the debtor, or (iii) the name as indicated on an unexpired driver's license.¹⁸ Under the Safe Harbor Approach, debtor names that are sufficient under existing law will remain sufficient after the enactment of the 2010 Amendments. This approach provides secured parties with greater flexibility in filing than under Alternative A. The enhanced flexibility, however, does not come without costs. Under Alternative B, lien searchers will be required to search all variations of the debtor's name that would satisfy any one of the three safe harbor approaches identified above. Accordingly, lien searches in Alternative B states will need to be broadened beyond the driver's license name of a debtor to include name variations.

To date, 26 out of the 32 jurisdictions that have enacted the 2010 Amendments have elected to adopt Alternative A. An additional 15 jurisdictions have introduced or plan to introduce legislative bills proposing the adoption of Alternative A (including the state of Washington, which recently introduced legislation to override its initial enactment of Alternative B¹⁹). For jurisdiction-specific elections, refer to the chart at the end of this article and for continuing updates, go to <http://apps.americanbar.org/dch/committee.cfm?com=CL710043>.

4. Secured Party Should Inquire If Debtor Has Changed Location in Previous Four Months

Currently under Article 9, perfection by filing continues for four months after the jurisdiction in which the debtor is located changes.²⁰ However, the secured party does not have a perfected security interest in assets acquired by the debtor during this four month period. The 2010 Amendments contain changes to § 9-316, which has been re-titled "Effect of Changes in Governing Law," that fill a previous gap in perfection by secured parties.²¹ Under the 2010 Amendments, the secured party is perfected with respect to collateral acquired by the debtor before *and within four months of* the change in location. This revision not only affects secured parties, but also affects prospective purchasers. As part of the diligence process, a prospective purchaser or secured party should ask whether the debtor has changed location within the previous four months to determine if searches should be conducted in additional jurisdictions.

The 2010 Amendments include a similar change with respect to a new debtor that is a successor by merger. Perfection now extends to both collateral owned by the successor before the merger and collateral acquired by the successor four months after the merger.²²

5. Clarifications Regarding Filing Against Certain Debtors

The 2010 Amendments have made a number of clarifications dealing with filings against certain debtors. For a registered organization, the name on the public record of the registered organization's jurisdiction of organization must be on the financing statement.²³ However, if a state maintains more than one public record, there is often uncertainty about the relevant public record. The 2010 Amendments create a new definition of "public organic record," which is a record available for public inspection that has been filed with or issued by a state or the United States to form an organization.²⁴ Under this new definition, other possible names, such as those contained in a good standing certificate or an online database, which may contain variations because of a data entry error or small field size, are no longer sufficient. Under the 2010 Amendments, for a financing statement to be sufficient, the name of the registered organization debtor on the financing statement must be reflected in the "public organic record" of the registered organization.²⁵

The 2010 Amendments also create new rules for common law trusts and personal representatives of a deceased individual. The Amendments clarify that a common law trust that is not required to file a public record with the state is not a registered organization.²⁶ This rule may apply to certain common law trusts that are formed for business or commercial purposes that are required by state statute to file with the state (e.g., a Massachusetts business trust).²⁷ Minor clarifications were also made to the filing requirements for

collateral held by a personal representative of a deceased individual,²⁸ collateral held in a trust that is not a registered organization,²⁹ and collateral held by a transmitting utility.³⁰

Under current § 9-518, a debtor is authorized to file a correction statement³¹ or a claim that a financing statement was unauthorized. The correction statement has no legal effect on the filing, but it provides public notice of the debtor's claim that the financing statement was wrongfully filed or contains incorrect information. Under the 2010 Amendments, the filing is now called an "information statement" rather than a "correction statement."³² The 2010 Amendments also permit, but do not require, the secured party to file an information statement if the secured party maintains that an amendment to its financing statement was not authorized.³³

6. Secured Parties Taking Control

The 2010 Amendments clarify portions of § 9-104, addressing control over a deposit account, and § 9-105, relating to control of electronic chattel paper. The 2010 Amendments add an example to the Official Comment to § 9-104 to highlight that a depository bank acting as an agent for a syndicate of lenders is automatically perfected by control with respect to deposit accounts maintained by the borrower with the agent depository bank. Regarding chattel paper, the 2010 Amendments make clear that if chattel paper consists of both tangible and electronic records, a secured party's security interest is perfected by control when it takes possession of the tangible records and has control of the electric records.³⁴

7. Secured Parties Afforded Greater Latitude in Enforcing Remedies

The 2010 Amendments clarify the foreclosure provisions in §§ 9-406(d) and 9-408(a) and (d). These provisions address contractual terms that prohibit the assignment or grant of a security interest in payment intangibles and promissory notes. The 2010 Amendments make clear that §§ 9-406 and 9-408 do not apply to foreclosure sales or strict foreclosure sales.³⁵ The 2010 Amendments also include additional commentary specifying that internet foreclosure sales are permitted under the UCC.³⁶

8. Article 9 Goes Hi-Tech and Accommodates Electronic Transactions

As part of the 2010 amendments, revisions were made to the definitions of "authenticate," "certificate of title," "public organic record," and "registered organization". The definition of "authenticate" in § 9-102(a)(7) was revised by deleting the requirement for the person to take an action with the present intent to identify the person. This definition is more consistent with the definition of electronic signature in the Uniform Electronic Transactions Act and the federal Electronic Signatures in Global and National Commerce Act. The definition of "certificate of title" in § 9-102(a)(10) has been revised to permit states to maintain electronic records in which ownership and liens on goods may be noted. The revised definitions of "public organic record" and "registered organization" are discussed above.

9. Amendments Override Bad Case Law

The 2010 Amendments include revisions to address and overrule two cases that have caused confusion among UCC practitioners. In *Highland Capital Management LP v. Schneider*, 8 N.Y. 3d 406 (2001), which is viewed as having been wrongly decided, the court held that commercial notes may be Article 8 securities because a note register could be maintained. To address *Highland Capital Management LP*, the 2010 Amendments include commentary in Official Comment 13 to § 8-102 that a promissory note is not necessarily "investment property" under Article 9 merely because the issuer records or could record ownership or transfers of such note on its books and records.

To address the bankruptcy court's ruling in *In re Commercial Money Center*, 350 B.R. 465 (B.A.P. 9th Cir. 2006), the 2010 Amendments clarify in Official Comment 5(d) to § 9-102 that if a lessor's rights under a lease are evidenced by chattel paper, an assignment of the lessor's right to payment under the lease constitutes an assignment of the chattel paper, as opposed to a sale of payment intangibles. Accordingly, it is no longer a valid argument that a payment stream has been decoupled from the chattel paper and is no longer considered chattel paper.

Conclusion

The adoption of the 1998 Amendments marked a sea change in the application and practice of secured transactions. By contrast, the revisions to UCC Article 9 set forth in the 2010 Amendments are designed to address some of the practical issues (or wrinkles) that practitioners and scholars have identified since the 1998 Amendments. Most notably, the 2010 Amendments address the ambiguity that secured parties face when filing financing statements against individuals by providing criteria to determine the debtor's appropriate name for filing. While the 2010 Amendments are likely to be adopted by all 50 states and each U.S. territory, to date only 32 jurisdictions have done so. The ABA has prepared and regularly updates a webpage dedicated to tracking the enactment status of the 2010 Amendments by jurisdiction: <http://apps.americanbar.org/dch/committee.cfm?com=CL710043>.

Please click [here](#) for a chart setting out the enactment status of the 2010 Amendments to Article 9 as of March 15, 2013.

We are grateful for the assistance of Scott J. Burnham, Curley Professor of Commercial Law at Gonzaga University School of Law, Recent Developments Editor.

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AN ATTEMPT TO “DEMISTIFY” QUEBEC SECURED TRANSACTIONS LAW (PART III)

By [Kiriakoula Hatzikiriakos](#)³⁷

In the final part of this Article, and following a lengthy break, which we hoped useful in helping you assimilate the Quebec secured transactions concepts analyzed in [Parts I](#) and [II](#),³⁸ we will delve even further into the Quebec secured transactions regime.

In this final part, we will answer the following questions:

- (1) How are sales (assignments) of accounts receivables treated and perfected in Quebec?
- (2) What does Quebec security documentation look like in a syndicated lending transaction?
- (3) Which conflict of law rules are relevant when structuring a cross-border transaction with significant assets in Quebec?

A. Assignment of Receivables

Whether you are counseling a factor purchasing receivables payable by Quebec-based account debtors or a purchaser of receivables also payable by such debtors in a securitization transaction, understanding the *Civil Code of Quebec* (CCQ) assignment of receivables rules is necessary to properly perfect the assignment (sale) against such debtors. Under Quebec law, the “hypothec” regime (ie. security interest) is different from the “assignment” regime.

In contrast to the other Canadian provinces where an assignment of accounts is treated as a security interest under the *Personal Property Security Acts* (PPSAs)³⁹ and a sale of receivables must be registered in the personal property security registry where the seller is located,⁴⁰ in Quebec, an assignment of “claims”⁴¹ (e.g. accounts receivable) must be distinguished from a “hypothec” on claims. An assignment of property for the purposes of securing a debt is invalid under the CCQ.⁴² Accordingly, an assignment of accounts receivable under the CCQ is akin to an outright sale or transfer of such accounts. If the transfer aims to secure a debtor’s obligations to its creditor, the creditor should obtain a hypothec on the claims (not an assignment).

Under the CCQ, there are no special rules for the validity of an assignment (other than a written document establishing the assignment), such as is the case for hypothecs (e.g. amount of hypothec).⁴³ Assuming that the assignment is valid and all requirements of a “true sale” are present, the next step is to render the assignment perfected against third parties (e.g. trustee in bankruptcy, other creditors) and the account debtor. To ensure such perfection, the assignee must comply with Quebec law if Quebec is designated as the place of payment in the agreement between the assignor and the account-debtor. If the agreement does not state where the receivable is payable, the CCQ rules would also apply to the extent the account debtor is located in Quebec.⁴⁴

The CCQ contemplates two types of assignments of claims: the assignment of a specific claim (e.g. a determined receivable) and the assignment of a “universality” of claims (e.g. all the receivables owed by X to Y). The assignment of a specific claim is considered perfected against the account debtor as soon as the latter consents to the assignment or is notified of its existence (ie. receives a copy or a pertinent extract of the deed of assignment or any other evidence of the assignment).⁴⁵

An assignment of a universality of claims, present or after-acquired, is perfected against the relevant account debtors and third parties by the registration of the assignment in the Quebec personal property registry (Register of personal and movable real rights (RPMRP)).⁴⁶ What is a “universality” under the CCQ? There lies the million dollar question! I briefly touched upon this issue in Part I of this Article.⁴⁷ The CCQ does not define the term “universality”. In the case of receivables, a category of identifiable receivables presenting common characteristics would, in principle, constitute a “universality” (e.g. all receivables derived from sales to a particular customer). It can also be argued that a sale of all receivables of a seller presenting common characteristics generated between certain

specific dates constitutes a “universality”. Evidently, determining what is a “universality” is not always simple. For instance, a list of receivables may not qualify as a “universality” if it does not present certain “objective” common elements. What if the sale of a certain category of receivables excludes certain receivables? Can the pool of sold receivables still be considered a “universality”? Faced with this uncertainty, in addition to filing the assignment at the RPMRR, counsel to the purchaser may require an opinion on whether a particular category of receivables constitutes a “universality” (which opinion is often qualified), or alternatively, notify each account debtor of the assignment (which can be a daunting task in the presence of multiple account debtors located in many jurisdictions). The parties can agree to provide such notification at the outset of the transaction or following the occurrence of certain events. Perfecting the assignment through registration or notice to the account debtor will prevent the account debtor from opposing against the assignee a payment made to the assignor after the assignment, as well as any other cause of termination of the debtor’s obligations vis-à-vis the assignor.⁴⁸

If the receivables sold in a securitization transaction relate to installment sale agreements (conditional sales), leases or leasing contracts, in addition to assignment filings (as described above), purchasers should also consider making filings evidencing the transfer of the rights resulting from such agreements (e.g. reservation of ownership of seller under an installment sale filing) in order to render their rights effective against third parties.⁴⁹

B. Quebec Security Documents in a Syndicated Loan Transaction

If you’ve ever been involved in a syndicated transaction with security taken in collateral located in Quebec, you are certainly familiar with the concept of a “*fondé de pouvoir*” (i.e. person holding the power of attorney of the creditors; the “Agent/Collateral Agent” under the credit agreement). Unlike the common law jurisdictions, where security can be held by an “agent” for and on behalf of all present and future creditors under a credit agreement, the CCQ and the RPMRR do not provide a specific regime allowing a third party (agent) to hold security for and on behalf of present and future creditors.⁵⁰ To achieve this, for years now, Quebec practitioners have mainly turned to article 2692 of the CCQ.⁵¹ Since this article refers to a hypothec in favour of a person “holding the power of attorney” of other creditors, Quebec practitioners involved in syndicated transactions have preferred it over other possible structures.⁵² The challenge has been to ensure that the documentation complies with the requirements of art. 2692 of the CCQ. This article applies when a hypothec secures payment of bonds or other titles of indebtedness issued by a trustee, limited partnership or a legal person authorized to do so by law. If these elements are present, the hypothec must be granted by notarial act “en minute” in favour of the person holding the power of attorney of the creditors (*fondé de pouvoir*).

The use of 2692 of the CCQ in the context of syndicated transactions presents certain challenges. Lenders strive to fall squarely within the ambit of 2692 of the CCQ, so as to avoid facing the possibility of invalid security. The criteria of a valid hypothec under 2692 are:

- necessity that the hypothec secures the payment of bonds or other titles of indebtedness;
- requirement that such hypothec be granted by “notarial act” (ie. in the presence of a Quebec notary) in favour of the “person holding the power of attorney of the creditors” (ie. agent for the creditors); and
- issuance of bonds or titles of indebtedness by a trustee, limited partnership or a legal person authorized to do so by law.

A “typical”⁵³ Quebec security package in a syndicated transaction includes the following:

- a deed of hypothec granted by the debtor on its assets in favour of the “*fondé de pouvoir*”, acting for and on behalf of the lenders (under the credit agreement), for an amount stated as the “hypothec amount”,⁵⁴ to secure the payment of the bonds or debentures issued by such debtor under the deed of hypothec, which deed is registered at the RPMRR (and land register if collateral includes real property);
- a bond or debenture (which is the “title of indebtedness” referred to in art. 2692 CCQ) issued by the debtor to the *fondé de pouvoir* under the credit agreement in the hypothec amount (as stated in the deed of hypothec). The bond refers specifically to the deed of hypothec under which it is issued; and
- finally, a pledge agreement which reflects the “real deal”, that is, the credit arrangement between the parties. In the pledge agreement, the bond or debenture is pledged by the debtor in favour of the lenders (represented by the *fondé de pouvoir*, acting for the purposes of the pledge, as “agent and custodian” for the lenders)⁵⁵ to secure the debtor’s obligations under the credit agreement and any other loan documentation.

Furthermore, in the credit agreement’s section dealing with the agent’s appointment and its powers, there is typically a provision stating that, for the purposes of the Quebec security, the lenders constitute the “agent” (administrative/collateral) as the holder of an irrevocable power of attorney (*fondé de pouvoir*) (as understood under art. 2692 of the CCQ) for the purposes of holding any security granted by the debtor or any other loan party.⁵⁶ For the “pledge agreement”, the credit agreement also provides that the lenders

appoint and agree that the agent, acting for the lenders, can act as agent and custodian for and on behalf of the lenders with respect to any bond or debenture that may be issued and pledged for the benefit of the lenders. The credit agreement also deals with “future” lenders/assignees. It typically provides that appointment of the *fondé de pouvoir* (also in its capacity as “agent and custodian”) is deemed to have been ratified and confirmed by any future lender to the credit agreement and by any assignee thereto, as of the date such lender or assignee becomes a party to the credit agreement.

Finally, the credit agreement establishes that the rights, powers and obligations of the *fondé de pouvoir* are the same as those of the agent under the credit agreement, including any provisions relating to the resignation and appointment of a successor to the agent. A foreign agent that does not have a presence in Quebec may appoint (by power of attorney) an authorized signatory in Quebec to sign the deed of hypothec on its behalf. You will recall that pre-filings of security are not allowed under Quebec law⁵⁷ and that it can take up to a day to receive confirmation of a hypothec filing from the RPMRR (the delay can be longer for confirmation from the land registry). Therefore, to ensure that the Quebec hypothecs are in place before closing, the parties should ensure to execute and file the hypothecs a few days before closing. To the extent the Quebec assets form a valuable part of the collateral and the Quebec hypothec filings are condition precedent to funding, it is advisable that the Quebec hypothecs be registered before disbursement.

For many years now, Quebec practitioners in syndicated transactions have used the above structure to ensure that it squarely fits within the requirements of art. 2692 of the CCQ and can ensure that a “one-time” filing can be made to perfect the present and future lenders’ rights under the hypothec. Needless to say, the security documentation which is customarily prepared can be difficult to understand and not so “user-friendly”. Article 2692 CCQ can also lead to unfortunate consequences for a lender who does not strictly comply with its requirements. For example, even outside the context of a syndicated transaction, if a hypothec secures a title of indebtedness (e.g. debenture), the prudent approach is to have the hypothec granted by notarial act en minute in favour of a “*fondé de pouvoir*” (even if only one creditor exists at the time the hypothec is granted).⁵⁸ In light of the foregoing, changes to article 2692 CCQ are necessary and hopefully forthcoming.

C. Conflict of Law Rules

In this section, we will give a brief overview of the conflict of law rules relating to the validity, publication (perfection) and effects of publication of hypothecs on the most common forms of personal property collateral. For a more detailed discussion, we refer to our article entitled: “Taking security in Canada: the rules of the game”.⁵⁹

The same Quebec conflict of law rules apply to the validity, publication and effects of publication of “security”.⁶⁰ As is the case under UCC Art. 9, under Quebec conflict of law rules, a reference to the law of a jurisdiction is a reference to the internal law of that jurisdiction, excluding its conflict of laws rules (ie. no “*renvoi*”). We must bear in mind that, given the distinction which exists in the CCQ between a hypothec and the rights resulting from a “title device” contract (i.e. instalment sale, leasing contract, lease),⁶¹ the latter may not be considered “security” as understood under Quebec law. Accordingly, the security conflict of law rules may not apply to “title device” contracts, in which case we must consider applying the conflict of laws relating to real rights.⁶² Also, given the distinction that exists in Quebec law between “hypothecs” and “absolute assignments” (as discussed above), conflict of law rules relating to real rights would also govern absolute assignments of property (e.g. sale of receivables).

The law of the jurisdiction where the collateral is situated (*lex situs*) at the time the hypothec is created governs the validity of a hypothec in tangible property (and possessory hypothecs).⁶³ The law of the jurisdiction where the collateral is “currently” situated (i.e. at the time the issue of publication is considered e.g. at closing or when enforcement arises) governs the hypothec’s publication and its effects.⁶⁴

For intangible property and mobile goods (in transit), the law of the grantor’s “domicile” (head office; registered office)⁶⁵ governs the validity of the security, its publication and effects.⁶⁶ The rule of the law of the bank’s jurisdiction found under UCC section 9-304 for the perfection and priority of security interests in deposit accounts does not exist in the CCQ (or under the PPSAs).⁶⁷ Deposit accounts are “claims” under the CCQ, which are intangible property (“incorporeal property” in Quebec parlance). As such, the lender would have to publish its security at the debtor’s head office.⁶⁸

The conflict of rules relating to security in investment property are essentially the same as those found under UCC Art. 9. In fact, the PPSA and the CCQ rules were modeled on the UCC Art. 9 rules.⁶⁹

For “title devices” (e.g. installment sales, leasing contracts, leases), it is uncertain whether the conflict of laws relating to “security” can apply to the validity and publication of the rights resulting from such devices.⁷⁰ Hence, we must turn to the conflict of laws relating to real rights in property: real rights and their publication are governed by the law of the place where the property concerned is situated (*situs*); if in transit, such rights and governed by the law of the jurisdiction of their place of destination.⁷¹ The conflict of law rules relating to “sales” may also be relevant.⁷² Accordingly, if the “title device” agreement you are examining has any relation to the province of Quebec (e.g. Quebec is lessee’s/buyer’s domicile, agreement is governed by Quebec law, property leased/purchased is located in Quebec), the CCQ should be complied with for the validity and publication of the rights resulting from such devices.

The same conflict of law rules apply to the assignment of claims. As mentioned in the first section above, under Quebec law, an assignment of property for the purposes of securing a debt is invalid and the CCQ regime for “assignments” is different from the regime for “hypothecs”. Accordingly, the “security” conflict of law rules would not apply to an assignment of property. Rather, the real rights conflict of law rule (*situs*) applies.⁷³ But where is a “claim” located? Two interpretations are supported: place of payment (as agreed between the parties) or, if no place is chosen, the account debtor’s domicile (e.g. head office/registered office).⁷⁴ In a securitization transaction taking place outside Quebec where account debtors are located in Quebec, the assignee should comply with the Quebec internal rules to render the assignment enforceable against the Quebec account debtors.⁷⁵

This concludes my 3-part article on the Quebec secured transactions regime. As stated in Part I, my goal was to “demystify” the Quebec concepts. I hope to have achieved this or at least provided you with the necessary tools to facilitate your discussions with Quebec counsel in a secured transaction involving parties or collateral located in the Province of Quebec.

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NON-UNIFORM FILING RULES WILL REMAIN DESPITE THE 2010 AMENDMENTS TO UCC ARTICLE 9

By [Paul Hodnefield](#)⁷⁶

There may be legal professionals who expect that the 2010 Amendments to UCC Article 9 (the “Amendments”) will finally do away with all those pesky non-uniform filing requirements that states have enacted over the years. Unfortunately, that won’t happen. While the Amendments do provide many welcome revisions, very few states have used the enactment process to replace non-uniform filing provisions with the official text from Part 5 of Article 9.

The remaining non-uniform filing requirements pose risks for UCC filers because they are not always obvious. This article identifies by state a sampling of non-uniform departures from the official text of Article 9 that will not be affected by enactment of the Amendments. This article also offers some suggestions to avoid the potentially costly traps non-uniform versions of Article 9 create for those who file UCC records.

Florida

A non-uniform addition to Fla. Stat. § 679.512(1)(a) requires that all amendments provide the names of the debtor and secured party of record. The filing office refuses to accept an amendment that omits the party names under § 679.516(2)(c) on the grounds that the record fails to correctly identify the initial financing statement in compliance with § 679.512(1)(a).

Ordinarily, a rejected amendment poses little risk for the secured party. The filer will simply resubmit a corrected version after receiving the rejection notice. Unless, of course, the filing office rejects a time-sensitive record, such as a continuation statement submitted at the end of the six-month window. In that case, the secured party could be at risk. Consequently, a UCC filer should always include the party names when filing an amendment in Florida. The party names can be provided either on the amendment form, space permitting, or on an attached exhibit.

Georgia

The official text of UCC § 9-515(a) provides the general rule that a financing statement is initially effective for five years. There are some exceptions, however. If the record indicates that it is filed in connection with a public-finance or manufactured-home transaction, then § 9-515(b) provides that it is effective for 30 years. Likewise, if the record indicates that the debtor is a transmitting utility then § 9-515(f) makes it effective until terminated.

Some states omitted either public-finance or manufactured-home transactions from the scope of § 9-515(b). Georgia, however, omitted the official text of both subsections (b) and (f) entirely from Ga. Code Ann. § 11-9-515. As a result, all financing statements filed in Georgia are initially effective for a five-year period, no exceptions.

If a secured party sets its continuation tickler based on the assumption that Georgia law follows the uniform effective periods, it will not be reminded to file a continuation statement at the correct time and the record will lapse.

Georgia's version of Article 9 also creates a trap for the unwary UCC filer when the collateral includes growing crops. Georgia law treats growing crops in the same manner as timber to be cut, as-extracted collateral and fixtures. In other states there are no special requirements for financing statements that cover growing crops.

Under Ga. Code Ann. § 11-9-501(a)(1)(A), however, the proper place to file a financing statement covering growing crops is the same office where a mortgage would be recorded on the affected real property, not the regular UCC index. Likewise, a financing statement that covers growing crops must satisfy the additional § 11-9-502(b) content requirements for records that cover real-estate-related collateral. Unless a financing statement covering growing crops located in Georgia is filed in accordance with § 11-9-501(a)(1)(A) and § 11-9-502(b), then the secured party may find itself with an unperfected security interest.

The Amendments may bring one significant Georgia statutory deviation back into uniformity with the official text. Under current § 11-9-502(c), a record of a mortgage cannot be effective as a financing statement filed as a fixture filing. The bill introduced in Georgia this year to enact the Amendments replaces current § 11-9-502(c) with the uniform text from UCC § 9-502(c). However, the legislation, as introduced, will not change the other non-uniform provisions described above.

Idaho

Perfecting a security interest in any farm products requires special care in Idaho. If a security interest includes farm products as collateral, non-uniform Idaho Code Ann. § 28-9-502(e) imposes additional requirements for the sufficiency of the financing statement.

Under the official text of UCC § 9-502(a), a financing statement is sufficient if it provides just three pieces of information: the name of the debtor, name of the secured party, and an indication of the collateral. There are no special rules for the sufficiency of a financing statement that covers farm products.

In Idaho, however, § 28-9-502(e) applies the federal requirements for an "Effective Financing Statement," as defined in 7 U.S.C. § 1631(c)(4) of the Food Security Act, to the sufficiency of a UCC financing statement that covers farm products. Under this non-uniform provision, a written financing statement covering farm products is sufficient if it provides the names and addresses of the parties, is signed or authenticated by the debtor, and includes the debtor's Social Security Number ("SSN") or other unique identifier selected by the Secretary of State. Moreover, the record must describe the farm products by category and identify the locations by county where the farm products are produced or located.

To further complicate matters, the content requirements differ for records filed electronically and those submitted on written forms. For example, the debtor must sign or otherwise authenticate a written UCC record that covers farm products. The same record submitted electronically, however, would not require the debtor's signature or authentication.

Indiana

A non-uniform provision added to Ind. Code § 26-1-9.1-502 imposes a unique duty on the secured party following the filing of a financing statement. Subsection (f) requires the secured party to furnish a copy of a financing statement to the debtor within 30 days of the file date. The provision also places the burden of proving compliance with this requirement squarely on the secured party.

It is significant that the text of § 26-1-9.1-502(f) does not limit the secured party's responsibility to providing the debtor with a copy of just an "initial financing statement." Instead, subsection (f) uses the broader term "financing statement." The official text of Article 9 and Ind. Code § 26-1-9.1-102(a)(39) both define "financing statement" to include any filed record related to the initial financing statement. Consequently, this provision arguably requires the secured party to send the debtor a copy not just of the initial financing statement, but also any related amendments filed at a later date.

A secured party's failure to send a copy of the filed record to the debtor will not make the record ineffective. Nevertheless, there are potential costs if the secured party overlooks this requirement. A secured party that fails to comply with subsection (f) is subject to the penalties set forth in Ind. Code § 26-1-9.1-625. To play it safe, a prudent UCC filer should promptly send the debtor a copy of any UCC record filed in Indiana by a method that provides proof of delivery.

Louisiana

The risk of filing office error generally falls on those who search the UCC records. A secured party is protected against a filing office indexing error by UCC § 9-517. Likewise, UCC § 9-516(d) partially protects the secured party when the filing office wrongfully refuses to accept the record, except in Louisiana.

Louisiana omitted subsection (d) when it enacted La. Rev. Stat. § 10:9-516. Consequently, a record wrongfully rejected by a Louisiana filing office through no fault of the secured party is nevertheless ineffective against other creditors.

To avoid the risk caused by the omission of UCC § 9-516(d) in Louisiana, filers should assume that a wrongfully rejected record is ineffective. The UCC filer must respond promptly to any notice of rejection from a Louisiana filing office and do what it takes to get the record filed.

South Dakota

Prior to 2001, several states required financing statements to include the SSN of an individual debtor. By early 2012, only South Dakota still required an individual's SSN by statute for all financing statements. It was widely hoped that South Dakota would use the Amendments legislation as an opportunity to finally eliminate the SSN requirement. That did not happen. When it enacted the Amendments in March 2012, South Dakota retained the SSN requirement for sufficiency in S.D. Codified Laws § 57A-9-502(a)(1).

UCC filers must continue to provide an individual debtor's SSN on any financing statement submitted in South Dakota or the filing office will reject the record. Moreover, the SSN is a requirement for *sufficiency* under S.D. Codified Laws § 57A-9-502(a)(1). A record without the SSN may not be effective even if the filing office accepts it. The safest course of action, therefore, is to ensure that all financing statements submitted to a South Dakota filing office provide the individual debtor's SSN.

Wyoming

In 2013, Wyoming enacted a significant non-uniform amendment to the Article 9 financing statement duration and effectiveness rules. The new law amends Wyo. Stat. Ann. § 34.1-9-515(a) to provide that financing statements filed after July 1, 2013 will be effective for 10 years. In addition, the filing of a continuation statement after July 1, 2013 will extend the effectiveness of the related financing statement for an additional 10-year period.

The reasoning behind this non-uniform departure from the official text of UCC § 9-515(a) is that a growing number of finance transactions now extend beyond five years. A 10-year effective period for financing statements reduces the risk that a lender would inadvertently miss the continuation deadline and become unperfected. It also saves lenders the cost of filing continuation statements because nearly all transactions will conclude within that 10-year period.

A 10-year effective period for UCC financing statements should reduce the number of instances where a record inadvertently lapses because the secured party missed the continuation deadline. Whether this benefit outweighs the added costs of a longer effective period remains to be seen. It will take several years before the lenders and debtors feel the full impact of the increased transaction costs.

Conclusion

The states listed above are by no means the only jurisdictions that enacted UCC Article 9 with non-uniform filing requirements. Perhaps someday every state will finally adopt the full official text of the Article 9 filing provisions. Until then, non-uniform filing requirements will continue to create risk for secured parties and their legal counsel. The best way to limit that risk is never to assume that the filing requirements are entirely uniform. The UCC filer must carefully review the statutory requirements prior to filing in a particular state.

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ARBITRATION CLAUSES CREATED THROUGH DATA-PASS MARKETING PROGRAMS AND SHRINK-WRAP PRESENTATIONS MAY CREATE ENFORCEABILITY ISSUES

By [Anjanette H. Raymond](#) and [Elizabeth Simos](#)⁷⁷

Introduction:

On September 7, 2012 the Second Circuit struck a blow for those consumers that have been trapped by data pass marketing programs, especially those that contain an arbitration clause hidden within its terms. In the case of *Schnabel v. Trilegiant Corp.*,⁷⁸ the court examined the enforceability of online contract terms. Most relevant and telling, however, was the fact that the court specifically invalidated the arbitration provision of the disputed agreement.

You likely are aware of what a post-transaction/data pass marketing program is, but you may have never heard the name associated with the activity. A ‘post-transaction’ or ‘data pass’ marketing program occurs when a consumer is presented with a ‘discount’ or cash-back offer from a third-party marketer at the conclusion of a transaction with an online retailer. If the consumer responds to the offer, whether by an affirmative ‘click’ or by the provision of personal information, their payment data is provided *directly* to the third-party marketer by the online retailer who collected it in connection with the original underlying transaction. The consumer is then enrolled in a program and their payment card is charged a monthly fee.⁷⁹ As of 2010, the direct passing of *payment* information in this manner is prohibited by the *Restore Online Confidence Act* (S. 3386 (111th Cong., 2d Sess. 2010)) unless, among other things, the consumer’s “express informed consent” is obtained. However, issues still remain in relation to the agreement that arises in these types of transactions. Most concerning is the presence of an arbitration clause within these agreements and the absence of the need to present this information to the consumer.

II. The *Schnabel* case

The *Schnabel v. Trilegiant Corp.* case arises from the practice of data pass through marketing. The defendant, Trilegiant Corp. is a third party marketer that markets and sells membership club and loyalty products for everything from travel, shopping, health, dental, entertainment, and consumer protection services.⁸⁰ Trilegiant Corp. receives its customers from online referrals from other merchants. In most instances, a customer is shopping online from a website, such as Priceline.com. At the end of the transaction with Priceline.com, the customer is presented with a webpage operated by Trilegiant Corp where the customer is presented with information about the loyalty or discount program. If the customer clicks on the link to ‘find out more’ the customer is then given the opportunity to enroll in one of Trilegiant Corp. loyalty or service clubs. At the time of the decision, one of Trilegiant Corp.’s customers was a company known as Great Fun. Great Fun is a discount club which offers customers discounts on items such as dining, shopping, entertainment and travel.⁸¹

The plaintiffs, Brian and Edward Schnabel became enrolled in one of Trilegiant Corp.’s services, Great Fun when they made a purchase through one of Trilegiant Corp.’s subscribing websites.

In both instances, as they were finalizing their purchases, they were presented with the opportunity to click on a hyperlinked invitation to ‘See Details’⁸² contained on the purchase confirmation page, which offered an opportunity to receive a ‘Cash Back’ on the purchase.⁸³ This initial page reportedly contained other key information, such as: ‘your Online Price Guide subscription has also been sent to [your email address]’ and a button titled ‘See Details.’⁸⁴

According to Trilegiant Corp., neither plaintiff could join Great Fun without affirmatively entering personal information into various fields appearing on the enrollment page, such as the plaintiff’s city of birth and a password created by the plaintiff. Neither plaintiff was required to re-enter credit-card information on the Trilegiant Corp. website.⁸⁵ However, the enrollment webpage contained a two paragraph description of some of the general terms of the agreement, including a statement that the first month of membership will be free but that the purchaser’s credit card will be charged \$14.99 per month if he or she does not cancel the membership by calling a toll free number.⁸⁶ The text also states that by entering the city of birth and password and clicking the ‘Yes’ button, the purchaser agrees that the vendor will transmit his or her credit-card information to Great Fun.⁸⁷ Further, by clicking the ‘Yes’ button, the purchaser acknowledges that he or she has read the terms and conditions of the agreement.⁸⁸ Below these two paragraphs are two hyperlinks, one to a ‘Privacy Policy,’ and the ‘Terms & Conditions.’⁸⁹ The ‘Terms and Conditions’ section of the website contains the arbitration clause at issue.⁹⁰

It is important to note that Trilegiant Corp. also emails each of its newly enrolled members a written document entitled ‘Great Fun Membership Terms and Conditions’ following his or her online enrollment in the service.⁹¹ The email subject line reads: ‘Important information about your membership privileges’ without mention of the contract or terms to be included in it.⁹² The body of the email provides a membership number and similar information, while the ‘Terms and Conditions’ are not included until thirteen paragraphs later.⁹³ The arbitration clause is paragraph number seven in the ‘Terms and Conditions’ section of the email.⁹⁴

In early 2010, Edward Schnabel discovered that Edward’s credit card had been charged \$14.99 per month for every month between September 2009 and February 2010 for Edward’s membership in Great Fun.⁹⁵ Edward claimed that he never made any discounted purchases for which he was qualified as a Great Fun member.⁹⁶ Similarly, Brian had been charged \$11.99 per month since December 2007 by Trilegiant Corp. for membership in Great Fun.⁹⁷ After complaints to Trilegiant Corp. failed to result in a refund of the payments,⁹⁸ Brian and Edward brought a putative class action alleging they had never intended to join Great Fun and that their membership was the result of deceptive practices [through] . . . unauthorized enrollment practice[s] [known as] . . . post-transaction marketing and data pass.⁹⁹

The defendant filed a motion to dismiss and compel arbitration pursuant to the emailed arbitration provision contained in its terms and conditions that mandated binding arbitration and precluded class-wide arbitration.¹⁰⁰

III. The Decision

The Second Circuit's decision affirmed the district court's order denying the defendants' motion to compel arbitration, and remanded the case to the district court.

In relation to the specific issues presented for coverage in this paper, the Second Circuit spent considerable time analyzing and providing comprehensive detail in rendering its decision. First, it is important to note in the United States when courts are faced with a motion to compel arbitration, the threshold question is whether the parties have indeed agreed to arbitrate.¹⁰¹ Whether or not the parties have agreed to arbitrate is a question of state contract law.¹⁰² In this case, while two jurisdictions were implicated in the choice-of-law decision, both jurisdictions (California and Connecticut) use substantially similar rules for determining whether the parties mutually assented to a contract term.¹⁰³ Consequently, the court facing a false conflict avoided the issue; however, it is possible that the applicable law determination could have impacted the case in the instance that state law differed on the definition of mutual assent.

The Second Circuit also specifically noted that the link was not at issue and was therefore not considered within the analysis. One can appreciate this case would have been decided in a significantly different manner if the website link to terms and services had been considered.¹⁰⁴ The law is reasonably well settled on this issue. As long as the arbitration clause was present and the link was prominent, the clause would have been enforceable.

The Second Circuit rejected the defendants' argument that the e-mail¹⁰⁵ containing the arbitration provision put the plaintiffs on inquiry notice of the provision. The reasoning of the Second Circuit in rendering its decision was that an e-mail does not establish that: (1) a person should know that terms disclosed in an e-mail relate to a service in which he has previously enrolled and (2) failing to opt out of the service equaled assent to the terms. As the Second Circuit reasons "[o]ne can assent to terms one doesn't actually read, but the offer must still make clear to a reasonable consumer *both* that terms are being presented and that they can be adopted through the conduct that the offerer wants to constitute assent."¹⁰⁶ An offeree isn't bound by inconspicuous contractual provisions of which he's actually unaware when contained in a document whose contractual nature isn't obvious. Here, an unsolicited email from an online business didn't put its recipients on inquiry notice of the terms in that email and the relationship of those terms to a service in which they'd already enrolled, nor of the fact that a failure to act affirmatively by cancelling the membership would constitute assent.¹⁰⁷

It's true that in the "modern commercial context, there are reasons to allow parties to contract without consideration of, and the possibility to negotiate, every term." But duty-to-read cases involving terms delivered after a contract begins does not "nullify the requirement that a consumer be on notice of the existence of a term before he or she can be legally held to have assented to it." The Second Circuit reasoned that with shrink-wrap terms: (1) a reasonable purchaser would understand that unless he returned the goods he was subject to the package's provisions and (2) the purchaser cannot begin using the goods until after being presented with the terms. In this case, however, the plaintiffs could benefit from the Great Fun service before being confronted with the existence of the arbitration provision.¹⁰⁸ The Second Circuit noted that the arbitration provision was both *temporally and spatially decoupled* from the plaintiffs' enrollment and use of Great Fun.

As the Second Circuit highlights, a reasonable person "may understand that terms physically attached to a product may effect a change in the legal relationship between him or her and the offeror when the product is used."¹⁰⁹ However, as correctly noted by the Second Circuit "a reasonable person would not be expected to connect an email that the recipient may not actually see until long after enrolling in a service with the contractual relationship he or she may have with the service provider, especially where the enrollment required as little effort as it did for the plaintiffs here."¹¹⁰ On these facts, the email wouldn't have raised a red flag vivid enough to make a reasonable person anticipate a legally significant alteration in the contract.¹¹¹

Moreover, as the Second Circuit noted: "the 'duty to read' rule combined with the 'standardized form' contract makes it unlikely in many contexts that a consumer will actually read such an agreement beyond a quick scan, if that."¹¹² And as has been noted numerous times, the offeror doesn't really expect customers to read, much less understand, the standard terms.¹¹³ Within this particular context, however, consumers should at least be confronted with the terms "at a place and time that the consumer will associate with the initial purchase or enrollment, or the use of, the goods or services from which the recipient benefits,"¹¹⁴ Here, however, "Trilegiant Corp. effectively obscured the details of the terms and conditions and the passive manner in which they could be accepted."¹¹⁵ The solicitation and enrollment pages, combined with the credit card pass through, "made joining Great Fun fast and simple and made it appear—falsely—that being a member imposed virtually no burdens on the consumer besides payment."¹¹⁶

With respect to whether the plaintiffs agreed to the arbitration provision by merely continuing to pay their monthly membership fees, which were automatically charged to their credit cards, the court stated that for a finding of assent, a failure to act affirmatively must carry a significance that reasonable people would understand to be assent.¹¹⁷ The Second Circuit stated that the plaintiffs' "continued payments were too passive for any reasonable fact-finder to conclude that they manifested a subjective understanding of the existence of arbitration"¹¹⁸ and an intent to be bound by the other terms.¹¹⁹

III. The Implications

On its face, the Schnabel case highlights the importance of presenting online terms and conditions to purchasers and website users with clarity and visibility. The ideal time for such terms to be presented is at the time of purchase of a product, registration or enrolment onto a service. In so doing, the Schnabel case revives the essence of traditional contract making in the online framework.

The Second Circuit's opinion suggests that the policy rationales typically underpinning a shrink-wrap license may not exist in the context of online service subscriptions and downloads. It is easy for vendors to provide notice online which purchasers can peruse at their leisure prior to assenting, leaving little room for shrink-wrap license principles to be applied in this context.

Moreover receipt and assent can be acknowledged online by a click-through means, ensuring active and not passive assent from the purchaser to the terms sought to be incorporated into the agreement. In practice this may simply mean requiring a tick by the purchaser in an 'I agree' box prior to or at the point of online purchase or enrolment. Ultimately the seller must ensure that the receipt, acknowledgement and agreement of the terms can be demonstrated with a sufficient level of certainty. The seller cannot simply rely on the mere existence of inconspicuous terms to enforce an agreement. The lesson for vendors is thus to avoid strategically 'hidden' terms, which will in any event most likely be unenforceable.

Whilst the court made a detailed assessment of the mechanics of enforceable online contracts, there are other prominent themes to be extracted from the court's reasoning. Firstly, the Schnabels benefited from being retrospectively protected as online consumers. The court recognized the potential contractual traps facilitated by online complexities and restated the importance of transparent contract making. It struck a blow for the consumer in this sense by raising the threshold for vendors employing questionable tactics in an attempt to enforce obscure terms.

This otherwise consumer friendly approach does however come with a warning for online purchasers to employ due caution when contracting online. With the advent of instantaneous online purchases; the use of mobile phones with smaller screens and text size; and mobile applications providing immediate retail gratification; it can be easy for a consumer to be overcome by the informality of process and forget to employ due diligence when agreeing to online terms. Whilst there is little expectation that consumers carry out anything more than a quick scan of the terms, they can still be bound if they haven't read the terms they have agreed to. Simply put, in the Schnabel context the customers had not been provided with a sufficient opportunity to do so.

Finally, this case underlines that an arbitration clause sought to be relied upon must have a firm contractual foundation. Whilst the process of online contracting may on occasion cloud what might otherwise be a straightforward transaction, the Schnabel case strongly suggests that clarity and certainty for contracting parties need not be compromised by the mere nature of the digital transactional framework.

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FILINGS AGAINST TRUSTS AND TRUSTEES UNDER THE 2010 REVISIONS TO ARTICLE 9 – THIRTEEN VARIATIONS

By [Norman M. Powell](#)

Introduction

Certain amendments (the "2010 Amendments") to the official text of, and official comments to, Uniform Commercial Code Article 9 ("Article 9") have been promulgated by its sponsoring organizations and are intended to take effect on July 1, 2013. While most simply clarify existing text, some are noteworthy, including amendments relating to the naming of trusts and trustees as debtors. Over a decade ago, I attempted to provide clarity with respect to the seemingly ministerial tasks of filling out and filing financing statements where trusts or trustees are debtors.¹²⁰ The 2010 Amendments include changes intended to simplify the filling out, if not the filing, of such financing statements. This article reconsiders such financing statements in light of the 2010 Amendments. Unless otherwise noted, all citations in this article are to Article 9.

Where to File

With limited exceptions¹²¹, Article 9 provides for filing in the debtor's location without regard to the location of the collateral to which the filing relates.¹²² 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 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 are several possible answers, depending on 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.

Trust is Debtor and is a Registered Organization

Some trusts, including Delaware statutory trusts, are separate legal entities distinct from their settlors and trustees, and generally hold legal title to the trust estate.¹²³ 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

Other trusts, such as Delaware common law trusts, do not feature the same separate legal entity status as Delaware statutory trusts. In such trusts, the trustee generally holds legal title to the trust estate for the benefit of the designated beneficiary. Thus, the trustee has the relevant and requisite interest in the trust estate and is the debtor.¹²⁴ The filing should be made in the trustee’s location as determined under the applicable subsection of § 9-307.¹²⁵ A trustee that is a registered organization organized under state law is located in the state under whose laws it is organized.¹²⁶ 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 formed¹²⁷, the jurisdiction designated by the trustee in accordance with the federal law under which it is formed¹²⁸, or in the District of Columbia, if neither of the foregoing applies.¹²⁹ 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 business¹³⁰, or its chief executive office if it has more than one place of business.¹³¹ A trustee that is an individual is located at such individual’s principal residence.¹³²

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.¹³³ If the trust has more than one place of business, the trust is located at its chief executive office.¹³⁴

How to Provide Debtor-Related Information on the UCC-1 Financing Statement

Section 9-503 sets forth the rules for providing the debtor’s name on the financing statement. These rules are revised, and their interrelation clarified, by the 2010 Amendments. Section 9-503(a)(1) provides 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 effect prior to July 1, 2013, these rules no longer turn on the question of whether the debtor is the trust or a trustee.¹³⁵ 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 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 UCC-1 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 Article 9 as in effect prior to July 1, 2013, wherein filers were invited to check the appropriate check box in box 17 of the UCC-1 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 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.¹³⁶ 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) may require use of an individual's name 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 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 is streamlined by the 2010 Amendments, which retains box 1c (debtor's mailing address), but omits 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 Amendments' 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 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.¹³⁷

Transition Period

The 2010 Amendments are intended to be effective on July 1, 2013¹³⁸, 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 prior to July 1, 2013 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)).

As in effect prior to July 1, 2013, Article 9 requires that a financing statement 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 debtor and is a registered organization.¹³⁹ 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 simply require in such circumstances an indication that the collateral is held in a trust.¹⁴⁰ 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. In light of this change, the last sentence of Section 9-805(e) (a transition rule) provides "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 Article 9 as in effect prior to the effectiveness of the 2010 Amendments.

Thirteen Variations Summarized

The chart which follows summarizes and provides step-by-step guidance for the completion and filing of UCC-1 financing statements relating to trusts and trustees as debtors after giving effect to the 2010 Amendments. 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 UCC-1 financing statements prepared in each of the thirteen variations should be filed.

Filings Against Trusts and Trustees Under The 2010 Revisions to Article 9 – Thirteen Variations

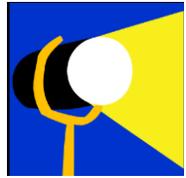
UCC 1 Financing Statement Box	Trust is Debtor and is a Registered Organization	Trustee is Debtor									Trust is Debtor and is not a Registered Organization		
		Trust with a Name			Trust without a Name						Trust with a Name	Trust without a Name	
		Individual Trustee	Registered Organization Trustee	Organization Trustee (other than Registered Organization)	Individual Trustee		Registered Organization Trustee		Organization Trustee (other than Registered Organization)				
					Individual 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)
B	Mailing address of trust*
C	Mailing address of trustee*
D	Trust's location per RA-9 § 307(e)
E	Trustee's location per RA-9 § 307(b)(1) or (c)
F	Trustee's location per RA-9 § 307(b)(2), (b)(3), or (c)
G	Trustee's location per RA-9 § 307(e) or (f)
H	Name of settlor or testator indicated in trust's organic record per RA-9 § 503(h)(1) or (2)
I	Trust's location per RA-9 § 307(b)(2), (b)(3), or (c)
J	Information to distinguish debtor (whether trust or trustee) from other trusts with same settlor or trustor per RA-9 § 503(a)(3)(B)(ii)
K	Check first item (Collateral is held in a Trust)

* 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.

UCC Spotlight

By [Stephen L. Sepinuck](#) and [Kristen Adams](#)



The purpose of this column is to identify some of the most disconcerting judicial decisions interpreting the Uniform Commercial Code or related commercial laws. The purpose of the column is not to be mean. It is not to get judges recalled, law clerks fired, or litigators disciplined for incompetence. Instead, it is to shine a spotlight on analytical errors, and thereby provide practitioners and judges with reason to disregard the decisions.

Algonquin Power Income Fund v. Christine Falls of New York, Inc.,
[2013 WL 336002](#) (2d Cir. 2013)

This case concerns a security interest in a tort claim and the transition rules of revised Article 9. The court probably reached the correct result but its reasoning was flawed because it overlooked a key provision.

The critical facts are as follows. In 1988, the debtor obtained \$22.5 million loan to finance the development of seven hydroelectric plants in upstate New York. In 1997, after a default, modification, assignment of the loan, and a subsequent default, the noteholder accelerated the debt and sought to enforce its security interest. The collateral at issue was a malpractice claim against project engineers, initiated in 1989, for failing to properly measure the property. In 1999, after a jury found the engineers liable, the engineers paid \$11.1 million pursuant to a stipulated settlement. The bankruptcy and district courts court ruled that the noteholder did not have a security interest in proceeds of the malpractice claim but the Second Circuit reversed.

Looking to § 9-104(k) of the pre-revision version of Article 9, which was in effect when the transaction documents were executed, the circuit court concluded that Article 9 did not initially apply to the claimed security interest. The court then evaluated the claimed

security interest under New York common law. The written agreement purported to assign all “rights in action . . . arising from or relating to” the real property. The debtor argued that this language was insufficient because it did not refer to the specific tort claim or even tort claims in general. The circuit rejected this argument, noting that assignments of general types or categories of property are sufficient under New York law.

Then the court considered what effect enactment of revised Article 9 may have had. Although the court did not mention it, this was important because § 9-108(e)(1) provides that a description of collateral only by type is insufficient for a commercial tort claim. However, the court concluded that the common-law security interest in the malpractice claim was saved by revised Article 9’s transition rules. Specifically, § 9-702(b) provides that a common-law lien remains valid after the effective date of revised Article 9 if it was validly entered into before the adoption of revised Article 9.

While the court did correctly interpret and apply § 9-702, it failed to note that § 9-702 is expressly subject to other rules in Part 7, *see* § 9-702(a), and that § 9-703 significantly limits § 9-702. Pursuant to § 9-703(b), a common-law lien that was valid prior to enactment of revised Article 9, but which is governed by revised Article 9 – as the security interest in the malpractice claim was – is effective only for one year unless it becomes enforceable under § 9-203 before the end of that period. Because the agreement failed to describe the malpractice claim other than by type, and thus the description of the claim was inadequate, the security interest in the malpractice claim in fact became invalid on July 1, 2002. *See* § 9-703 cmt 2., ex. 1 (following this analysis with respect to a security interest in a consumer’s securities account, for which revised Article 9 also requires a description other than by type of collateral).

The court may nevertheless have reached the correct result. Because the court ruled for the noteholder on this issue, it expressly declined to address the noteholder’s other arguments. Among these were that the security interest attached to the proceeds of the malpractice claim after the claim became a judgment, a claim against a bond, a claim under a contract, and a fund in a restricted escrow account. This argument was probably sound. The parties’ original security agreement covered general intangibles and a modification to the agreement added contract rights. Even if the security agreement failed to properly describe the malpractice claim itself – and thus the claim ceased to be collateral one year after Article 9 took effect – the security interest could have attached to the proceeds of the claim, provided that the proceeds were generated prior to the debtor’s bankruptcy and not cut off by § 552 of the Bankruptcy Code.

In re Marble Cliff Crossing Apartments, LLC,
[2012 WL 6758310](#) (Bankr. S.D. Ohio 2012)

This case involves a security interest in equipment comprising a security system installed in an apartment complex. The bankruptcy court ruled that the security interest was perfected because the equipment did not qualify as fixtures. The court’s conclusion was correct but its analysis was unnecessarily complicated because it apparently misunderstood the law relating to perfection.

The facts of the case are fairly straightforward. In 2010 and 2011, Bresco Solutions, LLC sold security cameras and wireless internet access equipment to the debtor and installed the goods in the debtor’s upscale apartment complex in Ohio. Bresco filed UCC financing statements with the Ohio Secretary of State’s office, but not with the county recorder’s office. When the debtor later went into bankruptcy, a party related to the debtor challenged the attachment, perfection, and priority of Bresco’s security interest. For the purposes of this discussion, we focus solely on the perfection issue.

The court began its analysis by looking to § 9-501(a), which provides that a financing statement must be filed in the office designated as the place for filing or recording a mortgage “if . . . the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures.” The court interpreted this to mean that perfection of a security interest in fixtures requires filing at the county level and only if the goods were not fixtures would perfection be achieved by filing in the Secretary of State’s office. The court then analyzed how the goods had been installed and concluded from those facts that the goods were not fixtures. As a result, Bresco had properly perfected its security interest.

However, the quoted provision of § 9-501 applies only if the filing is a “fixture filing.” Nothing in Article 9 says that a fixture filing is the only way to perfect a security interest in goods that are or are to become fixtures. In fact, quite the opposite is true. A traditional filing in the centralized office of the jurisdiction in which the debtor is located is sufficient to perfect a security interest in fixtures. *See* § 9-501 cmt. 4. A fixture filing may be preferable because it enables the secured party to have a heightened priority, but it is not needed to perfect. Thus, it should not have mattered whether the goods were fixtures and the court’s statement to the contrary is unfortunate and erroneous.

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Endnotes:

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- ¹ Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 Fed. Reg. 48225 (Aug. 13, 2012).
- ² Among other alternatives, the definition of an ECP includes, in relevant part, an entity “(I) that has total assets exceeding \$10,000,000; (II) the obligations of which under an agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support or other agreement by an entity described in subclause (I)...” 7 U.S.C. § 1a(18)(v)(2006 & Supp. 2010).
- ³ Swap Guarantee Arrangements; Jointly and Severally Liable Counterparties; Amounts Invested on a Discretionary Basis; and “Anticipatory ECPs”, CFTC No-Action Letter No. 12-17 (Oct. 12, 2012).
- ⁴ The LSTA turned to Jane Summers at Latham & Watkins LLP for assistance in drafting the LSTA Advisory and the suggested drafting language contained therein.
- ⁵ Amendments to Uniform Commercial Code Article 9 2010 Official Text with Comments.
- ⁶ Prop. U.C.C. § 9-801 (Proposed Amends. 2010).
- ⁷ Enacted by Camara Bill 2965, signed by governor on Jan. 17, 2012. Ley de Transacciones Comerciales, 2012 P.R. Laws Act 21 (P. de la C. 2965).
- ⁸ S.B. 1039, 51st Leg., 1st Reg. Sess. (Ariz. 2013).
- ⁹ Prop. U.C.C. § 9-801 cmt. 1 (Proposed Amends. 2010).
- ¹⁰ Prop. U.C.C. §§ 9-801 et seq. (Proposed Amends. 2010).
- ¹¹ Prop. U.C.C. §§ 9-803(a) (Proposed Amends. 2010).
- ¹² Prop. U.C.C. §§ 9-803(b) (Proposed Amends. 2010).
- ¹³ *In re Kinderknecht*, 308 B.R. 71 (B.A.P. 10th Cir. 2004); but see, *In re Erwin*, 50 U.C.C. Rep. Serv. 2d 933 (Bankr. D. Kan. June 27, 2003).
- ¹⁴ *In re Stewart*, No. 04-16838, 2006 WL 3193374 (Bankr. D. Kan. Nov. 1, 2004).
- ¹⁵ Prop. U.C.C. §§ 9-503(a) - (b) (Proposed Amends. 2010).
- ¹⁶ Prop. U.C.C. § 9-503(a), Alternative A (Proposed Amends. 2010).
- ¹⁷ Prop. U.C.C. § 9-503(a)(5), Alternative A (Proposed Amends. 2010).
- ¹⁸ Prop. U.C.C. §§ 9-503(a)(4), Alternative B (Proposed Amends. 2010).
- ¹⁹ See S.B. 5183, 63rd Leg., 2013 Reg. Sess. (Wash.).
- ²⁰ U.C.C. § 9-316(a)(2) (2009).
- ²¹ Prop. U.C.C. § 9-316(h) & cmt. 7 (Proposed Amends. 2010).
- ²² Prop. U.C.C. § 9-316(i) (Proposed Amends. 2010).
- ²³ U.C.C. § 9-503(a)(1) (2009).
- ²⁴ Prop. U.C.C. § 9-102(a) (Proposed Amends. 2010).
- ²⁵ Prop. U.C.C. § 9-503(a)(1) (Proposed Amends. 2010).
- ²⁶ Prop. U.C.C. § 9-503(a)(1), (a)(3) (2010); Prop. U.C.C. § 9-102(a)(71) (Proposed Amends. 2010).
- ²⁷ *Id.*
- ²⁸ Prop. U.C.C. § 9-503(a)(2) (Proposed Amends. 2010).
- ²⁹ Prop. U.C.C. § 9-503(a)(3) (Proposed Amends. 2010).
- ³⁰ Prop. U.C.C. § 9-515(f) (Proposed Amends. 2010); Prop. U.C.C. § 9-102(a)(81) (Proposed Amends. 2010).
- ³¹ U.C.C. § 9-518(a) (2009).
- ³² Prop. U.C.C. § 9-518 (Proposed Amends. 2010).
- ³³ Prop. U.C.C. § 9-503(c) (Proposed Amends. 2010).
- ³⁴ Prop. U.C.C. § 9-330 & cmt. 4 (Proposed Amends. 2010).
- ³⁵ Prop. U.C.C. § 9-406(e) (Proposed Amends. 2010); Prop. U.C.C. § 9-408(b) (Proposed Amends. 2010).
- ³⁶ Prop. U.C.C. § 9-610 cmt. 2 (Proposed Amends. 2010).
- ³⁷ The views and opinions expressed in this article are solely those of the author and do not reflect the practice or positions of the National Bank of Canada.
- ³⁸ See Part I, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in Commercial Law Newsletter, June 18, 2010 (basic Quebec secured transactions concepts and vehicles) and Part II, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part II)” in Commercial Law Newsletter, April 8, 2011 (purchase money security interests and consignment agreements).
- ³⁹ See art. 2 Ontario PPSA (PPSA applies to “a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation”).
- ⁴⁰ *E.g.*, see art. 7 Ontario PPSA (conflict of law rules relating to security interests in intangibles); art. 9-301 (1) and 9-307 (location of debtor) of the U.C.C.
- ⁴¹ The concept of “claims” under the CCQ includes “accounts”, as understood under the PPSA or art. 9 U.C.C. (ie. monetary obligation).
- ⁴² Art. 1801 CCQ states: “Any clause by which a creditor, with a view to securing the performance of the obligation of his debtor, reserves the right to become the irrevocable owner of the property or to dispose of it is deemed not written”. See Part I, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in Commercial Law Newsletter, June 18, 2010.
- ⁴³ See Part I, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in Commercial Law Newsletter, June 18, 2010. The validity of anti-assignment clauses is unclear under Quebec law (see art. 1212 CCQ: “No restriction on the exercise of the right to dispose of property may be stipulated, except by gift or will.”) The CCQ does not contain an article similar to U.C.C. § 9-406.
- ⁴⁴ See discussion in section C below.
- ⁴⁵ Art. 1641 CCQ; also provides that if the “debtor cannot be found in Québec, the assignment may be set up upon publication of a notice of assignment in a newspaper distributed in the locality of the last known address of the debtor or, if he carries on an enterprise, in the locality where its principal establishment is situated.”
- ⁴⁶ Art. 1642 reads: “The assignment of a universality of claims, present or future, may be set up against debtors and third persons by the registration of the assignment in the register of personal and movable real rights, provided, however, that the other formalities whereby the assignment may be set up against the debtors who have not acquiesced in it have been accomplished.”

⁴⁷ Note 10 of Part I (“An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in Commercial Law Newsletter, June 18, 2010 reads: “The CCQ does not define this term. Essentially, parties are free to determine the scope of the universality. In a typical secured transaction with a hypothec on the “universality” of the grantor’s (company) assets, the secured party would benefit from security on all of the grantor’s business assets. Note that specific universalities can also be created i.e. a hypothec on the universality of claims (accounts) from a specific account debtor. Curiously, in a 1996 Quebec Superior Court case, the Court refused to characterize 95% of the claims of an assignor from the same account debtor as an assignment of a “universality.” (*AutomobilesMailbot inc., Re*, 1996 CarswellQue 1701 (Que. Sup. Ct))).

⁴⁸ Art. 1643 CCQ.

⁴⁹ For a discussion on the rights resulting from such agreements, see Part I, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in Commercial Law Newsletter, June 18, 2010. The following CCQ articles provide for the filing of transfers of the rights resulting from such agreements: art. 1745 (instalment sales); art. 1847 (leasing contracts); art. 1852 (leases).

⁵⁰ In the context of syndicated transactions, we typically see PPSA and UCC filings designating the secured party “collateral agent”, acting for present and future lenders. This is not possible under the CCQ and the RPMRR, which means that every time a new lender joins the syndicated credit arrangement (i.e., by assignment), a new filing would have to be made at the RPMRR to reflect the new secured party. There are other alternatives to using art. 2692 CCQ in the context of syndicated transactions, such as using the CCQ’s agency principles (art. 2130 ssq. CCQ) or the CCQ principles of “solidarity between creditors” or commonly known as “active solidarity” (art. 1541-1544 CCQ) (i.e., one lender holds the security package for and on behalf of other lenders, but credit agreement provides for the solidarity of each lender with the lender who is holding the security package in their name (this entitles each lender to demand the entire performance of the debtor’s obligations), but these structures also present their set of disadvantages (this discussion is beyond the scope of this article).

⁵¹ Art. 2692 CCQ reads: “A hypothec securing payment of bonds or other titles of indebtedness issued by a trustee, a limited partnership or a legal person authorized to do so by law shall, on pain of absolute nullity, be granted by notarial act *en minute* in favour of the person holding the power of attorney of the creditors.” This article finds its origins in the practice developed prior to 1994 (entry into force of the CCQ) pursuant to which a trust deed would allow a debtor to grant security in all of its assets to secure its obligations under titles of indebtedness and have a trustee hold the security for and on behalf of the holders of such titles (commonly called “trusts deed”). The deed hypothec prepared under art. 2692 mirrors very closely this practice.

⁵² See note 50 above.

⁵³ Many transactions use this basic structure. However specific elements of the documentation may vary.

⁵⁴ The hypothec amount is usually set higher than the total amount of the credit facilities under the credit agreement (indebtedness) in order to allow for the hypothec to cover future increases to the indebtedness and enforcement costs and expenses (art. 2667 CCQ: A hypothec secures the capital, the interest accrued thereon and the legitimate costs, other than extra-judicial professional fees, incurred for their recovery or for conserving the charged property).

⁵⁵ Art. 2705 CCQ (The creditor, with the consent of the grantor, may hold the property through a third person, but if so, detention [holding of the property] by the third person effects publication only from the time the third person receives evidence in writing of the hypothec.).

⁵⁶ Some practitioners also have the debtor appoint the *fondé de pouvoir* in the deed of hypothec, in order to enable the parties to proceed with the deed of hypothec’s execution in the presence of the Notary before the execution of the Credit agreement (where the lenders appoint the *fondé de pouvoir* for the purposes of the deed of hypothec). This ensures that the deed of hypothec is filed before closing.

⁵⁷ The RPMRR forms require the execution date of the deed of hypothec: see Part I, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in Commercial Law Newsletter, June 18, 2010 (basic Quebec secured transactions concepts and vehicles).

⁵⁸ See *Positron Technologies inc. (Arrangement relatif à)*, 2008 QCCS 4668 (CanLII) (Quebec Superior Ct), at <<http://canlii.ca/t/21425>> (Que. Sup. Ct.).

⁵⁹ See Kiriakoula Hatz, A.B.A., Business Law Today, Aug. 2012.

⁶⁰ In contrast to U.C.C. art. 9, which sets out the rules for perfection and effect of perfection and U.C.C. § 1-301, which provides the rule for validity of the security i.e. law of contract.

⁶¹ For more, see Part I, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in Commercial Law Newsletter, June 18, 2010 (basic Quebec secured transactions concepts and vehicles).

⁶² Art. 3097 CCQ (Real rights and their publication are governed by the law of the place where the property concerned is situated. However, real rights on property in transit are governed by the law of the country of their place of destination.). The conflict of law rule relating to “sales” may also be relevant: art. 3114 CCQ (If no law is designated by the parties, the sale of a corporeal movable is governed by the law of the country where the seller had his residence or, if the sale is made in the ordinary course of business of an enterprise, his establishment, at the time of formation of the contract. However, the sale is governed by the law of the country in which the buyer had his residence or his establishment at the time of formation of the contract in any of the following cases: (1) negotiations have taken place and the contract has been formed in that country; (2) the contract provides expressly that delivery shall be made in that country; (3) the contract is formed on terms determined mainly by the buyer, in response to a call for tenders. If no law is designated by the parties, the sale of immovable property is governed by the law of the country where it is situated.)

⁶³ Also, *situs* governs security charging intangible property established by a title in bearer form or a security published by the holding of the title exercised by the creditor. Same rule applies under the PPSAs (see Ontario s. 5(1)(b): a possessory security interest in an instrument, a negotiable document of title, money and chattel paper); U.C.C. § 9-301(2).

⁶⁴ Art. 3102 CCQ.

⁶⁵ The PPSAs refer to the debtor’s location (i.e. chief executive office) (see s. 7(3) PPSA). Some PPSA provinces (e.g., Ontario, British Columbia) have begun proposals to amend the PPSA conflict of laws to define the debtor’s location by referring to the debtor’s jurisdiction of incorporation, bringing the law closer to the rules under U.C.C. Art. 9.

⁶⁶ Art. 3105 CCQ.

⁶⁷ A similar rule is being considered in amendments that are proposed to the Ontario PPSA, see Ontario Bar Association, “Perfecting Security Interests in Cash Collateral”, : <<http://www.oba.org/en/pdf/perfectingSecurityInterests.pdf>>, Feb. 6, 2012.

⁶⁸ If the debtor’s head office is not in the same location as the deposit account, in some cases, practitioners also file the security interest in the deposit account’s location.

⁶⁹ Art. 3108.1 – 3108.8 CCQ.

⁷⁰ Part I, “An Attempt to “Demystify” Quebec Secured Transactions Law (Part I)” in Commercial Law Newsletter, June 18, 2010.

⁷¹ Art. 3097 CCQ (“Real rights and their publication are governed by the law of the place where the property concerned is situated. However, real rights on property in transit are governed by the law of the country of their place of destination.”)

⁷² Art. 3112 CCQ, *see* note 62 above.

⁷³ *Id.*

⁷⁴ Art. 1566 CCQ states: “Payment is made at the place expressly or impliedly indicated by the parties. If no place is indicated by the parties, payment is made at the domicile of the debtor, unless what is due is a certain and determinate thing, in which case payment is made at the place where the property was when the obligation arose.”; Art. 3097 CCQ is the conflict of law rule that would apply to an assignment of claims. *See also* art. 3120 CCQ which reads: “The assignability of a claim and relations between the assignee and the assigned debtor are governed by the law governing relations between the assigned debtor and the assignor.”

⁷⁵ *See* discussion on arts. 1641 and 1642 CCQ in section A. above.

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⁷⁷ Following her undergraduate law degree (LLB Honours) at The University of Surrey, Elizabeth Simos completed the LLM with Merit in Corporate and Commercial Law at The Centre for Commercial Law Studies, Queen Mary University of London. She was awarded first place in the Clive M. Schmitthoff Essay Competition for her work “The CISG: A Lost Cause in the UK?” and received an Honorable Mention for her advocacy skills while finishing as a finalist in the Eighteenth Annual Willem C. Vis International Commercial Arbitration Moot. She has recently completed the Legal Practice Course at BPP Law School London. She currently writes in the areas of International Contracts, E-Commerce and International Commercial Arbitration.

⁷⁸ 697 F. 3d 110 (2d Cir. 2012).

⁷⁹ *See* Committee On Commerce, Science, And Transportation, Office Of Oversight And Investigations Majority Staff, *Aggressive Sales Tactics On The Internet And Their Impact On American Consumers*, Staff Report (Nov. 16, 2009) available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=c7b50606-8e74-4cbb-b608-87ab8b949d9a.

⁸⁰ The Trilegiant website provides more information; *see* <http://www.trilegiant.com/>.

⁸¹ The Great Fun website provides more information; *see* <https://www.greatfunonline.com/store/>.

⁸² Schnabel, 697 F. 3d at 7.

⁸³ *Id.*

⁸⁴ A “screenshot” of an order confirmation page similar to the Beckett Internet page that Brian saw when completing his purchase on Beckett, including the Great Fun solicitation “10% Cash Back”, is publicly available at http://www.ca2.uscourts.gov/Docs/Video_files/11_1311/Becket_ord_conf.pdf. *See* Schnabel, 697 F.3d at 7..

⁸⁵ This is an important fact when considering new cases arising in this type of transaction. The Restore Online Confidence Act (S. 3386, (111th Cong. (2d Sess. 2010) now requires, among other things, the consumer’s “express informed consent” which includes the customer re-entering his credit card information on the third party’s website. The Act additionally addresses the subject of negative option marketing in online transactions (“in an offer or agreement to sell or provide any goods or services, a provision under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.” (*See* 16 C.F.R. 310.2(f))). Transactions such as this are prohibited unless: (1) all material terms are “clearly and conspicuously disclosed” before the consumer’s billing information is obtained; (2) the consumer’s “express informed consent” is obtained before charging the consumer’s financial account; and (3) a “simple mechanism” is provided for the consumer to stop any recurring charges on the account.

⁸⁶ Schnabel, 697 F. 3d at 9.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See* Brief of Appellant at 36, Schnabel, 697 F.3d; Reply Brief of Appellant at 7, 13-14, Schnabel, 697 F.3d.

⁹¹ If the email bounced back, then Trilegiant would send a paper version of the document to the member at his or her billing address. *See* Schnabel, 697 F.3d at 10.

⁹² Schnabel, 697 F. 3d at 27 n.14.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Schnabel, 697 F. 3d at 11.

⁹⁶ *Id.*

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 11- 12.

⁹⁹ *Id.* at 12.

¹⁰⁰ *Id.* at 13.

¹⁰¹ This is because the arbitrator has no authority of any kind with respect to a matter at issue absent an agreement to arbitrate. The question of whether such an agreement exists and is effective is necessarily for the court and not the arbitrator. *See* AT&T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 648-49 (1986); *Specht v. Netscape Commc’n Corp.*, 306 F.3d 17, 26-27(2d Cir. 2002).

¹⁰² *See* *Specht*, 306 F.3d at 26; *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 295-96 (2d Cir. 1999) (“[W]hile . . . the FAA preempts state law that treats arbitration agreements differently from any other contracts, it also preserves general principles of state contract law as rules of decision on whether the parties have entered into an agreement to arbitrate.”)(internal quotation marks and footnote omitted).

¹⁰³ Schnabel, 697 F. 3d at 17-18.

¹⁰⁴ *See id.* at 40-41.

¹⁰⁵ The defendants also claimed that the provision was made available through a hyperlink on the page the plaintiffs would have seen before enrolling in their services. However, the court found that the defendants forfeited any argument based on that hyperlink by failing to raise it in the district court.

¹⁰⁶ Schnabel, 697 F. 3d at 26, citing Specht, 306 F.3d at 29; *see also, e.g.*, Guadagno v. E*Trade Bank, 592 F.Supp. 2d 1263, 1271 (C.D. Cal. 2008); John E. Murray, Jr., The Dubious Status of the Rolling Contract Formation Theory, 509 DUQ. L. REV. 35, 49 (2012), citing Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997)(explaining that “people who accept an offer assume the risk of unread terms that may prove unwelcome”).

¹⁰⁷ Schnabel, 697 F. 3d at 26.

¹⁰⁸ *Id.* at 34.

¹⁰⁹ *Id.* at 35.

¹¹⁰ *Id.*

¹¹¹ *See id. citing* Campbell v. Gen. Dynamics Gov’t Sys., 407 F.3d 546, 557 (1st Cir. 2005)(concluding that arbitration clause posted on employer’s intranet did not apply to employees even though a link to the site was included in an email because, *inter alia*, there was no evidence “of any other instance in which the company relied upon either an e-mail or an intranet posting to introduce a contractual term. . . .” (emphasis omitted)).

¹¹² Schnabel, 697 F. 3d at 35 *citing* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 770 (2002). *See also*, Anjanette H. Raymond, *Yeab, but Did You See the Gorilla? Creating and Protecting an ‘Informed’ Consumer in Cross Border Online Dispute Resolution*, HARVARD NEGOTIATION LAW REVIEW 19(1) (Spring 2014)(forthcoming)(discussing consumers, online behavioral tendencies and the means to better inform and present information).

¹¹³ Restatement (Second) of Contracts 6 §211, cmt. b (1981).

¹¹⁴ Schnabel, 697 F. 3d at 36.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 40, citing Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004)(“It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.”).

¹¹⁸ *See* Schnabel, 697 F. 3d at 38-39.

¹¹⁹ *Id.*

¹²⁰ *See Filings Against Trusts and Trustees Under Revised Article 9 – Thirteen Variations*, 35 UCC L.J. 91 (2002).

¹²¹ E.g., with respect to filings relating to fixtures (U.C.C. § 9-301(3)(A)), timber to be cut (U.C.C. § 9-301(3)(B)), and as-extracted collateral (U.C.C. § 9-301(4)).

¹²² UCC § 9-301(1).

¹²³ *See* Delaware Statutory Trust Act, DEL.CODE ANN. Tit. 12. §§ 3801(a), 3805(f).

¹²⁴ U.C.C. § 9-102(a)(28).

¹²⁵ Note that a trustee can have but one location under 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.

¹²⁶ U.C.C. § 9-307(e).

¹²⁷ U.C.C. § 9-307(f)(1).

¹²⁸ U.C.C. § 9-307(f)(2).

¹²⁹ U.C.C. § 9-307(f)(3).

¹³⁰ U.C.C. § 9-307(b)(2).

¹³¹ U.C.C. § 9-307(b)(3).

¹³² U.C.C. § 9-307(b)(1).

¹³³ U.C.C. § 9-307(b)(2).

¹³⁴ U.C.C. § 9-307(b)(3).

¹³⁵ This 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”, *supra*.

¹³⁶ These include Texas, which by non-uniform text in U.C.C. § 9-503 (enacted prior to the 2010 Amendments) requires use of the name shown on an individual’s driver’s license or identification certificate. Delaware chose to address the issue in its initial enactment of Article 9, not by non-uniform text in U.C.C. § 9-503, but rather by excepting financing statements naming individual debtors from the strict search logic test of U.C.C. § 9-506(b).

¹³⁷ This 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.

¹³⁸ U.C.C. § 9-801.

¹³⁹ U.C.C. § 9-503(a)(3)(B).

¹⁴⁰ *Id.*

ENACTMENT STATUS OF THE 2010 AMENDMENTS TO ARTICLE 9 (as of March 15, 2013)

State	Status	Option A/B	Bill Number
AK	Bill Introduced or Pending	B	HB9
AL	Bill Introduced or Pending	A and B	SB39, SB23 and H284
AR	Enacted	A	SB 219

AZ	Bill Introduced or Pending	A	SB1039
CA	Bill Introduced or Pending	A	AB 502
CO	Enacted	B	HB1262
CT	Enacted	B	HB6274
DC	Bill Introduced or Pending	A	B19-0222
DE	Bill Introduced or Pending	Non-Uniform	HB8
FL	Enacted	A	HB483
GA	Bill Introduced or Pending	A	SB 185
HI	Enacted	A	HB2162
IA	Enacted	A	HF2321
ID	Enacted	A	SB1307
IL	Enacted	A	SB3764
IN	Enacted	A	HB1321
KS	Enacted	A	HB2621
KY	Enacted	A	SB97
LA	Enacted	A	HB369
MA	Bill Introduced or Pending	A	HB28
MD	Enacted	A	HB713
ME	No Bill Pending or Enacted	N/A	N/A
MI	Enacted	A	HB5083, HB5081 and HB5082
MN	Enacted	A	SB194
MO	Bill Introduced or Pending	A	HB212
MS	Bill Introduced or Pending	A	S2609
MT	Bill Introduced or Pending	A	HB212
NC	Enacted	A	HB1068
ND	Enacted	A	HB1137
NE	Enacted	A	LB90
NH	Enacted	B	SB204
NJ	Bill Introduced or Pending	A	SB2144 & AB3613
NM	Bill Introduced or Pending	A	S146

NV	Enacted	A	AB109
NY	No Bill Pending or Enacted	N/A	N/A
OH	Enacted	A	SB208
OK	Bill Introduced or Pending	A	SB371 & SB388
OR	Enacted	B	HB4035
PA	Bill Introduced or Pending	A	HB24 & SB381
PR	Enacted	A	C2965
RI	Enacted	A	HB5573
SC	Bill Introduced or Pending	A	SB323 & H3569
SD	Enacted	A	HB1059
TN	Enacted	A	SB2931
TX	Enacted	A	SB782
USVI	No Bill Pending or Enacted	N/A	N/A
UT	Bill Introduced or Pending	B	SB41
VA	Enacted	A	SB51
VT	Bill Introduced or Pending	Pending	HB 483
WA	Enacted*	B*	HB1491*
WI	Enacted	A	SB416
WV	Enacted	A	HB4251
WY	Enacted	B	SB13

*While Washington enacted HB1491 and elected Alternative B, a senate bill has been introduced (SB5183) to change the election to Alternative A.