FORTY YEARS OF TITLE IX: HISTORY AND NEW APPLICATIONS

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Signed into law by President Nixon on June 23, 1972, Title IX of the Education Amendments of 1972 has done more than create a frenzy of ponytailed girls playing soccer. Its original intention was to "remedy to some extent sex discrimination in education."[1] It was passed with two objectives in mind: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices."[2] Its effect has been immense.

	1971-72	**2010-11**
Boys in high school varsity sports	3,666,917	4,494,406
Girls in high school varsity sports	294,015	3,173,549
Bachelor degrees awarded to men	500,590	685,382* (2008-09)
Bachelor degrees awarded to women	386,683	915,986* (2008-09)
Men entering medical school	10,435	10,193
Women entering medical school	1,653	9,037

These dramatic numbers show that Title IX has had its intended effect: to increase equality and to promote parity in entrance to graduate school, math and science programs and after school activities, though the majority of the attention given to Title IX has focused on sports. That focus has a good reason.[3] There is evidence that shows that participation in sports provides life skills beyond the playground. For example, Secretary of State Hillary Clinton stated: "I was never a great athlete, but I loved sports. Sports helped me learn how to be part of a team. It also helped me learn how to lose. You

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1. Trs. of Univ. of Del. v. Gebelein, 420 A.2d 1191, 1196 (Del. Ch. 1980).

2. Cohen v. Brown Univ., 101 F.3d 165 (1st Cir. 1996).

3. Karen Blumenthal, *The Truth About Title IX*, The Daily Beast (June 22, 2012), *available at* http://www.thedailybeast.com/articles/2012/06/22/the-truth-about-title-ix.html.

can't win every time you go out, and you have to figure out what you're made of after you do lose and whether you're ready to get up and keep going."[4] Similarly, others report that sports participation is linked to "higher wages, greater educational attainment and overall professional success in adult life."[5] If the goal of Title IX was to increase parity between women and men, then allowing access by women to sports seems to be a vital part of the program.

But has Title IX achieved its goal of parity? Is the act still relevant and important? In answering this question, this article will explore the history of Title IX, its implementation, and the significant case law that shapes the operation of Title IX today, as well as briefly discuss the ways in which Title IX is being used to combat bullying in schools.

I. HISTORY

No one can dispute that the passage of Title IX of the Education Act of 1972 (the "Act") has had a dramatic impact on girls' participation in sports; one that began almost immediately. "The proportion of high school girls in sports went from 1 in 27 in 1972 to 1 in 4 in 1978, while the proportion of boys in sports held steady at 1 in 2."[6] But the focus of the Act was not sports when it was originally conceived.

Title IX was added to the Educational Amendments of 1972 as a last minute amendment at a committee hearing by Representative Edith Green.[7] As written, Title IX of the Act reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[8]

This Act effects more than who plays sports or the conditions under which they play. In essence, Title IX is an anti-discrimination law, with provisions to address sexual harassment and sexual assault on school campuses.[9] "Title IX is not an affirmative action statute; it is an anti-discrimination statute…."[10] That means it seeks to prevent discrimination in many different areas.[11] In fact, it was originally intended to address inequality in science, technology, engineering and math (so called "STEM" areas) among other topics.[12]

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4. *The Cheat Sheet*, The Daily Beast, June 21, 2012 *at*: http://www.thedailybeast.com/cheats/2012/06/21/hillary-clinton-gets-sporty

5. Maha Atal, *Happy 40th Anniversary Title IX: From Girls' Sports to Women's Wages*, Forbes (June 22, 2012), *at* http://www.forbes.com/sites/mahaatal/2012/06/22/happy-40th-anniversary-title-ix-from -girls-sports-to-womens-wages/.

6. *Id.*

7. Blumenthal, *supra* note 3.

8. 20 U.S.C.S. § 1681; Mann v. Oppenheimer & Co., 517 A.2d 1056, 1065 n.10 (Del. 1986).

9. Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980) (applying Title IX to sexual harassment as a form of sex discrimination); North Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982) (applying Title IX to prohibit discrimination in employment). *See* David H. Williams, *Sexual Harassment in Schools*, 16 Delaware Lawyer 19, 20-21 (Winter 1999); *see generally* Simms v. Christina Sch. Dist., 2004 Del. Super. LEXIS 43 (Del. Super. Ct. Jan. 30, 2004); *see also* Valerie Jarrett, *40th Anniversary of Title IX,* White House Blog, *at* http://www.whitehouseblog/2012/06/21/40th-annivesary-title-ix. For an excellent comparison of Title IX to other anti-discrimination laws, such as Title VII, *see* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 Harv. J.L. & Gender 217 (Summer 2005).

10. Cohen v. Brown Univ., 101 F.3d 155, 170 (1st Cir. 1996).

11. *See* Alicia Jessop, *The 40th Anniversary of Title IX: The 21St Century Issue of College Coaches' Salaries*, Forbes (June 23,

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At the time Representative Green introduced her amendment, her focus was on ending educational quotas for admission found at law and medical schools.[13] That the law would have the revolutionary impact on sports that it has arose later when the Act was being considered in the Senate. When Senator Birch Bayh introduced the same amendment to the Act as Representative Green, he admitted in response to questioning from a colleague that Title IX would call for girls to have equal access to after-school activities.[14] The key and controversial areas of Title IX came more sharply into focus in its implementation.

II. IMPLEMENTATION

It was left to the Department of Health, Education and Welfare to determine how the Act would be implemented. That effort was led by Secretary Weinberger, who specifically decided that Title IX would apply to sports programs.[15] His vision, as stated at a press conference after releasing the implementing regulations in 1975, was that male and female teachers would be paid equally and all students would be equally able to participate in sports with similar equipment, facilities, and coaches.[16] The regulations issued in 1975 have remained virtually unchanged since that time.[17] In 1995, the Office for Civil Rights ("OCR"), the entity charged with enforcing Title IX, issued a new guidebook on how Title IX would be enforced.[18]

As to the most highlighted aspect of Title IX, involving varsity sports, the OCR regulations required equal opportunity for members of both sexes.[19] Specifically, those regulations state that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."[20] The regulations as to varsity sports address "whether the selection of sports and levels of competition effectively

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2012), *at* http://www.forbes.com/sites/aliciajessop/2012/06/23/ the-40th-anniversary-of-title-ix-the-21st-century-issue-of-college-coaches-salaries. It's worth noting that the pay discrimination claims under Title IX focus on the sex of the team coached, not the sex of the coach. *Id.*

12. *See generally* Zachary Nathan Klein, *NOTE: STEMing Out Disparities: The Challenges of Applying Title IX to the Study of Sciences, Technology, Engineering, and Mathematics*, 64 Rutgers L. Rev. 895 (Spring 2012). For more information on STEM programs, see http://www.stemedcoalition.org/.

13. Blumenthal, *supra* note 3.

14. Blumenthal, *supra* note 3.

15. *Id*.

16. *Id*.

17. Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 Nova L. Rev. 545, 546 (Winter 1997).

18. *Id*. at 546.

19. *Id.* at 549.

20. *Id.* at 561.

accommodate the interests and abilities of members of both sexes."[21] The method by which this equal opportunity is assessed, under the 1979 OCR Policy Interpretation, is:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice or program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by their present program.[22]

In sum, schools have three options for showing that they have met the OCR regulations concerning Title IX. The analysis for meeting these three options has been fleshed out in the case law, as discussed below. Most important to determining the scope and interpretation of Title IX has been the Supreme Court's decision that individuals have a private right of action under Title IX.[23] Once that decision was entered in 1979, the scope of Title IX began to form.

III. SIGNIFICANT CASES

Before its enactment, Title IX faced a variety of challenges in the Senate and House, each seeking to curtail the possible effects of Title IX on sports. Once enacted, no challenge was bigger than the *Grove City v. Bell* decision.[24] In that case, the court ruled that Title IX was only applicable to athletic programs which received "direct" federal financial aid. Congress responded to this significant limitation on Title IX when it created the Civil Rights Restoration Act of 1988, overriding a Presidential Veto by President Reagan. The Civil Rights Restoration Act was specifically targeted to overcome the *Grove City* decision and mandated that all educational institutions which receive any type of federal financial assistance, whether direct or indirect, were bound by Title IX.

Cohen v. Brown University,[25] was the first case to tackle how a federal court would review the three part test set forth by the OCR. The case, and its appeal, involved the demotion of two women's athletic teams from university-sponsored to donor-sponsored level.[26] The Court of Appeals affirmed the District Court's finding that a school may satisfy one of the three prongs of that policy; it need not show specific proportionality between the two sexes.[27]

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21. *Id.* at 562-63

22. HEW Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979).

23 *Heckman*, *supra* note 17; *see also Cohen*, *supra* note 10. The case determining that there is a private right of action is Cannon v. University of Chicago, 441 U.S. 677 (U.S. 1979). The issue of whether monetary damages were available for infringement on that private right was answered in the affirmative in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

24. 465 U.S. 555 (1984).

25. 809 F. Supp. 978 (D.R.I. 1992).

26. The specifics of the case involved the levels of participation of men and women at Brown. The Court of Appeals found: "In the course of the preliminary injunction hearing, the district court found that, in the academic year 1990-91, Brown funded 31

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The Court of Appeals was clear that Title IX did not mandate exact parity. "No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency documents – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals."[28] This goes to the heart of a major source of contention in the implementation of Title IX today – the idea that to meet the requirements of Title IX, men's sports teams must be cut. The Court of Appeals addressed this when it stated:

> absent a demonstration of continuing program expansion for the underrepresented gender under prong two of the three-part test, an institution must *either provide opportunities in proportion to the gender composition* of the student body so as to satisfy prong one, or *fully accommodate the interests and abilities of athletes of the underrepresented gender* under prong three.[29]

Much of the criticism against Title IX has come in response to cutting men's teams. Some opponents of Title IX have tried to argue that cutting men's teams violates Title IX as discriminatory towards men; they have failed.[30] In *Neal v. Board of Trustees of California State University*, decided in the Ninth Circuit, the court held that reducing the number of positions available on men's athletic teams in order to save money and to promote participation by women is not a violation of Title IX, putting such arguments to bed for the future.[31]

IV. CURRENT USE OF TITLE IX

While Title IX has had an impressive, possibly monumental impact on women's and girls' access to sports,[32] it has some serious ground to cover as to other areas of education. In 2000 the National Science Foundation and the Department of Energy performed an on-site compliance inspection of universities.[33] The results of that inspection, released in 2006, found that women were 25% less likely to attain full professorship and made up only 19% of full professors in the

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intercollegiate varsity teams, 16 men's teams and 15 women's teams, *Cohen I*, 809 F. Supp. at 980, and that, of the 894 undergraduate students competing on these teams, 63.3% (566) were men and 36.7% (328) were women…" Cohen v. Brown Univ., 101 F.3d 155, 163 (1st Cir. 1996).

27. *Cohen*, 101 F.3d at 166.

28. *Id.* at 170.

29. *Id.* at 176.

30. National Wrestling Coaches Assoc. v. U.S. Dept. of Ed., 366 F.3d 930 (D.C. Cir. 2004).

31. 198 F.3d 763 (9th Cir. 1999).

32. Many commentators note that there is still a serious disparity in minority children's access to sports programs. *See* Tom Farrey, *Too High a Price to Play*, ESPNW (June 7, 2012), *available at* http://espn.go.com/espnw/title-ix/7986414/too-high-price-play; *see also* Debra DeMeis, *Sex, Sports and Title IX on Campus: The Triumphs and Travails*, The Daily Beast (June 22, 2012), *at* http://www.thedailybeast.com/articles/2012/06/22/sex-sports-and-title-ix. Farrey presents a serious issue and states "Title IX also unwittingly introduced new barriers for disadvantaged girls because one way courts evaluate gender inequities is by looking at college scholarship aid for athletics, and recipients of that aid are often children of families with the means to chase it…."

33. DeMeis, *supra* note 32.

STEM areas.[34] This isn't to say that the sports situation is all wrapped up; serious discrepancies remain including massive disparities in coaches' salaries.[35]

Courts are still working out how Title IX should be applied. For example, in 2011, a federal judge ruled that the University of California, Davis, failed to offer enough athletic opportunities to women even though the judge went on to find that the University did not deliberately discriminate against the women (in that case female wrestlers).[36] This case highlights the *Cohen* decision discussed above in that the judge found that the University failed to follow Title IX because it could not prove that it had a continuing history of expanding opportunities for women, one of the three prongs of the enforcement set forth by the OCR.[37]

A significant issue has also been whether cheerleading can be considered a sport sufficient to meet requirements of a "sport" under Title IX.[38] The issue arose in a suit brought against Quinnipiac University in Connecticut.[39] In that case, Quinnipiac argued that the 30 women on the competitive cheerleading squad replaced the varsity volleyball team it cut.[40] The district judge found that cheerleading was not a sport because it was not conducted according to the U.S. Department of Education's standards for varsity sports. The NCAA has made clear that it does not recognize competitive cheerleading as a sport.[41]

Also at issue in the Quinnipiac case was whether the school was using roster-inflating tactics to make it seem as if they were meeting gender-equity minimums. The issue there, which is common in recent Title IX cases, involved the school's requirement that female cross country runners participate in track teams. Counting students who play more than one sport (cross country and track are distinct sports) is not in itself a violation of Title IX, but at Quinnipiac the school counted injured athletes as participants, raising a question of whether those athletes were actually participating in the sport, since participation is a key aspect of determining whether the OCR regulations have been met. As to whether injured athletes can be counted for determining rates of participation, the NCAA has stated "you can still count an athlete every time he or she is on a sport's roster, but you have to make sure they are having a legitimate participation experience."[42]

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34. *Id.*

35. *See* Jessop, *supra* note 11, for a chart of the top universities and the pay differential between the men's teams, coaches and the women's as of 2010-11.

36. Mansourian v. Bd. of Regents of Univ. of Cal., 816 F. Supp. 2d 869 (E.D. Cal. 2011).

37. *See* Katie Thomas, *Mixed Ruling in Title IX Case*, The New York Times B16 , 2011 WLNR 15500113 (Aug. 5, 2011).

38. For an in depth discussion of this issue, please see Erin Buzuvis, *The NCCAA At 100: Perspectives on its Past, Present, And Future: The Feminist Case for the NCAA's Recognition of Competitive Cheer as an Emerging Sport for Women*, 52 B.C. L. Rev 439 (March 2011), *available at* http://lawdigitalcommons.bc.edu/bclr/vol52/iss2/3/.

39. Michelle Brutlag Hosick, *Competitive Cheerleading Case Could Affect Title IX Landscape*, NCAA.Org (July 23, 2010) *available at* http://www.ncaa.org /wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/Competitive+cheerleading+case+could+affect+Title+IX+landscape; Biedeger v. Quinnipiac Univ., 691 F. 3d 85 (2d Cir. 2012).

40. *Biedeger*, 691 F.3d 85. *See also* Linda Greenhouse, *The Court at the Olympics,* The New York Times (Aug. 8, 2012), *available at* http://opinionator.blogs.nytimes.com/2012/08/08/the-court-at-the-olympics.

41. *Hosick*, *supra* note 39.

42. *Id*.

Another recent development includes appropriate plaintiffs under Title IX. Retaliation claims, made by individuals who claim that they were fired for raising concerns about parity, are a large part of modern Title IX claims.[43] In 2005, the Supreme Court ruled in favor of a girl's high school basketball coach who alleged that he was fired for repeated requests for more money and access to similar equipment as the boys' teams. The Court ruled that the coach had a right to challenge his retaliatory dismissal.[44]

Finally, there is the issue of how Title IX can be used in bullying cases. In making the link between bullying and Title IX, it's important to recall that Title IX addresses not only discrimination but also harassment. For example in 1992, a case was brought against a school concerning harassment occurring between students (as opposed to earlier cases involving harassment by staff against students). Student-on-student harassment may fit into the definition of bullying.[45] According to the National Women's Law Center, bullying crosses the Title IX line when it "is so serious that it creates a hostile environment for the victim and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees."[46] The issue of what constitutes bullying versus what falls into harassment may not be clear to school administrators. The Department of Education recently addressed this issue[47] and stated that student-on-student harassment or bullying will trigger Title IX liability when it "creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."[48] In this way, the Department of Education has expanded how Title IX can be applied, and now can be used in student-on-student harassment, also referred to as bullying.

This application of Title IX to bullying is true both for bullying based on gender and on sexual orientation. "On March 13, 1997, the United States Department of Education released guidelines that state: if 'harassing conduct of a sexual nature is directed at gay or lesbian students it may create a sexually hostile environment and may constitute a violation of Title IX in the same way that it may for heterosexual students.'"[49] Scholars have made the link between anti-gay bullying and Title IX in the following way: "though Title IX does not prohibit discrimination on the basis of perceived orientation, in some cases, harassment based on gender identity or orientation (even perceived orientation) may occur "because of" sex and, therefore, be sexual harassment of the type proscribed by Title IX."[50]

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43. *Heckman*, *supra* note 17, at 552.

44. Jackson v. Birmingham Bd of Ed., 544 U.S. 167 (2005). *See also* Title IX Case Law, AAUW, *available at* http://www.aauw.org.

45. *See* Davis v. Monroe County Board of Ed., 526 U.S. 629 (1999).

46. *Title IX Protections From Bullying & Harassment in School: FAQs for Students*, National Women's Law Center (Dec. 12, 2011), *available at:* http://www.nwlc.org/resource/title-ix-protections-bullying-harassment-school-faqs-students.

47. Victoria Stewart-Cassell, Ariana Bell, J. Fred Sprinter, U.S. Department of Education, *Analysis of State Bullying Laws and Policies,* at 17 (2011) *available at*: http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf .

48. *Id.*

49. Jane T. Monahan, David J. J. Facciolo, Shakuntla Bhaya, Deborah I. Gottschalk, *Gay & Lesbian Civil Rights: Marriage Is Not Enough*, 15 Delaware Lawyer 10, 35 (Summer 1997) (discussing the US DOE guidelines).

50. J. Dalton Courson and Abigayle C. Farris, *Title IX Liability for Anti-Gay Bullying*, ABA Section of Litigation, LGBT Litigator (Jan. 23, 2012)*, available at* http://apps.americanbar.org/litigation/committees/lgbt/articles/winter2012-title-ix-liability-anti-gay-bullying.html.

This link between anti-gay bullying and Title IX was reinforced by the federal court in *Galloway v. Cheasapeake Union Exempted Village Schools Board of Education*.[51] In that case, the court found that a student who had been bullied throughout middle and high school, including having his pants pulled down and having other boys grind into his back, had made a showing sufficient to satisfy Title IX's requirement that discrimination be "because of sex."[52] In contrast, an Oregon school district won a motion to dismiss in a similar peer harassment case based on physical taunting because there was a lack of evidence to support the plaintiff's claims that the harassment was motivated by his perceived homosexuality and thus covered by Title IX.[53]

It's clear that these harassment claims, which were first made subject to Title IX in *Davis v. Monroe County Board of Education*,[54] are on the rise. In 2009, the number of Title IX complaints based on athletics was 1,264. By way of contrast, in the same year, the number of racial harassment/sexual violence complaints was nearly identical at 1,137.[55] The future of Title IX seems to now encompass both claims based on discrimination in athletics, with all of its potential life enriching aspects, as well as student-on-student harassment or bullying.

In looking to whether the intention of Title IX to achieve parity in participation in school activities between the sexes has come close to fruition, it is important to look beyond the idea that there are three times, or ten times, as many women participating in high school and college sports as before Title IX was passed. According to the Women's Sports Foundation, "female high school athletes receive 1.3 million fewer athletic participation opportunities than their male counterparts (3.2 million female vs. 4.5 million male). Female athletes receive 63,000 fewer opportunities at NCAA Institutions (193,000 female vs. 256,000 male). Female college athletes receive $183 million less in NCAA athletic scholarships ($965 million female v. $1.15 billion male). In addition, female high school and college athletes continue to lag behind males in the provision of equitable resources such as equipment, uniforms and facilities."[56] So while women have been participating more than ever in sports, they still haven't reached parity with their male counterparts in major elements, such as scholarships, equipment and facilities. Given that there are still strides to be made as to parity, it seems clear that Title IX is still very much relevant, especially as it is now an effective tool to be used to quash bullying and student-on-student harassment.

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51. 2012 WL 6268946 (S.D. Ohio Oct. 23, 2012).

52. *Id.*

53. A.E. ex rel. Evans v. Harrisburg Sch. Dist. No. 7, 2012 WL 4794314 (D. Or. Oct. 9, 2012).

54. Davis v. Monroe County Board of Ed., 526 U.S. 629 (1999).

55. Presentation by Professor Ann C. Juliano to DSBA Women and Law Section, December 4, 2012, on file with author.

56. *Title IX Myths and Facts*, Women's Sports Foundation (last viewed March 15, 2013), *available at* http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/what-is-title-ix/title-ix-myths-and-facts.

THE "2010" AMENDMENTS TO DELAWARE UCC ARTICLE 9

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The current version of Article 9 ("Current Article 9") of the Uniform Commercial Code ("UCC"), as promulgated in 1998 by the Uniform Law Commission ("ULC") and The American Law Institute ("ALI"), has been enacted in all fifty states, the District of Columbia, and the U.S. Virgin Islands, and generally took effect on July 1, 2001. From 2008 to 2010, a committee (the "Review Committee") convened by the ULC and the ALI considered certain issues, ultimately recommending amendments to the official text of, and official comments to, Current Article 9 (the "2010 Amendments"), intended to take effect on July 1, 2013. While most are unremarkable and simply clarify existing text, some are noteworthy. Some address issues seemingly anticipated by nonuniform text in Current Article 9 as enacted in Delaware ("Delaware Current Article 9"). This article provides a summary and brief discussion of the 2010 Amendments as well as nonuniformities in their text as recently enacted in Delaware (the "Delaware 2010 Amendments"). To the extent feasible, related provisions are discussed together regardless of their juxtaposition (or lack thereof) in the UCC. Unless otherwise noted, all citations in this article are to Current Article 9. Where the Delaware 2010 Amendments differ from the 2010 Amendments, such differences are discussed below.

I. SUMMARY

The 2010 Amendments were approved by the ULC at its 2010 annual meeting, and are being adopted by the various states in anticipation of a proposed uniform effective date of July 1, 2013. They include provisions that clarify, rather than change, what was intended by Current Article 9, as well as substantive changes reflecting emerged and emerging thought. Perhaps the most significant change is the offering of two alternative approaches to the vagaries of determining individual debtors' names. Alternative A, the so-called "only if" approach, would require that such names be rendered as they appear on a driver's license or other specified document. Alternative B, the so-called "safe harbor" approach, would merely create a safe harbor for financing statements naming debtors thus. Delaware took a nonuniform approach to individual debtors' names in 2001, and continues essentially that same approach under the Delaware 2010 Amendments, but with the addition of Alternative B's safe harbor. Other debtor name changes are relevant where collateral is held by the personal representative of a decedent, and where collateral is held in a trust. The classification of certain entities as "registered organizations" is clarified, as is the record to be consulted to determine a registered organization's name. The current "four month rule" that continues perfection following a change in a debtor's location is changed to provide not merely that a secured party's perfected security interest continues for four months following a change in its debtor's location (or, similarly, for four months following a new debtor becoming bound under an existing security agreement), but that such secured party is generally perfected in collateral acquired by its debtor within four months thereafter. The much-misunderstood "correction statement," which has no legal effect and can be filed only by a debtor, is renamed an "information statement," continues to have no legal effect, but can be filed by either a debtor or a secured party. The

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proposed changes eliminate the requirement that financing statements indicate a debtor's type of organization, jurisdiction of organization, and organizational identification number, based on the judgment that the burden of providing such information outweighs the resulting benefits. For precisely that reason, Delaware did not require inclusion of organizational identification numbers under Delaware Current Article 9. These and the other revisions are discussed in more detail below.

II. PROPOSED CHANGES TO PART 1: GENERAL PROVISIONS

The 2010 Amendments begin with revisions to certain definitions, most reflecting further refined thinking or facilitating greater clarity and certainty.

A. Section 9-102(a)(7) – "Authenticate"

Section 9-102(a)(7) is revised such that the definition of "authenticate" more closely resembles the definitions of "sign" in revised UCC Article 1 (general provisions) and Article 7 (documents of title). Recall that Current Article 9, intended to be medium-neutral, largely did away with anachronistic terms that suggested any requirement for paper documents and manual signatures affixed by humans wielding pens. This amendment brings to Article 9 the further-refined thinking of the years since the text of Current Article 9 was finalized in 1998.

B. Section 9-102(a)((10) – "Certificate Of Title"

Section 9-102(a)(10)'s definition of "certificate of title" is revised to comport with the emerging practice in many jurisdictions of maintaining nonpaper electronic records evidencing both ownership and security interests. Conforming changes appear in section 9-311 (Perfection of Security Interests in Property Subject to Certain Statutes, Regulations, and Treaties). The 2010 Amendments include a new sentence in Official Comment 5b to section 9-102, noting that when electronic chattel paper is converted to tangible form ("papered-out," in industry parlance), tangible chattel paper results. In a similar vein, Official Comment 3 to section 9-330 is modified to more clearly state that a secured party may achieve priority with respect to "hybrid" chattel paper (that is, chattel paper that is partly tangible and partly electronic) under Section 9-330(a) or (b), and to clarify how a secured party can retain its priority when tangible chattel paper is converted to electronic chattel paper and vice versa.

C. Official Comment 5D To Section 9-102 – Assignment Of Lessor Rights As Chattel Paper

Rejecting the holding in *In re Commercial Money Center, Inc.*, 350 B.R. 465 (B.A.P. 9th Cir. 2006), the 2010 Amendments provide in their changes to Official Comment 5d to section 9-102 that if a lessor's rights under a lease constitute chattel paper, an assignment of the lessor's right to payment under the lease, even if the assignment excludes any other rights, would be an assignment of chattel paper.

D. Section 9-102(A)(68) – "Public Organic Record"

Section 9-102(a)(68) is new, and brings specificity to the question of just what public record should be consulted to determine a registered organization's name. The new term "public organic record" generally means the document filed

with or issued by the relevant state or the United States to form or organize a registered organization. Revisions to the accompanying Official Comment 11 explicitly indicate that a certificate of good standing is not a public organic record and, thus, is not an appropriate referent for determining a registered organization's name. In a modest nonuniformity, the Delaware 2010 Amendments recognize that relevant filings relating to Delaware registered organizations can include not only initially filed records, amendments thereto, and restatements thereof, but also related corrective filings. Similarly, the definition of "registered organization" in (what is renumbered as) section 9-102(a)(71) is amended to clarify that the term includes organizations (i) formed or organized, (ii) by (a) the filing or issuance of a public organic record, or (b) by legislative enactment, even if such organizations are created without the need for a public organic record. These latter two provisions work in concert with revisions to section 9-503 (discussed below).

E. Section 9-105 – Control Of Electronic Chattel Paper

Section 9-105 is revised to provide a general test, and a safe harbor, for achieving perfection by control of electronic chattel paper. The language derives from the Uniform Electronic Transactions Act, and defers to emerging systems that reliably establish the secured party as the assignee of the chattel paper, contemplating continued innovation in this field.

III. PROPOSED CHANGES TO PART 3: PERFECTION AND PRIORITY

The revisions to Part 3 clarify certain matters related to transmitting utilities, location of debtors, and priority issues. They also affect changes resulting from a change in governing law, as for example when a debtor's location changes from one jurisdiction to another.

A. Section 9-301 – Law Governing Perfection And Priority

The 2010 Amendments include revision and augmentation of Official Comment 5b to section 9-301 to clarify certain matters relevant to fixture filings and nonfixture filings against collateral of transmitting utilities. A security interest in most types of collateral, including fixtures, of a transmitting utility can be perfected by a central filing in the jurisdiction where the transmitting utility is located. But a fixture filing is effective to perfect a security interest only in fixtures located in the jurisdiction in which such fixture filing is made, with the consequence that multiple such filings may be required.

B. Section 9-307 – Location Of Debtor

Section 9-307 of Current Article 9 provides the rules for determining a debtor's location, and thus the place in which one must generally file a financing statement naming that debtor for such financing statement to be effective.[1] Its subsection (f) addresses the location of registered organizations organized under federal law. Subparagraph (f)(2) currently provides that when an organization's location is designated in accordance with federal law, such location constitutes the organization's location for filing purposes. Alas, this succinct and seemingly clear provision has given rise to considerable consternation. In the parlance of many federal laws (e.g., the National Bank Act), what's designated is actually denominated

1. The general rule is subject to exceptions, e.g., for fixture filings and for security interests in timber to be cut and as-extracted collateral. *See* U.C.C. § 9-301, cmt. 5.

a "main office" or "home office," not a location. In its initial enactment of Current Article 9, Delaware added to section 9-307(f) nonuniform language to the effect that designating a main office or home office constitutes designation of a location. Revised versions of the Official Comments to Current Article 9 offered the same assurance,[2] but of course lack the force of law. The 2010 Amendments remove any doubt that such designations are, in fact, designations of a location for filing purposes. Inasmuch as the language to such effect in the 2010 Amendments differs from the nonuniform language in Delaware Current Article 9, for avoidance of any uncertainty Delaware both carries forward its original nonuniformity and adopts the new uniform text.

C. Section 9-316 – Effect Of Change In Governing Law

The 2010 Amendments significantly alter the effect of a change in governing law. Under Current Article 9 section 316, perfection of security interests that have attached prior to a change in the debtor's location continues for four months after such change. The 2010 Amendments add a new subsection 316(h) pursuant to which a secured party would also enjoy perfection of security interests that attach within four months after a change in the debtor's location, provided the secured party has already taken steps pursuant to which it would have been perfected absent the change in location. To illustrate, assume D is located in Florida and SP has properly perfected its security interest in D's inventory and accounts receivable by filing a financing statement in Florida. Thereafter, D's location changes to Delaware. Under Current Article 9, SP remains perfected, for four months following the change in location, in any inventory and accounts receivable in which it was perfected *before* the change. Under the 2010 Amendment, this remains so, but SP is *also* perfected in any (newly acquired) inventory and (newly arising) accounts receivable to which its security interest first attaches during the four months *after* the change in location. Such perfection continues until the end of this four-month period.

Similarly, a new subsection 316(i) provides for perfection of security interests that attach within four months after a new debtor becomes bound by an existing security agreement. Returning to our example, let's suppose that upon its "relocation" to Delaware "old D" is succeeded by "new D" as the debtor bound by the existing security agreement in favor of SP. Let us further suppose that, within the four months following such "relocation," "new D" enters into a financing transaction in which it grants SP2 a security interest in all of its inventory and accounts receivable, and that SP2 promptly perfects its security interest by filing in Delaware a financing statement naming "new D" as debtor. As between SP and SP2, both of which have perfected security interests in inventory acquired and accounts receivable arising within the four months immediately following "new D's" becoming bound, who has greater priority? Current Article 9 section 326 generally provides that, with respect to collateral in which the original debtor never held an interest, the security interest perfected by filing against the original debtor is subordinate to the security interest perfected by filing against the new debtor. The 2010 Amendments include revisions to Section 326 that preserve and extend this result to the circumstances contemplated by new subsection 316(i). Thus, in our example, SP is subordinate to SP2 with respect to collateral in which "old D" never held an interest. A modest revision to Official Comment 2 to Section 9-326 clarifies the interplay between that section and section 9-508 regarding subordination of certain security interests created by a new debtor.

D. Section 9-317 – Interests That Take Priority Over Or Take Free Of Security Interest Or Agricultural Lien

In what is viewed as a clarification, the language of section 9-317 is expanded to explicitly cover buyers of all types of collateral not susceptible to possession. Thus, a licensee of a general intangible, and a buyer (other than a secured party)

2. *See Id.* § 9.307 cmt. 5.

of any collateral other than tangible chattel paper, tangible documents, goods, instruments, or certificated securities takes free of a security interest if such licensee or buyer gives value without knowledge of, and before perfection of, such interest.

E. Section 9-322 – Priorities Among Conflicting Security Interests In And Agricultural Liens On Same Collateral

In another clarification, Official Comment 4 to section 9-322 has been augmented to include an explicit statement to the effect that a financing statement filed without authorization, but later authorized or ratified, thereupon becomes effective, but nevertheless enjoys priority from its time of filing. Official Comment 8 to the same section has been augmented to complete the explanation of certain priority rules applicable to proceeds: specifically, where two security interests in the same original collateral are entitled to priority in proceeds under section 9-322(c)(2), the security interest having priority in the original collateral has priority in the proceeds.

IV. PROPOSED CHANGES TO PART 4: RIGHTS OF THIRD PARTIES

Current Article 9 section 406 includes a broad override of certain contractual restrictions on assignability of property including accounts, chattel paper, payment intangibles, and promissory notes, but does not apply to a sale of a payment intangible or promissory note. Current Article 9 section 408 includes a more narrow such override of certain contractual restrictions on assignability of property including promissory notes, health-care insurance receivables, and general intangibles, but applies only to security interests in payment intangibles or promissory notes arising out of a sale. Thus, if a right to payment is evidenced by a promissory note, or is a payment intangible, Current Article 9 sections 406 and 408 facilitate assignments for security but not assignments by sale. Uncertainty has arisen as to whether foreclosure should be regarded as a "sale" or an assignment "for security." The 2010 Amendments clarify that the anti-assignment provisions of both sections apply to sales pursuant to Article 9 Section 9-610 and acceptances of collateral under Article 9 section 9-620.

V. PROPOSED CHANGES TO PART 5: FILING.

Amendments to Part 5 relate to determination of debtor names, persons entitled to file amendments, what to do when a debtor entity is "converted" into another debtor entity (and thus may be the same debtor, albeit perhaps with a different name or location, or may be a new debtor), certain filings against utility companies, bases on which filing offices can rightfully reject filings, filings asserting that specified existing filings are inaccurate or unauthorized, and revisions to the safe harbor written forms accepted by all filing offices that accept written filings.

A. Section 9-503 (Name Of Debtor And Secured Party)

Perhaps the most significant of the 2010 Amendments, these changes are relevant to filings against registered organizations, filings where collateral is being administered by the personal representative of a decedent, filings where collateral is held in a trust that is not a registered organization, and, most significant of all, filings against individual debtors. With different variations in each context, it has proven challenging to determine exactly what a given debtor's name is, and likewise challenging to make other determinations antecedent to filling out financing statements and tendering them

for filing. In addition to the changes discussed below, consistent changes appear in Official Comment 2 to section 9-506 (Effect of Errors or Omissions).

B. Registered Organizations

It has proven unclear just which public record is relevant to determining the name of a registered organization. Many quickly came to the view that good standing certificates were not the appropriate source of such information, but uncertainty remained as to which filed, or issued, formation document should be consulted.[3] As revised by the 2010 Amendments, Section 9-503 refers to the "public organic record," the newly defined term appearing at new subsection 9-102(a)(68),[4] which includes a record filed with the relevant state or the United States, and a charter issued by such state or the United States. Helpfully, it explicitly notes that a certificate of good standing or an index of domestic entities is irrelevant.[5] In a modest nonuniformity, the Delaware 2010 Amendments refer to the "public organic record inclusive of the record most recently filed," rather than the uniform 2010 Amendments' formulation "public organic record most recently filed." The term "public organic record" is collective, and thus includes initially filed records and amendments thereto and restatements thereof, as well as (in Delaware—*see* discussion of 9-102(a)(68) *supra*) related corrective filings. Moving beyond the challenge of determining a registered organization's name, the 2010 Amendments revisit the threshold question of what organizations are registered organizations. "Registered organization" includes an organization created without a public record but that is "formed" only when a public filing has been made. For example, a Delaware statutory trust is "created" by its governing instrument,[6] but is "formed at the time of the filing of the initial certificate of trust in the office of the Secretary of State…."[7] Many have had little doubt that Delaware statutory trusts are "registered organizations," but may nonetheless take further comfort from the explicit assurance afforded by the 2010 Amendments. Similarly, the 2010 Amendments clarify that a Massachusetts business trust is a registered organization.[8]

C. Decedents And Their Estates; Trusts And Trustees.

The 2010 Amendments respond to some extent to difficulties experienced by those endeavoring to determine, in contexts involving decedents and their estates, and trusts and trustees acting with respect to property held in trust, the exact identity of the "debtor," which is to say the person possessed of the requisite rights in the collateral to meet the statutory

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3. In a better world, of course, a registered entity's name would be rendered identically always and everywhere. The concern arises because many states maintain separate databases from which different documents and informational reports are generated. For a variety of reasons, including human error in data entry, programming or execution error in the transfer of data from one database to another, differing field length limitations, and differing protocols for the rendering of nonstandard characters, it should be contemplated that the rendering of a registered organization's name may not be identical always and everywhere.

4. *See* discussion *supra*.

5. *Id.*

6. *See* Del. Code Ann. tit. 12, § 3801(a)(1).

7. Del. Code Ann. tit. 12, § 3810(a)(2).

8. §§ *See, generally,* 2010 Amendments §§102(a)(68) and (71), and Official Comment 11 thereto.

definition of "debtor" in section 9-102(a)(28). In the former context, the 2010 Amendments eliminate the requirement that a filing indicate whether, in fact, the debtor is "a decedent's estate,"[9] and instead simply require indication that the collateral is "being administered by the personal representative of the decedent." In the latter context, the 2010 Amendments eliminate the requirement that a filing indicate whether, in fact, the debtor is "a trust" or, alternatively, is "a trustee acting with respect to property held in trust," and instead simply require indication that "the collateral is held in a trust." In both contexts, special transition rules provide, in effect, that financing statements filed prior to the effective date of the 2010 Amendments and meeting the current requirements (that is, the requirements of Current Article 9) in this regard will not cease to be effective by reason of their failure to provide the simpler (yet arguably different) indication required by the 2010 Amendments. The reader is cautioned, however, that although the challenge of determining the precise identity of the "debtor" need no longer be met as a precondition to properly filling out a financing statement, it remains vitally important inasmuch as the financing statement, to be effective, must generally be filed in the jurisdiction in which the debtor is located within the meaning of section 9-307.[10] The 2010 Amendments clarify that these special rules applicable to property held in a trust don't apply where collateral is held by a trust that is itself a registered organization – in such cases, the ordinary rules for filing against registered organization debtors should be followed.

D. Individual Debtor Names

The issue that presented the greatest challenge to the Review Committee was that of individual debtor names. Under Current Article 9, when the debtor is an individual, a financing statement is sufficient only if it provides the "name of the debtor." While Current Article 9 provides guidance for determining and rendering a debtor's name "sufficiently," such guidance is less than helpful in the case of individual debtors, for whom use of their "individual" names is required.[11] The simplicity of the requirement belies the challenge of its application. American law provides individuals nearly unlimited freedom to change their names, often with little or no formality or documentation. Consider, for example, the name changes that commonly accompany marriage and divorce, and the insidious spread of informality by which many a Thomas is known far and wide as Tom and many an Elizabeth as Liz (or, if personal preference so dictates, Beth), to say nothing of Stefani Joanne Angelina Germanotta (or is her name now "Lady Gaga"? And if so, is that a first name and surname, or something else?). The simplicity of requiring the "name of the debtor," while appealing, presupposes that one can determine a debtor's name with greater certainty and ease than experience suggests one actually can. The Review Committee found no panacea, and instead offered in the 2010 Amendments two alternative approaches.

Alternative A – the "only if" approach – requires use of the name that appears on the debtor's driver's license or other specified document (e.g., an identification card issued by his or her state of residence) or, if the debtor has no such document, the debtor's surname and first personal name. Alternative B – the "safe harbor" approach – retains the current "name of the debtor" approach, but also provides a "safe harbor" for using either of the names designated by statute (viz., the surname and first personal name, or the name appearing on the debtor's driver's license or state-issued identification card). These alternatives strike different balances in the allocation of risks and protections among filers and searchers. The "only if" approach appears very simple – if only the name on the relevant identification document will suffice, searchers

9. Often, the "debtor" will be the personal representative of the decedent, not the estate itself. See 2010 Amendments, section 9-503, Official Comment 2c.

10. *See supra* note 1 and accompanying text.

11. U.C.C. § 9-503(a)(4)(A).

need only conduct searches in such name. But this approach is not without its limitations and shortcomings. The Delaware Division of Motor Vehicles utilizes only uppercase letters, truncates surnames at forty characters, lists first and middle names (without distinction between them) in a second field truncated at forty characters, omits all commas, renders "junior" and "senior" as "JR" and "SR," renders roman numerals as arabic (Thurston Howell, III, had he lived in Delaware, would have been issued a driver's license identifying him as THURSTON HOWELL 3RD), and uses only the twenty-six letters of the English alphabet and arabic numerals modified as shown in the preceding parenthetical. Hyphens are used only in the surname field; no "foreign" letters or characters whatsoever are used. Of course, these conventions could change at any time. If the relevant identification document expires, it is no longer a proper source for determining the debtor's name. One moves progressively down the waterfall of possible source documents or other indicia of individual names, any of which could provide something different as the debtor's name. That is to say, a financing statement once perfectly featuring the debtor's name could cease to be effective upon expiration of a driver's license, or issuance of a replacement license rendering the debtor's name differently.

Delaware was the first state to act on the challenge presented by individual debtors' names. Prior to the enactment of Delaware Current Article 9, it was recognized that determining an individual debtor's name could prove problematic. This issue arises as follows. Current Article 9 provides, in its subsection 9-503(a)(4)(A), that (as noted above) a financing statement "sufficiently" provides an individual debtor's name if it provides such debtor's individual name. Section 9-506 provides that a financing statement containing minor errors and omissions is effective unless the errors or omissions make it "seriously misleading." Any financing statement that fails sufficiently to provide the debtor's name is, of necessity, "seriously misleading."[12] Note that financing statements are generally indexed and searched by debtor's name. Subsection 9-506(c) provides a safe harbor, providing in effect that if a search under the debtor's correct name would disclose a filing that fails to provide the debtor's name in accordance with subsection 9-503(a), such filing would not be "seriously misleading" for that reason, and thus could be effective despite the rendering of the name. A corollary of this rule, of course, is that such a financing statement, if not so found, is "seriously misleading" and ineffective. In its enactment of Current Article 9, Delaware exempted filings naming individual debtors from Section 9-506's search logic test by inclusion of nonuniform text (i.e., "[e]xcept in the case of individual debtors…").[13] This approach has worked well for Delaware, and is continued through the Delaware 2010 Amendments, though with the addition of Alternative B. Thus, the Delaware 2010 Amendments offer safe harbors for filings providing either the surname and first personal name of an individual debtor, or such individual debtor's name as it appears on an unexpired driver's license or state-issued identification card.

E. Individual Debtor Names – Special Rule For Mortgages

The Review Committee recognized the very real possibility that people may continue to hold real estate in names that differ (at least to some extent) from their names as they appear on their driver's licenses. New subsection 502(c)(3)(B) recognizes that strict requirement of a debtor's "driver's license" name may not make sense in the context of real estate documents, and provides that use of the debtor's "individual name" or "surname and first personal name" suffices in the case of a mortgage effective as a financing statement. As explained in a legislative note to the 2010 Amendments, section 9-502 should only be amended in states that adopt Alternative A – the "only if" approach – for naming individual

12. U.C.C. § 9-506(b).

13. Del. Code Ann. tit. 6, § 9-506(b).

debtors under section 9-503, and is unnecessary in states that adopt Alternative B – the "safe harbor" approach. No such amendment has been made in Delaware.

F. Section 9-507 – Effect Of Certain Events On Effectiveness Of Financing Statement

Current Article 9 recognizes that debtors sometimes change their names, and that such changes can render existing financing statements seriously misleading and, thus, ineffective, unless appropriate amendments are filed. The Review Committee recognized that Current Article 9 subsection 507(c) focuses on behavior –"If a debtor so changes its name" – and in efforts to coordinate with the proposed revisions to section 9-503 regarding individuals' names, shifts the focus to consequences – "the name that a filed financing statement provides for a debtor becomes insufficient … under Section 9-503(a)." That is, it recognizes that under the 2010 Amendments a debtor's name may change not only by reason of action on the part of the debtor, but also by reason of, for example, expiration (or reissuance) of a driver's license.

G. Section 9-509 – Persons Entitled To File A Record

An amendment to Official Comment 6 to section 9-509 is intended to clarify that authorization to file a record under section 9-509(d) (that is, an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement) need not appear in an authenticated record. This stands in contrast with the requirement that any authorization required under section 9-509(a) (that is, in connection with an initial financing statement, an amendment that adds collateral covered by a financing statement, or an amendment that adds a debtor to a financing statement) must appear in an authenticated record.

H. Section 9-512 – Amendment Of Financing Statement (New Debtor Or New Name)

Many have puzzled over section 9-512 (Amendment of Financing Statement), and its requirements where a debtor undergoes a "conversion" to a different form of business entity under applicable state law. Many states permit "conversion" of one organization into another, but state laws differ (and some are simply unclear) as to whether the organization resulting from the conversion is the same legal person as the organization prior to conversion, or is a new legal person. That is, it is sometimes unclear whether the debtor is the same organization, albeit with a different name (and perhaps a different type of organization and jurisdiction of organization), or is a different organization entirely. Current Article 9 defers to the law governing conversion for a determination as to whether the resulting organization is the same legal person as the original debtor, and the 2010 Amendments make no change in that approach. New Official Comment 5 is intended to clarify and emphasize this deference. It explicitly provides that when such organizations are one and the same, an amendment reflecting the name (and any other) change should be filed, whereas when such organizations are separate and distinct, an amendment adding the resulting entity as a new debtor should be filed. Helpfully, the Official Comment offers that in the face of uncertainty, one would do well to follow both courses of action. Owing to the ubiquity of Delaware entities, in the interest of greater salience and clarity the Delaware 2010 Amendments include nonuniform text to such effect at section 9-512(f).

I. Section 9-515 - Evergreen Filings Against Transmitting Utilities

Recognizing a systems limitation present in many filing offices, section 515(f) is revised to require that in order to take advantage of the special rule that a financing statement naming a transmitting utility as debtor is effective until

terminated, the initial financing statement (as contrasted with an amendment thereto) must indicate such status. The similar rule, found in section 515(b), providing for thirty year effectiveness of financing statements relating to public-finance or manufactured-home transactions, has always required the designation in the initial financing statement. Many filing offices simply can't revisit their initial coding of a financing statement to change its lapse date.

J. Section 9-516 – What Constitutes Filing; Effectiveness Of Filing

This section deals with the question of what constitutes filing, whether of an initial financing statement or any amendment (including assignments, terminations, and continuations). It also provides an exclusive list of grounds upon which a filing office may rightfully reject a record, and the correlative concept that a wrongfully rejected filing is generally effective except as to a purchaser that gives value in reasonable reliance upon the absence of the wrongfully rejected record. This section is amended to reflect certain nomenclatural changes (see *infra* for discussion of section 9-518 and the change from "correction statements" to "information statements"; see above for discussion of section 9-503 and certain changes regarding the rendering of debtors' names).

In an effort to assist searchers in eliminating from concern filings that appear to relate to the debtors with which they are concerned but which, in fact, relate to other, identically or similarly named debtors, Current Article 9 provides that a financing statement can be rejected if it fails to state the debtor's type of organization, jurisdiction of organization, and organizational identification number (or an indication that it has none).[14] Of course, such information has little relevance except as applied to registered organizations, as to which filings are generally to be made in their jurisdiction of formation. And jurisdictions generally preclude the duplicative use of registered organization names and confusingly or deceptively similar names. The consequence is that the burden of providing such information was adjudged greater than any resulting benefit. The 2010 Amendments eliminate any requirement for these three data. Interestingly, Delaware Current Article 9 never required inclusion of organizational identification numbers – Delaware declined to adopt subsection 9-516(b)(5)(C)(iii). Thus, Delaware is no longer nonuniform in this regard.

Delaware Current Article 9 contains certain nonuniform provisions intended to coordinate with other provisions of Delaware law. These include text in section 9-516(c) relating to records filed in the office of the recorder of deeds in the several counties. Title 9, Chapter 96 of the Delaware Code requires that certain information appear on documents filed in such offices (e.g., real estate tax parcel number and identity of document preparer). While the 2010 Amendments do not bear directly on these nonuniform provisions, their text has been revisited in the Delaware 2010 Amendments to make certain nonsubstantive, conforming changes.

Finally, Delaware Current Article 9 contains certain nonuniform provisions intended to bring greater clarity and certainty to filings involving trusts and trustees as debtors. These provisions, which speak in terms of the debtor being a trust or trustee, have been amended to conform to the general nomenclature of the 2010 Amendments, and now speak in terms of the collateral being held in a trust. See *supra* for discussion of Decedents and Their Estates; Trusts and Trustees.

K Section 9-518 – Claim Concerning Inaccurate Or Wrongfully Filed Record

In a pernicious example of regrettable word choice, Current Article 9 gave rise to the so-called "correction statement." Conceptually, it was intended to be something akin to the statement an aggrieved debtor could send to the omnipotent consumer credit rating agencies, under the Fair Credit Reporting Act, to place "on record" a statement of

14. U.C.C. § 9-516(b)(5)(C).

disagreement with respect to an entry believed to be erroneous or unauthorized. The Article 9 correction statement is a mechanism by which a debtor can add to the public record an objection to a statement that he or she believes to be inaccurate or unauthorized. As a matter of law, it can be filed only by a debtor, and has no legal effect whatsoever.[15] Despite the clarity with which these limitations are stated, not a few secured parties have purported to file correction statements, sometimes seeking to "undo" terminations filed in error[16] or to add a collateral description where one is otherwise missing. In any event, the 2010 Amendments would rename these filings "information statements," and would permit both secured parties and debtors to file them. They would continue to have no legal effect, but nonetheless may prove helpful in certain contexts. For example, consider the secured party whose financing statement has not been terminated, but appears to have been terminated owing to the presence in the record of an erroneous termination statement filed by a rogue actor without authority.

L. Section 9-521 – Uniform Form Of Written Financing Statement And Amendment

While an increasing proportion of financing statements are filed online, some filers continue to tender written financing statements. Filing offices that accept written records may accept them on any number of different forms (including both current and out-of-date forms promulgated by IACA (the International Association of Commercial Administrators, a professional association for government administrators of business entity and secured transaction record systems)). Section 9-521 mandates, however, that a filing office that accepts written records must accept them on specified "safe harbor" forms. The 2010 Amendments include revisions to such forms, reflecting the substantive changes effected by the 2010 Amendments. The Delaware 2010 Amendments include such revised forms, as well as conforming revisions to certain alternative forms suitable for filing with the Delaware Secretary of State.

V. PROPOSED CHANGES TO PART 6: DEFAULT

The rules applicable following the occurrence of a default are being revised in three respects: nonjudicial enforcement of mortgages, public notice of electronic disposition of collateral, and prohibition of a secured party's buying collateral in its private disposition.

A. Section 9-607 – Collection And Enforcement By Secured Party

As it appears in Current Article 9, subsection 9-607(b)(2)(A) relates to nonjudicial enforcement of mortgages. It permits the secured party to record a copy of the relevant security agreement and a sworn affidavit with the mortgage

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15. *See* U.C.C. § 9-518.

16. A prominent example can be seen in Bank of America's filing of a correction statement in an attempt to fix its potentially $58 million filing mistake. Bank of America, acting for itself and as an agent of Citibank, terminated perfection of both institutions' security interests in certain assets of the now defunct law firm Heller Ehrman by accidently checking the "termination" box instead of the "continuation" box on the amendment it filed. The issue was litigated in connection with the bankruptcy of Heller Ehrman LLP (*See, In re:* Heller Ehrman LLP, Case No.: 08-32514 (Bankr. N.D. Cal. Mar. 27, 2009), *Order Granting Official Committee of Unsecured Creditors' Motion for Order Authorizing the Creditors' Committee to Pursue Certain Estate Causes of Action*. The author is unaware of the final resolution of this issue, which was before the U.S. Bankruptcy Court for the Northern District of California, San Francisco Division).

records. This sworn statement must state that a default has occurred, but the subsection is less than explicit in requiring indication that such default must have occurred with respect to the obligation secured by the mortgage, as contrasted with some other obligation. For example, suppose Homeowner obtains a mortgage loan from Bailey Savings and Loan, which in turn sells the mortgage loan to Bear Stearns, which bundles it with others and sells interests in the pool through a securitization. If the securitization vehicle defaults, for example by failing to make a scheduled payment under the securities it issued, the holder of such securities would not be able to foreclose on Homeowner's mortgage. This result, intended by Current Article 9, is more clearly mandated by the 2010 Amendments.

B. Section 9-613 – Contents And Form Of Notification Before Disposition Of Collateral: General

There has been much consternation in recent years regarding notification of a public disposition of collateral that will be conducted electronically. New text in Official Comment 2 to section 9-613 (Contents and Form of Notification Before Disposition of Collateral: General) would confirm the applicability of such section to those dispositions, and clarify what information is required for compliance. Among other things, the 2010 Amendments clarify that a Uniform Resource Locator (URL) or other Internet address currently suffices as an electronic "location."

C. Section 9-624 – Waiver

Official Comment 2 to section 9-624 (Waiver) notes that such section is a limited exception to the general rule of section 9-602 prohibiting waiver by debtors and obligors. It explicitly notes that the rule prohibiting a secured party from buying at its own private disposition, the equivalent of a "strict foreclosure," cannot be waived. The 2010 Amendments add language to similar effect to both Official Comment 3 to section 9-602 and Official Comment 7 to section 9-610. A new Official Comment 10 is added to section 9-611 (Notification Before Disposition of Collateral), reminding readers that enforcement of an Article 9 security interest may implicate other law.

VI. PROPOSED CHANGE TO PART 7: TRANSITION (TO CURRENT ARTICLE 9).

The 2010 Amendments include the addition of text to Official Comment 2 to section 9-706 (When Initial Financing Statement Suffices to Continue Effectiveness of Financing Statement), emphasizing that the "minor error" rule in section 9-506(a) applies to any initial financing statement filed as an "in lieu" continuation statement pursuant to section 9-706.

VII. PROPOSED (NEW) PART 8: TRANSITION (TO THE 2010 AMENDMENTS)

When current Article 9 was released for consideration and enactment, there was great interest in having a uniform effective date in all enacting jurisdictions. In furtherance of that goal, its text provided for a uniform effective date of July 1, 2001, roughly three years after its release. Similarly, the 2010 amendments contemplate a July 1, 2013 effective date.[17] Generally, there's a five-year transition period before "old" filings made in conformity with Current Article 9 must be amended or otherwise revised to conform to the 2010 Amendments. The most significant transition issue, and the one

17. 2010 Amendments § 9-801.

likely to require the greatest number of amendment to previously filed financing statements, involves sufficiency of debtors' names under section 9-503, particularly those relating to individual debtors. Less common, but no less important, is the fact that certain debtors perhaps not currently but soon-to-be considered "registered organizations" may experience a change in location (i.e., from their place of business or chief executive office to their jurisdiction of formation). Recognizing the risk, burden, and potential for errors posed by the transition from former Article 9 (i.e., Article 9 as in effect prior to July 1, 2001) to Current Article 9, Delaware Current Article 9 includes a nonuniform (and no longer relevant) subsection § 9-703(c) providing special transition rules for financing statements filed under former Article 9 with respect to trusts and trustees as debtors. This nonuniform provision, and the accompanying nonuniform text in subsection 9-705(f), effectively provides that certain Delaware filings made under former Article 9 and identifying the debtor in the manner customary under former Article 9 (e.g., ABC Trust Company, not in its individual capacity, but solely as Owner Trustee) could be continued under Delaware Current Article 9 without the necessity of complying with the debtor naming convention mandated by Delaware Current Article 9. This special rule is carried forward by the Delaware 2010 Amendments. As before, it applies only to continuations, and not to amendments. When such a Delaware filing made under Current Article 9 is first amended in any respect, it also must concurrently be amended to comply with then-current requirements for identifying the debtor.

VIII. ACCOMPANYING REVISION TO UCC ARTICLE 8 (INVESTMENT SECURITIES)

The 2010 Amendments add a new paragraph to Official Comment 13 to UCC Article 8 (Investment Securities) Section 8-102 (Definitions). The paragraph addresses the registerability requirement in the definition of "registered form" and its parallel in the definition of "security," clarifying that such requirement is satisfied only if books are maintained for the purpose of register of transfer, including termination of rights under section 8-207(a) (or if, in the case of a certificated security, the security so states). Explicitly rejecting the holding of *Highland Capital Management LP v. Schneider*, 8 N.Y.3d 406 (N.Y. 2007), the comment notes it is not sufficient that the issuer record ownership or transfers for other purposes, nor is it sufficient that the issuer, though not in fact maintaining books for such purpose, theoretically could do so (for such is always the case).

IX. INVITATION TO REPEAL UCC ARTICLE 11

Finally, noting that UCC Article 11 affects transactions that were entered into before the effective date of the 1972 amendments to Article 9, the 2010 Amendments invite states to consider whether they may wish to repeal Article 11. The Delaware 2010 Amendments do not affect UCC Article 11.