

When No Continuation Window Exists Due to § 9-705(c)

By Paul Hodnefield, Associate General Counsel for Corporation Service Company

Revised Article 9's five-year transition period comes to an end in most states on June 30, 2006. Peculiarities of prior law and non-uniform state RA9 enactments can combine to create the situation where there may be no safe window in which to file a continuation for financing statements originally filed prior to the RA9 effective date.

Secured parties need to prepare for this situation, because it will almost certainly arise in several jurisdictions. These include Florida, Connecticut, Ohio, and the U.S. Virgin Islands.

The situation arises due to the RA9 transition rules, specifically § 9-705(c). The applicable portion of § 9-705 states that financing statements filed before the effective date of RA9 remain effective until their original lapse date, or June 30, 2006, whichever comes first.

What exactly does this mean? The effect of § 9-705(c) is still in debate and won't be resolved until decided in the courts. That may take years and by then it's too late.

Secured parties need to assume the worst-case scenario to ensure their interests remain perfected. The worst case is that all affected financing statements will cease to be effective at the end of the transition period. Fortunately, there is a safe

harbor in most states. The secured party merely needs to file its continuation between the beginning of the six-month window and the statutory transition end date.

In some jurisdictions the safe harbor is not available. Connecticut, for example, adopted RA9 effective October 1, 2001. All financing statements filed in Connecticut between July 1 and September 30, 2001 were filed under old Article 9. However, Connecticut did adopt the uniform transition end date. The combination of a late effective date and uniform transition cutoff date results in the possibility that there may be no continuation window for some financing statements. The 6-month window for financing statements that originally had a lapse date between January 1, 2002 and March 31, 2002, but were continued on or before September 30, 2001 will not open before July 1, 2006. That is one day after the financing statement becomes ineffective under § 9-705(c).

Florida has a similar situation. The Florida legislature adopted RA9 effective January 1, 2002, but retained the uniform transition end date of June 30, 2006. Financing statements that were due to lapse after January 1, 2002, but were continued during the pre-effective portion of the

6-month window, will all cease to be effective on June 30, 2006. The normal 6-month window won't open until the following day-at the earliest. Again, there is no safe continuation window for affected financing statements.

The same result could occur in Ohio, but for a different reason. Ohio's version of Old Article 9 allowed the secured party to designate the obligation's maturity date as the lapse date in certain circumstances. This means that OH filing offices may have active financing statements originally filed under old law that show lapse dates well after the end of the RA9 transition period. If the designated maturity date was later than January 1, 2007, there is no safe continuation window.

Another jurisdiction where there may be no safe window is the U.S. Virgin Islands. The USVI adopted Revised Article 9 with an effective date of April 1, 2002. However, the territory retained the uniform transition period end date of June 30, 2006. This results in a situation where there may be no continuation window for many pre-effective-date financing statements.

SOLUTIONS

There is a possible solution to the no continuation window problem. In those jurisdictions where a continuation window may not exist, it is recommended that the secured party file a continuation prior to the end of the transition period. Secured parties should expect the filing office to reject the record in most cases. The rejected document should be filed as evidence

that the continuation was attempted during that time period. In addition, the secured party should also attempt to file a continuation during the six months prior to the lapse date.

Corporation Service Company can help you avoid unpleasant surprises during the end of RA9's transition period. We can help you identify affected financing statements through our extensive UCC database. Our customer service representatives will guide you through the process in those states with non-uniform transition provisions. Please contact CSC® at (800) 927-9800 for more details.

Feel free to contact the author with questions or comments at (800) 927-9801, extension 2375, or phodnefi@cscinfo.com.

Significant UCC Developments

By Trish Bogenrief Vice President, Corporation Service Company

MARYLAND

Maryland Continuations on Pre-effective Financing Statements

Maryland, under former Article 9, had a 12-year period of effectiveness that was addressed by a special amendment to the transition rules in 9-705(d). The language stated:

“Applicability of subsection (c)-Subsection (c) applies to all financing statements filed in this State before this title takes effect, including those filed with respect to security interests in collateral governed as to perfection by the local law of this State under the prior Code and this title.”

The Maryland Department of Assessments and Taxation determined that this authorized them to reset the lapse dates for all affected financing statement to June 30, 2006 and to open a special continuation window from January 1 to June 30, 2006, for affected secured parties to file these continuation statements and keep their financing statements effective.

Unfortunately, there is nothing in writing to document these procedures so CSC® has requested that the State provide a statement to this effect to us and has suggested that it be posted on their web site. CSC is waiting to hear whether or not this will be done but, in the meantime, wanted to inform our customers of this issue and the way that the State of Maryland is addressing it.

INDIANA

Indiana County Identification Security Protection Act

Indiana has a new law that was effective January 1, 2006 per IC 36-2-7.5 that reads:

“No document can be recorded that contains a Social Security Number, unless the number is required by law to be on the documents.”

Each preparer must fill out and sign the State Board of Accounts approved form (“Form 170”). The “Form” states that the signers have examined the document for Social Security numbers and redacted any Social Security numbers (unless the law requires the inclusion of them) and that they perjure themselves if they attest to this and the document contains a Social Security number.

No document can be recorded without a signed “Form 170” being attached as part of the document. A fee of \$2.00 shall be collected for this as an additional page of the recorded document.

The recorder shall post in their office a list of duties and responsibilities, of the recorder and the document preparer, and the penalties for each if they violate this statute.

It was initially thought that this did not pertain to UCC Financing Statements but the prevailing sentiment now is that it does. CSC has heard from some customers that their legal counsel feels

that all recorded documents in Indiana (State and County) must have “Form 170” attached and be signed by the preparer. Further research is being done to determine if this is the case and if the signing of the document can be done electronically and/or by CSC for their customers (with a limited power of attorney).

In the meantime, CSC suggests that clients include a signed “Form 170” with all Indiana County level filings. Clients can send multiple signed forms to their CSR, who will see that they are attached to all UCCXpress or E-mail submitted financing statements or amendment forms.