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House Bill 5148 (Substitute S-2)  
Senate Bill 1260 (as introduced 5-25-04)  
Sponsor: Representative Scott Shackleton (H.B. 5148)  
Senator Alan Sanborn (S.B. 1260)  
House Committee: Government Operations (H.B. 5148)  
Senate Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 6-2-04

### **CONTENT**

**House Bill 5148 (S-1) would amend Article 9 of the Uniform Commercial Code, which governs secured transactions, to do the following:**

- **Require the Secretary of State (SOS) to give notice to an individual who was named as a debtor on a financing statement filed with the SOS.**
- **Make it a felony for a person to file a false or fraudulent financing statement with the SOS.**
- **Allow a debtor named in a false or fraudulent financing statement to bring an action against the person who filed it.**
- **Prescribe a fee of \$15 (rather than \$10 plus other amounts) for filing and indexing a record.**
- **Waive the fee for an individual debtor filing a correction statement.**
- **Set a \$100 filing fee for a financing statement in which the debtor is a transmitting utility.**

**Senate Bill 1260 would amend the Code of Criminal Procedure to include in the sentencing guidelines filing a false or fraudulent financing statement. The offense would be a Class E felony against the public trust with a five-year statutory maximum.** The bill is tie-barred to House Bill 5148 and would take effect on January 1, 2005.

A detailed description of House Bill 5148 (S-2) follows.

(A financing statement is a document that, when filed, "perfects" the interest of a creditor (the secured party) in personal property of the debtor (the collateral). A financing statement is usually filed with the Secretary of State, and must include the name of the debtor and the secured party, and indicate the collateral covered by the statement. When a creditor's security interest is perfected, the creditor has priority over other creditors of the debtor who have an interest in the collateral.)

### **Notice to Debtor**

Part 5 of Article 9 governs the filing of financing statements, and designates where a financing statement must be filed. As a rule, a financing statement to perfect a security interest or an agricultural lien must be filed in the office of the Secretary of State. (An

agricultural lien is an interest, other than a security interest, in farm products, that meets specified criteria.)

Under the bill, if the Secretary of State received a financing statement for filing, and any debtor identified on it were an individual, the SOS would have to give written notice of the filing to that debtor. The notice would have to contain at least all of the following:

- The debtor's name and address as shown on the financing statement.
- The secured party's name and address as shown on the financing statement.
- The remedies available to the debtor under the Act if he or she believed that the financing statement was erroneously or fraudulently filed.

The Secretary of State also would have to provide to an individual debtor, at no charge, a copy or image of the filed financing statement and any attachments. If the debtor requested additional copies or images, the filing fees prescribed in Part 5 would apply to that request.

#### False or Fraudulent Statement

The bill would prohibit a person from knowingly or intentionally filing a false or fraudulent financing statement with the SOS. In addition to any other penalty provided by law, a violation would be a felony punishable by imprisonment for up to five years and/or a maximum fine of \$2,500. If the person were convicted, the court could find that the financing statement was ineffective and could order the SOS to terminate it. The court also could order restitution.

If a person filed a false or fraudulent financing statement with the SOS, a debtor named in it could file an action against the person seeking appropriate equitable relief or damages, including an order declaring the financing statement ineffective and ordering the SOS to terminate it, and reasonable attorney fees.

#### Filing & Search Fees

Currently, the fee for filing and indexing a record under Part 5 is \$10, plus the following additional fee or fees, if applicable:

- \$7, if the record is financing statement (or a financing statement amendment) in a form other than the one contained in the Act.
- \$12, if the record contains more than 100 pages.
- \$10 for each name over two that the filing office is required to index.

The bill would delete this fee structure and set a fee of \$15 for filing and indexing a record under Part 5. The fee would be \$100 for filing and indexing a financing statement in which the debtor was a transmitting utility. There would be no fee for filing and indexing a correction statement filed with the SOS by an individual named as a debtor on a record indexed by the SOS. (A correction statement may be filed by a person who believes that a record is inaccurate or was wrongfully filed.)

Under the Act, a filing office (e.g., the office of the Secretary of State or a register of deeds) must charge a fee for responding to a request for a search of the records concerning a debtor, including issuance of a certificate describing each presently effective record filed concerning the debtor, if requested. The fee is \$6 plus additional fees for particular requests. The bill would delete the additional fee of \$6 that applies when a person requests a certificate and the search discloses more than 100 presently effective records filed concerning the debtor.

**FISCAL IMPACT**

The \$5 increase in the fee for filing and indexing a record would generate approximately \$890,000 annually. The elimination of fees for particular records and certificates under Sections 9525(a), (b), and (c), and 9525(2)(a), and the new \$100 fee for filing a financing statement where the debtor is a transmitting utility, would result in the annual net loss of approximately \$21,080. The Department of State would incur indeterminate costs related to notifications required under the House bill. The fee increases would cover additional costs, subject to annual appropriations.

The bills' criminal penalties would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders would be convicted of the proposed felony offense. Offenders would receive a sentencing guidelines minimum sentence recommendation from 0-3 months to 24-38 months. Local units of government would incur the costs of intermediate sanctions or incarceration in a local facility, both of which vary by county. The State would incur the costs of felony probation at an average annual cost of \$1,800, as well as the cost of incarceration in a State facility at an average annual cost of \$28,000. Public libraries would benefit from any additional penal fine revenue.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.