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BILL ANALYSIS



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Senate Bill 1236 (as enacted)
Sponsor: Senator Roger Kahn, M.D.
Senate Committee: Judiciary
House Committee: Banking and Financial Services

PUBLIC ACT 383 of 2008

Date Completed: 4-9-09

CONTENT

The bill amended Article 9 (Secured Transactions) of the Uniform Commercial Code to do the following:

- Identify circumstances under which the Secretary of State (SOS) may refuse to accept a record for filing or recording.**
- Allow the person who presented a rejected record to bring an action to require the SOS to accept it.**
- Require the SOS to determine whether a previously filed record was wrongfully filed, if a person files correction statement alleging that the record was wrongfully filed.**
- Prohibit a filing office, except for a specified reason, from refusing to accept a financing statement that conforms to the current format prescribed by the National Conference of Commissioners on Uniform State Laws, rather the forms set forth in Article 9, which the bill deleted.**
- Provide for the discontinuation after five years of a financing statement that indicates that the debtor is an individual purporting to be a transmitting utility.**

The bill also repealed a section of Article 9 that required the SOS to report to the Governor and the Legislature on the operation of the filing office.

The bill took effect on March 29, 2009. It was tie-barred to House Bills 5934 and 5935 (Public Acts 381 and 382 of 2008, respectively). House Bill 5934 amended Article 9 to allow a person identified as a debtor in a financing statement filed with the Secretary of State to file an affidavit stating that the financing statement is fraudulent; require the SOS to terminate the financing statement upon receiving the affidavit; allow the person who filed the financing statement to bring an action to reinstate it; and make it a felony to file a materially false or fraudulent affidavit. House Bill 5935 amended the Code of Criminal Procedure to include that felony in the sentencing guidelines. House Bill 5934 took effect on March 29, 2009. House Bill 5935 took effect on December 29, 2008.

Overview of Article 9

Article 9 contains rules that govern secured transactions, which are transactions in which credit is granted and the creditor receives an interest in personal property of the debtor (the collateral). When a creditor's security interest is created, it must "attach" in order to be effective between the creditor and the debtor, and it must be "perfected" in order for the creditor to have priority in relation to other creditors of the debtor who have an interest in the collateral.

Perfection usually occurs when a financing statement is filed with the State.

Part 5 of Article 9 (which Senate Bill 1236 amended) governs the filing of records pertaining to secured transactions. Under Part 5, the office of the register of deeds is the proper place to file in order to perfect a security interest or agricultural lien if the collateral is uncut timber or as-extracted collateral, or if the financing statement is filed as a fixture filing and the collateral is goods that are or will become fixtures. In all other cases, the office of the Secretary of State is the proper place to file.

Rejection of Record

Under the bill, notwithstanding any other provision of the Code, if a person presents a record to the Secretary of State for filing or recording, the SOS may refuse to accept it if one or more of the following circumstances exist:

- The record is not required or authorized to be filed or recorded with the SOS.
- The record is being filed or recorded for a purpose outside the scope of Article 9.
- The SOS has reasonable cause to believe that the record is materially false or fraudulent.
- The record indicates that the debtor and the secured party are substantially the same or that an individual debtor is a transmitting utility.

The Secretary of State also may refuse to accept a record that asserts a claim against a current or former employee or officer of a Federal, State, county, or other local governmental unit that relates to the performance of the employee's or officer's public duties, and for which the filer does not hold a properly executed security agreement or judgment from a court of competent jurisdiction.

If the Secretary of State refuses to accept a record for filing or recording under these provisions, the person who presented it may bring an action under Section 9501a to require the SOS to accept the record. A record ordered by the court to be

accepted will be effective as a filed record from the initial filing date except as against a purchaser of the collateral who gives value in reasonable reliance on the absence of the record from the files. (Section 9501a contains the provisions enacted by House Bill 5934, as described above.)

If a filing officer, acting in a manner that does not subject him or her to personal liability under the statutes of this State, improperly refuses to accept a record for filing or recording under these provisions, the officer will not be personally liable for the improper refusal or determination.

Wrongfully Filed Record

Under Senate Bill 1236, if a correction statement filed with the Secretary of State under Section 9518 alleges that a previously filed record was wrongfully filed, the SOS must determine, without undue delay, whether the contested record was wrongfully filed. To make that determination, the SOS may require the person who filed the correction statement or the secured party to provide any additional relevant information, including an original or copy of a security agreement that is related to the record. If the SOS finds that the record was wrongfully filed, he or she must terminate the record, which will be void and ineffective. The SOS must give notice of the termination to the secured party named in the contested record.

(Section 9518 allows a person to file a correction statement with respect to a record indexed in a filing office under the person's name if the person believes that the record is inaccurate or was wrongfully filed. The correction statement must provide the basis for the person's belief that the record is inaccurate and indicate how the person believes the record should be amended to cure any inaccuracy, or provide the basis for the belief that the record was wrongfully filed.)

Regulated Financial Institution

The provisions of the bill allowing the SOS to refuse to accept a record do not apply

to a financing statement filed by a regulated financial institution or a representative of a regulated financial institution. If a regulated financial institution that is attempting to file a financing statement is organized under the law of a governmental unit other than this State, the SOS may request the financial institution or its representative to provide verification of regulation or licensure in the jurisdiction under whose law it is organized.

The bill defines "regulated financial institution" as the term is defined in Section 9501a. (Under House Bill 5934, "regulated financial institution" means a financial institution subject to regulatory oversight or examination by a state or Federal agency. The term includes a bank, savings bank, savings association, building and loan association, credit union, consumer finance company, industrial bank, industrial loan company, insurance company, investment company, installment seller, mortgage servicer, sales finance company, or leasing company.)

Refusal to Accept Financing Statement

Under Article 9, a filing office (the office of the SOS or a register of deeds) that accepts written records for filing may not refuse to accept a written initial financing statement or a written financing statement amendment in a form set forth in the Code, except for a reason stated in the Code.

Senate Bill 1236 deleted the statutory forms for a UCC Financing Statement and UCC Financing Statement Amendment. Under the bill, a filing office that accepts written records for filing may not refuse to accept a written initial financing statement or a written financing statement amendment that conforms to the current format prescribed by the National Conference of Commissioners on Uniform State Laws, except for a reason set forth in the Code.

Transmitting Utility

Under Article 9, except as otherwise provided, the effectiveness of an initial financing statement continues for five years upon the timely filing of a continuation statement. After the five-year period, the financing statement lapses unless another continuation statement is filed before the lapse.

Previously, if a debtor was a transmitting utility and a filed financing statement so indicated, the financing statement was effective until a termination statement is filed. Under the bill, this applies if a debtor is an organization identified as a transmitting utility and a filed initial financing statement so indicates.

A financing statement filed before the bill's effective date will be effective for five years after the date of filing, and may not be continued, if the financing statement indicates either of the following:

- The debtor is an individual purporting to be a transmitting utility.
- The debtor is an individual showing his or her name as an organization and purporting to be a transmitting utility.

Repealed Section

Section 9527 required the Secretary of State to report annually to the Governor and the Legislature on the operation of the filing office. The report had to state the extent to which the filing office's rules were not in harmony with the rules of filing offices in other jurisdictions that substantially enacted Part 5, or with the most recent version of the model rules promulgated by the International Association of Corporate Administrators, and the reasons for these variations.

The bill repealed this section.

MCL 440.9515 et al.

FISCAL IMPACT

There may be additional costs to the Secretary of State associated with the filing of financing statements. These

costs, however, should be minimal and should be absorbed within the Secretary of State's annual appropriations.

The bill will have no fiscal impact on local government.

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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.