

# **The Effect of Non-Uniform State Enactments of Article 9 on the Effectiveness After June 30, 2006 of Financing Statements Filed Under Former Article 9 Before July 1, 2001**

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Our postings to UCCLAW-L concerning UCC § 9-705(c) have prompted some people to ask us how the cut-off date in § 9-705(c)(2) for financing statements filed under former Article 9 (and related issues) works in the context of the few states that are non-uniform in one or more of three respects:

- (i) states that have a cut-off date other than June 30, 2006 in § 9-705(c)(2) (in all cases, a later date),
- (ii) states in which financing statements were effective for longer than five years under former Article 9, and
- (iii) states that had non-uniform effective dates for revised Article 9.

The states that are non-uniform are as follows:

- A. Non-uniform cut-off dates:
  - (i) Alabama (December 31, 2006),
  - (ii) Arizona (June 30, 2007), and
  - (iii) Mississippi (December 31, 2006).
- B. Non-uniform periods of effectiveness under former Article 9:
  - (i) Arizona (six years), and
  - (ii) Maryland (12 years).
- C. Non-uniform effective dates:
  - (i) Alabama (January 1, 2002),
  - (ii) Connecticut (October 1, 2001),

- (iii) Florida (January 1, 2002), and
- (iv) Mississippi (January 1, 2002).

As can be seen, some states are in more than one non-uniform category. Interestingly, only some of the states with non-uniform effective dates also have non-uniform cut-off dates.

The transition issues raised by these non-uniformities have not attracted as much attention as the second continuation statement issue addressed in our earlier postings and in the PEB Report *Maintaining Perfection Beyond June 30, 2006 of Security Interests Created and Perfected by Filing Under Former Article 9*, largely because they are generated by the non-uniform statutes of a small number of states. As you consider the analysis below, though, you may conclude that this set of issues will affect many more financing statements than are affected by the issue relating to second continuation statements.

The issues raised by these non-uniformities go beyond the safe harbor window for filing a second continuation statement, but may overlap that issue. In addition, the issues raised by the three sets of non-uniformities may overlap each other. So, how are you at three-dimensional chess?

### **How is § 9-705(c) structured?**

Section 9-705(c) provides that a financing statement filed under former Article 9 is effective until the *earlier* of one of two dates:

- (i) The date the financing statement would have lapsed under the former Article 9 of the state in which it was filed, and
- (ii) June 30, 2006 (in states with the Official Text)

### **Which state's § 9-705(c) applies?**

The answer to this question is critical to much of our analysis. Section 9-705(c) is a perfection rule, not a choice-of-law rule. As a result, a court in any revised Article 9 state should apply the normal revised Article 9 choice-of-law rules (§§ 9-301, 9-307) that mandate which state's law governs perfection by the filing of a financing statement. These rules will lead the court to apply the perfection rules (including § 9-705(c)) of the state in which the debtor is located, as that location is determined under revised Article 9 (*e.g.*, in the case of a corporation, the state of incorporation). As readers of this list know, because of changes in both the Article 9 choice-of-law rules and the rules that determine where a debtor is located, the state whose law governed perfection under former Article 9 (the "Former Article 9 State") is frequently different than the state whose law governs perfection under revised Article 9 (the "Revised Article 9 State").

In cases in which the Former Article 9 State and the Revised Article 9 State are the same state, the answer to the question of which state's § 9-705(c) applies is obvious – apply the § 9-705(c) of that state.

What happens, though, if the Former Article 9 State and the Revised Article 9 State are not the same state? If both states enacted the Official Text of § 9-705(c), there is obviously no difficulty because the uniform text in effect in each of those states makes irrelevant the answer to the question of which state's law applies. But what if one of the states has the Official Text while the other has a non-uniform variation with a later cut-off date? We explore this question in the following section of this post.

### **Non-uniform cut-off date in § 9-705(c)(2)**

Having determined which state's 9-705(c) applies, the analysis can then proceed to determine the effect of a non-uniform cut-off date in a particular state's § 9-705(c)(2). If the state with the uniform cut-off date of June 30, 2006 is the Revised Article 9 State, the effectiveness of the financing statement will terminate no later than that date, as provided in § 9-705(c)(2). This is true even if the date on which the financing statement would have ceased to be effective under the rules of the Former Article 9 state – the date made relevant by § 9-705(c)(1) of the Revised Article 9 State – is later than June 30, 2006, because § 9-705(c) ends the effectiveness of a financing statement on the *earlier* of the date identified in subsection (c)(1) and the date identified in subsection (c)(2). Thus, for example, even though a financing statement filed in Arizona under former Article 9 on May 1, 2001 would remain effective under Arizona law until May 1, 2007, if the Revised Article 9 State has enacted the uniform cut-off date, the effectiveness of that financing statement will terminate on June 30, 2006.

Even if the Revised Article 9 State is the state with a non-uniform, later cut-off date, the result in most cases will be the same – the effectiveness of the financing statement will still lapse no later than June 30, 2006. Recall that § 9-705(c) provides that a financing statement is effective until the *earlier* of the dates determined under § 9-705(c)(1) and (c)(2). The result stated in the first sentence of this paragraph occurs because, except in unusual circumstances, under the rules of the Former Article 9 state (made relevant by § 9-705(c)(1) of the Revised Article 9 State), the effectiveness of the filing would lapse no later than June 30, 2006 (because most filings in most states under former Article 9 had a life-span of five years and, thus, such filings could not remain effective later than five years after the last day of effectiveness of former Article 9) and, therefore, § 9-705(c)(1) would terminate the effectiveness of these filings even before the non-uniform cut-off date of § 9-705(c)(2) of the Revised Article 9 State is reached. For example, if a financing statement was filed in New York on May 1, 2001 under former Article 9, and the Revised Article 9 state is Mississippi, the effectiveness of that financing statement will cease on May 1, 2006 because of the application of Mississippi's § 9-705(c)(1) even though Mississippi's cut-off date in § 9-705(c)(2) is December 31, 2006.

The “unusual circumstances” that could change this analysis would primarily involve situations in which financing statement in the Former Article 9 State would terminate later than June 30, 2006 (as is the case in the Arizona example above) *and* the Revised Article 9 state is a state such as Mississippi that has a delayed cut-off date.

### **Non-uniform periods of effectiveness under former Article 9**

As noted, under former Article 9 two states had non-uniform (longer) periods of effectiveness for financing statements filed in those states. As discussed above, the cut-off date for the effectiveness of those financing statements will be determined by the § 9-705(c) of the Revised Article 9 State. Thus, if the debtor is located in a state that has enacted the Official Text of § 9-705(c), the effectiveness of the financing statement will lapse on June 30, 2006, even though, under the law of the Former Article 9 State, the financing statement would have had a longer period of effectiveness. As noted above, only if the Revised Article 9 State has a non-uniform, later cut-off date in § 9-705(c)(2) can the long-lasting filing in the Former Article 9 State be effective beyond June 30, 2006. Interestingly, while both Maryland and Arizona had non-uniform longer periods of effectiveness under former Article 9, Maryland enacted the standard June 30, 2006 cut-off date in its § 9-705(c)(2) (and added language to make it clear that the cut-off date applies even in the case of same-state same-office filings discussed in the *PEB Report*). Thus, even when Maryland is both the Former Article 9 State and the Revised Article 9 State, the June 30, 2006 cut-off date will terminate the effectiveness of financing statements earlier than would have been the case if the longer period of effectiveness of Maryland’s former Article 9 applied.

### **Delayed effective date of revised Article 9**

Now, let’s change the subject from non-uniform cut-off dates under § 9-705 to non-uniform effective dates under § 9-701. In Connecticut, for example, revised Article 9 did not go into effect until October 1, 2001. This means that there was a three month period during which revised Article 9 was effective in 46 states, but not Connecticut. Imagine a transaction in which a Delaware corporation with its chief executive office and all of its tangible assets located in Connecticut granted a security interest in all of its personal property to a Connecticut lender on August 15, 2001 and the lender filed a financing statement in Connecticut that day. Filing in Connecticut was a good idea, because former Article 9 was still in effect in Connecticut, and the choice of law rules in Connecticut’s former § 9-103 provided that Connecticut law governed perfection of the security interest. When does that financing statement cease to be effective to perfect the security interest? The answer, which will lead to the conclusion that filing *only* in Connecticut was not such a good idea, may be surprising.

Here’s the analysis. Now that revised Article 9 is in effect in all 50 states, a court in any of those states would follow (revised) § 9-301 and look to the law of the state of the debtor’s location – Delaware under the location rules in revised Article 9 – to

determine if the security interest is perfected. Because no financing statement was filed in Delaware, the security interest is perfected only if Delaware's § 9-705(c) gives effect to the Connecticut financing statement. You might think that the result would be that the Connecticut financing statement, filed while former Article 9 was in effect in Connecticut, would be effective until June 30, 2006, but take a close look at the introductory language in § 9-705(c). It provides that revised Article 9:

“does not render ineffective an effective financing statement that, *before this [Act] takes effect*, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [former Article 9].” (emphasis added)

Yet, in the situation we are describing, the Connecticut financing statement was *not* filed before “this Act” takes effect, because “this Act” is the *Delaware* revised Article 9, which went into effect on July 1, 2001. Thus, under the perfection law of Delaware, the security interest was never perfected and continues to be unperfected right now! Moreover, even if the matter is litigated in Connecticut today, the security interest should be held to be unperfected. After all, under Connecticut's current § 9-301, it is the perfection law of Delaware – including Delaware's § 9-705 – that now governs perfection. Only until the effective date of revised Article 9 in the forum state would the filing in Connecticut have been effective to perfect the security interest. Thus, to insure its perfection, the secured party should also have filed a financing statement in Delaware from the beginning.

The bottom line here is that if the Former Article 9 State was one of the states with a delayed effective date of Revised Article 9 and a financing statement was filed on or after July 1, 2001 in that state before Revised Article 9 went into effect there, the financing statement is ineffective today if Revised Article 9 went into effect in the Revised Article 9 State on or before the date of that filing. (It should be noted that this risk was publicized at the time revised Article 9 went into effect. On June 13, 2001, the PEB issued a PEB Report entitled *Article 9 Perfection Choice of Law Analysis Where Revised Article 9 Is Not in Effect in All States by July 1, 2001*. The Report stated that “A prudent secured party that wishes to perfect a security interest on or after July 1, 2001 should make sure that the security interest will be determined to be perfected by the courts of any state – whether or not that state has enacted revised Article 9.”)

### **Intersection with previously posted 9-705(c)(2) double continuation statement issue – the perfect storm**

Let's end this post with a scenario we call “the perfect storm” – the intersection of the double continuation statement problem that is the subject of the *PEB Report* with a state (either Connecticut or Florida) that had a non-uniform effective date for revised Article 9, but enacted the Official Text of § 9-705(c). Assume an original financing statement filed in Florida on February 1, 1997 with respect to a Florida corporation with

its chief executive office and all tangible assets in Florida. Assume further that the secured party filed a continuation statement under *former* Article 9 in Florida on August 15, 2001. (Revised Article 9 did not become effective in Florida until January 1, 2002.) Under former Article 9, the continuation statement continued the effectiveness of the financing statement for five more years through February 1, 2007. Now, the secured party would like further to continue the effectiveness of the financing statement. The debtor is a Florida corporation, so it is located in Florida and Florida's perfection rules – including § 9-705(c) – apply. When must a continuation statement be filed further to continue the effectiveness of this financing statement? Under the first theory described in the *PEB Report* and in our earlier posting, § 9-705(c)(2) applies and, accordingly, the financing statement ceases to be effective on June 30, 2006, unless a continuation statement is filed during the six-months prior to that date (*i.e.*, between December 30, 2005 and June 30, 2006). Under the second theory described in the *PEB Report* and our earlier posting, though, § 9-705(c) does not apply, the financing statement is effective through February 1, 2007, and a continuation statement may be filed only in the six-month period prior to that date (*i.e.*, between August 1, 2006 and February 1, 2007) Note that the two “continuation windows” do not overlap and, thus, there is no “safe harbor.” We recommend that, in this “perfect storm” scenario, the secured party should file a continuation statement in both windows (saving evidence of the attempt if one of them is rejected) – after all, a court in that state should hold that one of the two theories is correct and the secured party will have assured compliance with both of them.