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**REPORT ON LEGISLATION BY THE
COMMERCIAL LAW AND UNIFORM STATE LAWS COMMITTEE**

S.5502-A

Sen. Farley

AN ACT to amend the uniform commercial code, the civil practice law and rules, the lien law, the general obligations law, the banking law, the general business law, the arts and cultural affairs law and the personal property law, in relation to making technical corrections to conform with revisions to the uniform commercial code; and to amend chapter 505 of the laws of 2014 amending the uniform commercial code relating to modernizing commercial law in New York state, in relation to making technical amendments thereto

THIS BILL IS APPROVED

BACKGROUND

Legislation was enacted in 2014 (Chapter 505) which modernized Articles 1, 7 and 9 of the Uniform Commercial Code (UCC). The legislation was supported by the New York City Bar Association.¹ S.5502-A (“the Bill”) would:

- make some important, necessary technical amendments in several sections of law;
- improve certain filing processes under Article 9 of the UCC regarding security interests in personal property; and
- clarify the applicability of the amendments to Article 9 to transactions which were entered into on or after the effective date of the 2014 law (i.e. December 17, 2014).

Article 9 governs security interests in personal property. The Article was substantially revised and enacted in New York in 2001, and amended in New York in 2014 (the “December Amendments”). In addition to conforming bill references to other New York state laws, the Bill contains a few technical amendments to Article 9 relating to the rules for the system for filing financing statements, other clarifying changes and a transition rule.

SUMMARY OF SPECIFIC PROVISIONS

I. Important Technical Corrections to State Law Cross-References

- Sections 1 through 14 of the Bill makes important technical corrections to several

state laws, and fixes incorrect cross-references in such laws that were inadvertently introduced by the adoption of December Amendments. While all such corrections should be made, one in particular is worth highlighting here. Previously, § 5-1401 of the New York General Obligations Law permitted parties to a transaction covering in the aggregate of no less than \$250,000 to agree that New York law may govern that transaction, even if the transaction had no reasonable relation to the state of New York. This provision expressly preempted the “reasonable relation test” set forth in former UCC § 1-105. This provision provided clarity to counterparties, lawyers and judges that parties could choose New York law even if the transaction had no reasonable relationship to New York. When the 2014 amendments were enacted, certain provisions that were formerly in UCC § 1-105 were moved to UCC § 1-301, but the cross-references in a number of laws were not updated. As a result, among other implications, a transaction governed by the New York UCC would seemingly now be required to have a reasonable relationship to New York for New York law to govern. While it is clear that this was not the legislative intent, it is important that the cross-references be updated to provide clarity to counterparties, lawyers and judges that parties can choose New York law even if the transaction has no reasonable relation to New York and help ensure that New York is one of the leading jurisdictions for commercial law.

II. Clarification Related to Ambiguous Provision of Existing Law

- Sections 15 and 16 of the Bill contain some helpful clarifications to existing 9-406 and 9-408. As currently drafted, an incongruity exists between these two provisions that is causing significant transactional uncertainty. Current section 9-406(d) allows assignment of a payment intangible or promissory note to secure an obligation, even if such payment intangible or promissory note contains an anti-assignment provision. Current section 9-406(e) provides that this provision does not apply to certain sales of a payment intangible or a promissory note, although the intent was that the provision should apply to an enforcement sale of the collateral. By way of contrast, current section 9-408 permits a sale of a payment intangible or promissory note notwithstanding an anti-assignment term but does not require the account debtor or maker to enforce or otherwise recognize the buyer. The failure to resolve the conflict between sections 9-406 and 9-408 will result in uncertainty as to legal rights in contracts governed by New York law.
- The new language in the Bill keeps in place a policy that has been part of New York’s enactment of Article 9 for a half-century while resolving the tension between old and new provisions. The Bill clarifies that effectiveness of an anti-assignment term of a payment intangible or promissory note in the case of an enforcement of the security interest (e.g., sale or retention of the collateral in strict foreclosure) is governed by section 9-406 and not by section 9-408. The new language will not adversely affect the rights of consumers inasmuch as anti-assignment clauses (the subject of sections 9-406 and 9-408) do not exist in mortgage notes and other negotiable instruments, and are not used in consumer debt.

III. Clarifications Related to Filing Rules in 9-516, 9-518 and 9-521

- Section 17 of the Bill provides for an update to the filing rules in Part 5 of Article 9 that will allow New York to use the new uniform form of initial financing statement and amendment (the “New UCC Financing Statements”). New York’s 9-516 should be amended to not require the debtor’s type of organization or jurisdiction on the face of its current financing statement forms (the “New York UCCs”). The Uniform Law Commission polled offices of the secretaries of state (among other parties) regarding this information, and learned that not only was it not useful; requiring such information had the negative effect of adding cost and delay to the filing process. Because New York still requires such information to be included on the NY UCCs, New York is unable to use the New UCC Financing Statements otherwise in effect nationwide.
- Section 18 of the Bill updates 9-518. It provides that a statement may, but need not, be filed by a secured party of record who believes that an amendment or other record relating to the financing statement of the secured party of record was filed by a person not entitled to do so. Under the current version of New York’s 9-518, such statement may be filed only by the debtor. This amendment would allow any aggrieved person to make filings on the record should such person believe an unauthorized filing was made against him/her.
- Section 19 of the Bill provides that New York’s 9-521 should be amended to permit the use of the New UCC Financing Statements. In addition to the reason raised above (the NY UCCs have fields for information that is not useful), the New York UCCs do not contain fields for the new information required by the December Amendments to be included on the face of the form (e.g., indication of collateral being held in a trust or administered by a decedent’s personal representative, indication that the financing statement is subject to the transmitting utility rules). Allowing use of the nationwide standard will help simplify the filing process and make it more cost-efficient.

IV. Clarification to Transition Rule

- Currently, the December Amendments apply to transactions entered into on or after December 17, 2014. However, there is no definition for “transaction” to help parties understand when the December Amendments will apply. Secured transactions often have a lifespan of many years, so transactions entered into before the effective date of new legal rules can continue in existence for many years after that effective date. Section 20 of the Bill contains a definition for “transaction” to provide clarification; it provides that a transaction can include any amendment, modification, supplement or restatement to an agreement entered into prior to the December Amendments, if such action contains an express provision that the parties intend it to be a “transaction” under the December Amendments. This will allow parties to avail themselves of the benefits of the new legislation immediately.

CONCLUSION

We support this Bill, as it makes necessary technical corrections to other New York Laws to conform to the December Amendments and effectively addresses other technical issues in those Amendments. In addition, the bill will enhance the State's economic profile. New York is under increasing competition to maintain its rank as a leading commercial jurisdiction. Today, significant commercial transactions may be domiciled in a U.S. jurisdiction that has modernized its law, or in a foreign locale that has a mature legal system. While sophisticated and complex commercial transactions are not themselves taxed, they generate both jobs and income for New Yorkers, particularly in the financial services sector. It has been estimated that for each professional job that is lost, at least one to two additional nonprofessional jobs are lost as well. Keeping New York's commercial law as modern as any in the nation will help maintain its status as a preeminent commercial jurisdiction.

Commercial Law & Uniform State Laws Committee
Victor Chiu, Chair

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