

PEB COMMENTARY NO. 26
INDICATION OF COLLATERAL IN A FINANCING STATEMENT
(August 12, 2022)

By the Permanent Editorial Board for the Uniform Commercial Code*

PREFACE

The Permanent Editorial Board for the Uniform Commercial Code (PEB) acts under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). The PEB has resolved to issue supplemental commentary on the Uniform Commercial Code (UCC) from time to time. The supplemental commentary of the PEB generally will be known as a *PEB Commentary*, to distinguish it from the Official Comments to the UCC. A *PEB Commentary* may be denominated a commentary, a report, or otherwise as determined by the PEB.

The Resolution states that:

The underlying purposes and policies of the *PEB Commentary* are those specified in Section 1-103(a). A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the beginning of the Commentary: (1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to the inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with Section 1-103(a)(2), to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it relates to other statutes (such as the Bankruptcy Code and federal and state consumer protection statutes) and general principles of law and equity pursuant to Section 1-103(b); or (6) to otherwise improve the operation of the UCC.

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ISSUE

Does a financing statement¹ that indicates the collateral solely by reference in the financing statement to the security agreement or other record not attached to² the financing statement “indicate” the collateral that it covers, as required for the sufficiency of a financing statement under Section 9-502(a)(3) of the Uniform Commercial Code?

DISCUSSION

Introduction. Sections 9-308 to 9-316 of the UCC set forth the methods by which security interests can be perfected. Section 9-310(a) establishes the default rule: unless otherwise provided in Section 9-310(b) or 9-312(b), a financing statement must be filed to perfect a security interest.³ Under Section 9-502(a)(3), a financing statement is sufficient only if, among other things, it “indicates the collateral covered by the financing statement.” Section 9-504 states that a financing statement is sufficient if it “provides” a “description” of the collateral pursuant to Section 9-108⁴ or “provides” an “indication” that the financing statement covers all assets or all personal property of the debtor.⁵

This Commentary concludes that a financing statement does not satisfy Section 9-504 when the financing statement does not itself (including any attachments) contain a collateral description sufficient under Section 9-108 or an indication that the security interest covers “all assets” or “all personal property.” The financing statement does not satisfy the requirement if the financing statement indicates the collateral covered by the financing statement solely by referring to a record not attached to the financing statement (even if that record contains information that, if it were contained in the financing statement or an attachment, would satisfy the statutory standard).

This conclusion follows both from the text of the UCC and its underlying purposes and policies.

¹ The term “financing statement” includes “an initial financing statement and any filed record related to the initial financing statement.” U.C.C. § 9-102(a)(39).

² In deference to common parlance, and for ease of comprehension, this Commentary speaks of records that are “attached to” a financing statement to refer to records that are included in the filed records comprising an initial financing statement or amendment that adds collateral, as applicable. The term “record” means “information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.” U.C.C. § 9-102(a)(70).

³ The actions described in Section 9-310 and the other sections to which it refers will suffice to perfect a security interest that has attached. If the actions described in those sections occur before attachment of the security interest, the security interest becomes perfected when it attaches. U.C.C. § 9-308(a).

⁴ U.C.C. § 9-504(1). Section 9-108 generally requires that, to be sufficient, the collateral description must “reasonably identify” what is described. This Commentary addresses only whether a financing statement “provides” a sufficient description of the collateral under Section 9-108, or “provides” an indication that the financing statement covers all assets or all personal property, if the words of that description or indication are not in the records constituting the financing statement but instead are in a record that is not attached to the financing statement.

⁵ U.C.C. § 9-504(2). Such “supergeneric” indications of collateral were not sufficient under former Article 9. *See* former U.C.C. § 9-402(1) (“financing statement is sufficient if it . . . contains a statement indicating the types, or describing the items, of collateral”).

The text of the UCC. Section 9-502(a)(3) states that a financing statement is sufficient only if it *indicates* the collateral covered by the financing statement. That requirement is satisfied, according to Section 9-504, if the financing statement “provides” either a description of the collateral that would be sufficient under Section 9-108 or an indication that the financing statement covers “all assets” or “all personal property” of the debtor. Section 9-504 is one of several sections in which Article 9 refers to a record “providing” certain information to be sufficient. Section 9-502(a)(1) states that a financing statement is sufficient only if it “provides” the name of the debtor. When Article 9 requires a record such as a financing statement to “provide” certain information and states what is a sufficient provision of that information, the plain meaning of the text, and context and purposes of Article 9, requires the information to be in that record.

The purposes and policy of the UCC. Article 9 is but one article of the UCC. Article 1 (General Provisions) “applies to a transaction to the extent that it is governed by another article.”⁶ Section 1-103 provides as follows:

- (a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:
 - (1) To simplify, clarify, and modernize the law governing commercial transactions;
 - (2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
 - (3) To make uniform the law among the various jurisdictions.

As stated, among the purposes and policies of the UCC are simplicity, clarity, and uniformity in the law as enacted in various jurisdictions.

Comment 1 to Section 1-103 elaborates:

The Uniform Commercial Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Uniform Commercial Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

Publicly searchable financing statements efficiently, reliably, and inexpensively provide to third parties the information necessary for assessment of the risk that others have certain rights in the personal property indicated in the financing statement. The Comments to Sections 9-502 and 9-504 state the purpose served by use of a financing statement (emphasis added):

The *notice* itself indicates merely that a person may have a security interest *in the collateral indicated*. . . .

. . . However, even in the case of filings that do not necessarily involve a series of transactions (e.g., a loan secured by a single item of equipment), a financing statement is effective to encompass transactions under a security agreement not in existence and not

⁶ U.C.C. § 1-102.

contemplated at the time the notice was filed, if the indication of collateral *in the financing statement* is sufficient to cover the collateral concerned.⁷

A financing statement sufficiently indicates collateral claimed to be covered by the financing statement if it satisfies the *purpose* of conditioning perfection on the filing of a financing statement, i.e., if *it provides notice* that a person may have a security interest in the collateral claimed.⁸

The purposes of the UCC § 9-502(a)(3) requirement that a financing statement *indicate* the collateral, like the purposes of the UCC § 9-504(1) provision that a financing statement “provide” an indication of the collateral, are best served if those provisions are interpreted to mean that an adequate collateral description appears in the record or records that are attached to the financing statement, not solely in a record that is not “attached” to the financing statement. If the collateral description is not in the records comprising the financing statement, a searcher would need to make inquiries outside of the records of the filing office to obtain even the most basic information about the collateral covered. Such inquiries are inherently inefficient.⁹ Moreover, those inquiries might not yield the needed information.¹⁰ The court in *In re Financial Oversight and Management Board for Puerto Rico*,¹¹ considering the comparable rule in former Article 9, adopted this analysis:

[K]ey goals of the UCC and its filing system . . . include fair notice to other creditors and the public of a security interest. . . .

. . . Requiring interested parties to contact debtors at their own expense about encumbered collateral, with no guarantee of a timely or accurate answer, would run counter to the notice purpose of the UCC.¹²

The court held that a financing statement did not provide a sufficient indication of collateral where the only indication was in a document not attached to the financing statement.¹³

⁷ U.C.C. § 9-501, cmt. 2 (emphasis added).

⁸ U.C.C. § 9-504, cmt. 2 (emphasis added).

⁹ Requiring that an adequate indication appear in the record or records that are attached to the financing statement reduces the cost of credit for borrowers because an efficient, inexpensive, and reliable notice system makes financing less expensive in a holistic sense for lenders.

¹⁰ While Section 9-210 requires a secured party to provide its debtor with information about collateral in which the secured party claims a security interest when requested, the section generally allows the secured party up to 14 days in which to do so. The section does not require a secured party to provide the information to a third party such as a searcher. *See* U.C.C. § 9-210, cmt. 3. As stated in *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694 (1st Cir. 2019) (discussed below), this statutory right is not an efficient or timely alternative to requiring the filer to attach the indication to the financing statement. Nor would it be reliable, as the searcher would not have assurance that any record not attached to the financing statement is the latest version of that record or that the record may not be subsequently amended.

¹¹ 914 F.3d 694 (1st Cir. 2019).

¹² *Id.* at 711 (citations and footnote omitted).

¹³ The somewhat different wording in current Section 9-504 does not change the necessity of having the financing statement itself contain sufficient information about the collateral. Section 9-402(1) of former Article 9 required that a financing statement “contain” a statement “*indicating* the types, or *describing* the items, of collateral” (emphasis added). Section 9-502(a)(3) requires that a financing statement “indicate[.]” (accommodating the wording of 9-504(2)) the collateral covered by the financing statement. This requirement is satisfied by “provid[ing]” a description of the

However, any concern about a searcher needing to make inquiries outside of the records of the filing office goes only so far. The inquiry burden on the searcher is balanced against the burden on the filer of providing a sufficient collateral indication in or attached to the financing statement. That balance is evident in that a financing statement with a collateral description on its face providing sufficient information to “reasonably identify” the collateral or an “all assets” indication, which indication in either case *also* refers to information not attached to the financing statement for *additional* information, may be sufficient. When a financing statement that provides information that meets the standard for sufficient indication under Section 9-504(1) *also* refers to additional information in an unattached record, this does not cause the financing statement to fail the standards for sufficient indication.

For example, consider a financing statement that describes the collateral as “all inventory supplied by secured party to debtor under a supply agreement between debtor and secured party.” This description of the collateral would be sufficient because the description of the collateral as inventory alone would be sufficient¹⁴ under Sections 9-108 and 9-504(1). This language puts the searcher on notice that a security interest may be claimed in certain inventory even though a determination of the particular inventory encumbered may require further due diligence by the searcher, or even the implementation of intercreditor arrangements, if the searcher is considering extending credit against inventory or its proceeds. The searcher may decide not to inquire further if the searcher is considering extending credit only against non-inventory collateral.¹⁵

CONCLUSION

A financing statement that supplies information about the collateral that it covers solely by reference to a record not attached to the financing statement is not sufficient because it does not indicate the collateral that it covers as required by UCC § 9-502(a)(3). To the extent that *In re I80 Equipment, LLC*¹⁶ is inconsistent with this conclusion, this Commentary is to the contrary.

AMENDMENT TO OFFICIAL COMMENT

Official Comment 2 to Section 9-504 is hereby amended to add the following at the end of the first paragraph thereof:

A financing statement (including any attachments) that does not itself supply information satisfying Section 9-502(a)(3) or Section 9-504(a), but, rather, refers solely to a record not attached to the financing statement for information seeking to satisfy those provisions, does not satisfy the sufficiency requirement of Section 9-502(a)(3) that the financing statement indicate the collateral that it covers. See PEB Commentary No. 26, dated August 12, 2022. The Commentary is available at <https://www.ali.org/peb-ucc>.

collateral pursuant to Section 9-108. Former Article 9 was generally in effect before July 1, 2001, the effective date of current Article 9.

¹⁴ This assumes that the debtor in fact holds the goods as “inventory” as defined in Section 9-102(a)(48).

¹⁵ The searcher might also consider whether a financing statement might cover inventory as “proceeds” of the collateral indicated in the financing statement. U.C.C. § 9-315.

¹⁶ 938 F.3d. 866 (7th Cir. 2019), *reh’g en banc denied*, (7th Cir. 2019), *cert. denied*, 140 S. Ct. 1125 (2020).