CHAPTER 11

Effective Date and Transition Provisions for the 1981 Uniform Commercial Code Amendments

**SECTION 36‑11‑101.** Effective date of the 1988 amendments.

The amendments to Title 36 contained in this chapter become effective at 12:01 a.m. on January 1, 1989. The amendments to Title 36 contained in this chapter are officially designated as the 1988 UCC amendments; and the provisions of Act 1065 of 1966 are officially designated as the 1966 UCC.

HISTORY: 1988 Act No. 494, Section 7.

OFFICIAL COMMENT

None.

SOUTH CAROLINA REPORTER’S COMMENT

1. This chapter was prepared by the reporters of the UCC Permanent Editorial Board that drafted the 1972 Text but was not passed upon by the Article 9 Review Committee, the UCC Permanent Editorial Board, the American Law Institute, the National Conference of Commissioners on Uniform State Laws or the American Bar Association, all of which approved and recommended the other provisions of the 1972 Official Text. The rules in this chapter clarify many troublesome issues that would exist if it were not adopted. In this connection the vast majority of the states that have enacted the 1972 Text, have enacted this chapter.

2. This section establishes the effective date of the Official 1972 Revisions to Article 9 and related amendments (collectively referred to as the 1988 UCC amendments) and provides rules for determining whether the 1966 UCC (based on the 1962 official Text of the UCC) or the 1988 UCC amendments (based on the official 1972 Text) applies to the transaction in question as well as rules specifying what further action, if any, a secured party needs to take to maintain perfection and priority of a security interest which has attached before the effective date specified in this section. It should be read in conjunction with Chapter 10, which provides transition rules for pre‑code transactions. The effective date of the 1988 UCC amendments is a substantial time after enactment in order to allow ample time to inform persons affected by the UCC of these changes and to make any necessary refilings.

**SECTION 36‑11‑102.** Preservation of old transition procedures.

Except as otherwise provided in Section 36‑11‑106(4), the provisions of Section 36‑10‑102 shall continue to apply to the 1988 UCC Amendments, and for this purpose the 1966 UCC and the 1988 UCC Amendments must be considered one continuous statute.

HISTORY: 1988 Act No. 494, Section 7.

OFFICIAL COMMENT

None.

SOUTH CAROLINA REPORTER’S COMMENT

This section preserves the principle of Section 36‑10‑102 of the 1966 UCC that pre‑code transactions continue to be governed by pre‑code law. A different principle is set forth in this Chapter 11 for transition problems between the 1966 UCC and the 1988 UCC Amendments because the changes are not nearly as great. That principle, with minor exceptions, is that the 1988 UCC amendments govern. See Section 36‑11‑103 et seq.

Note that with respect to pre‑code transactions, a financing statement meeting the requirements of Section 36‑11‑106(4) will have to be filed within six months before the perfection of the pre‑code security interest would otherwise lapse under Section 36‑10‑102.

**SECTION 36‑11‑103.** Transition to 1988 UCC Amendments‑general rule.

Transactions validly entered into after the date specified in Section 36‑10‑101 and before the date specified in Section 36‑11‑101 and which were subject to the provisions of the 1966 UCC and which would be subject to the 1988 UCC Amendments if they had been entered into after the effective date of the 1988 UCC Amendments, and the rights, duties, and interests flowing from the transactions remain valid after the date specified in Section 36‑11‑101, and may be terminated, completed, consummated, or enforced as required or permitted by the 1988 UCC Amendments. Security interests arising out of the transactions which are perfected when the 1988 UCC Amendments become effective shall remain perfected until they lapse as provided in the 1988 UCC Amendments and may be continued as permitted by the 1988 UCC Amendments, except as stated in Section 36‑11‑105.

HISTORY: 1988 Act No. 494, Section 7.

OFFICIAL COMMENT

None.

SOUTH CAROLINA REPORTER’S COMMENT

This section makes the 1988 UCC Amendments applicable to existing security interests, e.g., the revised notice provisions of Part 5 will apply to existing security interests in the event of the debtor’s default. At first glance this conclusion appears to be a contradiction of the specific language of Section 36‑11‑103 which provides that preamendment security interests which would be subject to amended Article 9 if they came into being after the effective date of the 1988 UCC Amendments “may be terminated, completed, consummated, or enforced as required or permitted by the 1988 UCC Amendments”. While the quoted provision speaks of “may”, it is clear from the other provisions of Chapter 11 of the Official Reporter’s discussion of this section that the “may” only relates to whether the particular party desires to assert his rights. That is, “may” refers to whether he chooses to enforce his rights or to not enforce them. Once, however, he acts to enforce his rights he must act in accordance with the 1988 UCC Amendments and does not have a choice of proceeding under the preamendment law. To illustrate, if the creditor so desires, he “may” expose the collateral to sale after default, but if he does so, he must comply with the 1988 UCC Amendments in Part 5 of Chapter 9 as to notice and sale.

The “except” clause at the end is necessary because of the possibility that new financing statements might have to be filed in different offices because of modifications made by the 1972 Text.

**SECTION 36‑11‑104.** Transition provisions on change of requirement of filing.

A security interest for the perfection of which filing or the taking of possession was required under the 1966 UCC and which attached prior to the effective date of the 1988 UCC Amendments but was not perfected is considered perfected on the effective date set forth in Section 36‑11‑101 of the 1988 UCC Amendments if the 1988 UCC Amendments permit perfection without filing or authorize filing in the office or offices where a prior ineffective filing was made.

HISTORY: 1988 Act No. 494, Section 7.

OFFICIAL COMMENT

None.

SOUTH CAROLINA REPORTER’S COMMENT

This section is a further refinement on the basic transition rule set forth in Section 36‑11‑103. The 1988 UCC Amendments recognize that there are situations in which the amendments confer perfection on a security interest when the 1966 UCC refused perfection under the same circumstances. Section 36‑11‑104 cures the prior lapse of perfection by declaring as perfected any security interest which though unperfected by the 1966 UCC would be perfected if the facts had occurred after the effective date of the 1988 UCC Amendments. One case it covers is the situation where readily removable factory or office machinery or replacement domestic appliances are held to be fixtures but no proper fixture filing has been made. Under the 1966 UCC if the secured party had not filed a financing statement covering such collateral in the real estate mortgage records, the secured party’s security interest would be subordinate to many real estate interests. However, under revised Section 36‑9‑313(4)(d), this same secured party will take priority over all owners or encumbrancers of the real estate in question even though no fixture filing has been made so long as the security interest has been perfected in some authorized manner. In the case of readily removable factory equipment held to be a fixture, if a financing statement had been filed in the Secretary of State’s office before the effective date of the 1988 UCC Amendments, this filing would automatically result in the security interest having the priority granted by Section 9‑313(4)(d) of the 1972 Text without any further action by the secured party. If a secured party had a purchase money security interest in replacement domestic appliances before the effective date of the 1988 UCC Amendments, the same result would occur under Section 9‑313(4)(d) of the 1972 Text even though no filing of any kind had been made. See also revised Section 36‑9‑302(1)(d), paragraph 2(c) of the Reporter’s Notes to revised Section 36‑9‑313, and subsection (4) of new Section 36‑11‑105 below.

The same rule is applied where the filing which was made was in an improper office when made but the office would be a proper office under the 1988 UCC Amendments. In such a case, the filing in what was originally a wrong office is transformed into a proper filing by the fact of the 1988 UCC Amendments becoming effective.

In cases where the effectiveness of the 1988 UCC Amendments is relied on to cure the lack of perfection under the 1966 UCC, no action by the creditor is required. Thus there is no requirement that the creditor make any election or file any paper declaring that the security interest is now subject to or brought under the 1988 UCC Amendments.

**SECTION 36‑11‑105.** Transition provision on change of place of filing.

(1) A financing statement or continuation statement filed prior to the date specified in Section 36‑11‑101 which has not lapsed prior to that date remains effective for the period provided in the 1966 UCC but not less than five years after the filing.

(2) With respect to any collateral acquired by the debtor subsequent to the effective date of the 1988 UCC Amendments, any effective financing statement or continuation statement described in this section applies only if the filing or filings are in the office or offices that would be appropriate to perfect the security interest in the new collateral under the 1988 UCC Amendments.

(3) The effectiveness of any financing statement or continuation statement filed prior to the date specified in Section 36‑11‑101 may be continued by a continuation statement as permitted by the 1988 UCC Amendments, except that if the 1988 UCC Amendments require a filing in the office where there was no previous financing statement, a new financing statement conforming to Section 36‑11‑106 must be filed in that office.

(4) If the record of a mortgage of real estate would have been effective as a fixture filing of goods described in the mortgage if the 1988 UCC Amendments had been in effect on the date of recording the mortgage, the mortgage is considered effective as a fixture filing as to the goods under subsection (6) of Section 36‑9‑402 of the 1988 UCC Amendments on the effective date of the 1988 UCC Amendments as specified in Section 36‑11‑101.

HISTORY: 1988 Act No. 494, Section 7.

OFFICIAL COMMENT

None.

SOUTH CAROLINA REPORTER’S COMMENT

Under subsection (1) all existing financing statements specifying a duration of less than five years are automatically extended to the full five years (and longer in cases involving security interests in fixtures of transmitting utilities and recorded mortgages serving as fixture filings) as in the case for all financing statements filed under the 1988 UCC Amendments. See Section 9‑403(2), (3), and (6) of the 1972 Text. Like Section 9‑403, however, this provision only affects the effectiveness of the financing statement for notice purposes; whether or not the secured party has an enforceable security interest that has priority over conflicting claims of the debtor’s other creditors will depend on the validity and enforceability of the security agreement between the secured party and the debtor.

Subsection (2) makes clear that all existing financing statements and continuations on the effective date of the 1988 UCC Amendments remain valid for the remainder of the five years as to existing collateral, even though the appropriate place for filing may have changed under the new rules for accounts, general intangibles, etc. The existing filings also apply to new collateral acquired after such effective date, unless the appropriate filing place is different under the new rules. In that case there will have to be a new filing on such effective date to cover the new collateral. Compare, for example, the proper filing place for accounts receivable of a debtor with offices in more than one state under Section 9‑103 of the 1962 Text (1966 UCC), and Section 9‑103 of the 1972 Text (1988 UCC Amendments).

Pursuant to subsection (3), a continuation statement may be filed after the effective date of the 1988 UCC Amendments, but if the appropriate places under the new rules are different, the filing should be a UCC‑1 financing statement rather than a continuation statement.

Subsection (4) validates a recorded real estate mortgage as a fixture filing as of January 1, 1989, the effective date of the 1988 UCC Amendments. As is pointed out in the South Carolina Reporter’s Notes to Section 9‑313 of the 1972 Text a real estate mortgage would not ordinarily qualify as a financing statement under the 1966 UCC because of the absence of the mortgagee’s signature. There was confusion on this point, however, and some mortgagees have been under the impression that a recorded real estate mortgage gave them a perfected security interest in the mortgagor’s fixtures. Under the 1972 Text the secured party’s signature is not required on a financing statement and a real estate mortgage can therefore serve as a fixture filing. See also Section 36‑9‑402(1), (2), and (6) and the South Carolina Reporter’s Notes to Section 36‑9‑402.

**SECTION 36‑11‑106.** Required refilings.

(1) If a security interest is perfected or has priority when the 1988 UCC Amendments take effect as to all persons or as to certain persons without any filing or recording, and if the filing of a financing statement would be required for the perfection or priority of the security interest against those persons under the 1988 UCC Amendments, the perfection and priority rights of the security interest continue until three years after the effective date of the 1988 UCC Amendments. The perfection will then lapse unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.

(2) If a security interest is perfected when the 1988 UCC Amendments take effect under a law other than the Uniform Commercial Code as enacted in South Carolina which requires no further filing, refiling, or recording to continue its perfection, perfection continues until and will lapse three years after the 1988 UCC Amendments take effect, unless a financing statement is filed as provided in subsection (4), or unless the security interest is perfected otherwise than by filing, or unless under subsection (3) of Section 36‑9‑302 the other law continues to govern filing.

(3) If a security interest is perfected by a filing, refiling, or recording under a law repealed or modified by this Title 36 as amended by the 1988 UCC Amendments which required further filing, refiling, or recording to continue its perfection, perfection continues and will lapse on the date provided by the law so repealed or modified for further filing, refiling, or recording unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.

(4) A financing statement may be filed within six months before the perfection of a security interest would otherwise lapse. The financing statement may be signed by either the debtor or the secured party. It must identify the security agreement, statement, or notice (however denominated in any statute or other law repealed or modified by this Title 36 as amended by the 1988 UCC Amendments), state the office where and the date when the last filing, refiling, or recording, if any, was made with respect thereto, and the filing number, if any, or book and page, if any, of recording and further state that the security agreement, statement, or notice, however denominated, in another filing office under the 1966 UCC or under any statute or other law repealed or modified by this Title 36 as amended by the 1988 UCC Amendments is still effective. Sections 36‑9‑401 and 36‑9‑103 determine the proper place to file the financing statement. Except as specified in this subsection, the provisions of Section 36‑9‑403(3) for continuation statements apply to the financing statement.

HISTORY: 1988 Act No. 494, Section 7.

OFFICIAL COMMENT

None.

SOUTH CAROLINA REPORTER’S COMMENT

Subsection (1) covers a purchase money security interest in farm equipment costing less than twenty‑five hundred dollars which under the 1966 UCC is automatically perfected upon attachment without any filing. However, under the 1972 Text, a financing statement must be filed in order to have a perfected security interest in any farm equipment irrespective of the cost. See the South Carolina Reporter’s Notes to Section 36‑9‑302 of the 1988 UCC Amendments. Under this section, a nonfiled purchased money security interest in farm equipment costing less than twenty‑five hundred dollars would continue to be perfected without any filing for three years from the effective date of the 1988 UCC Amendments. Most of the purchases in question should be paid in full by the end of this three‑year period. If not, then a financing statement meeting the requirements of subsection (4) must be timely filed. The subsection also applies to railway equipment trusts which under the 1988 UCC Amendments are not excluded from Article 9 as is the case under the 1966 UCC and would appear to allow three years for filing. Generally filing under Article 9 for equipment trusts covering railroad rolling stock is excluded by Section 9‑302(3) of the 1972 Text, and the old preamendment filing under the Interstate Commerce Act will continue to serve the purpose. See the further discussion of security interests against other property owned by railroads in the next paragraph.

Subsection (2) makes it clear that perfection of a security interest in automobiles and boats by means of notation on the certificate of title pursuant to the South Carolina Certificate of Title laws (see Section 9‑302(3) of the 1972 Text), and perfection of security interests under statutes requiring national registration, such as copyrights (17 USC Sections 28 and 30) and aircraft (47 USC Section 523) will automatically continue to be effective under the 1988 UCC Amendments. This subsection and subsection (3) also cover security interests against transmitting utilities which under the laws of some states were dealt with in statutes other than the UCC and provide for indefinite filing duration. Two situations affected by subsections(a) and (3) are (1) former Section 36‑9‑403(4) of the 1966 UCC which provides for indefinite filing of security interests against rural electric cooperatives and public utilities subject to the jurisdiction of the South Carolina Public Service Commission; and (2) Section 36‑9‑302(3)(b) of the 1966 UCC which authorizes special filings for security interests against railroads that are valid for the life of the underlying real estate mortgage, pursuant to Section 30‑11‑20 of the 1976 South Carolina Code. These two South Carolina Code sections have been modified by Act 494 of 1988, the legislation that enacted the 1988 UCC Amendments, since all the security interests covered by these special provisions would be governed by the transmitting utility provisions which contain less onerous filing provisions than the existing statutes. See Section 8(17) of Act 494 of 1988 and the South Carolina Reporter’s Notes to Sections 36‑9‑302, 36‑9‑402, and 36‑9‑403. The intent of subsections (2) and (3) is that all filings made pursuant to the above cited sections prior to the effective date of the 1988 UCC amendments will continue to be valid without further action until they expire or are satisfied. The wording in the official text version of subsection (3) was modified to cover special problems presented by former Section 36‑9‑403(4) of the 1966 UCC dealing with South Carolina public utilities and subsection (4) covers a case where an ordinary continuation statement cannot be filed because the original filing was a Non‑UCC filing or was a UCC filing in a different filing office. The concept of financing statements rather than the concept of continuation statements was used for these fact situations. This subsection also covers a case where a pre‑UCC security interest has been renewed under the old chattel mortgage renewal provisions in former Section 60‑306 of the 1962 South Carolina Code pursuant to Section 36‑10‑102. Any further renewals of such security interests after the effective date of the 1988 UCC Amendments will have to comply with this subsection.

CROSS REFERENCES

Transactions entered into before effective date of the Commercial Code, see Section 36‑10‑102.

**SECTION 36‑11‑107.** Transition provisions as to priorities.

Except as otherwise provided in this Chapter 11, the 1966 UCC applies to any questions of priority if the positions of the parties were fixed prior to the effective date of the 1988 UCC Amendments. In other cases questions of priority are determined by the 1988 UCC Amendments.

HISTORY: 1988 Act No. 494, Section 7.

OFFICIAL COMMENT

None.

SOUTH CAROLINA REPORTER’S COMMENT

Most questions of priority can be broken down to questions between two parties, and the rule is that the 1988 UCC Amendments apply to resolve these questions unless the rights of both parties were fixed under the 1966 UCC.

If a commercial creditor acquires knowledge of an unfiled security interest before the effective date of the 1988 UCC Amendments, but gets his judgment after such effective date, the rule in Section 9‑301 of the 1972 Text governs, since he has no rights until after judgment and levy. Under Section 9‑301(1)(b) of the 1972 Text, the creditor’s knowledge of the unperfected security interest is irrelevant, whereas under the 1962 Text (see Section 36‑9‑301(1)(b) of the 1966 UCC), such knowledge would prevent the judgment creditor from taking priority over the unperfected security interest.

**SECTION 36‑11‑108.** Presumption that rule of law continues unchanged.

Unless a change in law has clearly been made, the provisions of the 1988 UCC Amendments are considered declaratory of the meaning of the 1966 UCC.

HISTORY: 1988 Act No. 494, Section 7.

OFFICIAL COMMENT

None.

SOUTH CAROLINA REPORTER’S COMMENT

This asserts that the 1988 UCC Amendments are declaratory, except where a change is clearly intended. This is an effort to minimize transitional problems. This provision should also be helpful to courts in determining the intent of the 1962 Text in litigation that is not governed by the 1972 Text. As is pointed out in the Introduction to Act 494 of 1988, the Statute that enacts the 1988 UCC Amendments, a great many of the modifications in the 1988 UCC Amendments are merely clarifications of the original intent of the 1966 UCC rather than changes in position or outcome on specific issues. A court can quite properly utilize these “clarifications” as authority in deciding these pre‑1988 UCC Amendments cases. See, e.g., Massey‑Ferguson Credit Corp. v. Wells Motor Co., Inc., 27 UCC Rep. 267, 272 (Ala, Sup. Ct. 1979).

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Cooperative Credit Unions Section 96, The Scope of State Power.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 7, Development of Trust Law in England and the United States‑Court Decisions and Statutes.

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