

Benefits of the UCC Insurance Policy

By John C. Murray
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Introduction

Some of the large land-title insurance companies now offer Uniform Commercial Code (“UCC”) insurance policies. UCC insurance provides indemnity insurance for the attachment, priority, and perfection of the lender’s security interest (there also is a buyer’s policy available) and transfers the risk of failing to properly create, perfect, or attain the desired priority of, the lender’s security interest to the insurer. (These policies may be examined on the websites of the title insurers that offer this product.) For a single premium, the lender who purchases a UCC insurance policy (and its counsel) obtains, in addition to an insurance policy that provides full legal-defense costs, the benefit of systems and procedures specifically designed to assure compliance with the UCC, including legal and procedural changes thereto under the 2001 revisions to Article 9 (“Revised Article 9”). Revised Article 9 changed the manner in which commercial loan security interests are granted, perfected and enforced, including filing forms, filing jurisdictions and in certain cases, the manner in which collateral is described.

Major Benefits

One of the major benefits of a UCC Insurance Policy is that knowledgeable and experienced personnel provide a “second set of eyes” and engage in a dialog with both the lender and the lender’s counsel. They provide assistance and advice during every step of the transaction, from ordering the policy to filing the required documentation in the proper location(s). The policy benefits also include – at no additional cost – record searches (with respect to a single search on a single debtor), document preparation, filing, follow-up, continuation and tracking (including timely notice of expiration dates) services, thereby providing peace of mind to lenders and their counsel. These national insurers are experienced, stable and well capitalized, and are regulated by each of the state insurance departments in which they do business. They are therefore able to spread their exposure among a large pool of customers and charge relatively low premiums for the risk assumed (especially in comparison to the fees that would have to be charged by UCC search companies or individual states to assume such risk). Without such coverage, lenders would either have to self-insure such risks or else have their law firms assume them, neither of which is cost effective or results in the extent of coverage provided by UCC insurance.

In those circumstances where the filing of a UCC-1 financing statement would be required to perfect the lender's interest, the insurer would provide insurance that the filing was accomplished in the proper jurisdiction and maintained the priority insured in the policy -- and perhaps most important, provide at the insurer's cost a defense against any

challenge (whether or not valid or justified) against the attachment, perfection, or priority of the lender's security interest.

As soon as there was a valid claim under the UCC insurance policy, the insurer would be obligated to pay. The fact that the lender might also have a claim against its attorney would be irrelevant and the insured would not be obligated to first pursue any rights it had against the attorney. But the insurer normally would, under its right of subrogation under the policy, have the right to pursue a claim against the negligent attorney in an attempt to recoup its loss. However, the insurer often can be persuaded to waive, by endorsement (or as part of the policy itself), any right of subrogation against the lender's attorney for indemnification for the attorney's negligent acts.

Recent Case Law

There have been recent court decisions that demonstrate the risk to lenders of relying on third parties, including their attorneys, to properly draft and file documents (or perform searches) to assure the proper attachment, perfection and/or priority of the lenders' security interest in personal property collateral. *See, e.g., Lory v. Parsoff*, 745 N.Y.S.2d 218 (2002) (holding that plaintiff, a former client of defendant and his law firm, was entitled to summary judgment against defendant and his firm for "per se" legal malpractice because of their failure to file UCC-1 financing statement that would have perfected plaintiff's security interest in assets of electronics company sold by plaintiff, which subsequently filed for bankruptcy); *Barnes v. Turner*, 278 Ga. 788 (2004) (ruling that attorney was guilty of legal malpractice for failing to advise client that financing statements were effective for only five years and that they could have been renewed to protect priority of client's security interest); *Shelby County State Bank v. Van Diest Supply Company*, 303 F.3d 832 (7th Cir. 2002) (ruling that creditor's security agreement was ambiguous as to whether it covered after-acquired inventory from other sellers, and was properly construed to limit collateral only to that particular creditor's products by bankruptcy court); *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*, 146 Wn. 2d 428 (2002) (upholding an express limitation of liability for damages to \$25 contained in defendant UCC search company's invoice, and ruling that limitation, which would prevent the plaintiff from recovering losses it allegedly incurred as result of search company's failure to disclose prior filing by another creditor, was valid and enforceable); *Clarke v. Deere and Co. (In re Kinderknecht)*, 308 B.R. 71 (10th Cir. B.A.P. 2004) (ruling that bankruptcy court erred in declining to grant avoidance of lien perfected by a UCC-1 filing that named debtor only by his commonly used nickname rather than his proper name); *Fleet National Bank v. Whippany Venture I case (In re The IT Group Inc.)*, 370 B.R. 762 (D. Del. 2004) (holding that secured creditor's security interest in proceeds of real estate sale contract was not an "interest in or lien on real estate" of the kind specifically excluded from scope of Article 9, but was in the nature of a general intangible interest; court also ruled that debtor had failed to properly perfect its interest in sale contract, and that "good faith reliance" on address provided by debtor is no defense to failure to file financing statement in proper jurisdiction); *In re Spearing Tool & Mfg. Co.*, 2005 US. App. LEXIS 11808 (June 21, 2005) (reversing district court and holding

that UCC rules were irrelevant to IRS's filing of tax lien because: federal law controls whether IRS's lien notice sufficed even though it did not contain the debtor's precise Michigan registered name; it would be unduly burdensome to require that tax liens identify the taxpayer with absolute precision; Michigan Secretary of State's office recommended searching using abbreviations of debtor's name; and UCC Article 9 precise-identification requirement was irrelevant because it only applies to transactions that create security interest in personal property or fixtures by contract).

Bankruptcy Concerns

The goal of every bankruptcy trustee is to obtain and preserve cash and assets, from all available sources, for the benefit of the estate and its general creditors and to pay the expenses of administering the estate. The trustee therefore will pay a great deal of attention to the sufficiency and validity of any security interest claimed against the debtor's collateral, and will challenge the perfection and lien position of such interest wherever possible. For a lender that is relying on the protection provided by its security interest in the debtor's collateral, a successful challenge to the perfection or priority of such interest could have devastating "all or nothing" consequences if its interest is reclassified as an unsecured claim. The lender's counsel also faces severe consequences if the bankruptcy court determines that the lender's security interest is defective or ineffective – including malpractice liability, damage to the lawyer's (and his or her law firm's) reputation, and loss of future clients and income. Many attorneys concentrate their efforts for their lender-clients on the negotiation and drafting of the legal documents that evidence and govern the financing of the debt secured by the debtor's collateral, and delegate to lower-level associates and paralegals such mundane and "ministerial" (and less lucrative) tasks as preparing, reviewing and filing UCC financing statements. However, the failure to correctly perform these "minor" tasks (or, perhaps, the failure to perform such tasks at all) often results in the most significant – and costly – malpractice exposure faced by attorneys in commercial financing transactions. The unfortunate fact is that an attorney can delegate authority, but not responsibility, for such actions by subordinates.

Attorney's Opinion; Malpractice Issues

Fortunately, as noted above, for parties to transactions involving a personal-property component UCC insurance is now available from some of the major title insurance companies that, for a relatively small premium, provides both liability coverage and defense costs in connection with many of these types of risks – not to mention peace of mind. Whether the issue is failure to file a financing statement, failure to correctly describe the covered collateral as to put a subsequent searcher on inquiry notice, or a mistake in the requested search by a filing company, the result of the cases discussed above is that there are only two avenues of recovery: the self-insured lender or the lender who wants to sue its own lawyer in the middle of the bankruptcy proceeding. The opinions of debtor's counsel do not address priority, and with the numerous carve-outs,

qualifications, exclusions, assumptions and exceptions contained therein, are generally worthless. It is lender's counsel who is, in fact, providing an oral perfection -- and probably priority -- legal opinion by permitting its lender client to proceed with the transaction. These two alternatives present the lender with a "Hobson's choice" that it should attempt to avoid. There is, with the availability of UCC insurance, now an alternative. The lender can require, in lieu of the relatively useless but nonetheless expensive perfection opinion, security-interest-priority insurance coverage from an established and reputable insurance company. The lender can therefore save the cost of the perfection legal opinion and buy true priority indemnity insurance. The result is true value for the money spent, real indemnity coverage -- i.e., a strict-liability standard -- for the failure of priority rather than a malpractice lawsuit and the negligence standard, and assurance from a significant insurance company that should provide a level of comfort beyond misplaced reliance based solely on the representations and warranties of the borrower.

Although not yet the case, in the future it is possible that the failure of lender's counsel to mention the availability and utility of UCC insurance may constitute malpractice. For example, after many years of acceptance, it arguably can be considered malpractice not to use land title insurance (or least advise the attorney's client of its existence and availability). *See, e.g.,* Robin Paul Malloy and Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN'S L.R. 407 (2000).

It is probably premature to make such a statement concerning the use of UCC insurance. However, given the existence of cases such as those discussed above, as well as rating-agency concerns, a court may eventually decide that a lawyer is liable for loss to a client as a result of priority failure. Such liability could arise where, e.g. (as evidenced by the *Puget Sound* case, *supra*), a search company missed a filing but limited its liability by means of a specific disclaimer as part of an enforceable contract, and the lawyer failed to insure the priority through available and cost-effective UCC insurance. The community standard in this area likely will continue to evolve over time, and the customary balancing of risk with the benefit of insurance will change as more lenders become aware of the utility of UCC insurance and as more cases, such as those discussed above, are decided.

As demonstrated in *Lory v. Parsoff*, *supra*, the loss of lien perfection and priority because of the failure to properly file a UCC financing statement can have catastrophic consequences and can expose the offending attorney (and his or her law firm) to significant financial liability and professional embarrassment. According to James D. Prendergast, Vice President and Special UCC Counsel to the UCC Division of The First American Corporation, "[i]n a commercial finance transaction . . . the greatest malpractice exposure to a lender's counsel is not in the negotiation and drafting of the primary loan documents (services requiring senior associate or partner attention), but rather in the ordering and review of existing financing statements relating to personal property of the borrower." James D. Prendergast, *Guide to the Eagle 9TM UCC Insurance Program*, 17 CEB CAL. BUS. L. PRAC. 1, 4 (Winter 2002). Mr. Prendergast also observes

that (as borne out in *Lory v. Parsoff, supra*), “there is a probability of economic loss to a lender in the event of failure of lien priority as a result of inadequate review of pre-existing filings, incorrect filings, documentation errors, or similar factors [R]eclassification of a lender from a secured creditor to an unsecured creditor in a bankruptcy proceeding could have a significant impact on the lender’s net income.” *Id.* at 3. Mr. Prendergast further notes that, “the secured party’s only remedy for loss of perfection or priority . . . is a malpractice lawsuit against the counsel who prepared the loan documentation This result is clearly untenable for the lender’s counsel, and may also be unsatisfactory for the lender if counsel’s malpractice coverage is inadequate or the issue is disputed in prolonged litigation.” *Id.* at 9.

Also, as pointed out by Mr. Prendergast, “[t]his is not a cost-replacement or cost-justification approach, but rather reflects that the secured lender is not now getting what it needs to be secure in its lien position.” *Id.* As further noted by Mr. Prendergast, “the fundamental impetus of the product is that [the UCC Insurance Policy] provides indemnity insurance for perfection and priority of the lender’s security interest This coverage is not otherwise available to lenders, although a lender may be deceiving itself by thinking that the circular perfection opinion of borrower’s counsel and the malpractice coverage of its own counsel provide comparable protection to the lender. They do not, as was discovered in the real estate arena long ago.” *Id.* at 10.

UCC Issues in Mezzanine-Financing Transactions

Mezzanine financing often involves extending credit to equity holders of a limited liability company (“LLC”), with the lender taking a pledge of the parties’ equity interests in the LLC. Under § 9-102(a)(49) of Revised Article 9 (which was enacted into law in Illinois in 2001, at 810 ILCS 5/9-101 *et seq.*, and became effective as of July 1, 2001), these types of assets can be either “investment property” or “general intangibles”. Investment property is defined, under § 9-102(a)(49), as a security (whether certificated or uncertificated), security entitlement, securities account, and commodity account or commodity contract. A security interest in investment property may be perfected by control, by filing, or, if the investment property is a certificated security, by possession. *See* UCC §§ 8-301, and §§ 9-313(a) and 9-328 of Revised Article 9. Under § 9-102(a)(42) of Revised Article 9, general intangibles are defined as personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes a “payment intangible” (defined in § 9-102(a)(61) of Revised Article 9 as “a general intangible under which the account debtor’s principal obligation is a monetary obligation”) and software. In essence, “general intangibles” is the residual category of personal property that is not included in the other defined types of collateral. A security interest in a general intangible is perfected by filing. *See* § 9-310 of Revised Article 9.

In order to have a priority security interest in the pledged collateral that will prevail over purchasers, other lenders, and creditors using judicial process to obtain a lien

on the collateral, the mezzanine lender must perfect its interest in the collateral. *See* § 9-308(a) of Revised Article 9. As stated above, perfection of a security interest in a pledge of an interest in an LLC can be accomplished by (i) filing a UCC-1 financing statement in the appropriate jurisdiction (under § 9-310 of Revised Article 9, if the security interest is deemed a general intangible or is investment property); (ii) taking possession of the collateral (under § 9-313(a) of Revised Article 9, which also provides that a perfected security interest in certificated securities may be obtained by taking delivery of the certificated securities under UCC § 8-301); or (iii) control (under § 9-314(c) of Revised Article 9, if the security interest is deemed investment property). While the general rule is that the earlier of the first to file or perfect has established priority, perfection by control will prime a security interest in the same property that is perfected by any other method of perfection, even if the control occurs after the time of first perfection. *See* § 9-328(1) of Revised Article 9. Section 9-331(b) of Revised Article 9 also makes explicit what was implied under former Article 9 and is explicit under Article 8, i.e., where investment property collateral is transferred to a person protected under UCC Article 8, Article 9 defers to the rights of protected purchasers under Article 8, to the extent Article 8 provides rights to those protected persons. *See* § 9-331 of Revised Article 9. Thus, although perfection by filing is available, to the extent possible lenders should always seek to perfect their interests in pledges of LLC membership interests by control.

If the governing documents of an LLC provide that the membership interests are securities, then such interests will be treated as securities instead of general intangibles. If an issuer thus opts into Article 8, the lender's interest in the collateral is deemed investment property and the lender can obtain "Protected Purchaser Status" under UCC § 8-303. A lender has "Protected Purchaser Status" when it gives value for the interest without notice of any adverse claim and has control of the security. Protected Purchaser Status will enable the lender to defeat any adverse claim, including claims of third parties that treat their interests as general intangibles and who perfect by filing in the jurisdiction in which the debtor is located. An example of an amendment to an Operating Agreement for an LLC that contains the necessary language to opt into Article 8 is attached hereto as **Exhibit A**. An example of an "acknowledgment and consent" from the issuer evidencing its intent to "opt in" to Article 8 is attached hereto as **Exhibit B**.

The issuer's counsel should be cognizant of the effect of opting into Article 8 and be careful to follow the mandates required within Article 8. For example: (i) § 8-202 requires the issuer to set forth the terms of the security on the certificate or to incorporate them by reference; (ii) § 8-204 requires the issuer to conspicuously note restrictions on transfer on the security certificate or, if uncertificated, to notify the registered owner; (iii) § 8-205 provides, under certain circumstances, for the effectiveness of unauthorized signatures; (iv) § 8209 provides that a lien in favor of an issuer is effective against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate; (v) § 8401 sets forth the requirements under which an issuer shall register a requested transfer of a certificated or uncertificated security; and (vi) § 8404 provides criteria for holding the issuer liable for wrongful registration.

Section 9-106 of Revised Article 9, by reference to UCC § 8-106, provides that a secured party takes control of an uncertificated security, such as a pledge of an uncertificated LLC membership interest, “if either it is delivered to the purchaser or the issuer agrees in a written agreement to follow the written instructions of the purchaser without further consent by the registered owner.” Delivery will occur, under UCC § 8-103, when the issuer registers the purchaser (i.e., the lender), or a third party not closely related to or controlled by the debtor -- other than a securities intermediary -- who holds on behalf of the lender, as the registered owner. An example of a control agreement entered into by the borrower, the lender and the pledgor, acknowledging an uncertificated pledge of the pledgor’s LLC membership interest to the lender, is attached hereto as **Appendix C**.

Control of a certificated security occurs when the lender or a third person not closely connected to or controlled by the debtor has possession of the certificate, and when the certificate is (i) issued in bearer form, (ii) is issued to the debtor as owner with an endorsement in blank, or (iii) the lender has an assignment separate from the certificate signed in blank by the debtor. *See* § 9-106 of Revised Article 9 and UCC § 8-106. *See also* Steven O. Weise, Philip Ebeling, Dena M. Cruz, Theodore H. Sprink, and Randall L. Scott, *It’s Time to Take a Close Look at UCC Article 9*, 19 CAL. REAL PROP. J. 3, 7-8 (2001).

According to one commentator:

A lender requiring an opt-in should take steps to prevent the issuer from opting out of Article 8 at a later time [by entering into an agreement with the issuer that it will not opt out and requiring that the LLC operating agreement provide that the language opting in to Article 8 cannot be amended without the lender’s consent]. A lender that does not require an opt-in should take steps to prevent an opt-in [by entering into an agreement with the issuer that it will not opt in under Article 8 or amend the LLC operating agreement to permit an opt-in without the lender’s consent].

Lynn A. Soukup, “*Opting In*” to Article 8 – LLC, GP & LP Interests as Collateral, COMMERCIAL LAW NEWSLETTER, American Bar Association, Section of Business Law (July 2002), at p. 1.

UCC Insurance for Mezzanine Lenders

The major title insurers offering UCC title-insurance policies have promulgated, in connection with the standard UCC Insurance Policy, a specialized endorsement for use in connection with mezzanine loans. Remarkably, if the governing documents of an LLC provide that the membership interests are securities and the lender has taken the proper steps to achieve Protected Purchaser status (as described above), at least one title insurer offers an endorsement insures that not only perfection by possession or control, but also

that the pledgor owns the interests being pledged as collateral. A copy of the endorsement is attached hereto as **Appendix D**.

Other Applications of UCC Insurance

In the area of mixed collateral, real and personal property securing the same indebtedness, the UCC policy, when coupled with a land title policy, offers a number of advantages. First of all, combining the two policies avoids any debate as to whether a particular piece of "personal" property is a fixture, such as a turbine in a power plant, an MRI machine in a hospital, or built-in appliances in a restaurant.

The linkage of land title and the UCC policy insures the collateral whatever it is, and avoids the cost and debate over a legal opinion trying to decide the issue. Further, in those jurisdictions where the UCC policy is classified as land title for regulatory purposes, allocating collateral value between real and personal property and tying the UCC policy with a land title policy, can result in a lower aggregate premium because of the usually lower premium cost per \$1000 for the UCC policy over the premium for land title. A UCC Insurance Policy can be used to insure the lien-free status of collateral being sold in a sale free and clear of liens in a bankruptcy, effectively insuring the adequacy of the notice list. UCC insurance may also be utilized in those transactions where there is a question of whether collateral is an instrument or a payment intangible, and counsel are unwilling to opine as to status. The UCC Insurance Policy can also be utilized to provide lien priority in houseboats, rolling stock, vessels, and whatever else may be deemed Article 9 collateral.

As noted above, the UCC lender's policy insures the priority of a lender's security interest in the collateral of a debtor or debtors. Some of the major title insurers also offer a "buyer's policy," which insures the lien status, or lack of liens, in assets being acquired by a buyer from a seller. The policy can be used in asset acquisitions, mergers and similar transactions. At least one major title insurer also offers a policy that insures available points in non-deeded timeshare programs, and a policy that insures cooperative interests in cooperative real estate projects (but this policy is limited to New York because of the unique provisions regarding cooperatives in New York's Uniform Commercial Code).

At least one major title insurer also now offers nationwide UCC search and filing services. With respect to the "assisted search" service, the company also will provide, for a small additional charge, insurance for the accuracy of the search. The searches cover fixture filings, bankruptcy, Federal and State tax liens, civil litigation, corporate record, and more, and are an effective way to determine perfected security interests filed against the borrower. The search service provides a portfolio-management tool designed to improve accuracy, consistency and speed in UCC processing as well as control over all UCC activities, including filing, searching, and document retrieval. The service analyzes search results against the borrower criteria supplied to the insurer and reviews the search results to determine which ones actually affect the lien status of the borrower. The "insured search" service (which is available for a small additional fee) affirmatively

insures the search results and the editing conducted by the insurer. Coverage is provided in the amount of \$25,000 for lost or missed liens, misindexing, incorrectly filed financing statements, and other filing-office errors, as well as for loss if items deleted in the review of the search report provided by the insurer did in fact relate to the borrower. Additional coverage up to \$250,000 per search is available for an additional small premium.

With respect to the “assisted filing” service offered by the insurer, automated filing of financing statements is provided, including tracking of pending lapse dates. This online filing service automatically populates financing-statement information, including secured-party data and variable collateral descriptions. The insurer will prepare and file the lender’s financing statement (including amendments, continuations and terminations) based on information supplied by the lender, and advise of a pending lapse date. The “insured filing” service, which is available for a small additional fee, includes: \$25,000 in coverage insuring the effectiveness of the filing and against inadvertent lapse; “gap” coverage against intervening liens; insurance (for a registered organization) of the accuracy of the debtor’s name and coverage for significant risk under the “exact name” criteria of Revised Article 9; insurance (for a registered organization, assuming proper attachment) of the perfection of the security interest and that the lender will prevail against any challenge by a trustee in bankruptcy or a creditors’ committee; insurance (for a registered organization) that the financing statement was filed in the correct location under Revised Article 9; and reimbursement of the insured amount of a loss of perfection if the insurer does not alert the lender and the filing lapses. Additional coverage up to \$250,000 per filed UCC financing statement is available for an additional small premium.

Regulatory Issues and Pricing

UCC insurance is either land title insurance or property and casualty insurance for State regulatory purposes, depending on a particular State’s insurance statute. Because of regulatory constraints, title insurers cannot tie a property-and-casualty product with a land title product. In those jurisdictions where the UCC policy is classified as land title for regulatory purposes, allocating collateral value between real and personal property and tying the UCC policy with a land title policy can result in a lower aggregate premium, because of the usually lower premium cost per \$1000 for the UCC policy over the premium for land title.

Pricing for the UCC Insurance Policy generally will vary depending on which title insurer is selected, and the range generally is between 30 cents and \$1.75 per thousand dollars of coverage for a single-site single debtor-obligor or seller transaction. Additional discounts may apply in connection with mixed-collateral (real and personal property) transactions, projects or portfolios, and the availability of simultaneously issued policies (both land title insurance and UCC insurance) as described above.

The cost for the “assisted search” and “assisted filing” services described above is \$26 per search or filing, as the case may be, and the cost of the “insured search” and “insured filing” described above is \$29.00 per insured search or filing, as the case may be

(with additional coverage up to \$250,000 for each such insured service and a maximum premium of \$79).

Conclusion

Given the right fact pattern, the use of a UCC Insurance Policy can be justified through reduced legal cost (both from counsel for the borrower and counsel for the lender) and from outsourcing certain UCC financial-statement preparation and filing functions. The fundamental impetus for this product is that it provides indemnity insurance (and full defense costs) for perfection of the lender's security interest. UCC insurance has found wide acceptance in mezzanine-financing transactions, where it can effectively insure the actual ownership of the equity interests of mezzanine borrowers in the borrowing entity. Also (especially for lenders involved in lower-dollar transactions), UCC insurance provides significant benefits over reliance on the representations and warranties of the borrower by effectively insuring the borrower's organization and the proper authorization, execution and delivery of the lien-granting documents, such as the Loan and Security Agreement. The premium charged by the insurer further includes significant outsourcing functions, including the preparation of all appropriate UCC-1 financing statements, filing the financing statements in the correct location, and accurately tracking the filings to alert the lender of pending lapse dates.

EXHIBIT A

FIRST AMENDMENT TO

THE OPERATING AGREEMENT FOR [NAME OF LLC ISSUER]

The undersigned, being all of the Members of [NAME OF LLC ISSUER], a [STATE OF ORGANIZATION] limited liability company (the “Company”), hereby agree that a new Section [] is added to the Operating Agreement of the Company dated as of [], 200[], reading in its entirety as follows:

Section []. Units Deemed to be Securities.

Pursuant to [APPLICABLE] Code [REFERENCE TO APPLICABLE STATE UNIFORM COMMERCIAL CODE § 8103(C)], the Units of Company capital held by Members of the Company shall be considered to be securities governed by [ARTICLE 8 STATE REFERENCE] of the [APPLICABLE] Code.

This First Amendment to the Operating Agreement for [NAME OF LLC ISSUER] may be executed by the parties hereto by means of facsimile signatures and in multiple counterparts, each of which shall be deemed an original and all of which, taken together, shall constitute one and the same instrument.

EXECUTED AND EFFECTIVE as of the _____ day of _____, 200[]

[MEMBERS]

By: _____

[MEMBERS]

By: _____

EXHIBIT B

ISSUER'S ACKNOWLEDGMENT AND CONSENT

To: [Proposed Insured]

Reference is made to that certain [Pledge and Security Agreement] dated as of [], 200[] (as amended, supplemented or otherwise modified from time to time, the "Pledge Agreement"), between [] (the "Mezzanine Lender") and [], a [] limited liability company, (the "Pledgor") and this acknowledgement relates to those membership interests (the "Pledged interests"), as further described on Schedule I to the Pledge Agreement.

[], the issuer of the Pledged Interests, acknowledges and agrees that the pledged interests are investment property subject to the provisions of Article 8 of the [applicable State] Uniform Commercial Code.

Dated: [], 200[]

Very truly yours,

ISSUER:

By: _____

Name: _____

Title: _____

ACKNOWLEDGED AND AGREED:

PLEDGOR:

By: _____

Name: _____

Title: _____

EXHIBIT C

CONTROL AGREEMENT

This Control Agreement (“Agreement”) is made and entered into as of the ____ day of [] 200[], by and among [Name of Borrower], a [] corporation, (“Borrower”), [Name of Insured], a [] corporation (“Lender”), and [Name of pledging Debtor] (the “Pledgor”). **[Assumes that the Borrower is the issuer of the Pledged Collateral]**

RECITALS:

WHEREAS, Lender has agreed to loan the aggregate sum of [] Million Dollars (\$[],000,000.00) (the “Loan”) to Borrower, pursuant to a Secured Promissory Note of even date herewith in such original principal amount, executed by Borrower in favor of Lender (the “Note”) and a Loan Agreement of even date herewith between Borrower and Lender (the “Loan Agreement”); and

WHEREAS, the Pledgor has guaranteed the indebtedness of Borrower to Lender evidenced by the Note pursuant to a General Continuing Guaranty of even date executed by Pledgor in favor of Lender (the “Guaranty”); and

WHEREAS, the obligations of the Pledgor to the Lender under the Guaranty are secured, in part, by a pledge to Lender of Pledgor’s []% membership interest in Borrower (such interest being referred to herein as the (“Pledged Collateral”) pursuant to a Pledge and Security Agreement of even date herewith, executed by Pledgor in favor of Lender (the “Pledge Agreement”); and

WHEREAS, the parties hereto wish to acknowledge such security interest and pledge and Lender’s control over the Pledged Collateral for purposes of the provisions of Article 8 and Article 9 of the Uniform Commercial Code as enacted and in effect in the State of [] (the “UCC”).

AGREEMENT:

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Defined Terms. All capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed thereto in the Loan Agreement.

2. Acknowledgment of Security Interest. Borrower hereby acknowledges and agrees that, pursuant to the Pledge Agreement, Lender has been granted and continues to hold a security interest in and to the Pledged Collateral as collateral security for the obligations of Pledgor under the Guaranty.

3. Agreement to Follow Instructions; Agreement Not to Register Transfer. Borrower, as issuer of the Pledged Collateral, hereby agrees to comply with any “instructions” (as defined in Section 8102(a)(12) of the UCC) originated by Lender without further consent of the Pledgor, including, without limitation, instructions regarding the transfer, redemption or other disposition

of the Pledged Collateral or the proceeds thereof, including any distributions with respect thereto. Pledgor agrees that it shall not register any transfer of the Pledged Collateral to any person without the prior written consent of Lender.

4. Intent of the Parties. By executing and delivering this Agreement, the parties hereto intend to establish Lender's control over the Pledged Collateral for purposes of the provisions of Section 8106(c)(2) of the UCC.

5. Consent. Pledgor hereby consents to the execution and delivery of this Agreement by Borrower and Lender.

6. Choice of Law. This Agreement shall be construed and enforced under the laws of the State of [] without regard to the conflict of law principles thereof

7. Counterparts. This Agreement may be executed in any number of separate counterparts, each of which shall collectively and separately constitute one agreement.

8. Amendments. No amendment, waiver, termination or other modification to this Agreement shall be effective unless the same is in writing and is signed by each of the parties hereto.

[signature page follows]

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date first written above.

[BORROWER]

By: _____

Printed: _____

Title:

[INSURED]

By: _____

Printed: _____

Title:

[DEBTOR]

By: _____

Printed: _____

Title:

EXHIBIT D

MEZZANINE FINANCING ENDORSEMENT (ALTERNATIVE) (UCC)

ATTACHED TO _____ UCC INSURANCE POLICY NO.

ISSUED BY

_____ TITLE INSURANCE COMPANY

The Company hereby confirms that the Certificates (the “Certificates”) representing the membership interests in ABC LLC, a _____ limited liability company, as described in the Mezzanine Loan Agreement dated as of _____, 2001 among DEF LLC, a _____ limited liability company, as Mezzanine Borrower, and XYZ BANK, NATIONAL ASSOCIATION, a national banking association, as Mezzanine Lender, is included within the Collateral that is covered by this policy.

The following Exclusions from Coverage do not apply to the Certificates:

- (a) Exclusion 1(a);
- (b) Exclusion 3(b);
- (c) Exclusion 4(b) and
- (d) Exclusion 5(h)

This endorsement does not insure against, and the Company will not pay loss or damage, costs, legal fees or expenses that arise by reason of any adverse claim affecting the Certificates not Known to the Company, but of which the Insured has Notice.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

_____ TITLE INSURANCE COMPANY

BY: _____

AUTHORIZED SIGNATORY

_____ UCC Insurance Policy (___ Version) - Mezzanine Loan Endorsement
(Certificates Representing Membership Interests — “Opting In” to Article 8 of the
UCC)