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# Commercial Transactions

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# Commercial Transactions

## Commercial Transactions; investment securities

Corporations Code §31405 (new); §§25101, 25211, 25213, 25535, 25607, 25608, 31402 (amended).

AB 381 (Seastrand); 1985 STAT. Ch 946

Support: Department of Corporations; Department of Finance

Under existing law, the sale<sup>1</sup> by any person<sup>2</sup> of a security<sup>3</sup> in a nonissuer transaction<sup>4</sup> is considered unlawful unless the security is qualified for sale.<sup>5</sup> Existing law further provides that certain issuer transactions are exempt from qualification if proper notice has been filed with the Commissioner of Corporations.<sup>6</sup> Chapter 946 specifies the individuals that may file the required notice with the Commissioner,<sup>7</sup> and further provides that notice filed by anyone except the issuer will lapse thirteen months after being filed.<sup>8</sup>

Existing law provides that a person registered as a broker-dealer<sup>9</sup> under federal law<sup>10</sup> who is a member of certain organizations<sup>11</sup> may become licensed as a broker-dealer in California merely by filing an application subject to specified exceptions.<sup>12</sup> The broker-dealer certificate becomes effective on the third business day after the application is filed or on the day the certificate is issued, whichever occurs first.<sup>13</sup> Under Chapter 946, however, the Commissioner may delay

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1. CAL. CORP. CODE §25017(a) (definition of sale).

2. *Id.* §25013 (definition of person).

3. *Id.* §25019 (definition of security).

4. *Id.* §25011 (definition of nonissuer transaction).

5. *Id.* §25130 (necessity of qualification).

6. *Id.* §25101. *Id.* §25101(b) (required contents of the notice).

7. *Id.* §25101(b)(7) (notice may be filed by the issuer, any registered broker-dealer, or any beneficial or record holder of any security covered by the notice).

8. *Id.*

9. *Id.* §25004 (definition of broker-dealer).

10. *See id.* §25211(b) (registered under the Securities Exchange Act of 1934).

11. CAL. CORP. CODE §25211(b) (New York Stock Exchange, American Stock Exchange, or National Association of Securities Dealers).

12. *Id.* §25211(b). A broker-dealer may become licensed provided the broker-dealer has not had any certificate as a broker-dealer, investment advisor, or agent denied or revoked. *Id.*

13. *Id.* §25211(c). If a proceeding has been instituted for the censure of a broker-dealer, or the denial, suspension, or revocation of a broker-dealer's certificate, the application for a certificate will not become effective. *Id.*

the date the certificate becomes effective for up to fifteen days under certain circumstances.<sup>14</sup>

Existing law provides that any person who violates the Corporate Securities Law of 1968<sup>15</sup> or the Franchise Investment Law<sup>16</sup> may be assessed civil penalties for each violation.<sup>17</sup> Chapter 946 limits the time period during which an action may be maintained to the four years following the act or transaction that constituted the violation.<sup>18</sup>

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14. *Id.* §25211(c). The effective date of the certificate may be delayed if the Commissioner believes that the delay is necessary in the public interest to determine whether a proceeding should be instituted under section 25212 of the Corporations Code. The Commissioner may delay the effective date of the certificate for more than 15 days only with the consent of the applicant. *Id.*

15. *See id.* §2500 (division title).

16. *See id.* §3100 (short title).

17. CAL. CORP. CODE §25535(a) (civil penalty not to exceed \$2,500 per violation).

18. *Id.* §25535(c).

## Commercial Transactions; perfecting security interests

Commercial Code §9403.5 (new).

AB 1102 (Harris); 1985 STAT. Ch 89

Support: Secretary of State

Under existing law, a secured creditor may file<sup>1</sup> a financing statement<sup>2</sup> that is effective<sup>3</sup> for a period of five years from the date of the filing.<sup>4</sup> Existing law also permits a secured creditor to file a continuation statement<sup>5</sup> that extends the effectiveness of the financing statement for another five-year period.<sup>6</sup> Prior case law held that the date of filing was to be excluded when computing the expiration date of a financing statement.<sup>7</sup> Chapter 89 provides that a financing

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1. CAL. COM. CODE §9401 (places where filings are to occur).

2. CAL. COM. CODE §9302 (when a financing statement must be filed).

3. A security interest may be perfected by following the procedures set forth in Commercial Code §§9302-9305. *See also*, 2 B. Witkin, Summary of California Law, *Perfection of Security Interest* §34 (8th ed. 1974) (steps for perfecting security interest).

4. CAL. COM. CODE §9403(2).

5. *Id.* §9403(3)(b) (language required in a continuation statement).

6. *Id.* §9403(3).

7. *SCT (U.S.A.), Inc. v. Mitsui Mfrs. Bank*, 155 Cal. App. 3d 1059, 1063, 202 Cal. Rptr. 547, 549 (1984).

statement is effective on the date filed.<sup>8</sup> Chapter 89 further provides that the final day the financing statement or continuation statement is effective is the date on which the statement was filed, in five-year increments from the date of filing.<sup>9</sup> Chapter 89 also provides that the financing or continuation statement is effective for the entirety of the final day of effectiveness.<sup>10</sup> Finally, Chapter 89 provides that a continuation statement may be filed at any time on the date the financing statement is due to lapse.<sup>11</sup>

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8. CAL. COM. CODE §9403.5(1). The financing statement or continuation statement is not effective for that portion of the day preceding the filing. *Id.*

9. *Id.* §9403.5(2) (statement is effective for entire final day of effectiveness). If the final day of effectiveness falls on a Saturday, Sunday, or legal holiday, the effectiveness of the statement is extended until the next day that is not a Saturday, Sunday or legal holiday. If the final day of effectiveness falls on February 29, and the last day of effectiveness falls in a year that does not include February 29, the final day of effectiveness is the preceding day, February 28. *Id.* §9403.5(3).

10. *Id.* §9403.5(4)

11. *Id.*

## **Commercial Transactions; conflicting security interests, purchase money security interest filing period**

Commercial Code §9312 (amended).

SB 250 (Vuich); 1985 STAT. Ch 606

Support: John Deere Industrial Equipment Company

Under existing law, a purchase money security interest<sup>1</sup> in collateral, other than inventory, has priority over conflicting security interests in the same collateral or the proceeds of the collateral, if the purchase money security interest is perfected.<sup>2</sup> Under prior law, for the purchase money security interest to be valid, it had to be perfected within ten days after the debtor received possession of the collateral.<sup>3</sup> Chapter 606 extends the period within which a creditor may perfect a purchase money security interest to within twenty days after the debtor received possession of the collateral.<sup>4</sup>

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1. CAL. COM. CODE §9107 (definition of purchase money security interest).

2. 1984 Cal. Stat. c. 927, §15, at 118 (amending CAL. COM. CODE §9312).

3. *Id.*

4. CAL. COM. CODE §9312(4).

## **Commercial Transactions; rate of interest on contracts**

Civil Code §3289 (amended).

SB 998 (Robbins); 1985 STAT. Ch 663

Support: Advisory Commission on Debt Collection to the Senate Committee on Insurance Claims and Corporations; California Bankers Association; California Trial Lawyers Association; California Association of Collectors

Existing law specifies the rate of interest that a contract may bear.<sup>1</sup> Existing law also provides that if the parties to a contract stipulate to any legal interest rate,<sup>2</sup> the interest remains chargeable after a breach of the contract unless superseded by a verdict or other new obligation.<sup>3</sup> Under Chapter 663, a contract that does not specify a legal rate of interest chargeable after a breach of the contract will bear interest, subsequent to any breach, at a rate of ten percent per annum.<sup>4</sup>

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1. CAL. CIV. CODE §§1805.1-1805.5.

2. Cal. Const. art. XV, §1 (rates of interest for loan or forbearance of any money, goods, or things in action).

3. CAL. CIV. CODE §3289. *See also* Puppo v. Larosa, 194 Cal. 717, 720, 230 P. 439, 440 (1924) (court may allow interest from due date of obligation to date of judgment even though not expressly reserved in contract); Peoples Finance and Thrift Co. v. Mike-Ron Corp. 236 Cal. App. 2d 897, 904, 46 Cal. Rptr. 497, 502 (1965) (a party entitled to receive interest under section 3289 of the Civil Code must make a request for interest in the trial court).

4. CAL. CIV. CODE §§1805.1-1805.5 (applicable only to contracts entered into after January 1, 1986).

## **Commercial Transactions; creditor's remedies**

Civil Code §§3440.2, 3440.3, 3440.4, 3440.6 (new); §§3440 (amended); §§3441, 3442, 3443 (amended and renumbered); Commercial Code §§6103, 9501 (amended).

SB 1357 (Torres); 1985 STAT. Ch 1368

Support: Business Law Section of the State Bar; Department of Consumer Affairs

Existing law provides that if a debtor<sup>1</sup> is in default under a security

1. Debtor means the person that owes payment or other performance of the obligation secured, whether or not the debtor owns or has rights in the collateral, and includes the seller of accounts, contract rights, or chattel paper. When the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the division dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both when the context so requires. CAL. COM. CODE §9105(d).

agreement,<sup>2</sup> the secured party may reduce the claim against the debtor to judgment, foreclose against the debtor, or enforce the security interest by any available judicial process.<sup>3</sup> Under prior law, however, if the security agreement covered personal property or fixtures and also covered real property, the secured party that chose to proceed against both the personal property or fixtures *and* the real property was limited to the remedies that are provided with respect to real property.<sup>4</sup> Chapter 919 provides that a secured party whose security is made up of both personal property or fixtures and real property may proceed against a defaulting debtor in any of the following ways:<sup>5</sup> (1) the secured party may proceed *in any sequence* against the real property security, in accordance with the rights and remedies provided by existing law in respect to real property,<sup>6</sup> or against the personal property or fixtures, in accordance with the rights and remedies available for proceeding against personal property;<sup>7</sup> (2) the secured party may proceed *in any sequence* against both the real property<sup>8</sup> and the personal property or fixtures in accordance with the rights and remedies provided by existing law with respect to real property;<sup>9</sup> or (3) the secured party may proceed *in any sequence* against part of the personal property or fixtures under the rights and remedies available for proceeding against personal property, and proceed against another part of the personal property or fixtures in accordance with the rights and remedies provided by existing law in respect to real property.<sup>10</sup> In addition, if an obligation is secured both by real property and personal property or fixtures, Chapter 919 provides that with respect to any personal property or fixtures the secured party has proceeded against or is proceeding against, and an obligation secured by the personal property or fixtures, the limitations of existing law

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2. Security agreement means an agreement that creates or provides for a security interest. *Id.* §9105(h).

3. *Id.* §9501(1).

4. 1963 Cal. Stat. c. 819, §9501, at 1991 (enacting CAL. COM. CODE §9501(4)).

5. CAL. COM. CODE §9501(4)(a).

6. *See generally* CAL. CIV. CODE §726 (remedies of a mortgagee and trustee).

7. CAL. COM. CODE §9501(4)(a)(i).

8. *Id.* §9501(4)(a)(ii) (may proceed against some or all of the real property).

9. *Id.* The personal property or fixtures, or a portion thereof, may be included in the foreclosure of the real property. A power of sale under either a deed of trust or a mortgage may be exercised with respect to the real property and the personal property or fixtures and the sale may be conducted by the mortgagee under the mortgage or by the trustee under the deed of trust. Chapter 919 provides that the secured party who proceeds against both personal property or fixtures and real property is not deemed to have elected irrevocably to proceed with respect to any of the property proceeded against until the property is actually sold. *Id.*

10. *Id.* §9501(4)(a)(iii).

in regard to proceedings against an obligation secured by real property do not apply,<sup>11</sup> with the following exceptions: (1) a secured party may not procure a deficiency judgment;<sup>12</sup> (2) if a proceeding is instituted under Chapter 919,<sup>13</sup> solely against personal property or fixtures, the secured party will be limited to one form of action, as provided by existing law,<sup>14</sup> if a monetary judgment against the debtor is sought and obtained;<sup>15</sup> or (3) the secured party is required to comply with provisions of existing law that regulate the nonjudicial sale of real property,<sup>16</sup> however, the secured party is not required to comply with regard to proceedings that are against only personal property or fixtures.<sup>17</sup>

If an obligation is secured by real property and personal property or fixtures, Chapter 919 provides that if a creditor realizes proceeds from the disposition of collateral composed of personal property or fixtures, the act of realizing the proceeds, disposing of the collateral, or applying the proceeds to the debt will not operate to cure a default, whether monetary or nonmonetary.<sup>18</sup> Furthermore, Chapter 919 provides that realizing proceeds, applying proceeds to the debt, or disposing of the collateral will not affect the rights or remedies of the secured creditor as to any remaining personal property or fixtures.<sup>19</sup> Under Chapter 919, an action by the secured creditor that does not contain a prayer for a monetary judgment on the debt<sup>20</sup> is not affected by the omission, nor does an action that does not pray for or result in a monetary judgment on the debt preclude a subsequent action that seeks a monetary judgment on the debt.<sup>21</sup>

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11. The provisions of existing law that do not apply include those regarding acceleration or reinstatement of obligations secured by real property, prohibitions against deficiency judgments, limitations on the right to proceed against collateral, and, in particular, section 726 of the Code of Civil Procedure relating to a limitation of one permissible cause of action. *Id.* §9501(4)(b).

12. *Id.* §9501(4)(c)(i) (judgment obtained pursuant to Code of Civil Procedure §580b).

13. A proceeding against the debtor under Commercial Code Section 9501, subsections (1) or (5). *Id.* §9501(4)(c)(ii).

14. CAL. CIV. PROC. CODE §726 (limitation of secured party to one form of action for the recovery of an obligation secured by real property).

15. CAL. COM. CODE §9501(4)(c)(ii).

16. CAL. CIV. CODE §2924c (regulating foreclosure of real property and allowing for the cure of any default within three months).

17. CAL. COM. CODE §9501(4)(c)(iii).

18. *Id.* §9501(4)(d)(i), (ii).

19. *Id.* §9501(4)(d)(ii) (application of the proceeds shall, to the extent of those proceeds, satisfy the secured obligations).

20. A monetary judgment on the debt is a judgment for the recovery of all or part of the principal and interest owing on the secured obligation. A monetary judgment on the debt does not include nonmonetary relief or ancillary forms of monetary relief such as attorney's fees and costs incurred in seeking the relief. *Id.* §9501(4)(f).

21. *Id.* §9501(4)(e).

If a secured party fails to comply with any of the requirements of proceedings<sup>22</sup> as to both real and personal property, a purchaser for value of any real property at a foreclosure proceeding<sup>23</sup> takes free of any interest of another person or any defect in title, unless the purchaser is either the secured party acting without good faith or the purchaser is someone other than the secured party but has actual knowledge of the bad faith failure to comply.<sup>24</sup> In addition, any subsequent purchaser for value purchasing from the person that purchased the property at the foreclosure sale takes free of claims, interests, or title defects unless the subsequent purchaser has actual knowledge of the bad faith failure to comply with Chapter 919.<sup>25</sup>

Existing law protects creditors<sup>26</sup> from debtor transfers<sup>27</sup> of personal property by providing that transfers that are not accompanied by immediate<sup>28</sup> delivery followed by an actual and continued change in possession<sup>29</sup> are void.<sup>30</sup> Under prior law such transfers were also presumed to be fraudulent.<sup>31</sup> Chapter 1368 deletes this presumption and further specifies that such transfers<sup>32</sup> are void at the time of the transfer.<sup>33</sup> In addition, prior law merely referred to creditors of the

22. *Id.* §9501(4)(g) (proceeding under Commercial Code section 9501(4)(a)(ii)).

23. *Id.* §9501(4)(g)(i) (applies to both judicial and nonjudicial foreclosure proceedings).

24. *Id.*

25. *Id.*

26. CAL. CIV. CODE §3440(b) (definition of creditor).

27. A transfer must be sufficient to give notice to the world of a change in ownership. *In re Murrieta Hot Springs*, 6 Bankr. 73, 77 (1980); see *Hassell v. Bunge*, 167 Cal. 365, 366, 139 P. 800, 801 (1914); *Center v. Kelton*, 20 Cal. App. 611, 614, 129 P. 960, 961 (1912).

28. *In re Murrieta Hot Springs* 6 Bankr. 73, 77 (1980). Reasonable construction is given to the term immediate delivery. The parties need not transfer the property instantly, rather a reasonable time is allowed for delivery with due consideration for the nature of the property and the circumstances surrounding the transfer. *Id.*

29. The sufficiency of the change of possession is a question of fact and depends to a large extent upon the circumstances of each particular case. See *In re Murrieta Hot Springs*, 6 Bankr. 73, 77 (1980).

30. CAL. CIV. CODE §3440(a). The purpose of the restriction on debtor transfers is to protect creditors. *Nicholson v. McDonald*, 193 Cal. App. 2d 675, 679, 14 Cal. Rptr. 505, 507 (1961); see *Dersch v. Thomas*, 138 Cal. App. (Supp.) 785, 789, 30 P.2d 630, 631 (1934); see *Center v. Kelton*, 20 Cal. App. 611, 614, 129 P. 960, 961 (1912); see *Beckjord v. Traeger*, 3 Cal. App. 2d 385, 387, 39 P.2d 523, 524 (1934) (for protection of creditors not in privity with parties to an obligation).

31. 1982 Cal. Stat. c. 517, §89, at 3271 (amending CAL. CIV. CODE §3440).

32. The restrictions do not apply to 1) things in action, 2) ships and cargoes at sea or in foreign ports, 3) sale of accounts or chattel paper governed by the Uniform Commercial Code, security interests, and contracts of bottomry or respondentia, 4) wines or brandies in the inventory of wineries or distilleries, 5) a transfer or assignment for the benefit of creditors, 6) property exempt from enforcement of a money judgment, 7) standing timber, 8) unless used as a device to defraud creditors, personal property located outside California, and 9) certain property subject to statutes or treaties of the United States or California requiring registration. CAL. CIV. CODE §3440.1 (incorporating 1982 Cal. Stat. c. 517, §90, at 2330 (enacting CAL. CIV. CODE §3441)).

33. CAL. CIV. CODE §3440(a).

transferor and did not distinguish between various types of creditors.<sup>34</sup> Chapter 1368 specifically provides for the protection of both secured and unsecured creditors of the transferor.<sup>35</sup> Chapter 1368 further defines the term creditor by specifically providing for the protection of persons that are creditors at the time of the transfer and those that become creditors after the transfer while the transferor remains in possession of the property.<sup>36</sup> Chapter 1368 also makes any transfer, with specified exceptions,<sup>37</sup> void as against any person that purchases the property from a transferor subsequent to the transfer to the original transferee in the ordinary course of the business<sup>38</sup> of the transferor.<sup>39</sup>

Under prior law, the restriction on transfers of personal property did not apply to the sale and immediate leaseback of the property if, prior to the transfer, notice of the intended transfer was filed and published by the transferor (lessee) or the transferee (lessor).<sup>40</sup> Under Chapter 1368 the restriction on transfers of personal property does not apply to any transfer by the transferor if, prior to the transfer, a financing statement<sup>41</sup> is filed<sup>42</sup> and notice of the intended transfer is published<sup>43</sup> by the transferor or transferee.<sup>44</sup> Under Chapter 1368, even if the filing and publishing requirements are not met prior to the transfer, the transfer is valid as against creditors of the transferor and good faith buyers from the transferor if the interest of the creditors and good faith buyers arose after the filing and publishing requirements have actually been completed.<sup>45</sup>

Under existing law, the subsequent transfer of a security interest from the transferee to a good faith secured party is valid as against all others if, prior to execution of the security agreement, the transferee

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34. 1982 Cal. Stat. c. 517, §89, at 3271 (amending CAL. CIV. CODE §3440).

35. CAL. CIV. CODE §3440(a).

36. *Id.*

37. Purchasers from a transferor in the ordinary course of business of the transferor are not protected from subsequent purchasers from a transferee or good faith secured party that acquires a security interest from a transferee if the transferor is no longer in possession. *See id.* §§3440.4, 3440.5 (incorporating 1982 Cal. Stat. c. 517, §91, at 2331 (enacting CAL. CIV. CODE §3442)).

38. CAL. COM. CODE §1201(9) (definition of buyer in the ordinary course of business). *See* CAL. CIV. CODE §3440.1(h). Purchasers from the transferor in the ordinary course of business are protected from transferees and secured creditors of the transferee even though notice of the transfer or security interest has been filed and published. *Id.*

39. *Id.* §§3440.1(h), 3440.5(b).

40. 1982 Cal. Stat. c. 517, §90, at 2330 (adding CAL. CIV. CODE §3441).

41. CAL. CIV. CODE §3440.1(h)(1). A statement is to be filed in accordance with Chapter 4 of Division 9 of the Commercial Code but may use the term transferor in lieu of debtor and transferee in lieu of secured party. *Id.*

42. *See infra* notes 26-28 and accompanying text.

43. *See infra* notes 29, 30 and accompanying text.

44. CAL. CIV. CODE §3440.1(h)(1), (2).

45. *Id.* §3440.2.

or good faith secured party files<sup>46</sup> and publishes<sup>47</sup> notice of the security interest.<sup>48</sup> Under Chapter 1368, if the transferor is no longer in possession at the time the security interest attaches, the filing and publishing requirements are eliminated.<sup>49</sup> In addition, Chapter 1368 provides that a subsequent transfer to a good faith buyer from the original transferee is valid as against all others if the original transferor is no longer in possession of the property.<sup>50</sup>

Prior law permitted certain transfers<sup>51</sup> of personal property not accompanied by an immediate and continued change in possession if notice of those transfers was filed with the office of the county recorder in the county where the property was located.<sup>52</sup> Chapter 1368 requires notice to be filed in the office of the Secretary of State.<sup>53</sup> In addition, prior law required the notice to be published at least five days before the transfer of the property.<sup>54</sup> Under Chapter 1368, notice must be published at least ten days before the transfer is to occur.<sup>55</sup>

Finally, Chapter 1368 imposes a statute of limitations on actions relating to transfers of property without immediate delivery and change of possession.<sup>56</sup> Under Chapter 1368, an action may not be commenced more than one year after the earliest of (1) the date that discovery of the transfer should have been made,<sup>57</sup> (2) the date the transfer was actually discovered, (3) the date of delivery and change of possession<sup>58</sup> of the property that was transferred, or (4) the date that

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46. See *infra* notes 26-28 and accompanying text.

47. See *infra* notes 29, 30 and accompanying text.

48. CAL. CIV. CODE §3440.5(b).

49. *Id.* §3440.5(a).

50. *Id.* §3440.4.

51. 1982 Cal. Stat. c. 517, §90, at 2330 (adding CAL. CIV. CODE §3441) (sale and leaseback transaction); *id.* at 2331 (security interest of a secured party of the transferee).

52. 1982 Cal. Stat. c. 517, §§90, 91, at 2330, 2331 (adding CAL. CIV. CODE §§3441, 3442).

53. CAL. CIV. CODE §§3440.1(h)(1), 3440.5(b)(1). A financing statement must be filed with the Secretary of State in accordance with Chapter 4 (commencing with Section 9401) of Division 9 of the Commercial Code. *Id.*

54. 1982 Cal. Stat. c. 517, §§90, 91, at 2330, 2331 (adding CAL. CIV. CODE §§3441, 3442).

55. CAL. CIV. CODE §§3440.1(h)(2), 3440.5(b)(2). The party filing notice must publish the notice one time in a newspaper of general circulation in the judicial district where the property is located. If there is no newspaper of general circulation in the judicial district, notice must be published in a newspaper of general circulation in the county in which the judicial district is located. The contents of the notice must include the names and addresses of the transferor and transferee, a general statement of the character of the property, the location of the property and the date on or after which the transfer will be made. *Id.*

56. *Id.* §3440.6.

57. *Id.* (using reasonable diligence).

58. *Id.* (actual and continued change).

filing and publication requirements are met for notice of the transfer of the property.<sup>59</sup>

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59. *Id.* See *supra* notes 28, 30 and accompanying text (filing and publication requirements).