



COMMERCIAL LENDING ALERT

“DOING MORE” CAN HARM YOUR UCC FILING

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Getting the Debtor’s Name Right

In cooking and other pursuits, many believe that “if some is good, more is better.” Or as a famous actress-philosopher (Mae West) once said: “Too much of a good thing can be wonderful.” When attempting to perfect a personal property security interest, however, “more” can be fatal when inserting information in a Uniform Commercial Code financing statement.

Under the UCC, a lender (secured party) must insert the “name” of the borrower (debtor) on the financing statement that is filed to perfect most personal property security interests (UCC §1-502(a)(1)). UCC filings are indexed by name so that a prospective lender or other person doing a UCC search can locate all filings against the “named” person (entity or individual) which indicate there may exist a security interest against that person’s personal property. Thus getting the name correct is crucial to the integrity of the UCC filing/search system.

When the debtor is an entity registered with a state (a “registered organization” such as a corporation or limited liability company), the “name” to use is the exact name located in the state’s official public record (UCC §9-503(a)(1)). Using something different – an assumed name or a variation of the exact organizational name or adding something *in addition* to the official name – could jeopardize the perfection of a secured party’s security interest if challenged by a subsequent lender or

the dreaded trustee in bankruptcy. A recent case highlights the seriousness of this problem.

Where “More” Was “Less”

In the case of *In re EDM Corporation* (68 UCC Rep Serv 2d 139, Bankr. D. Neb, February 10, 2009), Lender 1 made a loan to a Nebraska corporation, whose official name was “EDM Corporation.” In addition to inserting that exact name on the UCC financing statement, the lender added “d/b/a EDM Equipment.” When the borrower became subject to a bankruptcy proceeding, a subsequent lender (Lender 2) to the debtor challenged the perfection of the security interest of Lender 1. If successful, Lender 1 would become merely a general unsecured creditor and the proceeds of the assets pledged to Lender 1 would be available for Lender 2, who properly perfected its security interest.

Adding the assumed name to the debtor’s official name caused an official UCC search of the Nebraska UCC records, utilizing the filing office’s standard search logic, not to reveal the filing made by Lender 1. The result of such failure under UCC Article 9 was that the UCC financing statement was “seriously misleading” and therefore was insufficient to perfect Lender 1’s security interest, relegating Lender 1 to “getting in line” with the unsecured creditors of the debtor (UCC §9-506(b)) while Lender 2’s perfected security interest was validated.

The court was uncomfortable with the result, even though it was correct under the UCC Article 9:

“... I feel it is important to note the difficulty of this decision. Hastings [Lender 1] acted in a manner that many would consider to be prudent - it included on its financing statement the debtor’s true legal name as well as another name by which the debtor was apparently known. Hastings tried to cover all its bases. Frankly, it is hard to understand why the Secretary of State search engine fails to find that financing statement. Of course, Huntington [Lender 2] also acted prudently by performing a search prior to making its advance which provided the funds to purchase the Collateral. So, the end result is appropriate, notwithstanding its difficulty.”

The Proper Procedure

In order to determine the proper name to include in a UCC financing statement, always obtain a copy of the “public record” showing the name of a debtor that is a registered organization, which means the actual organizational document on file with the state of organization, and all amendments thereto, showing the organization’s exact name. Do not rely simply on a computer search of listings on the website of a secretary of state or even a good standing certificate, which could contain errors

in transmission of the name from the public record to the good standing certificate.

Once the lender has located the debtor’s exact legal name, only that name, without embellishment, should be inserted on the UCC financing statement as identifying the debtor.

Conclusion

The framers of the latest revisions to UCC Article 9 attempted to make the determination of the name of a registered organization for UCC filings simple and clear. That intention is thwarted, however, if a lender decides to “do more” than Article 9 requires in naming the debtor on a filed UCC financing statement because the standard search logic used by most central UCC filing offices (including the Missouri Secretary of State) will not recognize such a supplemented name as being the same as its unadorned, official name. In this matter, carefully following the directions of UCC Article 9 is essential to assure a lender that its security interest is perfected and will not be subject to successful challenge by a subsequent lender or a trustee in bankruptcy. To paraphrase Mae West, “too much of a good thing” could be disastrous to a lender.

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