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SECURED LENDING ALERT

UCC FINANCING STATEMENTS – THE DEBTOR'S EXACT NAME

This article explores the need to get the debtor's exact legal name correct in the UCC Financing Statement and the risk of not getting the job done properly.

You've heard it many times before – make sure you use the debtor's full legal name in your UCC Financing Statements. This is not always an easy task, whether you are dealing with a registered entity, such as a corporation, a limited liability company or a limited partnership, or an unregistered entity such as a general partnership or a trust or an individual.

Section 9-503(a)(1) of Revised Article 9 provides that for registered entities such as a corporation, limited liability company or limited partnership, a financing statement sufficiently provides the debtor's name "only if" the name is the same as that indicated on the public record of the debtor's jurisdiction of organization. This requires you to obtain and review a copy of the filed articles of incorporation (for a corporate debtor), filed articles of organization (for a limited liability company debtor), and filed certificate of limited partnership (for a limited partnership debtor), in order to verify and use the exact legal name of the registered entity in the UCC Financing Statement. Bear in mind that you need to use the exact name, including accurately showing all periods, commas and spaces between letters in the debtor's name. A recent case in Utah discussed below highlights how the failure to use the debtor's exact legal name in a UCC filing was fatal for the unsuspecting secured party.

Some lenders have from time to time discovered a debtor name discrepancy when comparing the registered entity's name listed in the filed articles to such debtor's name reflected on the secretary of state's website or a good standing certificate issued by the secretary of state. This raises several important issues for a lender:

1. It's prudent for the lender to get both the filed articles in addition to a current good standing certificate to verify the exact debtor name. If there is a discrepancy between the two, the most likely result is that the legal name in the filed articles would be deemed the correct legal name, and not the name on the certificate of good standing or secretary of state website. This principle is assumed by most legal commentators to be correct, although there hasn't actually been a case which has held that the name in the filed articles prevails over a name variation in the secretary of state's web site or good standing certificate.

2. Since there is no established case law in this area and Code Section 9-503 is silent on this issue, if you do encounter a discrepancy in the registered entity's name in its filed articles and the secretary of state's website or good standing certificate, it would be conservative and cheap insurance to file against both names. This can be done in either the same filing or a separate filing. A UCC1 Financing Statement allows you to show two debtors on the face page of the filing (there is a primary debtor box and an additional debtor box available), and additional debtor names can be reflected in an addendum attached to the UCC filing.

What happens if you don't use the exact legal name of a debtor in a UCC filing? The risk is that the error in the debtor's name may make your UCC filing "seriously misleading" under Code Section 9-506, and ineffective resulting in your security interest being unperfected. The objective test is whether or not a search of the records of the filing office using the debtor's correct name, using the filing office's standard search logic, if any, would disclose your UCC filing containing an incorrect debtor name. If such search discloses your UCC filing, the UCC filing is not "seriously misleading" and thus effective. If such search fails to disclose your UCC filing, your UCC filing is "seriously misleading" and ineffective. As indicated, this would render your security interest unperfected and in some circumstances may result in the lender not being able to collect its debt.

Some states employ a search system that relies on an "exact match" search logic and will only pick up filings containing the exact name searched. Utah is one of those states which uses a very strict and narrow search logic, as demonstrated in the Host America case discussed below. In these states that use a narrow search logic, any debtor name deviation used in a UCC filing may be fatal for the secured party.

In Host America Corporation v. Coastline Financial, Inc., 2006 WL 1579614 (D. Utah), it was held that a lessor ("Coastline") who perfected its landlord's lien against a debtor prevailed over an earlier filed secured party (Host America as assignee of Mr. Sack), because the UCC filing held by the secured party did not reflect the exact legal name of the debtor, and was thus "seriously misleading" and ineffective. The court never did conclude whether the debtor's exact legal name was "K. W. M. Electronics Corporation" (with spaces

between periods) vs. "K.W.M. Electronics Corporation" (with no spaces between periods). The court noted that the UCC filing in question did not use periods at all and showed the debtor as "K W M Electronics (no periods). The court concluded that "the evidence is undisputed that a search under KWM's correct name using the filing office's standard search logic would not have revealed Mr. Sack's security interest at any point in time before Coastline seized the goods as part of its foreclosure activities."

Let's examine the many ways a simple corporate name can be bungled. For example, let's say the debtor's corporate name is **A & B Corp.** The following name variations, however slight, may in some states cause your UCC filing to be ineffective:

- A and B Corp. (not exact match – uses "and" instead of "&")
- A & B Co. (abbreviation)
- A. & B. Corp. (periods added)
- A&B Corp. (no spaces between A and B)
- A & B Corp. d/b/a Trader Market (adds assumed name in legal name)
- A & B Corporation (not exact match) – hopefully most state searches would pick this up, but its not clear that every state would
- A & B Corp. Inc. (extra word)

The preceding paragraph illustrates the importance of using the debtor's exact legal name in your UCC filing, right down to the periods, commas, spaces, etc.

Revised Article 9 makes it very clear that filing against a debtor's trade name (including an assumed name) is not an effective filing. Thus, never file against a debtor's trade name in the main debtor box of a UCC filing. We sometimes are asked whether a lender can file against a trade name, in addition to filing against a debtor's legal name, for notice purposes. My response is that it is not required by the Code, but if you want to file against a trade name for notice purposes, make sure that the main debtor box in the UCC filing (the first debtor's box) only reflects the exact legal name without any reference to the trade name. In such instance, you can file on the trade name in a separate UCC, or list the trade name in the second additional debtor box in your UCC.

A related issue is when your debtor is an individual doing business under a trade name (a sole proprietorship). In such case you must file against the debtor's exact individual name (e.g., Doe, John, Robert). If you want to file against the trade name, you would do so separately as described above (but the main debtor box would reflect only the individual debtor's exact legal name).

Unfortunately, getting the correct legal name of an individual debtor can sometimes be more challenging than confirming the correct legal name of a registered or unregistered entity. A recent 10th Circuit case held that only the "legal name" of an individual on a UCC was sufficient, and anything short of that (such as a nickname) was ineffective.

In In re Kinderknecht, 308 B.R. 71 (B.A.P. 10th Cir. 2004), it was held that the secured creditor must list an individual debtor by his precise "legal name", not by nickname. In that case, the secured creditor (John Deere Credit Services) listed the debtor in the

UCC financing statement by his nickname: "Terry J. Kinderknecht" instead of his legal name, "Terrance Joseph Kinderknecht". The bankruptcy trustee ran some searches under the debtor's legal name, "Terrance Joseph Kinderknecht", but such searches did not pull up John Deere's UCC filing. Therefore, it was held that Deere's filing was "seriously misleading" so that Deere had an unperfected security interest voidable in bankruptcy.

Of course, the national UCC filing form itself requires you to list the individual debtor's last name first, followed by the first name, and then the middle name, all in separate boxes on the standard form.

It must be recognized that even though nicknames are forbidden, numerous problems still arise in determining what is the individual debtor's exact legal name. There are many different legal documents listing an individual debtor (all of which may have some name variation). For example, there are birth certificates, driver's licenses, social security cards, passports, and other governmental documents. Some legal commentators believe a birth certificate may be the best standard to use, but that is by no means determinative. Just as with registered entities, if your individual debtor has different name variations, the only safe approach may be to file against all of them.

Another possible issue with individual debtors is whether you need to spell out the middle name or just use the middle initial. This may also be resolved by filing against the individual debtor using both the middle initial and the full middle name.

A final word of caution. For those situations where there is some doubt whether a secured party used the exact legal name of the debtor in its UCC financing statement, the test under Revised Article 9 for determining whether or not such UCC financing statement is effective is whether or not the UCC financing statement is found in an "official" UCC search of the filing office using the standard search logic employed by that filing office. A number of search services used to provide UCC searches may provide searches based on "informal" searches which produce broader search results than an "official" search, and may lull some secured parties into believing that since its filing showed up in an "informal" search, that it would also show up in an "official" search using the standard search logic employed by that filing office. That may not always be the case.

This article is informational in nature and is not intended to constitute, nor should it be relied upon as, legal advice to any recipient.

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