

IS IT STILL BREATHING?

A Look at Best Practices When Determining the Effectiveness of a UCC-3 Termination

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Before Revised Article 9 took effect in July of 2001, many state filing offices required that the Secured Party of record execute the UCC-3 termination statement before they would accept the document for filing. Following the enactment of RA9, with the signature requirement lifted, many searchers began to fear a filer uprising leading to an inevitable epidemic of fraudulently filed termination statements. While this foretelling may have been a bit dramatic, searchers today must pause to ask the question: is this a valid termination statement?

Remember that the *acceptance* by the filing clerk of any UCC financing statement has little to do with the *effectiveness* of the lien. Although a physical signature is no longer required on the face of our UCC financing statements, the resulting authorization is. With few exceptions, the filing offices are obligated to accept and index submitted financing statements. However, according to §9-510(a) and §9-509(d), a filed termination statement is effective only if authorized by the secured party of record. Even in the event of no remaining obligation secured by the collateral, a debtor is not necessarily authorized to file a termination on their own behalf. Unfortunately, our UCC search reports offer little more than an indication of the filing and an image that may boast little information (especially if filed electronically). Searchers are left with the burden of determination.

But it's not simply the fraudulent filers or the filers who do not understand the authorization requirements that muddy the effectiveness issue. A good-intentioned filer who makes an honest mistake when transposing their initial financing statement number onto their UCC-3 document can cause a termination statement to be filed against another party's lien. The filing offices' administrative procedures under OA9 allowed for filing clerks to review the UCC-3 amendment document to determine its validity prior to indexing. Oftentimes, the filing clerks would cross-check the name of the secured party of record against the name of the authorizing party on the document to be sure they were one in the same. This would sometimes help to safeguard against an incorrect initial financing statement reference. This procedure is no longer commonplace. Today, clerks are traditionally instructed to tack the amendment onto the initial financing statement regardless of the other indicators. It is not the job of the filing clerk to investigate the filer's intentions, but the job of the searcher.

Luckily, there are some warning signals that searchers can pick up on when doing an examination of their search results. Any termination statement that is authorized by the debtor is a termination statement that deserves another look. Debtor parties may terminate on their own behalf only after an authenticated request to the secured party of record has gone unanswered (§9-513). While this certainly does occur in the busy world

of commercial transactions, it is also likely that an unsophisticated Debtor was not aware of the official requirements for self-authorizing a termination filing.

While not required in many states, filers will often indicate the original filing date beside the original file number in box #1 of an amendment filing. When reviewing the copy of the termination statement, an examiner can often catch a referenced date that is not correct. This might be an indication that the lien has been mistakenly filed against an unrelated UCC-1.

Subsequent to filing an authorized termination, secured parties often remove the lien's information from their in-house databases to avoid future tracking of the UCC. Therefore, coming across a financing statement's history that indicates a termination *followed* by another type of amendment is a red flag that the secured party of record probably did not intend to terminate or did not intend to file a subsequent amendment.

Know your borrower. Sometimes, the termination of a working capital lien simply doesn't make sense. If a termination filed against Copy Place's lease lien on a copy machine is present, we may assume that all is well. However, if a termination is filed against Big Old Bank's lien on "all assets", our examiner may wonder how Debtor is funding his business. Perhaps this is the termination that our examiner would choose to investigate.

Of course, there are no guarantees that our searcher will be able to find comfort with every termination reflected on his or her search results. A certain amount of risk is inherent when basing decisions on any lien search. Thankfully, there are groundbreaking risk-shifting products on the market that will not only protect our searcher, but reduce much of the time-consuming due-diligence process associated with determining filer's priority or the lien encumbrances of the collateral. Eliminate the guess work. Consider First American's Eagle9® Lender's and Buyer's policies when contemplating your next commercial transaction.