

MISINFORMATION ON THE UCC DATABASE OVERCOMING THE “OPEN DRAWER” CONCEPT

By David L. Wanetik, Esq.

Prior to the Revision of Article 9 in 2001, when a termination was filed against a prior financing statement, within a reasonable period of time, most filings were purged from the UCC database. Changes to the code changed that process and required statutory means to provide notice that misinformation was on the record.

Most jurisdictions did purge all records once a termination was filed. This eliminated old filings but did not deal with fraudulent terminations which purged the record on what were valid liens. The purging process also allowed for removing incorrect filings which had misinformation or information that should not be part of the public record. Assuming that no other lien had been filed in the intervening time, it allowed for a “do over” when something was incorrectly placed on the public record.

The Revision of 2001 created the “Open Drawer” concept. While those exact words are not used in the statute, Section 9-522 provides that any and all filings on a particular record will remain on file for the full statutory period plus one year regardless of what is filed. So even if an amendment terminating a record is filed one year after the initial financing statement, the initial financing statement and termination will remain on record for the usual five year statutory period plus one. The concept was born when signatures were eliminated from the forms and the concern arose about fraudulent filings including debtors filing terminations on their own debts. In addition, it further emphasized the fact that the UCC system is only a notification system providing guidance to searchers. Searchers were obligated to follow up on what they find on the record.

The down side of the “Open Drawer” was how to deal with misinformation. Examples would be incorrect information on a filing, filings which were disputed by debtors, terminations not authorized by secured parties or information which should not be part of the public record. Once a financing statement is filed and on the record, it cannot be erased or purged. So what is one to do?

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The current statute, under 9-518, refers to a Correction Statement although unlike other provisions, does not mention a specific form. Still, a UCC5 Correction Statement was available for such use. Current Section 9-518 provides a mechanism whereby an aggrieved debtor may use the filing office to make a public declaration concerning the debtor's belief that a filed financing statement naming the debtor is inaccurate or was wrongfully filed. It does not provide similar relief for secured parties and the name of the form could give the incorrect impression that the record was being corrected. The statute merely states that this information will now be part of the record when searched but will not change the data on file.

In 2010, a new form was created to replace the Correction Statement. Under the name Statement of Claim and using the same designation of UCC5, the new form provided an easier method to indicate what was wrong on the record and specifically provided use by the debtor or the secured party. To reflect the new form and intention, 9-518 has proposed revision wording to remove the wording Correction Statement and will refer to the filing as an information statement. This will further clarify that this is only a declaration on the file but is not changing the information on the record.

The one area which cannot be dealt with cleanly is information which is inadvertently provided in a financing statement. Years ago I was brought into a call where the financing statement against a debtor who had pledged his extensive art collection was trying to undo a filing which not only described each painting with great detail but listed the exact location of each painting as well. This collection is valued at \$3 million dollars. The filing caused concern for security of the artwork. When asked what could be done to eliminate all of this information, I had to break the bad news that once filed, it would remain on the record for 6 years. There is no cure for such a problem.

Moral of the story: If there is information you do not want on the public records, keep it off the UCC financing statement or live with it for 6 years.

David Wanetik, Esq.
Chief Operating Officer,
UCC Division
dwanetik@firstam.com



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