

Forget the Article 9 Folklore...

The Exact Debtor Name May Not Be Enough

There is conventional wisdom that Revised Article 9 of the Uniform Commercial Code radically altered the methodology for searching the UCC records of the central filing offices of the various states. However, Revised Article 9 continues the requirement from Former Article 9 that financing statements include the debtor's name. Given this requirement, when does an inaccurate debtor name become so inaccurate as to render the filed financing statement ineffective?

By James D. Prendergast

There is conventional wisdom that Revised Article 9 of the Uniform Commercial Code radically altered the methodology for searching the Uniform Commercial Code records of the central filing offices of the various states. The argument goes that you only need the exact legal name of the debtor, which is a relatively easy chore for a registered organization,¹ to have an effective filing or to conduct a thorough search of the UCC filing records. For the moment we will ignore the added complexity of searching and filing against individual, trust and non-registered organization entities.

However, Article 9 is not quite that simple. Revised Article 9 continues the requirement from Former Article 9 that the financing statement include the debtor's name,² and continues to disapprove of the use of fictitious names.³ If the debtor is a registered organization, the financing statement must provide the name of the debtor indicated on the public records of the debtor's jurisdiction of organization that shows the debtor to have been organized.⁴ Given the requirement of the name of the debtor in the financing statement, the pertinent question is when does an inaccurate debtor name become so inaccurate as to render the filed financing statement ineffective?

Section 9-506 addresses the degree of error sufficient to render the financing statement sufficiently "seriously misleading" so as to be ineffective to accomplish perfection of the security interest of the secured party. Minor errors or omissions do not preclude the effectiveness of a financing statement unless such errors or omissions render the financing statement seriously misleading.⁵ Of course, that statement begs the question. Section 9-506(b) continues with a clarifying statement that, except as provided in subsection (c) of Section 9-506, a financing statement that fails to provide the name of the debtor in accordance with Section 9-503(a) is seriously misleading. Hence the folklore that the name of a registered organization must be an exact match to the "legal" name of the debtor as reflected on the organizational documents of the debtor registered organization.

The reason I use the term "folklore" is that Section 9-506 continues in subsection (c) to provide: "If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search

logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading."⁶

This exception may seem like a minor deviation from the requirement of exact legal debtor name of UCC Section 9-503. However, this exception may be large enough to drive a truck through and creates a significant due diligence burden for the searching creditor. A recent case out of the Bankruptcy Court for the Middle District of Florida highlights the complexity of the simple statement in Section 9-506, subsection (c).

In the case of *In re: Summit Staffing Polk County, Inc. Debtor*⁷ the searching question was whether a filing against "Summit Staffing" was an effective filing against Summit Staffing of Polk County, Inc. The conclusion of the bankruptcy court was that the filing against the incorrect name was an effective filing and that a searcher, under Revised Article 9, was still to be held to a standard of "reasonable diligence" in the review of UCC search results, although with some modification from a similar standard under Former Article 9.

The facts of the case are relatively straightforward. On August 22, 2001, Associated Receivables Funding of Florida, Inc. entered into a funding agreement with Randy Vincent d/b/a Summit Staffing. Collateral for the revolving credit facility was certain accounts receivable to be sold and assigned to Associated Receivables as well as a blanket security interest in all receivables and other collateral. On September 4, 2001, Associated Receivables filed a UCC-1 financing statement, as secured party, and naming Randy A. Vincent as debtor and Summit Staffing as an additional debtor. Summit Staffing was described as a sole proprietorship.

On March 14, 2002, Summit Staffing of Polk County, Inc. was incorporated and its Articles were filed with the Florida Secretary of State on March 15, 2002. Summit Staffing of Polk County, Inc. conducted the business formerly conducted by Randy A. Vincent d/b/a Summit Staffing. Associated Receivables continued to advance to Summit Staffing of Polk County, Inc. under the loan agreement with Randy Vincent d/b/a Summit Staffing. No new loan agreement was signed and no amendment to the September

4, 2001 financing statement was filed and no new financing statement was filed against Summit Staffing of Polk County, Inc. Summit Staffing of Polk County, Inc. filed its Chapter 7 petition on October 16, 2002, showing its name as Summit Staffing Polk County, Inc.

The trustee in the Chapter 7 proceeding moved for summary judgment on the issue of the perfection of Associated Receivables' security interest. In her affidavit in support, the trustee argues that she had conducted a UCC search through the official Secured Transactions Registry Internet website using the exact legal name of the debtor, "Summit Staffing of Polk County, Inc." The search did not disclose the Randy Vincent financing statement.

In support of the summary judgment motion of Associated Receivables, the legal assistant to counsel for Associated Receivables provided an affidavit stating that she had searched the same official website for Summit Staffing of Polk County, Inc. The results, attached to her affidavit, presented an alphabetical listing with "Summit Staffing Services" as the first listing. The paralegal then selected the "Previous" command to display the results page with alphabetical listings immediately prior to "Summit Staffing Services." On this page there was a listing for "Summit Staffing" with the address of the debtor.

Given these facts, the question facing the court was a simple one — was the filing by Associated Receivables against "Summit Staffing," as the d/b/a of Randy Vincent, an effective filing against "Summit Staffing of Polk County, Inc." If effective, Associated Receivables would prevail over the position of the trustee as a hypothetical lien creditor under 11 USC Section 544. If the initial filing was not effective over the incorporated debtor, the trustee would prevail and Associated Receivables would drop from a secured to an unsecured creditor.

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The court then proceeded to review the applicable provisions of Revised Article 9 of the UCC governing effective financing statements. The court began by addressing Section 679.508 of the Florida Statutes, Section 9-508 of the Uniform Commercial Code. This section provides the rules for the effectiveness of financing statements if a new debtor becomes bound by the security agreement of a prior debtor — the double debtor problem.

Section 9-508 (a) provides that a financing statement filed against an original debtor is effective to perfect a security interest in collateral in which the new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral. A "new debtor" is defined in Section 9-102(56) as a person that becomes bound as debtor under Section 9-203(d) by a security agreement previously entered into by another person. Section 9-203(d) completes the thought by providing that a person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than Article 9 or by contract (1) the security agreement becomes effective to create a security agreement in the person's property, or (2) the person becomes generally obligated for the obligations of the other person, including the obligations secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

The exception to the general rule of Section 9-508(a) is set forth in Section 9-508(b). This section provides that if the difference between the

name of the original debtor and the new debtor causes a filed financing statement that is effective under subsection (a) to be seriously misleading. If the filed financing statement is seriously misleading, the secured has a four-month grace period within which to file an initial financing statement against the new debtor in order to maintain perfection.

Given the facts of the case and the course of dealing between the parties, there was little question that Summit Staffing of Polk County, Inc. was a successor-in-interest and a "new debtor" to the sole proprietorship "Summit Staffing." The principal issue before the court, therefore, was whether the original financing statement filed against "Summit Staffing" was effective against "Summit Staffing of Polk County, Inc." To answer this question the court turned to the Florida version of Section 9-506 of the Uniform Commercial Code. The court then correctly concluded that if a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that does not sufficiently provide the name of the debtor, the name provided does not make the financing statement seriously misleading.

The court concluded: "Accordingly, if a search of the records of the filing office under the name Summit Staffing of Polk County, Inc., using the filing office's standard search language, would disclose the financing statement showing Summit Staffing as the debtor, the financing statement is not seriously misleading."⁸

The "standard" search logic of the Florida Secretary of State is not an exact match search logic but a broader form of search logic. Searching on the correct debtor name of Summit Staffing of Polk County, Inc. produced a search report that a significant number of similar names. On the initial page presented by the Florida website under the search for "Summit Staffing of Polk County, Inc., the listing of 20 names began with "Summit Staffing Services" and ended with "The Summur Limited Liability Company." However, the displayed page has a "< Previous" button. If you hit the button, the prior 20 names include "Summit Staffing" at the location of the debtor "Summit Staffing of Polk County, Inc."

Given this result, the court concluded that the earlier filed financing statement was not seriously misleading and was effective to perfect the security interest of Associated Receivables in the collateral of the debtor.

The court then goes on to provide its rationale for requiring the searching creditor to hit the "< Previous" button. The initial page did not disclose "Summit Staffing" at the location of the debtor. The searching creditor had to do a bit of hunting. The court mentioned that the filing office suggests that the searcher should use the "< Previous" command to display additional search results. Given this, the court concluded that the searched should check the preceding names on the alphabetical list. Given this conclusion, the court was forced to define how far should the quest for the debtor name take the searching creditor.

The court concluded that because the listing was alphabetical there was a "reasonableness" standard as to how far the searching creditor should search. The court did not consider it reasonable to require the searching creditor to continue to the "< Previous" button all the way back to the beginning of the alphabetical sequence. But where to draw the line?

Against the issue of how far to search, the court discussed the issue that if the search under the correct debtor name did disclose the prior filing under an incorrect debtor name, the financing statement is effective because the purpose of the UCC, to give notice, had been accomplished. There is no requirement under the Code that the searching creditor actually find the incorrectly named financing statement. The fact that the financing statement would be disclosed in the results of a proper search is sufficient to exempt the financing statement from being seriously misleading.

The court, given this reasoning, then considered the duty imposed by Former Article 9 that searchers be reasonably diligent. Because Revised Article 9 requires more accuracy in filings, the court concluded that Revised Article 9 places less of a burden on the searching creditor to seek out erroneous filings. Revised Article 9 does not require multiple searches under various alternative names of the debtor as Former Article 9 may have required. However, the revisions to Article 9 do not entirely remove the duty imposed on a searching creditor to be reasonably diligent. Under Revised Article 9 the searching creditor is not required to conduct multiple searches. However, the searcher must reasonably examine the results of the proper search using the debtor's correct name to determine if any financing statements relating to the debtor are disclosed by that search.

So where does this case leave the searching creditor? Obviously, unless the standard search logic of a state is "exact match" the searching creditor has its work cut out for it. Exact match state search logic is easy. Put in the correct name of the debtor and if the "misleading" filing doesn't show up, no notice and the filing is seriously misleading. However, if the "standard search logic" is a broader based logic, as is the case in Florida, any filing that "pops" up is *not* seriously misleading. This conclusion forces the searching creditor to review the "matches" maybe not back forever, but certainly for a few 20 debtor displays, and compare the resulting names through address to determine if any of these "related" filing are the debtor.

This going back over similar filings is a significant clerical burden and the downside is significant. If the searching creditor only goes back two 20 debtor displays and the name at issue was on the third or fourth or fifth 20 debtor display, was the debtor "diligent" in stopping at two. So much for the certainty of Revised Article 9. Maybe, to be safe, the searching creditor needs to go back to the beginning of the initial letter of the debtor name. For "Summit Staffing," back to the beginning of "s" or maybe "su" is diligent and safe to stop.

There is, however, an alternative to this clerical and risk burden. Land title insurance companies, through their UCC insurance companies, now provide insured searches that will take the responsibility of reviewing the extensive search results, cull the results down to those filings that the insurance company concludes pertain to the debtor, and insure the results. The insurance covers loss, up to the insured amount, that the filings excluded by the insurance company as not pertaining to the debtor, in fact, did not pertain to the debtor. If the excluded filing did relate to the debtor and would be considered an effective filing under the logic of the Summit Case, the insurance company would cover any loss due to the secured party being primed by the prior filing up to the insured amount under the UCC policy.

This type of coverage, offered by land title insurance companies, clearly meets the difficulty of analyzing extensive search results in those states without exact match search logic. The trade off is the paralegal expense of reviewing the extensive results generated by a broad search logic and the risk of error versus the insurance company premium for an insured search. The malpractice exposure to the law firm conducting the search probably warrants the minimal premium for an insured search.

Of course, law firms can elect to self-insure, but the law firms are probably not consciously making this evaluation. They may just be concluding that the search logic is exact match and that there is no real risk is not reviewing the different names hit by the state search logic. This is a very incorrect conclusion. The Summit Case forces the searching creditor and its law firm to investigate the standard search logic of the state being searched and adapt in response to the methodology of the state. Given the fact that state search logic can change over time, the prudent law firm will reinvestigate the search logics of the states periodically to stay ahead of the curve. Or call your UCC insurance provider. **abfj**

James D. Prendergast is general counsel of the UCC Division of The First American Corporation. He is a regent and fellow of the American College of Commercial Finance Lawyers, chairman of the Programs Subcommittee of the Commercial Financial Services Committee of the Business Law Section of the American Bar Association, VP of the Financial Lawyers Conference, treasurer of the Commercial Law and Bankruptcy Section of the Los Angeles County Bar Association, and a former member of the UCC Committee of the Business Law Section of the State Bar of California.

ENDNOTES:

- 1 UCC Section 9-102(70). "Registered organization" means an organization organized solely under the laws of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized." This article will not address whether a particular State jurisdiction maintains such records for particular entity forms so as to constitute the particular entity a "registered organization" for Article 9 purposes.
- 2 UCC Section 9-502(a)(1).
- 3 UCC Section 9-503(c).
- 4 UCC Section 9-503(a)(1).
- 5 UCC Section 9-506(a).
- 6 Official Comment 2 to UCC Section 9-503 amplifies the statement in subsection (c) by providing that a financing statement that is seriously misleading under UCC Section 9-503 is ineffective even if it is disclosed by (i) using a search logic other than that of the filing office to search the official records, e.g., a broader search logic using wild cards offered by a number of search companies, or (ii) using the filing office's standard search logic to search a data base other than that of the filing office.
- 7 United States Bankruptcy Court for the Middle District of Florida, Tampa Division, 305 B.R. 347; 2003 Bankr. LEXIS 1911; 17 Fla. L. Weekly Fed. B 74 (October 15, 2003).
- 8 Page 7 of the Case.

