

WHAT'S IN A NAME?

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In years past, the state by state inconsistencies in the 'Uniform' Commercial Code had become an industry punch line. Revisions made to the code in 2001 helped to alleviate some of the jurisdictional disparity. However, over the past 5 years, case law has revealed that RA9's 'tough love' approach has left some creditors high and dry.

The filing system is inherently flawed. The mis-indexing of financing statements by a filing office, a computer glitch in a search database, fraudulently or mistakenly filed termination statements are only a few of the stumbling blocks that searchers and filers encounter when accessing the public record. Potentially, a blameless creditor could be left holding the short end of the stick at a bankruptcy hearing simply due to an error that they had no control over.

While there always was (and still is) an un-intended element of pure risk involved when searching and filing in the various state indexes, the drafters of Revised Article 9 attempted to clearly identify which party would bear the responsibility of an 'honest mistake.' The last few years have given rise to several cases that have tested these rules and proven the rigidity of RA9's definition of "seriously misleading."

A common misconception among searchers is the assumption that a standard search logic has been adopted universally among filing offices in conjunction with their adoption of Revised Article 9. Not so. Although the International Association of Commercial Administrators has urged states to confirm to a standard search logic, it remains the prerogative of the filing office to determine the best practices when it comes to indexing their liens and making that information available to searchers.

In *Host America Corp. v. Coastline Financial, Inc.*, filer stated debtor's name on the financing statement as: KWM Electronics Corporation without the period punctuation between letters K, W, and M. Filer may not have known that Utah does not subscribe to the IACA Model Standard Search Logic which indicates that punctuation entered by a searcher should be ignored by the search database. Due to the inflexibility of Utah's search parameters, creditor's lien did not appear when searched for using debtor's legal name: K.W.M. Electronics Corporation. The court ruled that the financing statement failed to list the exact legal name of the debtor, and furthermore, that its omission from the UCC search indicated that the lien was seriously misleading.

Another filing office that has not adopted all of IACA's guidelines for search logic is the State Corporation Commission of Virginia. Certain common words associated with an organization's name (corporation, limited liability company, limited partnership) are ignored by many states' databases when running lien searches. For example – in many jurisdictions – a search for ABC Corporation would reveal liens against: ABC, ABC Corp., ABC LLC, ABC Limited Partnership, etc. This is not the case in *all* states, however. Virginia has chosen to abbreviate certain corporate endings within their database rather than completely eliminate what IACA has dubbed "noise words." Hence, in *The Official Committee of Unsecured Creditors for Tyingham Holdings, Inc. v. Suna Bros. Inc.*, court ruled that the filing made under debtor name: Tyingham Holdings was seriously misleading as it did not appear under a search for legal name: Tyingham Holdings, Inc.

While a very strict logic may appear to be burdensome for filer, the cornerstone of Revised Article 9 rests on a very simple rule of thumb: Get The Name Right. Regardless of their knowledge of the states' database parameters, had either of these creditors correctly stated debtor's name on their financing statements, their liens would have effectively appeared on the search results. It's not always filer who

bears the brunt of perfection heartache, however. Liberal search logic can put the burden on searcher to hunt for liens that are not necessarily filed under debtor's legal name.

In Florida's Summit Staffing case, the court ruled that searcher had the obligation to utilize the functionality of the state website to enable the presentation of a variation listing in which searcher would have discovered another creditor's lien. Even though the financing statement was *not* listed under the correct name of the debtor, because the alphabetical name list would have produced an indication of the lien had searcher been diligent enough to scroll *backwards*, the court determined that the UCC filing was not seriously misleading.

Perhaps the biggest debate when it comes to the debtor name issue is that of an individual debtor. While industry practice dictates that prudent searchers and filers should obtain drivers licenses, tax returns, voter registrations, and more to determine an individual's name – statute does not dictate a steadfast rule. While instinct may tell us that a mere nickname of a debtor would not be sufficient, some case law has said differently. In re: Michael A. Erwin v. Bucklin National Bank, a filing made under Mike Erwin was found to be sufficient notwithstanding its omission from a search run under legal name: Michael A. Erwin. The Kansas court argued that statute does not hold an individual debtor to the full legal name standard. Burden is again on searcher to exhaust all possibilities.

Another case in the same state was overturned. Initially, a filing made under nickname: Terry as opposed to legal name: Terrance was found to be sufficient until the appellate court reversed the decision. This court reasoned that individual names should not be held to a different standard than organizational names. In Nebraska's case: Genoa National Bank v. Southwest Implement, Inc., filing made under Mike Borden was deemed to be seriously misleading when not found under a search of their records using legal name: Michael Borden. The Nebraska court went on to say that it is not too burdensome to expect one taking a security interest to exhaust all potential name variations prior to drafting their financing statement.

Consistently echoed throughout all of our examples remains the mantra: Get The Name Right. This applies to both diligent searchers and filers. However, even the very best care to compile accurate information will not protect parties from the mis-indexed lien, mistakenly terminated filing or priority interest appearing within the gap of time between creditor's first search and their subsequent filing. Nor will getting the name correct shield parties from the Federal Tax Liens that are not held to the same exacting standards as a creditor's financing statement. The very essence of the search and filing function begs the need for a risk shifting solution.

Don't continue to make decisions based on information that may be flawed. Consider First American's Insured Search™, Insured Filing™ and array of Eagle 9® products and services for your due diligence arsenal. Our UCC policies are tailored to meet the needs of today's lender. Whether it's simple insurance for your search results, or complete outsourcing of your lending portfolio, contact us today for information about what products will best serve you.