

PUBLICATION

UCC Filings and Incorrect Information (Not All Content is Equal)

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After all the hard work involved in bringing in business; approving credit; and structuring, negotiating and documenting a transaction; it can be frightening to think of the damage that can be done to a Secured Party's lien position if the one-page form UCC-1 financing statement is not properly completed.

Although it is important to accurately complete all areas of a financing statement, it is comforting to know that not all errors are created equal. Of course, as is often the case with Article 9, issues are frequently more complex than they appear and it takes some mental gymnastics and dexterous flipping through various provisions to fully analyze this issue.^[1]

Previous issues of Dispatches from the Trenches have discussed in detail the importance of listing the proper name for the Debtor. Similarly, everybody in this business understands the importance of a sufficiently encompassing collateral description. This issue of Dispatches from the Trenches focuses on some of the less frequently discussed components on financing statements (some of which, thankfully, will be removed by recent amendments to Article 9 which will be effective July 1, 2013).

1. Key Article 9 Provisions regarding the Information on the Financing Statement.

Section 9-502(a) of the UCC provides that a financing statement is sufficient only if it provides the name of the debtor, the name of the Secured Party (or its representative) and an indication of the collateral. Nothing else is required by that section even though the standard UCC-1 form includes a variety of other information.

Other information on form financing statements is addressed in Section 9-516 of the UCC, which allows the filing office to reject a financing statement that does not have the name of the debtor or secured party **or certain other information**. Of particular note, is information contained in subsection 9-516(b)(5). Currently, that information includes:

1. the mailing address for the debtor;
2. whether the debtor is an individual or an organization; and
3. if the financing statement indicates that the debtor is an organization:
 1. a type of organization for the debtor;
 2. a jurisdiction of organization for the debtor.
 3. in **some** states, an organization identification number or an indication that the Debtor has none.

As will be discussed in more detail later, Amendments to Article 9 which will be effective as of July 1, 2013 remove the information in subsection (C). The new form of UCC financing statements is also being changed to delete the boxes for this information.

If the information in Section 9-516 is incorrect but the filing is still accepted by the filing office, the filing is effective to perfect the security interest and therefore would defeat lien creditors generally, including a trustee in bankruptcy. However, Section 9-338 provides that a financing statement with incorrect 9-516(b)(5) information would be **ineffective** against Secured Parties or purchasers who give value in **reasonable** reliance

on the incorrect information. The official comments to that section specifically describe such reliance as occurring on rare occasions.

2. Name of Secured Party (or Representative).

The financing statement may name either the Secured Party or its representative and need not indicate the representative capacity. The name of the Secured Party is not used for indexing and therefore receives less scrutiny. There are at least three different circumstances addressed under Article 9 in which a financing statement is effective even though it lists a different name for the Secured Party.

First, the financing statement can have the name of a "representative" of the Secured Party and need not even disclose the representative capacity. In particular, the UCC provides that "[f]ailure to indicate the representative capacity of a Secured Party or a representative of a Secured Party does not affect the sufficiency of a financing statement."^[2] However, there must be some source of the representative authority. For example, in *In re QuVis, Inc.*, dozens of noteholders loaned money to QuVis pursuant to the terms of an open-ended loan and security agreement but not all filed financing statements. When some non-filers tried to rely on filings made by other noteholders under the theory that the filers filed for their own protection and as representatives of the non-filers, the court rebuffed them, holding that "an alleged representative must be able to demonstrate some source of authority to be deemed the 'representative of the secured party'" for purposes of perfection.^[3]

Second, a Secured Party may assign its security interest to a third party and the financing statement will remain effective even if no amendment is filed to reflect the transfer of the security interest.^[4]

Third, errors in the name of the Secured Party should not generally cause a financing statement to be ineffective. In particular, the comments to §9-506 provide as follows:

Inasmuch as searches are not conducted under the secured party's name, and no filing is needed to continue the perfected status of security interest after it is assigned, an error in the name of the secured party or its representative will not be seriously misleading. However, in an appropriate case, an error of this kind may give rise to an estoppel in favor of a particular holder of a conflicting claim to the collateral.^[5]

It is important to understand in the examples above that the Secured Party designated on the financing statement is the party with the power to amend it, terminate it or otherwise deal with it. In the event multiple Secured Parties are listed on a financing statement, each Secured Party may file amendments and termination statements with respect to its interest or may authorize another party to do so.

3. Addresses.

Technically, a correct address is not required for a financing statement to be effective.^[6] However, a filing office can (and usually will) reject financing statement without addresses for the Debtor or the Secured Party as allowed under Section 9-516(b)(4) and (5).

That being said, errors in addresses should not render financing statement ineffective. Before the 2000 revisions, the address of the Secured Party was described as an "address . . . from which information concerning the security interest may be obtained." This language has been removed and official comments make clear that the purpose of the Secured Party's address is "to provide an address to which others can send required notifications, e.g., of a purchase money security interest in inventory or of the disposition of collateral."^[7]

As far as the debtor's address is concerned, the purpose of including it on the financing statements is ostensibly to assist the searchers in "weeding out false positives."^[8] Even if this information is missing or incorrect, the financing statement is effective if accepted by the filing office.^[9] However, with respect to the debtor address only (not the Secured Party's address), a filing is ineffective against Secured Parties or purchasers who give value in **reasonable** reliance on the incorrect information.^[10]

4. Other Information.

As noted previously, the current version of Article 9 allows a filing office to reject a filing that does include certain information outlined in Section 9-516. However, if it accepts the filing nonetheless, it is enforceable against lien creditors generally, including a trustee in bankruptcy. However, Secured Parties or purchasers who give value have an argument that their interest trumps a filing which has incorrect information with respect to a specific subset of items outlined in Section 9-516(b)(5) as long as such parties have **reasonably** relied on the incorrect information—something the official comments describe as rare.^[11]

The information in 9-516(b)(5) currently includes (a) the mailing address for the debtor; (b) whether the debtor is an individual or an organization; (c) the type of organization and state of organization of the debtor; and (d) in some states, an organization identification number.

However, amendments to Article 9 which will be effective as of July 1, 2013 remove items (c) and (d), leaving only the mailing address of the debtor and whether it is an individual or organization.

5. Conclusion

Of course, filers should be careful to accurately complete all information on financing statements. However, when things go wrong (as they inevitably do) , it is helpful to have a clear understanding of the ramifications of incorrect information.

[1] Despite numerous attempts from the author, Article 9 Provision Flipping is not yet an event at legal forums or the Olympics.

[2] UCC §9-503(d).

[3] 2010 Lexis 1830 (D. Kan. 2010).

[4] UCC §9-310(c)

[5] UCC §9-506, Official Comment No. 2.

[6] It is not a requirement of Section 9-502(a). See also §9-516, Official Comment No. 5 ("The failure to include an address for the secured party of record no longer renders a financing statement ineffective.")

[7] UCC, §9-516, Official Comment No. 5.

[8] UCC §9-520, Official Comment No. 3.

[9] Again, it is not a requirement of Section 9.502(a). See also §9-520, Official Comment No. 3.

[10] See UCC 9-338. This results stems from the fact that the address of the debtor is enumerated in Section 9-516(b)(5) and will continue to be so under the new Amendments to Article 9 effective in July of 2013.

[11] UCC §9-338.