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# UCC Article 9 Update on Searching and Filing: Best Practices for Secured Lenders

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# UCC Article 9 Update: Searching and Filing

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# Outline

- Filing
  - o When
  - o Where
  - o Filling out the form
- Post-filing changes
- Searching



## Financing statement – when to use

- Available for all types of collateral (§ 9-310(a)), *except*:
  - o Money
  - o Deposit accounts
  - o Letter-of-credit rights
  - o Required federal or other state filings
- Sometimes perfection by filing subject to non-temporal priority rules



## Financing statement – where to file

- File at ‘location’ of debtor (§ 9-301(1))
- Fixture filing recorded in real property records where fixtures are located (§ 9-301(3)(A))
- See below for agricultural liens and transmitting utilities



# What is the ‘location’ of the debtor?

- ‘Location’ of debtor:
  - o Registered organization (corporation, LLC, LP): state of organization (§ 9-307(e))
    - Same rules for certain business trusts
  - o Partnership: state of chief executive office (§ 9-307(b)(3))
  - o Individual: state of principal residence (§ 9-307(b)(1))
  - o Non-US entity: place of chief executive office, if country has filing system comparable to Article 9, otherwise Washington, D.C.



# Financing statement – where to file

- *Clinton v. Adams*, 2014 WL 6896021 (C.D. Cal. 2014) (Security interest in the debtor's copyright infringement claim was unperfected because the law firm filed a financing statement in California, where the infringement claim was prosecuted, rather than in Florida, where the debtor was located)
- *Sturtz Machinery, Inc. v. Dove's Industries, Inc.*, 83 U.C.C. Rep. Serv. 2d 425 (N.D. Ohio 2014) (Secured party perfected its security interest in the debtor's fixtures by filing a financing statement in Pennsylvania, where the debtor was located, even though the fixtures were located in Virginia)



# Hague Securities Convention

- Purpose and scope
- Status
- General Rule – Article 2(1) issues
- Application – Primary Rule
  - o Account agreement
  - o Qualifying office
  - o Multi-unit States
- Fall-back rule
- Transition



## Financing statement – content (§ 9-502(a))

- Debtor name
- Secured party name
- ‘Indication’ of collateral



## Financing statement – debtor name (§ 9-503)

- Must be exactly correct (except for narrow exception)
- For registered organization: copy exactly from organizational documents
- Individuals
  - o What is the ‘name’?
  - o Driver’s license rules discussed below



## Financing statement: registered organization name

- Registered organization
  - o Confirm by looking at actual organizational document ('public organic record')
  - o Effect of *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694 (1<sup>st</sup> Cir. 2019)?



## Financing statement: name of registered organization

- *In re Patriot Electric and Mechanical, Inc.*, 2014 Bankr. Lexis 1962 (Bankr. D. Md. 2014) (State search logic stated ‘enter as much or as little of the debtor name: so long as you start at the beginning.’; financing statement had the beginning of the debtor name but failed to include entire debtor name, so filing will be found if partial name entered; filing against incorrect name not sufficient)



## Financing statement: individual's name

- Alternative A (waterfall) or Alternative B (safe harbor):
  - o Driver's license (or other state ID from same office) from state of filing
  - o 'Name'
  - o First personal name and surname
- No guidance on what is 'first personal name' and 'surname'

## Financing statement – trusts

- Common law trusts
  - Use name of trust (if it has one) for ‘debtor’s’ name (§ 9-503(a)(3))
- Business trusts – usually a ‘registered organization’ (§ 9-102(a)(71))



## Financing statement: put the debtor's name in the right field

- *In re Voboril*, 568 B.R. 797 (Bankr. E.D.Wis. 2017) (Financing statement was insufficient where the secured party put the individual debtor's name in the field for an organization's name; a search using the filing office's standard search logic would not disclose the financing statement)
- *Bailey v. Rose*, 2019 WL 2710209 (Cal. Ct. App. 2019) (Financing statement not sufficient where individual's surname put in first given name field and first given name put in surname field)

# Financing statement – examples of debtor name mistakes

Debtor name	Mistaken financing statement
C. W. Mining Company	CW Mining Company
EDM Corporation	EDM Corporation d/b/a EDM Equipment
Michael Erwin	Mike Erwin
Terrance Joseph Kinderknecht	Terry J. Kinderknecht
Rodger House	Roger House
Michael Barry	Mike Barry
Andrew Fuell	Andrew Fuel
Silver Dollar, LLC	Silver Dollar Stores, LLC
Jim Ross Tires, Inc.	Jim Ross Tire Inc.



## Financing statement – secured party's name

- OK to name 'representative' of secured party (§ 9-502(a)(2))
- Do not have to indicate representative status (§ 9-503(d))
- Less stringent rules as to getting secured party's name exactly right (§ 9-506, Comment 2)



## Financing statement – 'indication' of collateral

- OK if would satisfy security agreement (§ 9-504(1))
- May use 'all assets' as 'indication' (§ 9-504(a)(2))
- *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694 (1<sup>st</sup> Cir. 2019) (financing statement itself must contain reasonable identification of collateral);
- *In re 180 Equip., LLC*, 938 F.3d 866 (7th Cir. 2019) (indication of collateral in financing statement may refer to unattached document)



## Financing statement – trusts

- Common law trusts
  - o Trustee is usually the ‘debtor’ as under trust law trustee usually ‘owns’ the collateral
    - File at location of trustee
  - o But, as noted above use name of trust (if it has one) for ‘debtor’s’ name (§ 9-503(a)(3))
- Business trusts – usually a ‘registered organization’ (§ 9-102(a)(71))

## Financing statement – fixtures

- Perfect either by:
  - ‘Fixture filing’ in real estate records in state where fixtures are located (§ 9-301(3)(A), 9-501(a)(1)(B)), or
  - Central UCC filing at location of debtor
- ‘Fixture filing’ gives some priority benefits against real estate interests (§ 9-334(d) and (e))



## Financing statement – agricultural liens

- File in state where farm products are located (§ 9-302)
- File centrally in that state (§ 9-501)



## Financing statement – transmitting utilities

- For a fixture filing, file in *each* state where fixtures are located (§ 9-301(3)(A))
  - o File *centrally* (§ 9-501(b))
  - o Filing also constitutes a fixture filing
- Also file at location of debtor for a non-  
fixture filing (still perfects in fixtures,  
but not as a ‘fixture filing’)



## Financing statement – amendments (§ 9-512)

- Add or delete collateral
- Change other information
- Assign financing statement
- Continue
- Terminate



## Financing statement – effect of post-closing events

- Change in debtor's name (§ 9-507(c))
  - *In re Wastetech, LLC*, 605 B.R. 264 (Bankr. N.D. Ga. 2019) (name change *before* filing of financing statement not entitled to 4-month grace period)
- Debtor becomes located in different jurisdiction (§ 9-316(a)(2))
- Collateral transferred to a different debtor
  - Same jurisdiction (§§ 9-315(a)(1) + 9-507(a))
  - Different jurisdiction (§ 9-316(a)(3))



## Financing statement amendments – authorization (§ 9-509)

- Need for authorization
- Who is ‘debtor’
- Role of agency law (*see below*)

## Financing statement – amendments – mistakes

- *In re Northern Beef Packers Ltd.*  
*Partnership Tax ID/EIN 26-2530200*, 83  
U.C.C. Rep. Serv. 2d 104 (Bankr. D.S.D.  
2014) (Blanket security interest in the  
debtor's assets became unperfected  
when the lessor amended its financing  
statement to 'restate' the collateral to  
consist *only* of the equipment covered  
now or in the future by a lease or  
security agreement between it and the  
debtor)



## Effect of agency law

- *In re The Adoni Group, Inc.*, 2015 WL 2080521 (Bankr. S.D.N.Y. 2015) (Debtor can ratify earlier, unauthorized filing of a financing statement)
- *In re Motors Liquidation Co.*, 777 F.3d 100 (2d Cir. 2015) (Secured party had accidentally authorized filing of termination statement)



## Effect of agency law

- *Fjellin ex rel. Leonard Van Liew Living Trust v. Penning*, 2014 WL 4298053 (D. Neb. 2014) (Termination statement filed without the knowledge or consent of the secured parties by the law firm representing the debtor was ineffective)
- *In re Wheeler*, 2017 WL 6568758 (Bankr. W.D. Ky. 2017) (Perfectured security interest became unperfected when the secured party mistakenly filed a termination statement, even though 10 minutes later the secured party attempted to amend the termination by adding itself as the secured party; although the termination might have been inadvertent, it was authorized because it was filed by a loan processor of the bank that handles financing statements)



## Effect of bankruptcy

- *In re Colony Beach and Tennis Club, Inc.*, 508 B.R. 468 (Bankr. M.D. Fla. 2014) (Post-petition lapse of financing statement did not cause the secured party to lose its lien or make the lien avoidable under Bankruptcy Code § 544(a) because lapse makes the security interest retroactively unperfected only against purchasers, not lien creditors)



# Searching

- Be sure to use standard search logic
- Search the ‘right’ name(s)
  - Effect of *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694 (1<sup>st</sup> Cir. 2019)?
- Search in right state
- Note effect of proceeds rules on what to look for in collateral indication (§ 9-322(b)(1))



# Searching

- Note effect of filings against prior owners
  - Filing generally remains effective if buyer not a buyer in ordinary course of business
- Fixture
  - Search against debtor at its location
  - Search fixture filings at location of fixtures



## Non-uniform amendments

- New Jersey requirements
- Abusive filings



## Filing and superpriority

- Investment property (§§ 9-328 + 9-331)
- Chattel paper (§ 9-330)
- Instruments (§§ 9-330 + 9-331)
- Documents (§ 9-312(c))
- Letter-of-credit rights (§ 9-329)
- Deposit accounts (as proceeds) (§9-327)
- Money (as proceeds) (§ 9-332)