

community BANKER

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Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

Community Banker
c/o Olson & Burns P.C.
P.O. Box 1180
Minot, ND 58702-1180

olsonpc@minotlaw.com
Also, visit our web site at:
www.minotlaw.com

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OLSON & BURNS P.C.

17 FIRST AVENUE S.E. • P.O. BOX 1180 • MINOT, NORTH DAKOTA 58702-1180
TELEPHONE (701) 839-1740 • FACSIMILE (701) 838-5315 • E-MAIL: olsonpc@minotlaw.com

REVISITING THE BASICS – DEBTOR NAMES ON UCC FINANCING STATEMENTS

The question of “what’s the correct debtor name?” still comes up regularly. The purpose of a UCC financing statement is to provide notice of claimed security interests which, of course, turns on whether an interested party can *locate* the record. Filing office search systems retrieve UCC records by debtor name using state-specific “search logic.” Any error, omission, or variation in the debtor name can prevent a searcher from finding a filing. N.D.C.C. § 41-09-74 (UCC § 9-503) lays out the rules for names of different types of debtors, but names are not always clear. Unfortunately, there are harsh consequences for the secured party when a financing statement does not comply with the debtor name rules and it is not located in a search.

For a registered organization debtor (*i.e.* a corporation, LLC, PLLC) the financing statement must provide the organization name provided in the “public organic record.” For an individual debtor, the financing statement must provide the name on the debtor’s driver’s license or other permitted identification card. Areas of uncertainty exist, however. For example, it’s not always clear what name to use when the security interest is granted by the series of an entity, the collateral is held in a trust or administered by a decedent’s personal representative, or the debtor doesn’t actually *have* a name.



There is one exception to the rule that a financing statement that fails to sufficiently provide the debtor name under N.D.C.C. § 41-09-74 (UCC § 9-503) will render the financing statement seriously misleading and not effective. The exception occurs when a search of the filing office records on the *correct* name of the debtor, using the jurisdiction’s search logic, discloses the record. *See* N.D.C.C. § 41-09-77. In that case, the “insufficient” or wrong debtor name does not render the financing statement seriously misleading because the search logic happened to catch the filing. This is a happy accident and lenders shouldn’t rely on a fluke catch. The search logic used by most jurisdictions may disregard minor variations in punctuation, a leading “the”, and

spacing, but even these general search logic quirks are different state to state.

Permit us to scare you with a UCC filing horror story. The bubblegum company Double Bubble, Ltd., objected to its classification as an unsecured creditor in a receivership action. It claimed that it perfected its security interest by filing a UCC financing statement, so the receiver should classify it as a *secured* creditor. The receiver classified Double Bubble as an unsecured creditor because its financing statement did not turn up in the records when he searched for financing statements using “ISC, Inc.” as the debtor organization. As it turns out, Double Bubble filed its financing statement listing “ISC, Inc.” as the debtor, with a space between the final “c” and the “.” The extra space was a simple typo, but it prevented the Double Bubble financing statement from showing up on a search of the accurate legal name of ISC, Inc. Because of the search logic used in Wisconsin, the extra space prevented the Double Bubble financing statement from coming up in a search using ISC's correct legal name.

The court was sympathetic to Double Bubble, noting that the additional space would be easy to overlook even if one were careful in filing the financing statement. It also agreed with Double Bubble that the receiver could have found its financing statement if he had used a different search, say a search simply for “ISC” with no punctuation or corporate designation. However, the space between the “c” and the “.” (“Inc .”) made this particular filing “seriously misleading” because it didn’t turn up in the receiver’s search. “Seriously misleading” is a term of art with a statutorily defined meaning: a search “under the debtor’s correct name” must find the financing statement, otherwise it is seriously misleading. Unlucky Double Bubble had to participate in the receivership as an unsecured creditor. *See United States Sec. & Exch. Comm’n v. ISC, Inc.*, No. 15-CV-45-JDP, 2017 WL 3736796, at *1–2 (W.D. Wis. Aug. 30, 2017).

Individual Debtor Names

Happily, determining the correct name of an individual debtor is a bit easier. Generally, the financing statement must provide the name indicated on the debtor’s driver’s license or identity card that has not expired. N.D.C.C. § 41-09-74(1)(d). However, there are still dangers – what is the procedure if the debtor lacks the specified identification documents? What if it’s an unusual name and you aren’t sure which is the first name and which is the last name? (Ask.)

Organizations and Series-of-Entities Debtor Names

If the debtor is a registered organization, the financing statement must provide the name stated to be the name of the organization in the public organic record. “Public organic record” is defined in N.D.C.C. § 41-09-02(1)(vvv) and is generally the formation documents filed with the North Dakota Secretary of State. Other public records, such as tax returns, certificates of good standing, and other official sources might contain multiple variations of an entity’s name. These records are *not* the proper source of the name, so don’t rely on any of these.

You may also run into questions regarding what name to provide on the financing statement for a relatively new type of debtor, the “series” of an entity. N.D.C.C § 10-32.1-102 allows for the creation of the series LLC structure, which is a collection of LLCs that are grouped under one parent LLC. Generally, this enables businesses to separate different parts of the company into separate LLCs, allowing them to isolate the liabilities of each segment from the others. There is uncertainty regarding what name to provide for the debtor when the security interest is granted by the series of an entity. Right now, the law does not appear to require filing with the North Dakota Secretary of State to create a series, though the statute has a provision permitting the Secretary of State to adopt rules reasonable and necessary to address requirements related registration. N.D. C.C. § 10-32.1-102(14). UCC filers should take great care with series to determine what debtor name is correct for a series debtor and list that name *and* any possibly-correct names as separate debtors on the financing statement.

Other Types of Debtors and Their Confusing Names

The debtor-types discussed above are the most common, but there are other types of debtors. What if the collateral is held in a trust? What if the collateral is administered by a decedent’s personal representative? The debtor name requirements are not always obvious, which can lead to mistakes. Do you know what to do if your debtor doesn’t have a name. That crops up with an unnamed entity (such as a general partnership

between the two farming brothers that has never been given a name). If the debtor does not have a name, the financing statement sufficiently provides the name of the debtor “only if the financing statement provides the names of the partners, members, associates, or other persons comprising the debtor, in a manner that each name provided would be sufficient if the person named were the debtor.” N.D.C.C. § 41-09-74(1)(f)(2).

The Ultimate Point

Our point here is that strict compliance with the debtor name rules in the UCC are *always* important and are worth getting it right. Whoever has the job of filing the UCC records should provide the name required by N.D.C.C. § 41-09-74 exactly as it appears on the designated source document, including matching the spelling, the spacing, and the punctuation. If there’s any doubt as to what the statute requires for the correct name, the filer should provide one or more name variations in the filing or in a separate filing to ensure that whatever name a court might later decide is actually the correct name will be one that’s located somewhere on the bank’s financing statement.