



## COMMERCIAL LENDING ALERT

### GETTING THE DEBTOR'S NAME RIGHT ON UCC FINANCING STATEMENTS

June 2007

#### Security Interest Perfection

A security interest in most personal property is perfected under Article 9 of the Uniform Commercial Code by filing an initial "financing statement" in the filing office in the state where the debtor is "located." When the debtor is a "registered organization," such as a corporation, limited partnership or limited liability company, the "location" of the debtor is the state in which the debtor is organized. The filing office in that state is normally the secretary of state, but the UCC of each state should be checked to confirm that the financing statement is being filed in the proper office.

Among the requirements for a properly prepared financing statement is to include "the name of the debtor." UCC § 9-502(a)(1). For a registered organization, the name of the debtor is "... the name of the debtor indicated on the public record of the debtor's jurisdiction of organization ...." UCC § 9-503(a)(1).

#### Getting the Debtor's Name Right

Why is getting the name exactly right so important? Financing statements are indexed in filing offices by the debtor's name. Revised UCC Article 9 places the burden on the lender to use the exact legal name of a registered organization. If a subsequent proposed lender (or the dreaded trustee in bankruptcy) searches the records of the filing office under the debtor's exact name, using the UCC filing office's "standard search logic," and does not find the previously-filed financing statement because the name of the debtor on that financing statement isn't precisely correct, the prior-filed financing statement is deemed "seriously misleading" and will not protect the priority of the first lender's security interest against a security interest perfected by a subsequent UCC filing under the exact name.

The "public record" of a debtor's jurisdiction is NOT the listing on the website of the secretary of state or even the name included on a good standing certificate issued by a filing office. Rather, it is the name appearing in the registered organization's articles of incorporation, articles of limited partnership or articles of organization on file with the state of its organization, including punctuation and the proper "suffix" (e.g., "Inc.," "Ltd.," "LLC"). In light of the ability of a lender to access the "public record" of the name of a registered organization and get the name right, there should be little excuse for not doing so.

#### Two Case Studies

Two recent cases highlight the importance of getting the name of the debtor right on a UCC financing statement, although in each case, as will be indicated below, the errors in listing the name of the debtor probably would not have been fatal for a filing with the Missouri Secretary of State.

In a recent case, a financing statement filed with the Virginia central UCC filing office listed the debtor's name as "Tyringham Holdings." The debtor was a Virginia corporation and was listed as "Tyringham Holdings, Inc." on the public records of the Virginia State Corporation Commission (the central filing office for registering corporations in Virginia). In a bankruptcy proceeding, the committee of unsecured creditors for the debtor obtained an official UCC search from the Virginia State Corporation Commission, utilizing the state's standard search logic, under the official name of the debtor. The search did not reveal the prior-filed financing statement, which therefore was held to be seriously misleading and not effective to perfect the lender's security interest, resulting in the lender becoming an unsecured creditor. In re Tyringham Holdings, Inc., 354 B.R. 363 (Bankr. E.D.Va. 2006).

In a case involving the Utah UCC central filing office, a debtor obtained financing from a financial institution which, in turn, filed a financing statement with the Utah Secretary of State listing the debtor as “K W M Electronics Corporation.” Subsequently, a party who had acquired prior debt of the debtor filed a financing statement listing the debtor by the official name in the public records of the Utah Secretary of State, “K.W.M. Electronics Corporation.” The United States District Court for the District of Utah, applying the Utah UCC, held that the prior-filed financing statement was seriously misleading because a search of the state’s records, conducted using the filing office’s standard search logic, did not reveal the prior-filed financing statement. Under that test from the UCC, the prior-filed financing statement was not effective to perfect a security interest. Host America Corporation v. Consulting Financial Corporation, 60 UCC Rep. Serv. 2d 120 (D. Utah. 2006).

### Missouri UCC Search Logic

Although these holdings appear harsh, they are correct under Revised Article 9 of the UCC. The source of the problem for the above two cases (in addition to the lenders’ inattention to detail) was the rigidity of the official search logic used by Virginia and Utah, which did not disregard “noise words,” punctuation or spacing.

Missouri, along with most other states, has adopted a search logic that disregards punctuation marks and also words and abbreviations at the end of a name that indicate the existence or nature of the organization (e.g., “company,” “corporation,” “incorporated,”

“limited,” “limited partnership,” “limited liability company,” and their abbreviations). Those words are called “ending noise words.” Further, all spaces in a name are disregarded and the words “a” and “the” at the beginning of a name are also disregarded. Under that more flexible search logic, the prior filings in both of the above-described cases would likely have been found, would not have been determined to be seriously misleading and therefore would have been effective to perfect the desired security interests.

### The Proper Procedure

What to do? In order to determine the proper name to include in a UCC financing statement, always obtain a copy of the “public record” showing the name of a debtor that is a registered organization, which means the actual organizational document, and all amendments thereto, showing the organization’s name, and not simply a computer search of listings on the website of a secretary of state or even a good standing certificate, which could contain errors in transmission of the name from the public record to the good standing certificate. Taking such an approach will comply with the “name” requirements under Article 9 of the UCC, even in states whose official UCC financing statement search logic is not as flexible as Missouri’s.

Revised Article 9 of the UCC has placed the burden on the financing statement filer to get the debtor’s name right. Failure to be meticulous in this regard could invalidate the perfection and priority of a security interest and relegate the unfortunate lender to the unenviable status of unsecured creditor.

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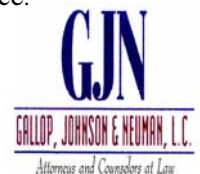
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