

EXACT NAME OF THE DEBTOR—WHAT’S IN A NAME?



THE ISSUE:

Because financing statements are indexed based on the debtor’s name, using the correct name of the debtor is central to the operation of “notice filing” under Article 9 of the Uniform Commercial Code. To be useful, the system must enable searchers to identify potentially conflicting security interests with a high degree of certainty. Revised Article 9 attempts to provide certainty by specifying when a financing statement “sufficiently” provides the name of the debtor (9-503(a)). It also sets forth the standard for when a financing statement is “seriously misleading” and therefore ineffective to perfect a security interest (9-506(b) and (c)).

Section 9-503 outlines when the name provided in a financing statement for organizations (registered and unregistered), estates, trusts or trustees, individuals and, oddly enough, debtors without a name, is “sufficient.” The consequence of failing sufficiently to provide the debtor’s name is that the financing statement will be “seriously misleading” as a matter of law (9-506(b)) and therefore ineffective to perfect a security interest (9-506(a)).

There is one exception to this rule: if a search of the records of the filing office under the debtor’s *correct* name, using the filing office’s “standard search logic,” would disclose a financing statement with an *incorrect* name, the financing statement is not seriously misleading. For the exception to apply two things must occur: (1) the searcher must use the “correct” name under the rules of 9-503(a) and (2) the financing statement with an incorrect name must be revealed using the filing office’s “standard search logic” In the age of computer searches, the “standard search logic” becomes critically

important—in most cases the computer search will reveal “exact matches” (subject to parameters of the search logic) and may exclude financing statements that a manual search might find with relative ease. The Nebraska Secretary of State’s Administrative Rules for searches are illustrative:

Search results are created by applying standardized search logic to the name presented to the filing officer by the person requesting the search. Human judgment does not play a role in determining the results of the search.

NAC-Title 436, Ch. 5, Sec. 502.1. Simply put, subject to some flexibility built into the search logic, the searcher will get exactly what is requested—nothing more.

Host America Corporation v. Coastal Financial, Inc. 2006 WL 1579614 (D. Utah), 60 UCC Rep.Serv.2d 120, illustrates the harsh results that may come about because of “search logic.” The financing statement on which Host relied listed the debtor as “K W M Electronics Corporation.” (spaces and no periods between “K W M”). The parties disagreed on the “correct “ name of the debtor—Host contending that it was “K. W. M. Electronics Corporation” (spaces between the periods) and Coastline contending that it was “K.W.M. Electronics Corporation” (*no* spaces between the periods). The court concluded that in any event, the correct name contained periods and applied the test of 9-506(c) –Would a search under the debtor’s correct name, using the filing office’s standard search logic, disclose the financing statement? The undisputed evidence revealed that the search logic in effect at the time would not have disclosed Host’s financing statement, and therefore the financing statement was “seriously misleading” and ineffective to perfect the security interest.

Points to Ponder: Search Logic

- **Nebraska Administrative Code.** *A copy of Title 436, Chapter 5—Search Requests and Reports –of the Nebraska Administrative Code is included in the Appendix. Some of the “rules”:*
 - *The standard search logic will not distinguish between upper and lowercase letters and will disregard: (1) punctuation marks and accents, (2) “ending noise words” such as “company,” “limited,” “incorporated” or abbreviations thereof; (3) the word “the” at the beginning of the search criteria; and (4) spaces.*
 - *For first and middle names of individuals, initials are equated with **all** names beginning with such initials (e.g., a search for “F. Lee Bailey” would reveal “Francis Lee Bailey” as well as “Fred Lee Bailey”).*
 - *No middle name or initial is equated with **all** middle names and initials (e.g., “F. Bailey” would reveal “Francis Lee Bailey,” “Francis Robert Bailey” and “Francis R. Bailey”).*
- **“Wild Card” Search Logic.** *In addition to the “standard search logic” the Nebraska Secretary of State employs a “wild card” search logic for **non-UCC liens** which is more flexible (e.g., root words may be used as can abbreviations such as “mfg” for “manufacturing”). The Official Comments make it clear, however, that even if a financing statement would be revealed by use of this more flexible logic, the financing statement will be “seriously misleading” if the financing statement would not have been revealed using the standard search logic. 9-506 Comment 2.*
- **Misspellings.** *Misspellings may be fatal. In Pankratz Implement Company v. Citizens National Bank, 281 Kan. 209, 130P.3d 57 (2006), the debtor’s name was “**Rodger** House.” The financing statement misspelled the name as “**Roger** House.” The Kansas standard search logic using the correct name did not reveal the incorrect filing, and the financing statement was deemed seriously misleading.*

THE “RULES”:

Revised Article 9 in Section 9-503 attempts to provide “bright-line” rules for determining the sufficiency a debtor’s name provided in a financing statement and also contains clarification regarding the use of trade names.

Registered Organizations

A financing statement sufficiently provides the name of a “registered organization” *only* if the name of the organization indicated on the public record of the jurisdiction in which the debtor is organized (9-503(a)(1)). The rule is clear: whether a filer or a searcher, refer to the organization’s organizational document as filed in the public record and use the name *exactly* as it appears on that document. If “Acme Tool Manufacturing Incorporated” is the name on the public record, variations such as “Acme Tool Mfg. Inc.” or “Acme Manufacturing” are not acceptable.

“Registered organization” is a defined term (9-102(a)(70)) and is limited to organizations for which a state (or the United States) is *required* to maintain a public record showing the organization to have been organized. The term would include corporations, limited liability companies and limited partnerships. It would *not* include a general partnership because states are not required to maintain a public showing that the partnership has been organized.

Points to Ponder—Registered Organizations

- **General Partnerships.** *The Official Comments make it clear that a general partnership is not a “registered organization” even if the partnership files an assumed name certificate [Neb. Rev. Stat. 67-101, terminated January 1, 2001] or a statement of partnership authority [Neb. Rev. Stat. Sec. 67-415]. (Official Comment 11 to 9-102)*
- **Is a limited liability partnership a registered organization?** *Probably not. A limited liability partnership is a general partnership that must file a “statement of qualification” in the office of the Secretary of State to become a limited liability partnership. The partnership is not required to file to evidence of its existence as a **partnership**. The filing is only necessary to take advantage of the limited liability provisions. In any event, the name of the partnership set forth in the filing would be the best evidence of the “name” of the partnership.*

Other Organization

The term “organization” is broadly defined at 1-201(28) to include a:

corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

Of these, corporations, business trusts, limited liability companies would be “registered organizations” subject to 9-503(a)(1). Decedent’s estates and common law trusts are subject to special rules set forth at 9-503(a)(2) and (3). All other “organizations” are subject to the catch-all rule of 9-503(a)(4) for debtors *with* names (9-504(a)(4)(A)) and debtors *without* names (9-504(a)(4)(B)). If an organizational debtor has a “name,” 9-503(a)(4)(A) provides, somewhat circularly, that a financing statement sufficiently provides the name of the debtor “only if it provides the . . . organizational name of the debtor.” If the organization does *not* have a name, the financing statement sufficiently provides the name of the debtor “only if it provides the names of the partners, members, associates, or other persons comprising the debtor.” 9-503(a)(4)(B).

Points to Ponder—Organizations

- **Partnerships.** *Partnerships will no doubt be the most commonly encountered non-registered organization. If the partnership has a name, it would be established by the agreement of the partners. Note that under the Uniform Partnership Act of 1998, the “partnership agreement” may be “written, oral, or implied.” (Neb. Rev. Stat. Sec. 67-402(7)). To avoid confusion, the partnership agreement (hopefully written) should be consulted to determine whether the partnership has a “name” and if so, a certification of the partnership name would be appropriate.*
- **Partnership Statements.** *Nebraska no longer requires a partnership to record a certificate showing the firm name (Neb. Rev. Stat. Sections 67-101 to 67-105 terminated January 1, 2001. Partnerships may file a “statement of authority” with the Secretary of State which would include the name of the partnership. Neb. Rev. Stat. Sec. 67-415(1)(a)(i).*

Individuals (including individuals doing business as a sole proprietorship)

Revised Article 9 fails to provide a “bright line” rule determining the correct name of an individual debtor. Section 9-503(a) provides: “A financing statement sufficiently provides the name of [a debtor that is an individual] . . . only if it provides the individual . . . name of the debtor.” There is no definition of, or reference to, the appropriate source for determining an individual’s name (although official forms and the Nebraska Administrative Code contain references to “exact full legal name” (UCC-1 Financing Statement); “exact legal name” (UCC-11 Information Request); and “full correct name” (NAC Sec. 501.1)).

So what is an individual’s “correct” or “legal” name? Is it the full name on the birth certificate, or would first name, middle initial and surname (as on a driver’s license) suffice? The variations on this theme are endless.

One thing is clear: nicknames (unless, for example, “Bill” and not “William,” is on one’s birth certificate) are to be avoided. The recent case of *In re Borden*, 353 B.R. 886 (D. Neb.), *affm’d* 2007 WL 2407032 (U. S. Dist. Ct., D. Neb. August 20, 2007), is instructive. In that case Genoa National Bank perfected its blanket security interest in the debtor’s personal property by filing a financing statement under the name “Michael R. Borden.” Southwest Implement, Inc. claimed a security interest in two items of equipment and filed a financing statement under the name “Mike Borden.” The bank argued that Southwest’s security interest was unperfected because the financing statement using the name “Mike Borden” was “seriously misleading” under 9-506(b) and therefore not effective to perfect Southwest’s security interest under 9-506(a). The court

concluded the debtor's "legal name" was "Michael Ray Borden" although the debtor often signed legal documents as "Mike Borden" and was commonly known as "Mike." A search under "Michael R. Borden," using the Secretary of State's standard search logic, failed to disclose Southwest's financing statement. Therefore, the exception under 9-506(c) was not available to save the filing. *See also, In re Kinderknecht*, 308 B.R. 71 (10th Cir. BAP 2004) (legal name "Terrance Joseph Kindekrnecht"; filing as "Terry J. Kinderknecht" seriously misleading).

Revised Article 9 confirms the rule that a sole proprietorship is not an entity separate from the individual. Filing *must* be accomplished using the name of the individual under the rule of 9-503(a)(4)(A) and a financing statement providing only a debtor's trade name will be ineffective. 9-503(c).

Points to Ponder—Individuals

- ***Can a debtor have more than one "correct" name?*** According to cases such as *Borden and Kinderknecht*, and 9-503(a)(4)(A), probably not. An old Nebraska case, *Fidelity & Deposit Co. v. Bodenstedt*, 170 Neb. 799, 104 N.W.2d 292 (1960), sets forth the following: "In general, . . . a person, without abandoning his real name, may adopt or assume any name, wholly or partly different from his name, by which he may become known, and by which he may transact business, execute contracts, and carry on his affairs, unless he does so in order to defraud others" (quoting 65 C.J.S., *Names*, Sec. 9). There, a man whose birth name was "Fred Clair Clay" used the name of his grandfather "Fred C. Jarvis" in purchasing a car. Fred had lived with his grandfather since birth and had used the name "Fred C. Jarvis" since childhood. Under these rather unusual facts, and without a clear rule, there should at least be question of what Fred's "correct" name was.
- ***What is the "correct" name of "Jane Doe" who assumes the name "Jane Smith" upon her marriage to Joe Smith?*** What is the interplay of 9-507(c)—a debtor that changes "its" name so that the financing statement becomes seriously misleading? For example, Jane Doe operated a business as a sole proprietorship and granted Lender a security interest in the accounts receivable. The security interest was properly perfected by a financing statement providing the debtor's name as "Jane Doe." Jane marries Joe March 1 and assumes the name "Jane Smith." Under 9-506(c) the financing statement will be "seriously misleading"

because a search for “Jane Smith” (assuming this is now the debtor’s “correct” or “legal” name) will not reveal the earlier statement. The financing statement would not be effective to perfect the security interest in receivables acquired after July 1 (four months after the name change) **unless** an amendment is filed **within four months after the change** (9-507(c)(2)).

- **Potential “safe harbor” provision.** At least one state (Texas) has adopted a “safe harbor” as a part of 9-503(a): A financing statement sufficiently provides the name of an individual debtor “if the financing statement provides the individual’s name shown on the individual’s driver’s license or identification certificate issued by the individual’s state of residence.” Tex. Stat. Ann. Sec. 9.503(a)(4).
- **Does one have to be actually “misled” by a “seriously misleading” financing statement?** The Borden case illustrates that actual reliance is not required. If the financing statement is misleading under the test of 9-506(c) it is ineffective to perfect a security interest. In Borden the later filed financing statement evidenced a purchase money security interest which, if properly perfected, would have priority over the bank’s earlier perfected security interest under 9-324(a). Because it was determined to be misleading, and therefore not perfected, it lost its priority.

Decedent’s Estates

If the debtor is a decedent’s estate, the name in the financing statement is sufficient *only* if it (1) provides the name of the decedent and (2) indicates that the debtor is an estate (9-503(a)(2)).

Points to Ponder—Decedent’s Estates

- **How does the Personal Representative fit in?** Under Nebraska law it is the personal representative who has the power to borrow money and encumber estate assets. Neb. Rev. Stat. Sec. 30-2476(16) and (23). Is the “debtor” for purposes of the financing statement the “estate” or the personal representative? For purposes of the UCC the “debtor” is a “person” who has an interest in the collateral. 9-102(28) A “person” includes an “organization,” and an estate is an “organization.” 1-201(30) and 1-201(28). It is clear, therefore, that an “estate” can be the “debtor.”
- **What name should a searcher use?** Under 9-503(2) an estate debtor could be correctly identified in several ways, such as “Estate of John Doe” or “John Doe Estate” or “Estate of John Doe, Deceased.” The filing office will enter the name

as an “organization” exactly as it appears on the UCC-1 (NAC Sec. 407). Searchers would be well advised to make multiple, broad based searches.

Trusts and Trustees

If the debtor is a trust (other than a business trust, which would likely be a registered organization) or a trustee, the name in the financing statement is sufficient *only* if it (1) provides the name of the trust (as set forth in the trust document), or if no name is specified, the name of the settlor along with other distinguishing information and (2) indicates (in the debtor’s name or otherwise) that the debtor is a trust or trustee (9-503(a)(3)).

It is generally recognized that a “trust” is not a legal entity distinct from the trustee, but rather refers to a fiduciary relationship. *See* Restatement (Third) of Trusts, Sec. 2 and Comment *a*. However, for the purposes of providing the debtor’s name in a financing statement, the distinction is one without a difference because the rule is the same for both a “trust” and a “trustee”. If the trust document contains a name, the name *must* be included even if the debtor is the trustee.

Points to Ponder—Trusts and Trustees

- ***What is the correct way to request a search for a trustee?*** *For example, a security agreement is signed “John Doe, Trustee of John Doe Living Trust” and the debtor’s name in the financing statement is set forth as “John Doe Living Trust, John Doe, Trustee.” The financing statement meets the requirements of 9-503(a)(3). However, a financing statement could also correctly provide the name of the debtor as “John Doe, Trustee of the John Doe Living Trust” or possibly “Doe, John, Trustee of the John Doe Living Trust.” The filing office will enter the name exactly as set forth on the form. NAC Sec. 407. The format of the UCC-11 Information Request form provides different formats for individuals and organizations. A “trust” is an “organization” (1-201(28)); a “trustee” is an individual. A subsequent searcher would be well advised to make multiple, broad based searches.*

SEARCHES

In theory, Revised Article 9 provides the searcher with certainty by providing bright line rules for determining the correct debtor's name. By following the rules of 9-503 a searcher should only be required to search the "correct" name. If a search using the debtor's correct name and the filing office's standard search logic fails to reveal a deficient financing statement, the searcher wins and the filer loses. In the case of debtor's that are registered organizations the theory holds. Both filers and searchers have an easily accessible source for determining the debtor's only correct name. However, in other cases, searchers (and filers for that matter) have some degree of risk. There may be more than one "correct" name for a decedent's estate or a trust (and possibly an individual) and there is always the chance that a filer or searcher will run afoul of the filing office rules and standard search logic.

The goal of the searcher should not be a search that will win in court, but rather a search that will reveal relevant information about the potential debtor. As one commentator has observed, legal compliance is not due diligence:

[A searcher] must go beyond mere legal compliance, beyond mere standard search logic, and put on [as under pre-Revision Article 9] the hat of the reasonably diligent searcher if you want to conduct reasonable due diligence regarding possible liens noted on the public record, effective or not.

UCC Searching after July 1, 2006, CT Corporation and Carl R. Ernst (2006) [Internet Search].

Because of the foregoing, searchers are encouraged to conduct broad based searches that would reveal deficient financing statements (for example, a Nebraska search using only an individual debtor's last name will reveal all debtors with that last name).

While a narrow search using what is ultimately determined to be the debtor's correct name may win the day under 9-506(c), considered (and possibly multiple) searches may avoid problems in the future.

APPENDIX

The following materials are attached:

1. Chapter 5—Search Requests and Reports, Nebraska Administrative Code, Title 436
2. Form UCC-1--Financing Statement
3. Form UCC-11—National Information Request
4. Nebraska Secretary of State's Search Instructions
5. Nebraska Secretary of State, Memorandum "*Changes to Secretary of State's UCC Central Filing System*"