

Debtor Name Changes Under UCC Article 9:

The Importance of Keeping Financing Statements Current and Accurate



by Mary B. Cowan, President NCS, in collaboration with:

Professor Margit Livingston, DePaul University College of Law

Introduction

As all secured creditors know, maintaining perfection of their security interests is essential to ensuring priority over other claimants and to the survival of their interests in bankruptcy. The most common method of perfection under U.C.C. Article 9 is the filing of a financing statement in the appropriate public record. U.C.C. § 9-310 (a) (Official Text 2013). In filing a financing statement, the secured party (SP) must provide all of the required information on the document and also file it in the correct location. See U.C.C. §§ 9-301 (1), 9-501, 9-502, 9-516 (b). But even if the secured party performs all of those initial steps correctly, post-filing events can cause a financing statement to become ineffective and can result in loss of perfection. In particular, post-filing changes in the debtor's name can invalidate the financing statement with respect to certain collateral, so it is critically important to know the rules in this area. See *Gugino v. Wells Fargo Bank Northwest, N.A. (In re Lifestyle Home Furnishings, LLC)*, 2010 Bankr. LEXIS 111 (Bankr. D. Idaho Jan. 14, 2010).

Non-Jurisdiction Changes

Debtor Name Change

We will first consider what happens if a simple name change occurs and the debtor does not relocate to another state. U.C.C. § 9-507 (b), (c). Suppose, for example, that the debtor, Acme Florists, a general partnership, is located for Article 9 purposes in Ohio. The creditor, SP, files a financing statement to perfect its security interest in Acme's inventory and equipment in Ohio on February 1, 2014, and lists the debtor as "Acme Florists," which is the debtor's legal partnership name. On June 1, 2015, the debtor changes its name to "Ace Flowers." Under U.C.C. Article 9, a significant name change triggers the need for the secured party to file an amendment to the existing financing statement to reflect the debtor's new name. SP should follow several steps in this regard:

- SP must determine whether the name change renders the filed financing statement seriously misleading. U.C.C. § 9-507 (c).
- A filed financing statement is seriously misleading if a search of the official filing office database under the debtor's correct name would not disclose the financing statement with the incorrect name. U.C.C. §§ 9-506 (b), (c). Thus, SP could conduct a search in the Ohio central filing office under the debtor's new name, "Ace Flowers," and see whether the original financing statement listing the debtor as "Acme Florists," would be disclosed. Given the extent of the name change in this hypothetical and the relative rigidity of most filing offices' search logic, it is highly unlikely that such a search would reveal the original financing statement.

- Having concluded that a significant name change has occurred, the secured party should file an amendment to the original financing statement to reflect the debtor's new name. Filing an amendment to reflect a debtor name change does not require the debtor's cooperation or permission; SP can proceed on its own. U.C.C. § 9-509 (d). It is important to file an amendment **within the four-month grace period**, rather than a new financing statement, because SP will want to preserve its original priority date of February 1, 2014. U.C.C. § 9-514 (a).
- SP should be aware that the name change will not affect its perfection in all of the collateral. Under Article 9, SP's security interest will remain perfected indefinitely in all collateral acquired by the debtor before the name change and within four months thereafter. U.C.C. § 9-507 (b). Thus, for debtor's equipment and inventory in existence on June 1, 2015, when the name change occurred, SP's security interest will remain perfected until the end of the five-year effective period for the original financing statement (and beyond if SP files a continuation statement). The same is true for collateral acquired by debtor within four months after the name change (until October 1, 2015).
- For collateral acquired by debtor **more than four months after the name change** (from October 1, 2015 on), SP's security interest will cease to be perfected unless SP has updated the original financing statement to reflect the name change. U.C.C. § 9-507 (c)(2); *Broyhill Furniture Industries, Inc. v Hudson Furniture Galleries, LLC*, 2008 N.Y. Misc. LEXIS 8290 (N.Y. Sup. Ct. Feb. 28, 2008). This rule, of course, affects security interests in collateral that "turns over," such as inventory and accounts much more than those in more static collateral, such as equipment. To cover all bases, SP should consider filing both an amendment to the original financing, within the four-month grace period, and a new financing statement—the latter in case the amendment is deemed untimely.

Debtor Name Change and Business Structure Change

Sometimes, in addition to changing its name, a debtor will also change its business form. Thus our debtor above, Acme Florists, might decide to incorporate and become “Ace Flowers, Inc.” under Ohio law. Or, debtor XYZ Corporation might merge with another corporation, ABC, Inc. With any of these changes in business form, the debtor will normally engage in an “all-in-the-family asset” or “all assets” transfer in which the debtor conveys all of its assets (e.g., inventory, accounts, equipment, general intangibles, etc.) to the successor entity. Under Article 9, the successor entity is considered a “new debtor” in most cases and is bound by the security agreement entered into by the original debtor. U.C.C. §§ 9-102 (a)(56), 9-203 (d), (e). In addition, the financing statement filed against the original debtor will continue to be effective indefinitely against the new debtor, unless new debtor has a significantly different name from the original debtor. U.C.C. § 9-508 (a). If the name of the new debtor would cause the original financing statement to become seriously misleading, the SP must refile in the new debtor’s name, within four months after the business form and name change, to have continuous, unbroken perfection in collateral acquired by the new debtor more than four months after the name change. U.C.C. § 9-508 (b).

- For example, if Acme Florists (a general partnership) becomes Acme Florists, Inc., (a registered corporation) and does an all-in-the-family asset transfer to the new corporation, SP would not need to amend its financing statement because the debtor did not undergo a name change that would render the original financing statement seriously misleading. See *Planned Furniture Promotions, Inc. v. Benjamin S. Youngblood, Inc.*, 374 F. Supp. 2d 1227 (M.D. Ga. 2005). Note that the same rules apply if Acme Florists sells its business to an unrelated corporation that happens to have the same name. As a precautionary matter, SP will want the successor entity to execute a new security agreement and authorize the filing of a new financing statement, but technically, Article 9 does not require those actions. In fact, Article 9 recognizes that unrelated successor entities have no incentive to cooperate with the secured party in executing new paperwork.

- But if Acme Florists becomes Ace Flowers, Inc., then the name change is undoubtedly significant and would require SP to amend its financing statement to reflect the name of the new debtor to preserve perfection in collateral acquired by Ace Flowers, Inc. more than four months after the name change. Assuming that the name change occurred on June 1, 2015, SP would have until October 1, 2015 to amend its financing statement.

- If SP did not amend its financing statement, it would still have indefinite perfection in collateral transferred by the original debtor to the new debtor and in collateral acquired by the new debtor from June 1 until October 1, 2015. U.C.C. §§ 9-507 (a), 9-508.

- **Caution:** In situations involving debtor name changes coupled with a change in business form, it is best for SP not to wait the full four months to amend its financing statement. A special Article 9 priority provision states that between two secured parties, the one that has filed a financing statement in the new debtor's name will have priority over the secured party that is relying upon continuation of perfection under the section 9-508 grace period. See U.C.C. § 9-326. Thus if in our hypothetical, Trade Creditor filed against Ace Flowers, Inc., on June 20, 2015 and SP filed on August 1, 2015 (within the four-month grace period), Trade Creditor would have priority over SP in the collateral acquired within the four-month period and beyond, even though SP's original financing statement dates back to February 1, 2014.

Jurisdiction Changes

Debtor Name Change

In the context of a simple name change, relocation of the debtor to another jurisdiction may or may not be involved. For example, Alice Adams changes her name to "Alice Miller," perhaps in the context of a marriage or divorce. It is possible, though unlikely, that she would also relocate to another jurisdiction at exactly the same time. Changes in the debtor's location do affect the effectiveness of financing statements. See U.C.C. § 9-316 (a)(2) (providing a four-month grace period for refile in the jurisdiction to which the debtor has relocated).

Debtor Name Change and Business Structure Change

On the other hand, debtors that undergo a change in business form along with a name change often move to another jurisdiction as a result. In our original hypothetical, Acme Florists was a general partnership located in Ohio for Article 9 purposes. If Acme decides to incorporate, it might choose corporation-friendly Delaware as its state of incorporation. As part of the changeover (which we assume again is June 1, 2015), Acme will transfer all of its assets to the newly formed corporation, which is named "Ace Flowers, Inc." Hence, our debtor has not only undergone a name change and a change in business form, but has also moved to another jurisdiction. A corporate debtor is deemed to be located in the state in which it is formed—here, Delaware. U.C.C. § 9-307 (e). In that situation, the rules governing debtor relocations apply under Article 9.

- With respect to the **collateral transferred** on the date of incorporation, **SP has one year to refile** under the new debtor's name. U.C.C. § 9-316 (a)(3). Therefore for the pieces of equipment and inventory, and the accounts transferred to Ace Flowers, Inc., SP would have one year from the date of the transfer to file in Delaware against Ace Flowers, Inc. to maintain continuous, unbroken perfection and, therefore, priority. Assuming incorporation took place on June 1, 2015, SP would have until June 1, 2016 to accomplish refiling.

- With respect to **collateral acquired after incorporation**, SP has four months to refile in the name of Ace Flowers, Inc. in Delaware. If SP fails to meet this deadline, it not only loses its perfection going forward from the end of the four-month period (namely, October 1, 2015), but also suffers loss of perfection all the way back to the time of its original filing on February 1, 2014 as against purchasers for value of the collateral. U.C.C. § 9-316 (i). Purchasers for value include other secured parties and buyers of the collateral. U.C.C. § 1-201 (b)(29), (30). Thus, if Trade Creditor had filed against Acme in Ohio subsequent to SP on September 1, 2014 and then had refiled against Ace in Delaware on June 20, 2015 (within four months after the debtor's move), Trade Creditor would become senior to SP if SP did not refile against Ace in Delaware by October 1, 2015. This rule operates in a much draconian way than the rule for name changes described above.

- **Caution:** As mentioned above, it is important that secured parties not rely on having the full four-month grace period in these situations. The same special priority rule described earlier also affects secured parties in interstate relocations of debtors. A secured party that perfects by filing in the name of the new debtor in the new state will have priority over a secured party relying on continuation of perfection under U.C.C. § 9-316 (i). See U.C.C. § 9-326 (a).

Tips for Secured Parties Facing Possible Debtor Name Changes

- Incentivize your debtor to keep you informed. In the security agreement, the debtor should agree to inform you of any planned name changes and/or relocations [specify number of days] in advance. Failure to do so should constitute a default, allowing the secured party to call in the debt.
- Examine the payments made by the debtor. If the debtor has been sending payment checks that reflect a certain name or address and that information changes, you should immediately contact the debtor for clarification.
- Every three months check the state corporate registry where your debtor is listed. A change of name or status will be indicated on the registry.
- Do not advance additional funds to the debtor beyond the original credit limit amount without verifying the debtor's current name, address, and business form.
- Partner with NCS. We specialize in corporate monitoring and will alert you to changes of a registered entity.

In sum, keeping track of debtor name changes, changes in business form, and changes in location can be challenging for secured parties. But it is well worth the effort: loss of perfected status is a prospect that no secured party wants to face.

About the Authors

Mary B. Cowan is the president at NCS where she also directs the UCC Services Group. Mary and her team offer companies customized solutions that fit their needs. The UCC Services Group oversees all aspects of perfecting your security interest, including corporate searches, filing preparation and submission, UCC searches, monitoring, archiving, auditing, continuations and terminations. If desired, NCS will carry through from start to finish, or assist for a specific step of the filing process.

Professor Margit Livingston, DePaul University College of Law, is a nationally recognized expert in U.C.C. Article 9 secured transactions. She has taught secured transactions for over 25 years at DePaul and at the University of Illinois College of Law and has won several awards for her teaching. She has authored numerous law review articles and essays on secured transactions, including *Perfecting and Maintaining Perfection in Article 9 Security Interests Under the 2010 Amendments: New Sections 9-503 and 9-316*, 10 DePaul Bus. & Comm. Law Journal 461 (2012) (Symposium) (with Steven Harris & Jason Kilborn); *Bewitched, Bothered, and Bewildered: The Courts and Revised Article 9 of the Uniform Commercial Code Ten Years Later*, 9 DePaul Bus. & Comm. Law Journal 169 (2011); *A Rose by Any Other Name Would Smell as Sweet (Or Would It?): Filing and Searching in Article 9's Public Records*, 2007 B.Y.U. L. Rev. 111 (2007); and *Certainty, Efficiency, and Realism: Rights in Collateral under Article 9 of the Uniform Commercial Code*, 73 No. Car. L. Rev. 115 (1994). Her article in the B.Y.U. Law Review was consulted in the process of amending Article 9 in 2010.

To Learn more:

Call 800-826-5256

email SecureYourTomorrow@NCScredit.com

web NCScredit.com