

Seriously misleading UCC searches

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Determining whether a security interest is properly perfected by using a state's online lien search may be leading you astray.

Perfecting a security interest in collateral establishes the priority of the secured party's claim to such collateral, providing the perfected secured party with an interest in such collateral superior to the rights held by most subsequently perfected security creditors or judicial lien creditors. For most types of collateral owned by an entity, a security interest may be perfected by filing a financing statement describing the security interest with the secretary of state's office in the state where such entity is formed. A financing statement is a form of public notice intended to inform others dealing with such borrower (referred to as a "debtor") that the debtor has granted a security interest in its assets.

The Uniform Commercial Code ("UCC") dictates that a financing statement covering property owned by an entity debtor (as opposed to an individual) must identify the debtor by its exact legal name. Nonetheless, to alleviate the otherwise disastrous consequences of harmless errors or omissions in a financing statement, the law provides that financing statements are effective (even with errors) so long as they are not "seriously misleading."

In regard to a debtor's name on a financing statement, the UCC expressly provides that a financing statement is not seriously misleading on account of an error or omission in the debtor's name, "[i]f a search of [financing statements on file with the secretary of state's office] under the debtor's correct name, using the [secretary of state's office's] standard search logic, if any, would disclose [such] financing statement." In such a case, despite an error in naming the debtor, a financing statement that is returned under a search of the correct name provides the desired notice and is deemed effective.

However, in many states there are multiple ways to search financing statements filed with the secretary of state's office, and not all search methods return the same results. Only the results of a search using the secretary of state's office's "standard search logic" are considered in determining if a debtor's name on a financing statement is seriously misleading.

In Ohio, there are two ways to search financing statements filed with the Ohio Secretary of State's Office - (1) on the Secretary of State's website (an "Online Search") and (2) by a written request to the Secretary of State's Office (an "Offline Search").

An Online Search of Ohio financing statements is quick, easy and free. Although the Ohio Secretary of State's Office does not publish the search logic for its online financing statement searches, the search logic appears to (i) not distinguish between upper and lower case letters; (ii) disregard, in both the searched name and the filed financing statements, the word "the" at the start of an entity's

name, words indicating the entity's legal status, such as "Inc.," "LLC," "Company," and "Co." appearing at the end of an entity's name, and all spaces and punctuation; and (iii) include all financing statements with debtor's names that ***start*** exactly the same as the searched name.

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The Offline Search in Ohio requires the submission of a search request form accompanied by a fee of \$20 and can take several days to be processed. This Offline Search uses a different search logic than the Online Search and can produce different results. The search logic for the Offline Search is codified at section 111-11-62 of the Ohio Administrative Code. Like the search logic for Online Searches, the search logic for an Offline Search (i) does not distinguish between upper and lower case letters; and (ii) disregards, in both the searched name and the filed financing statements, the word "the" at the start of an entity's name, words indicating the entity's legal status such as "Inc.," "LLC," "Company," and "Co." appearing at the end of an entity's name, and all spaces and punctuation. However, unlike with an Online Search, the search logic for an Offline Search will return only names of debtors that are contained in unlapsed financing statements that otherwise ***match exactly*** with the searched name.

An Offline Search for financing statements with a debtor's name of **"Doorstop Inc."**

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Ohio's enactments of the UCC and the related provisions of Ohio Administrative Code do not specify whether the Online Search or the Offline Search employs standard search logic. However, based on the codification of the Offline Search procedures and search logic in the Ohio Administrative Code together with the disclaimer on the Secretary of State's website stating that the results of an Online Search "are for informational purposes only [and that a]ny certification of authenticity of this information must be provided by the office of the Ohio Secretary of State," the codified search logic of the Offline Search should be used in determining if a debtor's name is seriously misleading.

Of the differences between an Online Search and an Offline search, perhaps the most troubling involves instances in which filers have appended a debtor's name with the debtor's DBA. Providing too much information, at least in regards to a debtor's name, can be disastrous. Relying on an Online Search may lead some secured creditors to believe that a financing statement that identifies a debtor by its actual name followed by its DBA is effective. However, in Ohio, such a financing statement would be seriously misleading and ineffective because it would not be returned by an Offline search under the debtor's actual name.

The best practice is to file a financing statement in the exact legal name as it appears in the debtor's organizational documents and thus never have to consider whether a filing is seriously misleading. If a filer feels it is important to include the DBA, he could file the financing statement identifying multiple distinct debtors, with one being identified by the debtor's exact legal name and another being identified using the debtor's name followed by the DBA. Such a filing would be effective based on the exact legal name listed as the first identified debtor regardless of the DBA in the second identified debtor's name.

During the first six months of 2015, three hundred forty-three financing statements and amendments have been filed with the Ohio Secretary of State that include a debtor with DBA appended to a debtor's name. In some instances, these filings included the debtor's legal name with the DBA as an additional debtor, and thus were still effective. For other filings, the debtor's actual legal name in its organizational documents curiously included the DBA, and thus would be effective as well. However, apparently unbeknownst to their filers, several of these financing statements identified the debtor only by its legal name followed by a DBA and are thus seriously misleading and ineffective. Practitioners should know the limitations of Online Searches and, given the narrowness of the standard search logic, should recognize that under the standard search logic very few discrepancies in a debtor's name will not be seriously misleading.

For a few interesting cases on this topic consider: *In re Gold v. Pasternak (In re Harvey Goldman & Company)*, 455 B.R. 621 (Bankr. E.D. Mich. 2011); *PRM Tech., Inc. v. Maxus Capital Group, LLC*, 452 B.R. 165 (Bankr. M.D.N.C. 2011); *Hasting State Bank v. Stalnaker (In re EDM Corp.)*, 431 B.R. 459 (8th Cir. BAP 2010).