

1. Introduction

One of the most significant changes in Rev. Article 9, as explained in Part 1 Chapter 2, is the clarification of what happens if the debtor name is wrong on a financing statement or on a search request. To paraphrase Rev. UCC §§9-506(b), (c) and (d), if you as the filer or searcher get the “correct” name of a debtor so wrong that the “standard search logic, if any” of the filing office does not disclose the name on a search of its UCC index, you lose.¹

The Bankruptcy Trustee (and Others) Will Win

Do not underestimate the severity of this new rule. Assume that you filed a financing statement under Rev. Article 9 that contains an incorrect debtor name, and that the debtor later goes bankrupt. You can be assured that the bankruptcy judge will void your company’s security interest if the trustee in bankruptcy performs a search of the filing office UCC index, using the “debtor’s correct name” and “standard search logic,”² that does not reveal your filing.

If the filing office does not provide a search using “standard search logic,” the situation is even more dire. As explained in Section 7 below, even if a UCC filing can be found using another form of search logic, the filing may still be ineffective if it contains the slightest debtor name error. In this instance, a barely incorrect debtor name may also render a filing ineffective against a future secured party

What about *Pre-Effective-Date* Filings?

This chapter deals only with filings submitted on or after the effective date of Rev. Article 9 in each state. Chapters 8 (Transition Rules) discusses the consequences of having the wrong debtor name on *pre-effective-date* filings.

2. Debtor Name Risk Management

Two risk management issues bear mentioning with respect to debtor names. The first, discussed in Part 2 Chapter 2, is the issue of ownership of collateral. You need to **get the right debtor**—the one that has rights in the collateral—not just the right debtor name.

Second, there is always some degree of risk involved in **determining the “correct” name of the debtor**, once you have determined that you have the right debtor. Therefore, the following recommendation parallels policy recommendation 2-2.4.

2-5.1 Policy Recommendation

The extent of due diligence with respect to the name(s) of a debtor will be commensurate with the size and type of secured transaction.

¹ This rule will have many variations in practice, depending on the administrative rules, indexing methods and search logic that each state’s central filing office decides to apply to the filings it receives. Although the model administrative rules provide a benchmark against which each filing office will develop its rules, there is no assurance that any two offices will choose the same program logic. Parts 3 and 4 of this publication explain the general rules, policies and practices you will need to apply to searching, and each of the State Summaries in Part 5 will highlight how each state varies from the model administrative rules.

² The administrative rules of each state central filing office define the term “standard search logic.” Some central filing offices may not provide “standard search logic.” Part 3 Chapter 3 explains what “standard search logic” means in the model administrative rules, and Part 4 discusses the controversy whether this is the only possible form of “standard search logic.”

In the real world there can never be 100% assurance in every case that you have obtained all the right names of the entities that have rights in the collateral that is the subject of a secured transaction. The extent of the due diligence performed with respect to these two risk management issues in the real world is limited by some balance of risk vs. cost.

Levels of risk can be objectively identified based on the size of the secured transaction. For example, the risk involved in the financing \$3,000 computers for thousands of buyers may be insignificant by comparison to the risk involved in financing \$1,000,000 of inventory for one company.

The activity that *UCC Alert* concentrates on is getting the UCC filing right so that the security interest of the secured lender is perfected and maintains priority over all competing claims.

To develop specific due diligence practices with respect to the two risks associated with the debtor name, you might follow these steps:

- (1) Quantify levels of transaction size by dollar amounts.
- (2) Quantify the dollar losses anticipated for each dollar of transaction size.
- (3) Quantify the dollar recoveries anticipated from sale of collateral against these losses.

At this point, the dollar of anticipated recoveries is the maximum that can economically be spent on due diligence to assure that your security interest is established properly.

- (4) Based on the anticipated recoveries, estimate a reasonable cost of debtor name due diligence as a percentage of recoveries.
- (5) Determine the cost of various levels of confidence in proving the ownership of the collateral and proving the debtor's correct name.
- (6) Assign proof of ownership and debtor name validation practices to types of transactions based on those relative costs.

The chart below outlines this type of analysis.

Transaction Size/Type	Proof of Ownership	Proof of Registered Name	Cost of Proof
Small/Simple	Representations	Obtain debtor documents	Nothing
Medium	Invoices and representations	Obtain debtor documents; check proprietary or state database	Low (less than \$20)
Large/Complex	Invoices, representations, and audit procedures	Obtain debtor documents; check proprietary and state database; obtain good standing certificate and certified copies of official documents	High

There is a simple, highly effective, low-cost method for proving ownership of goods collateral: Look at the buyer name on copies of the invoices for the goods. If you wish to audit the invoices, call the seller to confirm the information on the invoices.

There are also simple, highly effective, low-cost methods of proving debtor names as well, which are explained below by type of debtor name.

3. First, Get the Debtor Name *Format* Right

In Chapter 3 you were introduced to the difference between debtor types (based on the definition of “organization in UCC §1-201(28)) and debtor name *formats* (as used in Rev. UCC §9-503), summarized in the chart in Chapter 3 Section 4. In Chapter 4 you used the definition of “organization” to separate debtors into two categories—individual and organization—for the purpose of determining the location of the debtor and where to file. You will recall that for the purpose of determining where to file, estates, trusts without names and unregistered organizations without names are treated as organizations per the chart. However, your determination of where to file does not end the challenge of getting the debtor name right for the purposes of preparing a UCC financing statement. To get the debtor name right for that purpose, you will need to consider how Rev. UCC §9-503 demands you to list it on UCC forms.

In this chapter, we will focus on the debtor *format* definitions from the chart in Chapter 3 Section 4 to determine how to ascertain the proper name to put on a UCC financing statement. This first step is necessary to make sure that you handle trust, estate, and unregistered organization debtors correctly. The question you need to answer is, “Is your debtor to be considered an individual or an organization under Rev. Article 9?”

You can go to the applicable next step once you know if your debtor is an organization or an individual. Sections 4 through 6 explain the steps to take if the debtor is an organization. Section 8 explains the steps to take if the debtor is an individual.

4. Debtor Type and Name *Format* Are Both Organization

You will recall from Part 2 Chapter 3 that there are four types of organization debtors: registered, unregistered, estates and trusts. For the purposes of determining the “correct debtor name” of these types, most debtor organizations are registered, and most trusts and unregistered organizations have names, so the debtor type for these entities is “organization,” and the debtor name *format* is also “organization.” We will discuss the oddball organizations—estates, unregistered organizations without names and trusts without names—in the next section.

A. Registered Organization

A registered organization owes its legal existence, or at least its legal status, to the laws of a state or the United States.³ Common forms of registered organizations are corporation, limited partnership, and limited liability company.

As you have learned, the state in which the registered organization is organized is its home under Rev. Article 9. Therefore, determining the correct name and information required to be placed on a financing statement is a three-step process:

- (1) Obtain copies of organization documents from the debtor,

³ Foreign organizations are never considered “registered organizations.” They need to be treated as unregistered organizations for the purpose of determine where to file, as discussed in Chapter 4 Section 2 above (2/02).

- (2) Determine the state of organization, and
- (3) Confirm the current, correct debtor name, form (type) of organization, and registration number in the state of organization, if available.

1. Obtain copies of organization documents from the debtor

This is a no-cost step that should not be an imposition to any debtor. Although in many small transactions this and the next step may be skipped, there is no harm in getting the debtor to do a little homework to help prove its name.

2. Determine the state of organization

The internal documents from step 1 indicate the probable state of organization.

3. Confirm the current, correct debtor name, form of organization, and registration number in the state of organization

To confirm the information in the organization documents, you usually have no option other than to access some outside source in order to confirm the registration number.

The risk management aspect of performing these steps was discussed above in Section 2. One of the choices for obtaining proof of debtor name was, “check proprietary and/or state database.” In the low risk category, you may use a proprietary database⁴ because you can conduct two types of broad searches that will answer the following questions, which will increase your assurance that the UCC filing will be accurate and complete:

- (1) By searching the debtor name nationally, you can determine whether the debtor name exists in other states or other legal forms.
- (2) By searching owner/officer names, you can determine if the principals of an organization also own other registered entities.

Because these type of searches may also unearth other useful information to the prospective secured party, do both the proprietary and state database searches where the risks are higher.

2-5.2 Practice Recommendation

Approved procedures will be followed for determination of ownership interests and correct debtor names, based on policies 2-2.5 and 2-5.1

Obtaining v. Confirming a Registered Organization Name

Do not confuse **confirming** the registered name with **obtaining** the correct registered organization name. The correct name can only be obtained from the original organization documents. The computerized index of registered organizations in a state may or may not reflect the exact, correct name as stated in the organization documents. A computerized index should be

⁴ Two proprietary on-line, national proprietary sources of registered names are www.lexis.com, and www.knowx.com

Appendix 8 illustrates the results of a search on www.knowx.com for a registered organization starting with the words “Ernst Publishing.” We did a national search—which had the additional benefit of indicating if more than one entity with that name happened to exist—and got two hits. One was a defunct corporation in Tennessee, and the other, as illustrated in Appendix 8, was Ernst Publishing Co., LLC in Arizona. This is the name we were looking for. The search listed all the debtor information needed to properly fill in a UCC financing statement. The type of organization is a **domestic** limited liability company, which confirms that Arizona is the home state for the company, and the identification number is L08628168. We do not recommend using other databases such as Dun & Bradstreet in which the company names do not necessarily agree exactly what names in the official state database.

used to confirm that the organization is registered in a state, but not to determine the exact, correct name.

In the past when computer systems and storage were much more expensive, states may have abbreviated registered organization names or left out punctuation when the names were entered into the index, in order to save precious disk space. As a result, the registered name as shown in a computerized index may not agree exactly with the name as it appears on the articles of organization. Therefore, depending entirely on a registered name as indicated on a computer index is not recommended.

2-5.2a Practice Recommendation (New 6/01)

To determine the name of a registered organization, trust only the articles of organization, as amended. Use a computerized index only to confirm the name and to obtain related information.

However, current litigation (as of October 2003) is considering whether an organization name taken from the index rather than the articles is “sufficient,” that is, not seriously misleading, under Rev. UCC §9-506(c). Section 11 below discusses the issue.

B. Organizational Endings

Organizational endings include any of the endings that indicate the type of registered entity, such as Corporation, Inc. or LLC. In the IACA model administrative rules (MARS), these terms are called “Ending Noise Words.” The IACA-approved list of these abbreviations, words, and phrases is reprinted in Appendix 10.

You may have heard that these organizational endings are not significant because standard search logic will eliminate them. Do not believe this myth. Even though in most instances a corporate ending will be properly eliminated in the search logic of a filing office, the office may handle names like “The Corporation Company” and “Ernst Publishing Co., Limited Liability Company” differently from what you might suppose.⁵

Also, certain suffixes to registered entity names are not organizational endings, and should never be used unless the phrase is in fact a part of the actual debtor name. These suffixes include “d/b/a,” “a/k/a,” “A Division of,” “Parent of,” “A Delaware Corporation,” and “A Partnership” The last two examples appear frequently in UCC indexes today (November 2000). It is very likely that any filings under Rev. Article 9 that contain any of these phrases would be unperfected.⁶

2-5.3 Policy Recommendation (Revised 10/03)

The exact, correct name of a registered organization debtor includes the organizational ending in the form it appears on the organization document, including blank spaces, subject to the caveat in recommendation 2-5.7.

⁵ Appendix 10 contains a discussion of possible variations in how filing offices handle ending noise words.

⁶ The California central filing office index contains more than 1,600 instances of “A Delaware Corporation” after the actual company name as of November 2000.

C. Unregistered Organization or Organization-Type Trust

These types of entities are determined to be organizations by looking at the documents that created them, as discussed in Part 2 Chapter 3.⁷

You must verify that the originating document clearly states the exact name of the entity. You must then verify when you prepare the UCC financing statement that the same exact name appears on the form. Unlike registered organization names, endings like “A Partnership,” may be a real part of an unregistered organization, such as in, “Gamblers Investment Group, A Partnership.”

Having discussed how to handle organization names, the following recommendation summarizes a practice to support the policies recommended above.

2-5.4 Practice Recommendation

Verify that the exact name of an organization debtor as it appears on the public record or original documents that created the organization agrees with the debtor name as entered on the UCC financing statement, and code the type of organization and registration number of the organization.

5. Debtor Type Is Organization/Debtor Name *Format Is Individual*

In certain circumstances, Rev. UCC §9-503 requires UCC forms to contain individual names associated with an organization, as discussed in Chapter 4 Section 3 above. Our advice, summarized in recommendation 2-3.0a, is to enter the individual names in the proper format.

6. Special Considerations When Debtor Type Is Organization

Identifying Information about an Organization

As explained in Part 2 Chapter 6, “Preparing the New Forms,” three additional pieces of information must accompany any organization named on a financing statement under Rev. UCC §9-516(b)(5)(C):⁸

(1) Type of organization

Neither Rev. Article 9 nor the commentary gives any hint as to what the phrase “type of organization” actually means. It has generally been interpreted to refer to the form of organization, such as, the following:

Registered Organization Types: Corporation, Limited Partnership, Limited Liability Company, Business Trust (Massachusetts)

Unregistered Organization Types: Trust, Estate, General Partnership

(2) Jurisdiction of the organization

Of course, you need to determine the second item, the jurisdiction, in order to know where to file.

(3) Organizational identification number, if any, or an indication that there is none

⁷ These documents are part of the transaction documentation, or you could not have made the decision with respect to the format of the debtor name.

⁸ Rev. Article 9 in a few states varies these requirements.

Based on the type and jurisdiction of the organization, you then can determine whether the organization is registered and what its registration number is.

7. Capitalization, Punctuation, Special Characters and Blank Spaces

Registered and other organization names may include the following characteristics in the organic document:

- (1) Capital and lower-case letters
- (2) Punctuation (includes characters like apostrophe (‘), comma (,), and period (.) that are common elements of all types of organization name *formats*)
- (3) Other special characters (include all the other characters that appear on a QWERTY keyboard other than punctuations, such as the conjunction ampersand (&) and characters like \$, ? and #.)⁹
- (4) Blank spaces also need to be considered as characters.

For example, here are versions of an actual registered organization name, Ernst & Teal Publishing Co. L L C, in escalating variations:

All capital letters—ERNST & TEAL PUBLISHING CO., L L C

No punctuation—ERNST & TEAL PUBLISHING CO L L C

No special characters—ERNST AND TEAL PUBLISHING CO L L C

No blanks in organization ending— ERNST AND TEAL PUBLISHING CO LLC

As you will learn in Parts 3 and 4 of this publication, certain of these variations will not match the “debtor’s correct name” using forms of “standard search logic” implemented in most state central filing offices under the exact debtor name exception in Rev. UCC §9-506(c). If that provision cannot be counted on to save debtor names on filings from being “seriously misleading,” we believe that best practice demands that recommendations 2-5.2a, 2-5.3 and the following practice be followed consistently.

2-5.4a Practice Recommendation (2/02)

The exact correct name of a registered or other organization debtor to be entered on a UCC form includes all capitalization, punctuation, special characters and blank spaces.

The article titled “What Is the Debtor’s Correct Name” in Issue 01-6c of our newsletter, *The Filing Flash*, discusses the punctuation issue as well as related issues.

8. Debtor Type and Name *Format* Is Individual

In Part 2 Chapter 3 you learned that there are five types of individual names: plain old individuals, sole proprietorships, estates, trusts without a name and unregistered organizations without a name. Once you have decided that one or more of the debtors in a transaction must be designated by individual name, you then need to determine the “correct” individual name.

Determining the “correct” name of an individual is extremely difficult by comparison to determining the “correct” name of an organization.¹⁰ First, there is no official public record

⁹ As explained in Part 3 Chapter 3, we use the term “punctuation” in this publication to mean all the characters on a QWERTY keyboard other than the ampersand and the blank space.

¹⁰ This issue is central to two cases in Kansas, *In re Erwin* and *In re Kinderknecht*. Both cases are analyzed in Part 8, Case Analysis.

that can be depended upon to give the “correct” name. Second, an individual can adjust the form of a name to meet individual predilections. Third, names change through marriage and other legal processes.

Rev. Article 9 does not give any more comfort than old Article 9 that any particular form of a name will in fact be sufficient to assure the perfection of a security interest against that individual. Therefore the best you can do is to consistently follow a reasonable set of written policies, practices and procedures that you can explain to the court if you ever need to a counter a claim that the name you used was misleading. Appendix 17 contains a proposal we have made for standardizing the source of debtor names depending on the characteristics of the underlying transaction.¹¹

2-5.5 Policy Recommendation

The names of individual debtors will be determined according to a consistent rule.

2-5.6 Practice Recommendation

An individual debtor name will consist of a first name; middle name if available, or middle initial if debtor has a middle initial that is used in available documentation; a last name; and a suffix only if it is a title of lineage (Jr., III, etc.).

9. Individual Name Filing Worksheet

One comforting thought is that the IACA model administrative rules (MARS) do provide specific rules for keying of and searching on individual debtor names, as discussed in Part 3 Chapter 3. However, the actual keying and standard search logic used by any given filing office are subject to local variations on these model rules, so that a national standard for the form of individual names may never exist. Also, the model rule for individual name search logic is incomplete, as discussed in Part 3.

Based on our understanding of the model rules, we have devised the following worksheet that you can use to determine individual names consistently, for both filings and searching purposes.

Worksheet Instructions

- (1) Sources of Individual Names—Obtain one or more of the types of documentation listed in this section of the worksheet, and write down the individual name as it appears on these documents. Reconcile differences by discussing them with the debtor.
- (2) Your Subject—From the debtor and other sources, list any variations of name spelling and any nicknames that the debtor is known by. “Bud” Kearney may be a real name or a nickname these days.
- (3) Based on your analysis of items 1 and 2, enter the individual’s name and any variations that might be searched. For example, if C. Alexander Ernst is the way he fashions his name, but his full name is Carl Alexander Ernst, use both on the UCC financing statement.

¹¹ Lynn Lopucki, Professor of Law at UCLA Law School, pointed out to us that under the form of “standard search logic” proposed in the model administrative rules, the name “J. Smith” on a UCC filing would not be considered “seriously misleading.” This is an unintentional result of the way the model rules were drafted, since it might encourage a filer in an office that adopted the rule to skimp on individual name details.

Individual Name File/Search Worksheet

This worksheet is provided to rationalize the choice of the form of an individual name of the purpose of filing and searching under Rev. Article 9.

1. Sources of Individual Names:

Source	Name
1. Social Security Card	
2. Driver's License (2/02)	
3. Passport	
4. Birth Certificate	
5. Marriage Certificate	
6. Wage Records (W-2)	
7. Tax Return	
8. Credit Report	
9. Calling Card	
10. Usual Form of Signature	

Hint: Official sources (1-5) are likely more acceptable to a court than informal sources (6-8)

2. Your Subject

	Name Variation	Source
First Name 1		
First Name 2		
Nickname(s)		
Middle Name 1		
Middle Name 2		
Last Name 1		
Last Name 2		
Last Name 3		
Suffix (lineage)		

3. UCC Filing Names

Based on the above analysis, record the names under which you will file:

Last Name	First Initial/Name	Middle Initial/Name	Suffix (Lineage only)

10. No Leeway (2/02)

In the introduction to this chapter, we mentioned the dire consequences of getting the debtor name wrong on a UCC filing due to the impact of Rev. UCC §§9-506(b) and (c). We did not tell you the whole story there. Consider the following.

Rev. UCC §§9-506(b) and (c) read as follows:

“(b) **[Financing statement seriously misleading.]** Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) is seriously misleading.

(c) **[Financing statement not seriously misleading.]** If a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading.”

As discussed above, Rev. UCC §9-503(a) is fuzzy about how to parse out debtor names other than those of registered organizations. You will need to consider both the administrative rules and the results of litigation in each state before you can be assured what the proper ways are to format and list certain trust, estate and unregistered organization names on UCC forms.¹²

On the other hand, the debtors listed in filing office UCC indexes which have the largest outstanding loans will be registered organizations, and the rules to determine the correct name of a registered organization are close to crystal clear in Rev. Article 9. Per the statute quoted above, getting the name of a registered organization just a little bit wrong will make the name “seriously misleading” in any filing office that does not provide “standard search logic.”

In addition, the official commentary to Rev. UCC §9-506 reads in part as follows (Our emphasis):

“Subsection (b) contains the general rule: a financing statement that fails sufficiently to provide the debtor’s name in accordance with Section 9-503(a) is seriously misleading as a matter of law. Subsection (c) provides an exception: If the financing statement nevertheless would be discovered in a search under the debtor’s correct name, using the filing office’s standard search logic, if any, then as a matter of law the incorrect name does not make the financing statement seriously misleading. A financing statement that is seriously misleading under this section is ineffective even if it is disclosed by (i) using a search logic other than that of the filing office to search the official records, or (ii) using the filing office’s standard search logic to search a data base other than that of the filing office.”

This commentary confirms what we have tried to put across in this section of our publication. “Pretty close” is not good enough. It is best for you to assume in your policies and practices that any mistake in obtaining the correct debtor name or in transcribing it onto a UCC filing form will be fatal to the perfection of your security interest.

(1) Based on this analysis, we conclude that there is **no leeway** allowed under Rev. Article 9 in getting the debtor name right on UCC filings in any office that does not provide a

¹² It may never be possible to assure compliance with the correct debtor name standard for other than registered organizations until the law is clarified.

search using “standard search logic.” Therefore, the best way for you to assure that your filings against a registered organization will meet the requirements of the statute is to enter the name exactly as it appears on the articles of organization per recommendation 2-5.2a, including the organizational ending per recommendation 2-5.3 and punctuation and other special characters per recommendation 2-5.4a.

11. The Registered Organization Name Controversy (10/03)

Recommendation 5-2.a in Section 4 above admonishes filers to consider “correct” only the debtor name as given on the articles of organization, and not to accept the name merely as indexed by the state for public reference. The indexing methodologies of registration agencies vary all over the lot;¹³ the corporate endings, or even the name itself, may be abbreviated, the name may be misspelled, or worse of all, the words in a name may be shuffled.

A bankruptcy case currently in litigation (as of October 2003) is addressing this last variation. In this particular state, the name of a registered organization is sometimes altered in the index if the organization name contains an individual name. For example, “Carl Ernst Associates, Inc.” may be indexed “ERNST CARL ASSOCIATES INC.” In this case, the secured party looked only at the index, and filed under the indexed form of the debtor name. The trustee is trying to avoid the security interest because the debtor name is seriously misleading under Rev. UCC §9-506. The secured party is now claiming that the name of an organization as presented in the organization index of a state registration agency is sufficient under Rev. UCC §9-506(b) because the organization index is a form of the “public record” mentioned in Rev. UCC §9-503(a)(1).

Because of the traditional bankruptcy court bias towards giving filers the benefit of the doubt, as expressed in the various forms of the “reasonably diligent searcher” rule, it is possible that the court will find a way to rule for the secured party, and, since the plaintiff is the bankruptcy trustee, the case will not be appealed, leaving searchers to contend with a new form of the reasonably diligent searcher rule. We will provide a complete analysis of this case in Part 8 once it is settled. If the bankruptcy court rules this way, the decision will not provide a real precedent since the case is being tried only at the district court level. However, it may embolden another secured party in the future to claim not only that the name as indexed is a sufficient name, but that it is the **only** sufficient name. We hope no court would be fooled by such a claim, and so we are not changing our advice in recommendation 2-5-2a above regarding how to determine the name of a registered organization for the purpose of filing. However, here is a policy recommendation to your legal counsel, just in case.

2-5.7 Policy Recommendation (New 10/03)

Based on an assessment of the risk of litigation arising from another secured party’s use of a variation from the actual name as provided in the organization document of a registered debtor name as given in the web-based index of the state of organization, legal counsel must determine whether financing statements should include name variations appearing in such indexes.

We also recommend in Part 5 Chapter 4 Section 2 that you consider the organization name as indexed in determining the right names to search.

¹³ Searching these indexes is really easy (albeit dangerous to inexperienced searchers for many reasons) since all states except Delaware and New Hampshire make their registered organization indexes available on the web without charge, although copies of organization documents may incur a copy fee.

12. Sole Proprietorship v. Partnership—The Marriage Problem (10/03)

The issue of whether a debtor is a sole proprietorship or an organization owned with a spouse (which I will cavalierly call a “partnership” for the purpose of this discussion) has not been adequately addressed by the legal pundits, although it has been addressed partially by at least one court in *In re Griffen*.¹⁴ Their arguments get caught up with family law when that has practically nothing to do with the problem of who the debtor is under Rev. Article 9. I would argue that whether a state is a community property state, for example, has no bearing on the kind or extent of due diligence that a secured party must apply to a business loan transaction with an individual who has a spouse.

The issue, properly stated as a question, is simple—When a lender intends to enter into a transaction in which the collateral is purportedly owned by an individual as a sole proprietor, what *due diligence* is required to determine whether a spouse is also an owner of the collateral. We discussed this issue above in Chapter 3 Section 3, where recommendation 2-3.0b stated a defensive policy in the event that the question cannot be answered definitively.

However, we do think that due diligence requires that the lender make a definitive decision about the issue—The borrower is either a sole proprietor or an organization.

We wonder why the secured lending community has not evolved a standard form of agreement to be signed by a spouse disavowing ownership in the sole proprietorship of the borrowing spouse. It has been suggested that the lender in a community property state should obtain the consent of the spouse to any transaction that purports to be on behalf of the other spouse as sole proprietor. That also makes sense to us.

The State of Kansas understood the problem and did something about it. Due to *In re Griffen*, the Kansas legislature in 1994 added the following words to KS UCC§ 84-9-402(7):

“Where married debtors are jointly engaged in business and it is unclear whether a partnership exists, the financing statement may be filed in the names of the individual debtors.”

This kind of wording would resolve the problem we are writing about here. Unhappily, neither the drafters of Rev. Article 9 nor the legislators in Kansas pondered on this provision, so it is missing from Rev. Article 9, even in Kansas. Here is our advice until further notice.

2-5.8 Policy Recommendation (New 10/03)

On advice of counsel, when dealing with individual business debtors who are married, establish due diligence procedures to determine whether the debtor is one spouse as a sole proprietorship or both spouses as an organization.

What is the “debtor’s correct name” if the debtor is determined to be an organization? That answer depends on whether the organization has a name under Rev. UCC 9-503(a)(4). The organization name may be found in written documentation or in trade usage.¹⁵ Since the debtor

¹⁴ *In re Griffen*, 141 B.R. 207 (D. Kan. 1992) contains the comment, “Establishing the existence of a spousal partnership in business requires a determination made by reference to the essential elements of partnership, without distinction as to whether the alleged partners are persons married to one another.” This case will be analyzed in Part 8 in a future update.

¹⁵ If a business has only a trade name because it does not have a written agreement, does the business then have no name because of Rev. UCC §9-503(c)?

name issue can be subject to litigation, the best way to avoid such interesting encounters is to follow this recommendation.

2-5.8a Practice Recommendation (New 10/03)

If the individuals referenced in recommendation 2-5-8 are determined to be an organization, enter on the financing statement the names of both spouses as individuals and any possible organization names.

Consumer Transactions

On the other hand, by definition an organization cannot be a debtor in a consumer goods transaction. Therefore, the following corollary recommendation is logically required.

2-5.9 Practice Recommendation (New 10/03)

If two people enter into a consumer goods transaction and a financing statement for some reason needs to be filed, enter the names of the two individuals as debtors on the financing statement.

13. Federally Chartered Organizations (10/03)

Rev. UCC §9-307(f) contains rules for determining the location of an organization that is organized under federal law. The location depends on what the organization law designates. It is either

- (1) the state that the law designates,
- (2) the state the organization designates under the law, or
- (3) otherwise, the District of Columbia.

For national banks registered with the Office of the Comptroller of the Currency (OCC), the location is the state indicated on the organization certificate as the bank's main office (Interpretative Letter #913 dated August 3, 2001). The organization or charter certificate can be obtained by addressing a request—including the bank name, city and state, plus mailing address and telephone number—to FOIA-PA@occ.treas.gov. Further, the request should also ask for the charter number, which is assigned to each bank that files an application, because the number does not appear on the certificate.

The location and identification number for other types of federally chartered organizations depends on the particular law application to them.

Completing the Organization Information

It seems reasonable to complete the e/f/g information for these types of organizations as follows:

- Type of Organization—National Bank, Federal Credit Union, etc.
- Jurisdiction of Organization—United States
- Organization ID—Charter or similar number.

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