

CROSS-BORDER FINANCE ALERT



UCC Update – Don't Space Out on UCC-1s

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It is impossible to understate the importance of using the correct name (and we mean the exact, correct name!) of the debtor on a UCC Financing Statement, and the dire consequences of getting that name wrong. A recent case from Wisconsin reminds us why.

United States SEC v. ISC, Inc.

In *United States SEC v. ISC, Inc.* (No. 15-cv-45-jdp. United States District Court, W.D. Wisconsin), creditor Double Bubble, Ltd. filed a UCC financing statement with the debtor's name written as "ISC, Inc. .". There was a mistaken space between "Inc" and "." As the court noted, "[t]he extra space was surely inadvertent, but it prevented the Double Bubble financing statement from showing up on a search of the accurate legal name of ISC, Inc." The result? Double Bubble was determined to be an unsecured creditor.

"Seriously Misleading" and Safe Harbor

The court, quoting the Wisconsin enactment of UCC 9-506(a), stated that a financing statement is effective "even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading." To test whether the financing statement was seriously misleading, the court, applying the test set forth in UCC 9-506(c), looked at whether a search of the records of the filing office under the debtor's correct name and using the filing office's standard search logic would disclose the financing statement. Unfortunately for Double Bubble, the search logic employed by Wisconsin Department of Financial Institutions prevents a search using the debtor's correct name ("ISC, Inc.") from finding Double Bubble's UCC financing statement with the extra space before the period. It did not matter that a different search, a search simply for "ISC" with no punctuation or corporate designation, would have found Double Bubble's UCC financing statement.

What is the correct name?

This case is a stark reminder that using the correct debtor's name is critical. But what exactly is the correct name? For a registered organization (i.e., corporation, LLC, partnership or statutory trust), UCC section 9-503(a) prescribes that the correct name for a debtor on a UCC financing statement is the name given to the debtor in its certificate of incorporation (or like publicly filed organizational certificate, as amended). Do not rely on a good standing certificate, the secretary of state's website or on internal documents, like by-laws or an operating or partnership agreement, to determine the debtor's name. This case also reminds us that there is no uniformity in the search logic among the states, and the search logic employed by some jurisdictions is incredibly unforgiving. The only way to be safe in all states is to get the certificate of incorporation (or comparable document) and make sure that the financing statement matches exactly – including capitalization, punctuation, and as the Double Bubble case shows us, spacing.

How to check yourself?

We can't help but think that a post-filing UCC search might have saved Double Bubble's bacon. Though not foolproof, a post-filing search is the best way to confirm that the filed financing statement was indexed correctly and can be found by the search logic. If a search of the records under the debtor's correct name does not disclose the filed financing statement any error in the debtor's name in the financing statement or any indexing error should be immediately corrected.

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