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ADDRESSING THE CHALLENGES OF UCC FILING AND SEARCHING IN WASHINGTON, D.C.

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As lenders and their counsel know, Revised Article 9, §9-307(c), which became effective in July 2001, requires filing in Washington, D.C. for debtors that are not "registered organizations," such as foreign entities, where the chief executive office is located in a jurisdiction that does not have a UCC-type filing/notice system that would give priority over the rights of a lien creditor with respect to the collateral. Less well known, however, is that the D.C. Recorder of Deeds' office has not updated its filing system and procedures to adequately handle on a timely basis the resulting increase in volume of filings. This presents significant challenges secured lending practitioners need to be aware of and address when filing or searching UCCs in Washington, D.C.

Did You Get the File Date You Expected?

The D.C. Recorder of Deeds' office ("ROD") is often unable to process all filings received on the date submitted. Additionally, ROD's procedures allow, in certain cases, for some UCCs to be processed and filed ahead of others previously submitted. ROD views UCC filings received in two categories: (1) five or fewer filings submitted at one time, and (2) more than five filings submitted at one time. More than five filings submitted simultaneously is considered a "bulk submission." ROD prefers to receive bulk submissions by 11 AM, but will accept them later; however getting UCCs in a bulk submission filed the day they are submitted is unlikely when submitted after 11 AM. Five or fewer filings can be submitted any time between 8:30 AM and 3:45 PM and usually get the same day's date, even when submitted AFTER bulk submissions submitted after 11 AM. In general, most filings are filed by the next business day at the latest, although there are occasional exceptions where filings may get processed and dated two or more days after submission.

- **Tip # 1:** *When working with a service company, make sure your rush D.C. filings are not included in "bulk submissions" after 11 AM.*

Ensuring UCC3s Are Properly Associated with Corresponding UCC1s:

Unlike most filing offices, **ROD's system is not able to connect a UCC3 to the corresponding UCC1 by file number.** As a result, ROD requires that the debtor name be listed in box 10 (Optional Filer Reference Info) of a UCC3 amendment. Providing the debtor name in box 6 only and not in box 10 (except for debtor name change amendments) will, in most cases, result in rejection of the filing.

In those instances where ROD accepts a UCC3 without a debtor name on the form, it often gets indexed as "Debtor Name Omitted" (or some variation thereof) and will not be found on a search. This situation was much more common in the first few years under Revised Article 9 until ROD started rejecting UCC3s without the debtor name on it. There are, however, still hundreds of UCC3s

in ROD's system that are not indexed under the correct debtor name¹. These filings will not be revealed when a search of the proper debtor name is conducted.

When filing a UCC3 online through the ROD web site, the system prompts the user to "Enter Debtors from UCC1". If the name is not entered, a reminder appears but the entry of the name is not required. Thus, UCC3s filed online without the debtor name(s) entered will also not be found on a search.

If/when ROD realizes that a filing is not indexed (which can be months after it is accepted), the filing will be returned with a "Re-Recording Certificate" to the party listed in the "Send Acknowledgment to" box on the form. The filer must then return the certificate with a corrected copy of the filing with the debtor name on it and pay an additional fee to get it indexed. ROD will then file the "Re-Recorded Certificate" with a copy of the corrected filing and the index will show the filing date as the date the Re-Recorded Certificate was filed. Note, however, that the copy of the corrected filing will still show the original file date stamped on it. In this situation, the filing accepted without the debtor name on the earlier date will still be floating around in ROD's system and *if searched by file number*, it will come up showing the first (earlier) date.

- **Tip # 2:** *Make sure to include the debtor's name in box 10 on all amendment filings and do a post-filing search against the debtor name to ensure the amendment will be found on a search.*

Filing and Search Considerations for Debtor Names with Foreign Punctuation/Special Characters:

As discussed on the UCCLaw listserve, filers using ROD's web filing system need to be aware of how ROD indexes UCCs against debtor names that contain foreign punctuation or special characters, such as the accent mark in the name "René". When such a name is submitted on an electronic UCC filing in ROD, instead of disregarding only the punctuation, ROD's system also disregards the character associated with the punctuation. As such, the name "René" would be indexed in ROD's system as "Ren" and would not be found when searching the name "Rene". Copies of the filing will show the name the way it was indexed, so it is unlikely the filer would be "saved" by D.C.'s Article 9, §28:9-517².

When this type of error is brought to the attention of ROD, the indexing of the name is corrected in the system but no notice is placed in the public index regarding the date the correction was made. Thus, such a filing that is not found initially on a search would later be found by a subsequent searcher without any indication of the index correction date, contrary to **Section 513.17(f)** of D.C.'s UCC Regulations³.

¹ On March 5, 2009, a search of ROD's Grantor/Grantee index for the debtor name "Debtor" revealed 337 filings indexed in the system as "Debtor Name Omitted", "Debtor not listed" or some variation thereof.

² D.C. §28:9-517: "**Effect of Indexing Errors.** The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record."

³ Section 513.17(f) of D.C.'s UCC Regulations (<http://otr.cfo.dc.gov/otr/cwp/view,a,1330,q,594604.asp#17>) states: "**Errors of the Filing Office** - The recording office may correct the errors of the recording office personnel in the UCC information management system at any time. If the correction is made after the filing office has issued a certification date that indicates the recording date of a corrected document, the filing office shall proceed as follows. A record relating to the relevant initial financing statement will be placed in the UCC information management system stating the date of correction and explaining the nature of the corrective action taken. The record shall be preserved for so long as the record of the initial financing statement is preserved in the UCC information management system."

When a paper UCC filing is submitted with a name containing foreign punctuation, the name gets entered into ROD's system leaving off only the punctuation mark(s). Thus, filings submitted electronically and on paper against the same exact debtor name containing special characters will be indexed two different ways in the system.

In April 2008, National Corporate Research, Ltd. ("NCR") contacted Landata, the company that handles ROD's electronic filing system, about this issue. The company indicated it would consider placing a notice on the ROD's electronic filing web page warning filers not to use foreign punctuation/special characters when preparing filings. As of the date of this writing, however, no such notice has been posted. When asked what, if anything, will be done about past filings indexed incorrectly in ROD because of this issue, Landata indicated it did not have a way to find the past filings and would contact the ROD's office about locating and correcting these filings. NCR has tried to contact the ROD's office to ask about this and the manner in which the index is being corrected, but as of this writing, the calls have not been returned.

- **Tip # 3:** *Secured parties who have included foreign punctuation in debtor names on UCCs filed in D.C. electronically may want to do a search to confirm how their filings were indexed and, if necessary, request that the index be corrected for any affected names. Filers wanting the correct name with the special punctuation to appear on copies of the filing made available to searchers would be well advised to avoid electronic filing and submit the filing on paper.*

OTHER SEARCH/INDEXING ISSUES:

Is Searching Only the Grantor Index Enough?

ROD does not conduct searches for the public, but provides an online search system. However, the way filings are indexed can make it difficult to get an accurate search. The system allows searchers to search the "Grantor" or "Grantee" index or both. Normally, a searcher would search only the debtor (Grantor) index, but in D.C., debtors are frequently mis-indexed as secured parties. Thus, if only the Grantor (debtor) index is searched, filings will sometimes be missed because the debtor names have been indexed as Grantees (secured parties)⁴.

- **Tip # 4:** *Make sure to search **both** the Grantor and Grantee indexes in D.C. to ensure you are aware of effective filings against debtors that may have been indexed as Grantees.*

Typos in the Index:

Another concern for searchers is that typos are frequently made when debtor names are entered into the ROD index. On August 21, 2008, NCR noted that 237 filings against Bear Stearns were mis-indexed as "**Bear Steams**" in ROD's index. These are all filings that were not found when someone searched the correct name. At that time, there were 1799 filings in ROD's system indexed against the correct spelling "Bear Stearns". Therefore, as of that date, 12% of the filings against Bear Stearns in ROD were indexed incorrectly. NCR brought this to the attention of the supervisor in the ROD's office at that time and noted that, as of early October 2008, the index had been fixed for these filings. Unfortunately, this type of indexing error is not uncommon and those relying on ROD UCC searches to make lending decisions or write legal opinions cannot be certain all effective filings are revealed on searches.

⁴ As one example, a search of financing statements and amendments for "Citibank" as Grantor (**debtor**) in ROD's system on 12/19/08 revealed 9,360 filings. Filings viewed by NCR in a random sampling confirmed that Citibank was the Grantee for a large number of these filings.

Through Dates: Can You Rely on Them?

NCR has seen many examples of incorrect through dates being posted to the ROD search system. The incorrect through dates are discovered when clients ask why specific recent filings prior to the through date were not included in search results. By way of example, a search NCR did with a through date of 5/20/08 did not reveal two filings dated 5/14/08. This was brought to the attention of the supervisor in the ROD office on 5/28/08. A daily check of D.C.'s system finally showed the missing filings on 6/12/08 when the through date was 6/2/08.

What Should Filers and Searchers Do?

Interested parties are urged to communicate concerns to the ROD's office in order for these issues to be addressed. Unless and until these problems are addressed and corrected, filers and searchers may be well advised to:

- Always do post-filing searches to ensure filings are properly indexed. While this is recommended in all jurisdictions, it is especially important in D.C. While having a search reveal a filing is not necessary to ensure legal sufficiency,⁵ it can potentially save the secured party the cost of future litigation.
- If the debtor name contains foreign punctuation/special characters, to ensure the filing is on record showing the true, correct name, avoid filing online and submit the filing on paper. When searching debtor names containing these special characters (e.g. "Café Grande, Inc."), search the name two ways: (1) with just the foreign punctuation removed (e.g. "Cafe Grande, Inc.") and (2) with the foreign punctuation and letter associated with it removed (e.g. "Caf Grande, Inc.").
- When working with a service company, make sure your rush D.C. filings are not included in "bulk submissions" after 11 AM and that both the grantor and grantee indexes are always searched.

Until the ROD's office is able to correct these problems, filers and searchers need to be cognizant of these issues and legal opinions based on D.C. search results should be carefully qualified.

Clare Oliva is a Vice President of National Corporate Research, Ltd. ("NCR"), a nationwide provider of registered agent, filing, research and library services. She has worked in the UCC/corporate service industry since 1978 and has extensive knowledge of the statutory requirements and practical applications of UCC filing rules. Article 9 reference pieces developed by Ms. Oliva have been included in legal publications such as the "Commercial Law Practice Tips" guide of the American Bar Association Business Law Section and in handout materials for the 2002 CLE seminar presented by the New York City Bar Association, "Pitfalls Under Revised UCC Article 9."

⁵ Per D.C. §28:9-517 – see footnote 2.