

Pennsylvania Bureau Notifies Filers of the Loss of Attachments Submitted with UCC Records

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Secured creditors that recently filed UCC records in Pennsylvania may need to act to ensure the proper documentation of their security interests.

The Pennsylvania Department of State's Bureau of Corporations and Charitable Organizations (the Bureau) has notified filers that it mistakenly discarded attachments to filings submitted by mail during the period beginning on March 1, 2019, and extending through April 3, 2019. These attachments will not be included in the filing record or in UCC search results conducted against affected debtors absent corrective action on the part of filers.

Attachments to UCC filings can include detailed descriptions of collateral and are often vital to the perfection of a secured party's security interest. Attachments are especially significant when a complex collateral package is at stake or when a secured party itemizes equipment or other assets subject to its security interest.

Secured parties should review any filings submitted to the Bureau from March 1, 2019, to April 3, 2019. If the correct attachments are not included as a part of the filing record, secured parties will need to notify the Bureau.

It is equally important for secured parties to review records submitted to a filing office in the routine course of business. The Bureau's error presents an opportunity for all secured parties to review practices with respect to filing UCC records and conducting lien searches:

- **Post-Filing Searches.** The Bureau's error serves as a reminder that a secured party cannot rest easy simply because a UCC record has been filed. Secured parties and their counsel

should conduct post-filing searches to ensure that a filing office has correctly indexed a filed financing statement or amendment, including its corresponding attachments. When conducting such searches, secured parties should be mindful of ordering copies of a filing record to accompany the search report.

- **Preliminary Searches.** Lenders contemplating the extension of new financing must understand the risks involved in the review of preliminary lien searches conducted against prospective borrowers and must work with their counsel to ensure a robust review of the filing record. The Uniform Commercial Code places the risk of a filing office's error in indexing a record on a lender conducting a search, not on the pre-existing creditor whose filing is not revealed in the search. Section 9-517 of the UCC states that "[t]he failure of the filing office to index a record correctly does not affect the effectiveness of the filed record." As the official comment notes, Section 9-517 "imposes the risk of filing-office error on those who search the files rather than on those who file." Not surprisingly, courts have relied on Section 9-517 to protect secured creditors when their financing statements are not returned in UCC searches as the result of filing office mistakes.¹ Secured parties must be aware that if missing attachments or other irregularities are the result of an error by the filing office, the searcher will bear the risk.² While no perfect solution to this issue exists from the perspective of a new lender, some help can be found in actively examining a record for irregularities indicative of potential filing errors; for example, records referring to attachments, exhibits, or schedules that are missing from a filing should be flagged for further review and diligence.

¹ See *Regions Bank v. Official Comm. Of Unsecured Creditors* (In re Camtech Precision Mfg.), 471 B.R. 293, 299-99 (S.D. Fla. 2012) (relying on section 9-517 to reverse summary judgment granted by bankruptcy court, finding genuine issue of material fact as to whether filing office made indexing error with respect to bank's financing statements); *Sheenan v. Peoples Bank, N.A.* (In re Feed Store, LLC), Case No. 5:16-bk-1257, Adv. No. 5:17-ap-8, 2018 Bankr. LEXIS 697 *5-9 (Bankr. N.D. W. Va. March 13, 2018) (holding that bankruptcy trustee could not avoid bank's security interest even though bank's financing statement did not show up in UCC search as a result of filing office's indexing error; section 9-517 does not violate constitutional due process rights); *Commer. & Savings Bank v. Wells Fargo Bank Nat'l Ass'n* (In re Twin City Hosp.), Case No. 10-64360, Adv. No. 10-6130, 2011 Bankr. LEXIS 1501, *6-8 (Bankr. N.D. Ohio April 22, 2011) (prior-filed financing statement had priority over later-filed statement even though first statement was indexed improperly and, thus, did not show up in records search at time of later-filed statement). It appears that section 9-517 merely codified what was already well-established law. See *Luker v. United States* (In re Masters), 273 B.R. 773, 776-77 (Bankr. E.D. Ark. 2002) (collecting cases prior to enactment of 9-517 and noting that "[n]umerous cases from other circuits . . . have held that various types of mistakes by filing officers do not affect the perfected status of a creditor who presented a proper financing statement for filing").

² Although the searcher will bear the risk of indexing errors, depending on state tort and governmental immunity principals in the applicable jurisdiction, the searcher may have a claim against the secretary of state if the searcher suffered damages as a result of the indexing error. See *Textron Fin. Corp. v. New Horizon Home Sales, Inc.*, Civ. Action No. 1:10CV39, 2011 U.S. Dist. LEXIS 26723, *28-29 (N.D. W. Va. March 15, 2011) (holding that under West Virginia law, governmental immunity did not prevent claim against county clerk for filing error); *Davis Trust Co. v. Citizens Bank of West Virginia, Inc.* (In re Reckart Equip. Co.), Case No. 12-bk-670, Adv. No. 13-ap-26, 2017 Bankr. LEXIS 624, *28-35 (Bankr. N.D. W. Va. March 9, 2017) (rejecting secretary of state's governmental immunity defense to claims based on filing error).

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