

community BANKER

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Welcome to the March/ April issue of the COMMUNITY BANKERS' ADVISOR.

The ADVISOR is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

You are asking

Q: What do we do when the law changes if we filed using the full middle name of an individual debtor if the debtor's driver's license doesn't use a middle name or even a middle initial? When we filed three years ago, we knew his full name is "Thomas Lyle Jones", but his driver's license has "Thomas Jones" on it.

A: File an Amendment naming Thomas Jones as the debtor. Effective July 1, 2013, the name on your financing statement should be exactly as it appears on the unexpired driver's license or state-issued ID.

Q: Under the UCC changes, do we need to provide the debtor's address on the UCC-1 exactly as it appears on the driver's license or state-issued ID card?

A: No. The driver's license or state-issued ID card was intended to serve only as the source of the debtor name for purposes of the financing statement under N.D.C.C. § 41-09-74. All Article 9 requires for the debtor's address is a "mailing address" for the debtor. See N.D.C.C. § 41-09-74(f). The address can be either a P.O. Box or a physical location, or both. Nothing in Article 9 or the new amendments requires you to or limits you to using the address on the driver's license or ID card.

Q: Do we need to go through every financing statement filed on individual debtors and amend



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the financing statements after the new requirements take effect? Some of our filings use middle initials and the driver's license has the whole middle name.

A: If you plan to let a filing lapse anyway, then no amendment is necessary. Otherwise, yes, you do. If you mean to continue the effectiveness of a financing statement filed before July 1, 2013, an amendment is required if the filing doesn't match the driver's license or state-issued ID name.

If the debtor's *name* changes so that your existing financing statement becomes "seriously misleading," which is *more* than a problem with an initial or the difference between a Greg and a Gregory, you need to file an Amendment within **four months** of the name change. See our discussion below.

Q: What if a debtor changes her name, for example if a woman marries and takes her husband's name or if she divorces and retakes her maiden name? Do we amend the individual debtor name on an already-filed financing statement if there is a change to the debtor's driver's license name?

A: Yes - make the Amendment now. If Debbie Debtor marries Barry Borrower and changes her license to show "Debbie Borrower", the filing on Debbie Debtor becomes "seriously misleading" and is ineffective to continue perfection in Debbie's after-acquired collateral UNLESS the secured party files an amendment within FOUR MONTHS of the name change event. N.D.C.C. § 41-09-78(3). The original financing statement would continue to be effective with respect to collateral acquired before the name change as well as collateral acquired within the four-month period, but not after-acquired collateral beyond that.

Keep in mind that we are talking about an individual here, but it is also important to keep an eye on these things with business debtors because businesses change names, too. If a sole

proprietorship incorporates and changes its name so as to make your filed financing statement "seriously misleading", you must file an amendment within FOUR MONTHS or you are unsecured in its after-acquired collateral like accounts and inventory.

Check to see if there is anything in the paper or if you hear gossip about a business changing its name, or periodically check the website of the secretary of state, doing a search with your debtor's name as a keyword. You should insert loan provisions requiring that debtor's notify you if they have a name change (but there will always be those who don't tell you).

Q: How do we find out if an individual's driver's license name changes? The driver's license is not a public record.

A: The driver's license is not a public record, which means that there is no easy way to identify changes to the driver's license. Some thoughts: Have someone whose job is to look in the paper at who gets married, who gets divorced, or who puts a notice of name change in the local paper. You may want to suspense files and check with the debtor periodically to ask whether there have been any changes. You may want to include a provision in the loan documents that requires the debtor to immediately notify the secured party of any changes to the driver's license. It strikes us that the only way to know for sure is to include a provision in the loan documents that requires the debtor to periodically produce his or her driver's license for inspection - and then inspect it.

Q: It is July 2, 2013. We have a new loan and our debtor has *never* had a driver's license, and we see that her ID card from the state of North Dakota expired last month. What name do we use?

A: In this case, the name on the financing statement is sufficient if it contains the "individual name" or the "surname" and "first personal name" of the debtor. N.D.C.C. § 41-09-74(1)(e). You should also put the social security card name on the financing statement as an additional debtor.

Individual Debtor Names

The Changes Effective July 1, 2013

Though the Legislature may tweak/clarify the deadline for amending financing statement that don't match the individual debtor's name, we read it right now as giving you from July 1, 2013, to July 1, 2014.

If you haven't already started going through your filings to see if you are in compliance with the various UCC changes, begin now. That means filing Amendments wherever the debtor's name on the financing statement doesn't match the name on the driver's license or state-issued ID *exactly*. If he is known by several names or in the past has conducted business under several names - William, Bill, Billy - you should file Addendums listing the different names. The point is to get notice out there and avoid litigation.

Starting now, for all new/original filings, file with an eye to July. Your debtor's driver's license says "Michael J. Mouse" but he signs "official" papers as "Michael Jerome Mouse" and that's the name on his social security card. Fill out your financing statement with "Michael J. Mouse" in box 1 for the debtor. Remember, you don't want to fight over collateral, so put "Michael Jerome Mouse" in box 2, the "additional debtor" box. N.D.C.C. § 41-09-74.

Transition: If your security interest was perfected before July 1, 2013, it will remain perfected as long as it meets all of the requirements for perfection under the amendments (such as containing the name listed on the driver's license). If so, you do not need to do anything. If your previously-perfected security interest does not meet the new requirements, file an Amendment. If the debtor's name is "William Jones" and it says so on his driver's license, your financing statement does not meet the sufficiency test if you indicated that the debtor is "Bill Jones." Make these changes

by July 1, 2014. N.D.C.C. § 41-09-133 (U.C.C. § 9-803).

Also, be mindful of the **FOUR-MONTH** rule regarding a debtor's name change. If Michael Mouse always hated his name and goes to court to get it legally changed to Stuart J. Mouse and that's now on his driver's license, the filing on Michael J. Mouse becomes "seriously misleading" and is ineffective to continue perfection in his after-acquired collateral **UNLESS** you file an amendment within **FOUR MONTHS** of the name change event. See N.D.C.C. § 41-09-78(3) and N.D.C.C. § 41-09-36. The original financing statement would continue to be effective with respect to collateral acquired before the name change as well as collateral acquired within the four-month period, but not as to after-acquired collateral beyond that.

It is also important to keep an eye on these things for business debtors. If the sole proprietorship incorporates and changes its name making your earlier filing seriously misleading, you need to file an amendment within **FOUR MONTHS** or you are unsecured in its after-acquired collateral like accounts and inventory.

A four-month rule also applies if your debtor moves out of state. If your debtor moves, you must refile in the new state within **FOUR MONTHS** after the move. If you fail to perfect before the four-month deadline, you are deemed never to have been perfected as against a purchaser of the collateral for value. N.D.C.C. § 41-09-36. If your debtor *transfers* collateral to a new debtor who is located in a different state, you have one year to find that out and re-perfect. N.D.C.C. § 41-09-36(1)(c).

Recent Cases

CitiMortgage, Inc. v. Adolph, 2012 ND 188, 821 N.W.2d 385.

In February 2008, the Adolphs executed a promissory note for \$187,600.00, which they borrowed from Bremer Bank, N.A. to purchase land in Traill County; the note was secured by a mortgage signed by the Adolphs. The mortgage identified

Bremer as the lender, but stated that Mortgage Electronic Systems, Inc., ("MERS") was the mortgagee under the terms of the security instrument. The mortgage also stated that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." The note provided that the Adolphs were required to make payments of \$1,050.51, beginning April 1, 2008, and continuing on a monthly basis until the note was paid in full.

The Note contained an endorsement that stated "Pay to the order of CitiMortgage, Inc. without recourse, Bremer Bank National Association." That endorsement was signed by an officer of Bremer Bank. CitiMortgage alleged in the foreclosure complaint that it was "the lawful holder, or agent authorized to act on behalf of the holder, of the above-described note and mortgage." The Affidavit of Proof submitted by CitiMortgage in support of its motion for summary judgment stated that "CitiMortgage, Inc., is the holder/owner, or party entitled to enforce, the promissory note and mortgage. The terms of the mortgage signed by the Adolphs contained provisions allowing for the transfer of that mortgage, as well as the promissory note, to other parties, and without notice to the Adolph's. MERS assigned the note to CitiMortgage in August 2011 and the Assignment of Mortgage was recorded in the office of the Traill County Recorder.

The Adolphs didn't pay the monthly installment due in February 2011, nor did they make payments due thereafter, which was a default under the terms of the note. The foreclosure proceedings initiated by CitiMortgage in the district court were authorized under the terms of the mortgage in the event of default by the Adolphs. In their Answer, the Adolphs denied that CitiMortgage was the holder, or the agent for the holder, of the note and mortgage and alleged that the original lender, Bremer Bank, was the proper party to foreclose. They maintained that position when objecting to the motion for summary judgment filed by CitiMortgage, although they did admit to being in default. The district court granted foreclosure of the mortgage property.

The borrowers appealed and argued that CitiMortgage was required to produce the original promissory note, that CitiMortgage was not a proper holder of the note, and that their right to due process was violated. In an opinion composed of one long sentence, the North Dakota Supreme Court affirmed the foreclosure judgment, noting that under North Dakota Rule of Evidence 1003, a duplicate may be used to the same extent as the original unless a genuine issue is raised as to the authenticity or effectiveness of the original, and citing the old case of Robertson v. Brown, 25 N.W.2d 781 (N.D. 1947), which stated that the transfer of a promissory note carries with it the mortgage securing the note though no valid assignment of the mortgage is executed and delivered.

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