

The year in banking was difficult. New loan originations were down, with an uptick in loan defaults and lenders working harder for fewer new transactions. With the onset of the fourth quarter, however, activity has increased. With the commencement of the "end of the year push," we wanted to share with you our reinvented Cooley, Shrair "Bank Alert" letter. We hope that you find this new format helpful. Our goal, as always, is to keep our clients informed of the latest trends and areas of concern so as to better protect them. We plan to email these alerts on a quarterly basis.

We have concluded the first five years operating under Revised Article 9 of the Uniform Commercial Code ("Revised Article 9"). While there are not a tremendous number of cases interpreting the new law, one fertile area for litigation has been the proper completion of the UCC-1 financing statement. The old rule was that a financing statement was sufficient provided that it was not seriously misleading. Case law then decided what was seriously misleading. The rule changed, however, under Revised Article 9 to the effect that registered organizations (limited liability companies, limited partnerships and corporations) are searched using the registered legal name. If a computer search identifies the debtor, then the secured creditor is protected. You need to be careful, however, as a missing dash, comma or extra space could prove fatal. If a second secured creditor does a search using the registered entity's correct registered name, and the search does not disclose your earlier filed (but not located because of a "typo") financing statement, then the second secured creditor will prevail.

It is more difficult with non-registered entities as Revised Article 9 does not specifically provide guidance as to an individual's correct name so as not to be seriously misleading. One case which has addressed this issue already this year is Pankratz Implement Co. v. Citizen's National Bank, in which the Supreme Court of the State of Kansas upheld a decision which essentially said that misspellings will not be considered seriously misleading if a computer search under the debtor's correct name would have disclosed the incorrect name. What this means is that a filing under "Bob" instead of "Robert" would be fatal, whereas filing under "Roberts" would likely not be fatal because a search of the name "Roberts" would have disclosed the name "Robert".

To avoid the uncertainty and risk of misfiling, our suggestion is that prior to loan closing, that a Certificate of Good Standing from the Secretary of State's Office be obtained to verify the exact spelling of the registered entity's name and that a valid driver's license or similar governmentally issued document be used to confirm an individual's correct name.

Hopefully this letter finds you busy as we enter the fourth quarter. As always, please feel free to contact us with questions you might have even if you have not decided to engage counsel as we continue to offer this service to clients who work with us.

Very Truly Yours,

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Cooley, Shrair P.C.

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