

THE ARROW

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PERFECTION BY FILING

The most common method of perfecting a security interest in collateral which is not a titled vehicle is through the filing of a financing statement.

The Uniform Commercial Code, §9-402, sets forth what a financing statement must contain. In Kentucky the following information must be included:

1. The name and address of the debtor.
2. The name of the secured party, along with an address from which information concerning the security interest may be obtained;
3. The signature of the debtor;
4. A statement indicating the type, or describing the items of, collateral.

If the financing statement meets these criteria, and is filed

in the right location, it is good for a period of five years. The secured party may file a continuation statement renewing the financing statement for an additional five years at any time during the final six months of the first five year period of perfection. The only signature required on the continuation statement is that of the secured party, but it must identify the original financing

statement by file number and date filed and state that the original statement is still effective.

In the event collateral subject to a security interest in another jurisdiction is brought into the state, or the debtor's residence is changed to this state, then a new financing statement may be filed without the necessity of a new signature from the debtor.

The proper place to file a financing statement in Kentucky in most cases if the debtor is a Kentucky resident is the office of the County Clerk in the county of the debtor's residence. In the jargon of UCC experts, this is referred to as "local filing." If the debtor is a nonresident, the financing statement for most types of collateral is filed in the office of the Secretary of State.

So long as the filing is made in the right place originally, it will continue effective for the full five years even though the debtor may change its residence.

The place of filing can become a tricky matter in the event that the debtor is a Kentucky corporation, because the "residence" of a Kentucky corporation for purposes of the UCC filing requirement is wherever the registered office of the

corporation's process agent happens to be. In many cases, the address given to the Secretary of State for the process agent is far removed from the actual location of the debtor's business or the location of the collateral. If the process agent's office is only slightly over the county line from the location of the debtor's business, filing in the county of the debtor's business location will render the secured party unperfected.

Why is perfection so important? The secured party needs perfection to protect itself against three potential opponents: (1) A bona fide purchaser; (2) a subsequent lien creditor; (3) a bankruptcy trustee. Lack of perfection can render a secured party's claim to its collateral inferior to any one of this trio of adversaries.

It is generally accepted law that since the purpose of the financing statement is merely to give notice to the world of a claimed security interest, the description of the collateral therein need not be as specific as the law might require for the security agreement itself. The collateral description should merely give notice -- enough information so that a reasonable party will know whether to make any further inquiry of the secured party.

If a secured party wishes to amend the contents of a financing statement, it may do so, but the amendment must be filed in the same place as the original financing statement, and include signatures of both the debtor and the secured party. Amendments do not extend the period of perfection of the original financing statement, and if additional collateral is added by amendment, perfection is effective as to the additional collateral only from the filing date of the amendment.

The security agreement itself may serve as a financing statement if it meets the requirements of a financing statement. It is a very popular practice among creditors to use a short notice form called a "UCC-1" stapled to a copy of the security agreement, with the description of the collateral on the UCC-1 reading something like the following: "All accounts, contract rights, inventory, etc. -- see original, attached."

Even if a creditor knows what a financing statement must contain and where to file it, it may not know the proper time to file it. In your editor's opinion, a financing statement should be filed as soon as possible -- that is, when the granting of a security agreement is first contemplated, not after its execution. The reasoning for this is simple: the priority of the creditor's security interest relates back to the date of filing when perfection is achieved by filing. Thus, a financing statement should be obtained and filed in anticipation of the granting of a security interest by the debtor. In actual practice, however, the filing of the financing statement usually lags behind the

execution and acceptance of the security agreement. Such a common practice can have devastating results if a delay in the mails then results in a late filing which eliminates either a purchase money priority, or any priority as to the collateral claimed. □

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