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UCC—Liberal Interpretation of Financing Statement Requirements

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the United States. Emphasizing the breadth of section 4, the Court declared:

> . . . Congress has . . . provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.[28]

It would be unfortunate if the *Radovich* policy gained general application without some thought given to its effect upon the more putative antitrust provisions, like section 7. Predication of treble damage recovery on the "target" test of liability, while denying literal effect to the provisions of section 4, does effectuate the theoretically cumulative nature of private actions.[29] If used in conjunction with the target test, the result in *Bostitch* would not inordinately promote unlimited liability, stifle business expansion, or create windfalls for persons tangentially suffering losses derivative from corporate acquisition. On the other hand, liberal implementation of the *Radovich* policy might work the opposite effect. Before allowing the courts to inaugurate such a policy, Congress should reconsider such possibilities as (1) discretionary trebling of damages,[30] (2) making compensatory damages more freely available while restricting treble damages to consummated restraints, or (3) restricting treble damages to intentional injuries in the case of unconsummated restraints.

UCC—LIBERAL INTERPRETATION OF FINANCING STATEMENT REQUIREMENTS

Filing requirements under the Connecticut enactment of the Uniform Commercial Code[1] have been construed by two recent decisions

[28] 352 U.S. at 453-54.

[29] The purposes of the private action for damages under § 4 are (1) compensation for injuries caused by violators of the antitrust laws, (2) prevention of violations through fear of cumulative damages, and (3) private assistance to the government in enforcing these laws when proof is difficult for the government acting alone to obtain. See ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 378-80 (1955); MacIntyre, *The Role of the Private Litigant in Enforcement*, 7 Antitrust Bull. 113 (1962); Comment, *Antitrust Enforcement by Private Parties: Analysis of Development in the Treble Damage Suit*, 61 YALE L.J. 1010, 1061-2 (1952).

[30] Discretionary trebling of of damages was recommended by the Attorney General's Committee, but the recommendation was not adopted by Congress. See ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 378-80 (1955).

[1] UNIFORM COMMERCIAL CODE 1962 OFFICIAL TEXT WITH COMMENTS [hereinafter cited as UCC].

Forty-three jurisdictions have enacted the *Uniform Commercial Code:* Ala. Acts 1965, act 549; ALASKA STAT. §§ 45.05.002—.794 (1962); ARK. STAT. ANN. §§ 85-1-101

of the United States Court of Appeals for the Second Circuit. In one case, a creditor duly filed a "security agreement"[2] which the debtor, "Excel Stores, Inc.," had inadvertently signed "Excel Department Stores." Upon debtor's adjudication as a bankrupt, creditor filed a reclamation petition. The district court denied the petition, holding that the security agreement was not properly signed in accordance with Uniform Commercial Code section 9-402(1). On appeal, the Second Circuit reversed and *held:* Use of "Excel Department Stores" instead of debtor's true name, "Excel Stores, Inc.," in a security agreement is a "minor error . . . not seriously misleading," and substantially complies with the formal requisites of a financing statement, Uniform Commercial Code section 9-402. *In re Excel Stores, Inc.*,

to -9-507 (1961), as amended, Ark. Acts 1961, act 185; CAL. COMMERCIAL CODE §§ 1101 —10104; Colo. Laws 1965, S.B. 104; CONN. GEN. STAT. REV. §§ 42a-1-101 to -10-104 (1961); D.C. CODE ANN. §§ 28:1-101 to 10-104 (1963); FLA. STAT. ANN. §§ 671.1-101 to 680.10-107 (Supp. 1965); GA. CODE ANN. §§ 109A-1-101 to -10-106 (1962); Hawaii Laws 1965, S.B. 138; ILL. ANN. STAT. ch. 26, §§ 1-101 to 10-104 (Smith-Hurd 1963); IND. ANN. STAT. §§ 19-1-101 to -9-507 (1964); IOWA CODE ANN. §§ 544.1101—.10104 (Supp. 1965); Kan. Laws 1965, ch. 564; KY. REV. STAT. §§ 355.1-101 —.10-102 (1962); ME. REV. STAT. ANN. tit. 11, §§ 1-101 to 9-507 (1964); MD. ANN. CODE art. 95B, §§ 1-101 to 10-104 (1964); MASS. ANN. LAWS ch. 106, §§ 1-101 to 9-507 (1963); MICH. STAT. ANN. §§ 19.1101—.9994 (1962); MINN. STAT. ANN. §§ 336.1-101 to .10-105 (Supp. 1965); MO. ANN. STAT. §§ 400.1-101 —.10-102 (U.C.C. Supp. 1963); MONT. REV. CODES ANN. §§ 87A-1-101 to -10-103 (1964); NEB. REV. STAT. U.C.C. §§ 1-101 to 10-104 (1964); Nev. Laws 1965, ch. 353; N.H. REV. STAT. ANN. §§ 382-A:1-101 to 9-507 (1961); N.J. REV. STAT. §§ 12A:1-101 to 10-106 (1962); N.M. STAT. ANN. §§ 50A-1-101 to -9-507 (1962); N.Y. U.C.C. §§ 1-101 to 10-105; N.C. Laws 1965, ch. 700; N.D. Laws 1965, ch. 296; OHIO REV. CODE ANN. §§ 1301.01-1309.50 (1962); OKLA. STAT. ANN. tit. 12A, §§ 1-101 to 10-104 (1963); ORE. REV. STAT. §§ 71.1010—79.5070 (1963); PA. STAT. ANN. tit. 12A, §§ 1-101 to 10-104 (Supp. 1964); R.I. GEN. LAWS ANN. §§ 6A-1-101 to -9-507 (Supp. 1961); TENN. CODE ANN. §§ 47-1-101 to -9-507 (1964); TEX. U.C.C. Art. 1-10 (Supp. 1965); UTAH CODE ANN. §§ 70A-1-101 to -10-104 (Supp. 1965); VA. CODE ANN. §§ 8.1-101—.10-104 (1965); Wash. Laws 1965, Ex. Sess., ch. 157; W. VA. CODE ANN. §§ 46-1-101 to -10-104 (1965); WIS. STAT. ANN. §§ 401.101—409.507 (1964); WYO. STAT. ANN. §§ 34-1-101 to -10-105 (Supp. 1965).

[2] A security agreement is "an agreement which creates or provides for a security interest." UCC § 9-105(1)(h). "Security interest" is the basic term denoting the secured party's interest in personal property or fixtures which secures payment or performance of an obligation, regardless of the form of security transaction employed. UCC § 1-201(37). "Security agreement" is to replace such terms as "chattel mortgage," "conditional sale," "assignment of accounts receivable," "trust receipt," etc. In *Excel Stores,* the security agreement was a conditional sales contract for the sale of six cash registers, classified as "equipment" under UCC § 9-109(2).

The paper that is filed to perfect, and give notice of, a security interest is a financing statement. The "formal requisites" of a financing statement are stated in § 9-402(1): "A financing statement is sufficient if it is signed by the debtor and the secured party," gives addresses of the parties, and describes the collateral by type or item. Section 9-110 provides that "any description of personal property . . . is sufficient whether or not it is specific if it reasonably identifies what is described." The "reasonable identification" test established in this section, and enacted by the various states without significant modification, replaces the former "serial number" test. UCC § 9-110, comment.

A copy of the security agreement is sufficient as a financing statement if it contains the required information and is signed by both parties. UCC § 9-402(1).

Most states have modified section 9-402 to some extent. California, Kentucky, Maryland, and New York have considerably changed the section, generally requiring inclusion of additional information in the financing statement.

341 F.2d 961 (2d Cir. 1965). In the second case, a creditor prepared a financing statement,[3] typing the parties' names and addresses in appropriate spaces. Debtor signed the statement, but creditor did not, due to a misinterpretation of the form's instructions. Both the financing statement and the security agreement,[4] the latter also lacking creditor's signature, were duly filed. Debtor was subsequently adjudged bankrupt. The district court affirmed the referee's allowance of creditor's petition for reclamation. On appeal to the Second Circuit, affirmed. *Held:* Insertion of a creditor's name in the body of a financing statement, without a signature, is sufficient as a "signing" within the meaning of Uniform Commercial Code sections 1-201(39) and 9-402. *Benedict v. Lebowitz,* 346 F.2d 120 (2d Cir. 1965).

In line with the general purposes of simplification and clarification of commercial transactions, article 9 of the Uniform Commercial Code provides a single, comprehensive system of chattel security[5] under which perfection and priority of security interests may be achieved by filing a security agreement or short-form financing statement meeting only a few formal requisites.[6] The issue presented by the principal cases was whether the technically deficient signatures defeated the basic purposes of the Code's "notice filing" system.

The court in *Excel Stores* decided that the filing provided sufficient public notice because the security agreement contained the debtor's

[3] See note 2 *supra.* The financing statement employed in the principal case was State of Connecticut Standard Form UCC-1.

[4] The security agreement in this case was a chattel mortgage covering various items of typesetting equipment.

[5] For a comprehensive discussion of article 9, see COOGAN, HOGAN & VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (1963).

[6] As under federal bankruptcy law, the term "perfected" is used to describe a security interest in personal property which cannot be defeated in insolvency proceedings or by general creditors. UCC § 9-301, comment 1. A security agreement is perfected when it has "attached" and when the secured party has taken whatever steps are necessary for perfection. These steps are explained in §§ 9-302, 9-304, 9-305, and 9-306. The requisites for attachment are stated in § 9-204. Section 9-302 states the general rule that, to perfect a security interest, a financing statement (or security agreement) must be filed; it also lists exceptions, most notably when the security interest is in collateral in the secured party's possession or is a purchase money security interest in consumer goods. Section 9-301 lists the classes of persons who take priority over an unperfected security interest. In addition to listing other sections which state special rules of priority in a variety of situations, § 9-312 states that priority among conflicting security interests is generally determined in the following manner: (1) in the order of filing if both interests are perfected by filing; (2) in the order of perfection unless both interests are perfected by filing; (3) in the order of attachment so long as neither interest is perfected.

The above mentioned Code sections have generally been adopted by the various states with only minor modifications, except for § 9-302. A number of states, including Alabama, California, Connecticut, Georgia, Kentucky, Michigan, Missouri, North Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming have included special language in § 9-302 dealing with security interests in motor vehicles and security agreements executed by public utility and transportation companies.

address and treasurer's signature. Underlying the court's decision was the parties' intent to create a perfected security interest, and the absence of any third party prejudiced by the misnomer. Because the creditor in *Benedict* typed his name into the body of the financing statement, the court found a sufficient signing under a broad construction of section 1-201(39), which defines the term "signed."[7] Both opinions failed, however, to recognize certain problems which may arise when a financing statement or security agreement is not properly signed.

Before adoption of the Uniform Commercial Code, rigid adherence to complicated statutory formalities was required to perfect a security interest, and even a slight technical deviation rendered perfection ineffective.[8] The Code, however, is intended to reduce formalities and pitfalls to a minimum. Its filing system requires few "formal requisites," only "the minimum information necessary to put any searcher on inquiry."[9] In line with its intention to simplify filing requirements, the Code states: "A financing statement substantially complying with the requirements of . . . section [9-402] is effective even though it contains minor errors which are not seriously misleading."[10]

In emphasizing substance over form, the court in *Excel Stores* apparently forgot that the efficacy of all filing systems is dependent upon detailed accuracy, especially as to names of the parties.[11] Under the Code, a recorded document is indexed according to the debtor's name.[12] Thus, a simple misspelling could render the filing ineffective. In many cases, filing is with the secretary of state,[13] and any error

[7] See text accompanying note 22 *infra*.

[8] *E.g., In re* Urban, 136 F.2d 296 (7th Cir. 1943) (failure to file affidavit of good faith); Petition of International Harvester Co., 9 F.2d 299 (6th Cir. 1925) (mere copy of affidavit not sufficient); *In re* Holley, 25 F.2d 979 (N.D. Iowa 1928) (did not properly disclose title of subscribing notary); Citizens Nat'l Bank v. Denison, 165 Ohio St. 89, 133 N.E.2d 329 (1956) (acknowledgment invalid because taken by telephone).

[9] 341 F.2d at 963.

[10] UCC § 9-402(5). This subsection has been enacted as quoted by every state which has adopted the Code.

[11] "Since notice filing contemplates access to the records through the medium of names, ascertainment and use in the documents of the right names would be as important under the Code as it is now." Shattuck, *Secured Transactions (Other Than Real Estate Mortgages)—A Comparison of the Law in Washington and the Uniform Commercial Code, Article 9*, 29 WASH. L. REV. 263, 268 (1954).

[12] UCC § 9-403(4). Most states have altered this section to some degree, allowing a variety of indexing methods.

[13] UCC § 9-401(1). This section did not attempt to resolve the controversy between the advocates of a completely centralized filing system and those of a local system, and was therefore drafted in a series of alternatives. A state may adopt (1) exclusive central filing, usually with the secretary of state, (2) filing on a county, city, or town level, or (3) both central and local filing. The state may also provide that the place of filing depends on the type of collateral. Due to the great diversity in this area, each state's requirements should be carefully consulted.

would lead to confusion in the voluminous records of a central filing system.

Corporate designations should be especially accurate, due to the many similar corporate names which are often distinguished only by different uses of "Inc.," "Co.," or "Corp." A file searcher should not have to look under all possible listings of a corporation, and then visit each address, to make certain he has the correct firm.[14] The Code fails to state what language would constitute an adequate description of a corporate party to a contract. Connecticut corporate law, however, requires that "corporation," "company," "incorporated," or any abbreviation of these, be in a corporation's name.[15] Minor discrepancies in a corporate designation are not considered fatal defects under Connecticut law as long as "there is enough expressed to show that there is such an artificial being and to distinguish it from all others . . . ."[16] The court's finding that the misnomer in *Excel Stores* was a "minor error . . . not seriously misleading" is questionable because (1) the name used, "Excel Department Stores," did not identify the debtor as a corporation, (2) a Massachusetts corporation named "Excel Enterprises, Inc." operated within the same store building and under the same management as the debtor, and (3) the treasurer whose signature appeared on the security agreement was an officer of both firms.[17]

It should have been of no consequence that the validity of a financing statement was being questioned by a trustee in bankruptcy, as might be found from a reading of the principal case. A sufficient financing statement or security agreement must be filed to perfect many security interests against certain lien creditors.[18] Under both the Code and federal bankruptcy law, a trustee in bankruptcy is a lien creditor from the date the petition in bankruptcy is filed.[19]

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[14] See Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing,"* 47 IOWA L. REV. 289, 292-93 n. 5 (1962).

[15] CONN. GEN. STAT. REV. § 33-287(a) (1961).

[16] Seaboard Commercial Corp. v. Leventhal, 120 Conn. 52, 54, 178 Atl. 922, 923 (1935). A financing statement listing a corporation as debtor but signed by an individual, the predecessor of the corporation, was held invalid in *In re* Pennar Paper Co., 2 UCC REP. 659 (E.D. Pa. 1964) (alternative holding).

[17] *In re* Excel Stores, Inc., 4 CCH INSTALL. CREDIT GUIDE ¶ 99406, at 89711 (D. Conn. 1963).

[18] UCC § 9-301(1)(b).

[19] Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603 (1961); Bankruptcy Act § 70(c), 52 Stat. 881 (1938), as amended, 11 U.S.C. § 110(c) (1964 ed.); UCC § 9-301(3).

It appears that the Code and Bankruptcy Act conflict as to a "lack of knowledge"

Since a trustee is an "ideal creditor"[20] under the "strong-arm clause" of the Bankruptcy Act, his claim should take preference if any third party could have been misled by an erroneous financing statement.[21]

The financing statement in *Benedict* was not misleading, as it accurately identified the parties and could have been properly indexed. The only question was whether the act of the creditor in typing his name in the body of the instrument constituted a "signing" by him. The court based an affirmative answer on its construction of section 1-201(39), which states that " 'signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing."[22] The Official Comment states that the symbol "may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead."[23] Under this broad definition, therefore, any mark which identifies a party, made with "intention to authenticate a writing," will suffice as a "signing."[24] There remains, however, the possibility that both names and signatures are "formal requisites" of a financing statement. Although section 9-402(1) uses only the word "signed," the suggested form presented in section 9-402(3) provides places for both names and

requirement. The Code states that, unless otherwise provided, "an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of the security interest and before it is perfected." UCC § 9-301(1)(b). Thus, if a trustee himself or all the creditors represented had knowledge of the security interest, the trustee is not a lien creditor. The federal act, however, says nothing of knowledge. Although it would seem, under the rule of Moore v. Bay, 284 U.S. 4 (1931), that the Bankruptcy Act prevails over the Code, much confusion in this area prevails in the courts. See Kennedy, *The Trustee In Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested By Articles 2 and 9*, 14 RUTGERS L. REV. 518 (1960), revised in 1 COOGAN, HOGAN & VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 1051 (1963); Note, *Some Possible Areas of Conflict Between the Illinois Uniform Commercial Code and the Bankruptcy Act*, 1962 U. ILL. L.F. 418; *Symposium—The Commercial Code and the Bankruptcy Act: Potential Conflicts*, 53 NW. U.L. REV. 411 (1958).

[20] See *In re* Waynesboro Motor Co., 60 F.2d 668, 669 (S.D. Miss. 1932).

[21] *Cf., In re* Babcock Box Co., 200 F. Supp. 80 (D. Mass. 1961). *But cf.*, Pacific Fin. Corp. v. Edwards, 304 F.2d 224 (9th Cir. 1962). The Bankruptcy Act's "strong-arm clause" states:

> The trustee, as to all property . . . upon which a creditor of the bankrupt could have obtained a lien . . . at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon, . . . whether or not such a creditor actually exists. 11 U.S.C. § 110(c) (1964 ed.).

[22] Except for Michigan and New York, where a carbon copy of a signature is specifically valid, this subsection has been enacted by the states without change.

[23] UCC § 1-201, comment 39.

[24] *Accord, In re* Horvath, 1 UCC REP. 624 (D. Conn. 1963). A name will not suffice as a signature in all cases. If the financing statement in *Benedict* had lacked the debtor's signature, instead of the creditor's, it should have been insufficient because the debtor's name was not typed by the debtor. See *In re* Causer's Town & Country Super Market, Inc., 4 CCH INSTALL. CREDIT GUIDE ¶ 98750 (N.D. Ohio 1965).

signatures.[25] Nonetheless, when section 9-402(1) is read with the definition of "signed," the act of typing a name should suffice as a signature in a *Benedict* situation.[26] In any case, both parties should be clearly identified in a financing statement or security agreement.[27]

The Code states that it should be "liberally construed and applied to promote its underlying purposes and policies."[28] Such was the court's intention in the principal cases. It did not want to indulge in a "fanatical and impossibly refined reading of ... statutory requirements ...."[29] The underlying purpose of filing and recording a financing statement or security agreement is to put interested parties on notice that a named party claims a security interest in another's property. This purpose, of course, would not be defeated by a minor error which was not misleading. But to provide adequate notice, a financing statement must accurately present certain basic information. Although the drafters of the Code sought clarification and simplification, they did not intend unlimited license. The formal requisites in section 9-402 may be few, but they should be met; "substantial compliance" has its limits. Liberal construction is one thing; disregard of a simple, but essential, requirement is another. *Excel Stores* was too liberal in deciding what was minor and not misleading.[30] The test should be, as it was in *Benedict*, whether public notice was effected by the filing of an authentic and sufficient financing statement. Since section 9-402 requires so little of a secured creditor, a court should require stricter compliance with the few formal requisites of a financing statement.

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[25] It appears that every state enactment of § 9-402(3), (usually stating, "A form substantially as follows is sufficient") specifies names and signatures. California's enactment of § 9-402(1) may have avoided this problem: "A financing statement is sufficient if it is *signed* by the debtor and ... secured party, gives the *name* ... of the debtor ...." (Emphasis added.) CAL. COMMERCIAL CODE § 9-402(1). See also MD. ANN. CODE art. 95B, § 9-402(6) (Supp. 1964).

[26] *Contra, In re* Murray, 2 UCC REP. 667 (D. Ore. 1964).

[27] *But see* Alloway v. Stuart, 385 S.W.2d 41 (Ky. 1964), criticized in 65 COLUM. L. REV. 922 (1965).

[28] UCC § 1-102.

[29] UCC § 9-402, comment 5.

[30] For a better interpretation, see National Cash Register Co. v. Firestone & Co., 346 Mass. 255, 191 N.E.2d 471 (1963). Misspelling of the name and style under which debtor, an individual, did business, as "Cozy Kitchen" rather than "Kozy Kitchen" was held to be a minor error. The financing statement was sufficient because the name of the debtor, himself, was correctly given and would have been correctly indexed.