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Collateral Descriptions in UCC Financing Statements

Lenders and their counsel know that it is important to properly describe the collateral on which a lien (mortgage or security interest) is being granted. The purpose of this post is to discuss some recent decisions contrary to what many corporate counsel thought they knew concerning collateral descriptions in security agreements and UCC financing statements.

A discussion of collateral descriptions for UCC issues starts with Section 9-108, which governs the sufficiency of description of the collateral for both security agreements and financing statements. Titled *Sufficiency of Description*, in many states that section provides in part:

(a) Sufficiency of description. Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Examples of reasonable identification. Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by: (1) specific listing; (2) category; (3) except as otherwise provided in subsection (e), a type of collateral defined in the Uniform Commercial Code; (4) quantity; (5) computational or allocational formula or procedure; or (6) except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

The Official Comment to this section includes: “The test of sufficiency of a description under this section, as under former Section 9-110, is that the description do the job assigned to it: make possible the identification of the collateral described.” The phrase “identification of the collateral” seems to be the phrase that has begun to get attention from courts and is creating risks for secured party lenders.

In certain situations, lenders who take security interests in only selected collateral items have described those selected items in

the security agreement and referred to that description in the UCC financing statement, often with a simple reference to the security agreement that may or may not be attached and filed with the financing statement. I am unaware of any Ohio cases directly addressing whether referring to a security agreement or other contract in the UCC financing statement is an adequate description of the collateral. Prior case precedence leads to the conclusion that such a reference is adequate. See, *Newsom v. Rabo Agrifinance, Inc.*, 427 S.W.3d 688 (Ark. App. 2013) (“Accordingly, a description of collateral need not enable a stranger to select the property—in other words, it need not be fully self-explanatory. It is sufficient if it will enable third parties, aided by inquiries that the instrument [filed financing statement] itself suggests, to identify the property. The onus is on the subsequent lender to seek out what information he needs.” (citations omitted)). *Accord, Lloyd Credit Corp. v. McClain Heller Ins.*, 620 A.2d 472, 476 (Sup. Ct. N.J. 1992) which includes this:

Under [N.J.S.A. 12A:9-402\(1\)](#), notice filing was designed to eliminate the requirement that the actual entire security agreement be filed . .

. .

Lloyds could have listed each “item” of collateral subject to its intended security interest, however it elected to refer to the collateral by “type,” which is equally permissible. [N.J.S.A. 12A:9-402\(1\)](#). **Lloyds’ financing statement, as recorded, placed Transamerica on notice of the collateral relationship between Lloyds and McClain. Transamerica, after making sufficient inquiry, would have learned** of the financial relationship between Lloyds and McClain. Obviously, the unrecorded documents creating a relationship between Transamerica and McClain did not and could not have provided Lloyds with notification of that economic relationship.

In this case, **the financing statement made specific reference to an agreement between Lloyds Credit and the debtor**

Thus, where a creditor refers to collateral by “type,” as here, “intangibles” and in conjunction therewith **refers the searching party to the existence of a specific contractual arrangement, which will enumerate specific “items” of collateral, the intended secured party will have met the statutory descriptive**

requirements. . . . (bold added).

The secured party won both of these and other cases by filing a financing statement that referred to an unattached contract that precisely described the collateral.

A couple recent decisions, however, caution that a UCC financing statement that refers to an unfiled document for the collateral description is inadequate. *First Midwest Bank v. Reinbold* (In re 180 Equip., LLC), 591 B.R. 353 (Bankr. C.D. Ill. 2018)[1] (providing that the bankruptcy trustee prevailed over secured creditor because the inadequate financing statement did not itself describe the collateral subject to creditor's security interest, but instead referred to description of collateral in security agreement that was not attached or otherwise publicly filed)[2]; and *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico*, 914 F.3d 694, 710 (1st Cir. 2019) ("[t]he Bondholders argue that we should adopt a lenient understanding of the collateral description requirement, such that the mere reference in the Security Agreement to the definition of 'Pledged Property' contained in a separate document, the Resolution, constituted a sufficient description, even though the Resolution, and thus its description of 'Pledged Property,' was not attached to the 2008 Financing Statements.") The Puerto Rico bondholders lost. The *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico* case cites the *Midwest Bank* case.

In conclusion: One commentator puts the current situation this bluntly: "Reference to a separate document that was not attached to the security agreement was insufficient." 8 *Quinn's UCC Commentary & Law Digest* § 9-502[B] (June 2019 update) discussing the *Midwest Bank* case. I am not prepared to go that far. But there are now two decisions against secured creditors interpreting a statute that is supposed to be applied uniformly across the country. So, the best practice is to not file a UCC financing statement whose collateral description is found solely within a referenced, but an unattached contract or another document. Until then, we commercial litigators have a new argument to consider.

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[1] The *Midwest Bank* court and the commentator at 96 No. 3 U.C.C. Bulletin NL 3 (Dec. 2018 “Matters of Major Interest”) each describe the issue in *Midwest Bank* as an issue of first impression.

[2] “First Midwest takes the position that a financing statement’s identification of the security agreement as the document containing the description of the collateral, without filing it as part of the financing statement and without setting forth any collateral description in the financing statement, is nevertheless sufficient to perfect its security interest. The parties agree that no published opinion by any court addresses this exact issue.” The court rejected this argument by the bank.

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