

community BANKER

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Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker 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.

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A QUICK REVIEW OF FILING A FINANCING STATEMENT ON AN “INDIVIDUAL” (ALSO KNOWN AS “A HUMAN BEING”)

Congratulations! You’re wrapping up the paperwork for the Ebenezer Scrooge loan, and you’re sitting down to file your financing statement! (We always suggest that lenders make a copy of the unexpired driver’s license for the file as a part of the credit application process.)

Your debtor is an individual natural person, so it’s essential that you comply with North Dakota law for identifying the debtor on a financing statement. According to N.D.C.C. § 41-09-74(1)(d) (U.C.C. § 9-503(a)(4)), the financing statement must list the debtor’s name as it appears on the debtor’s unexpired driver’s license. *Must* list the name as it *appears* on the *unexpired* driver’s license. Otherwise, a lender runs the risk of failing to identify its debtor in compliance with N.D.C.C. § 41-09-74. Failing to correctly identify Mr. Scrooge may mean that your financing statement might not be uncovered in a search, your financing statement may be found to be seriously misleading, and you might ultimately lose your secured creditor status.

North Dakota is an “Alternative A” or “Only If” state, and the relevant law provides that

1. A financing statement *sufficiently* provides the name of the debtor:

* * * * *

d. Subject to subsection 7, if the debtor is an individual to whom this state has issued a driver’s license or identity card that has not expired, *only if* the financing statement provides the name of the individual which is indicated on the driver’s license or identity card;

* * * * *

7. If this state has issued to an individual more than one driver’s license or identity card of a kind described in subdivision d of subsection 1, the one that was issued *most recently* is the one to which subdivision d of subsection 1 refers.

N.D.C.C. § 41-09-74(1)(d) & (7) (*emphasis added*). Because he is an individual, Alternative A is clear that a financing statement *sufficiently* identifies the name of the debtor who has a **1)** current **2)** North Dakota-issued **3)** driver’s license **4)** or identity card **ONLY IF** the financing statement supplies the name as provided on the driver’s license or identity card. (The identity card is a North Dakota Non-Driver Identification Card that is issued by the Department of Transportation under the same guidelines as a driver’s license.) The license and identity card are the only two identifying documents referenced under the statute (not a passport or a birth certificate), and those documents are good only if they were issued by the State of North Dakota and are unexpired.

If Mr. Scrooge just moved here from Montana and he wants to use his Montana driver's license to satisfy your due diligence, do not do so. An unexpired driver's license from a state other than debtor's state of residence is insufficient. In that case, document/note in your file that your debtor does not possess an unexpired North Dakota driver's license or identity card (or require that he get one or the other and file your financing statement before you disburse any funds). If you *do* extend the loan without a new license or card issued by the State of North Dakota for your North Dakota-resident debtor, determine the name as you did in the old days before the 2010 revision to the Uniform Commercial Code requiring a driver's license. See the rest of the story for suggestions.

THE REST OF THE STORY

Sometimes things aren't so straight-forward; don't just copy the license and jot the name down for use in the financing statement. Your close review of the license or identity card may uncover a problem – in that case, these prompts may be helpful:

1.0 Your Debtor is a resident of North Dakota and the collateral is

a. fixtures, as-extracted collateral, or timber to be cut:

You will file the financing statement for these types of collateral in the location of the related real property (the office where you'd file a mortgage on the real estate).

b. any collateral other than the type described in subsection a, above:

You will file the financing statement in the state of the Debtor's principal residence – in this case, North Dakota.

2.0 Does your Debtor have a driver's license or identity card issued by the State of North Dakota?

a. Yes. Proceed to point 3.0.

b. No. Proceed with **Action A** below.

3.0 Does your Debtor have more than one driver's license and/or, identity card as described in point 2.0 above?

a. Yes. Proceed to point 4.0.

b. No. Proceed to point 5.0.

4.0 Pick the most recently-issued North Dakota driver's license or North Dakota identity card and proceed to point 5.0.

5.0 Has the debtor's driver's license or identity card expired?

a. Yes. Proceed with **Action A** below.

b. No. Proceed with **Action B** below.

ACTION A: Provide the individual name of your Debtor or his or her last name and first personal name in the corresponding financing statement individual name fields in compliance with N.D.C.C. § 41-09-74(1)(e). Note in your file that your debtor doesn't possess a North Dakota-issued unexpired driver's license or identity card.

NOTE: Under Alternative A, if your Debtor does not hold a driver's license or identity card issued by the state in which the financing statement is filed, then either of the following names for the debtor would be sufficient as the debtor's name on the financing statement: (1) the individual name of the debtor, or (2) the debtor's surname and first personal name. Where does one get this information? A birth certificate? A passport? A tax return? Perhaps use the driver's license and a tax return to see if they are in agreement? File your UCC-11 using different variations of the debtor's name if necessary.

The statutes don't tell us what the "individual name" might entail; they also neglect to tell us which components of a debtor's name make up the last name. For example, there is no guidance when a last name is hyphenated. If there is any question concerning the proper name, file financing statements for the names commonly used. A common issue is that name usage is not always consistent. If your debtor uses more than one name, file for your financing statement for the all names commonly used: for example, file for "Drew Smith" and "Andrew Smith", for "Neil Vanderbilt" and "Cornelius Vanderbilt", and for those hyphenated names, file for "Joan Smith-Jones", "Joan Jones", and "Joan Smith."

ACTION B: Provide the name indicated on the unexpired North Dakota driver's license or identity card, whichever, in the corresponding financing statement individual debtor name fields in compliance with N.D.C.C. § 41-09-74(1)(e).

AND . . .

Finally, once a license expires, the name on the financing statement becomes insufficient if there's a *name change*. Banks will need to amend the financing statement within the four-month grace period to maintain perfection without losing priority in the event of a name change. See N.D.C.C. § 41-09-78 (U.C.C. § 9-507). We suggest that lenders manage the problem of expiring licenses/name change by keeping a copy of the driver's license on file and suspending the expiration date for further action.