

Paper Terrorism And The Bogus UCC-1 Lien War



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"Paper Terrorism" does not involve suicide missions, bombs or lethal chemicals. Rather, it is a formidable and evil document-filing plague that now spreads through American prisons.¹ Most recently, these so called "paper terrorists" have concocted a scheme to target the good names, reputations and credit standing of public officials they blame for their incarceration. Taking advantage of the computerized interfaces between unscreened official government filings and commercial reliance on the financial industry's personal financial data storage facilities, they make quick work to harass, extort, blackmail and terrorize public officials in their personal capacities.

One such scheme, referred to as the "bogus UCC-1, notice of lien scam" reportedly began in an Alaskan prison and now has spread in varying degrees through New York and other metropolitan prison locales in the northeast United States. This article will address the UCC-1 bogus lien phenomenon, and law enforcement's various responses including, in detail, the civil litigation option.

The UCC-1 or "Notice of Lien"

In its legitimate form, the UCC-1, or "notice of lien," plays an important role in the interplay of routine commercial transactions governed through the Internet-friendly Uniform Commercial Code.² Thousands of daily agreements between creditors and debtors in all fifty states either permit or require the filing of a UCC-1 notice of lien (UCC-1) form. The UCC-1 must be filed with a county clerk or with the New York State Department of State (hereinafter referred to as "DOS"), which is New York's official state registry. DOS accepts more than 1500 UCC-1 notices of lien filings each day.

The UCC-1 protects a creditor's interest in either property or the collateral that supports the extension of credit or financing. It is a simple "fill-in-the blank" form usually completed during the financing application process. Once filed, the UCC-1 places other potential creditors on notice that there is a claimed financial interest by another in that property. The UCC-1 is routinely filed in sale transactions

for goods, major appliances, home improvements, and home sales. It is also filed for any other purchases made under a written financing agreement, where the lien held by the financing company represents their interest in the property or goods financed.³

Comparable to a publicly available mortgage, UCC-1 filings are available in searchable electronic form on the DOS web site, and thus available to anyone with Internet access.⁴ Many financial institutions routinely search the state's UCC-1 database to assess a potential debtor's reputation and credit worthiness. In fact, the DOS web site proclaims that no creditor should extend credit to a potential debtor without first checking their UCC web site. Of course, this proclamation also supports the state's interest in collecting the nominal fees charged for filing the documents.

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The UCC-1 Effect On Your Credit Rating

Most banks do not rely exclusively on a UCC-1 data as conclusive proof of financial debt. Some banks even reject the notion that they use the filings to compute an individual's credit score. Of course, banking institutions are notoriously reluctant to candidly state their specific operational policies on the extension of credit because the credit business is extremely competitive. Just count the number of credit card applications you receive in the mail during the year! Banks are well aware that transparency regarding their credit procedures may jeopardize those same procedures, cost them clients, and increase fraud. For these reasons, the consequences of a bogus UCC-1 on one's credit standing are difficult to quantify. At the very least, a bogus UCC-1 lien generates a cloud on the title to the property which is the subject of the

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UCC-1, and raises an issue as to debtor's overall financial condition.

A bogus UCC-1 filed against an unsuspecting individual will adversely affect his ability to use the subject property as collateral for financing. Let's take one simple example. You apply for financing to buy a car, boat or a house and you do not know that a bogus UCC-1 has been filed against all your property.⁵ A prospective creditor who discovers the bogus UCC-1 during a routine credit check may suspect you of making a material omission in the financing paperwork, and have cause to deny or delay financing until you resolve the matter. Your ability to obtain a quick determination of the bogus status of the UCC-1 is as likely as receiving an admission to the misdeed from the bogus filer. Do the phrases "fat chance" or the proverbial, "up a ---- creek without a paddle, come to mind?"

The Limited Role of the DOS Filing Office

DOS has no pre-screening policy for UCC-1 liens, a practice consistent with the UCC's purpose to simplify, clarify, modernize and make uniform the law of commercial transactions in the fifty states.⁶ In addition to violating the letter and spirit of the UCC, pre-screening UCC-1 liens would overburden DOS employees who simply would not be able to perform such a task in an expeditious manner. At best, the UCC provides a debtor with correction and termination procedures and filing mechanisms, but these procedures are time consuming when they involve uncooperative individuals or bogus filings.⁷

The Response of Law Enforcement

The response by law enforcement has been varied. Correctional facilities have promulgated regulations that prohibit inmates to send or receive mail related to the UCC. These regulations allow the facilities to designate mail, and "how to books" such as Cracking the Code as contraband subject to seizure.⁸ In large measure, courts have approved these prison rules as legitimate penological functions.⁹ Additionally, prosecutions for the bogus filings have occurred in cases where the bogus lien filers leave a paper trail.¹⁰ To be frank, though, these prosecutions have little deterrent value, where

these paper terrorists are already serving long prison terms, and use a bogus lien prosecution as opportunity to break the routine of prison life for a "change of scenery." Unfortunately, these criminal prosecutions give the paper terrorists more of what they want – the power to disrupt the life and financial stability of the public official they have targeted. In cases where the paper terrorist uses friends, family, and out-of-state entities to facilitate his bogus filings, successful prosecution becomes problematic when investigation of the paper trail becomes costly and time consuming.

The next option is civil litigation. Although it presents a path rarely taken by the criminal prosecutor, civil litigation provides the concomitant benefit of the UCC's own "home-made remedies," and the ability to draw an adverse inference if a party invokes his Fifth Amendment privilege.¹¹ Queens County District Attorney Richard A. Brown utilized this rare option in the case of *Brown v N. Y. S. Department of State and James Walker*, an unpublished decision, which is discussed below.¹²

The Civil Litigation Option & the UCC's Remedies

In *Brown*, the Queens District Attorney sued DOS and the alleged bogus filer, James Walker. The victims of the bogus filing were the trial prosecutor, and the presiding judge in the criminal case against Walker. DOS accepted Walker's bogus UCC-1 lien for filing, despite the vague description of a security interest in "all of debtor's assets, land and personal property, now owned and hereafter acquired, now existing, and hereafter arising, and whenever located . . ." on the notice of lien. DOS, acting solely in its ministerial capacity, duly recorded the UCC-1 lien.¹³ An interesting wrinkle in the case was that it pitted one prosecutor against another. DOS was represented by the Office of the New York State Attorney General ("AG"). The victim judge, usually represented by the AG in litigation, was not considered a party to the litigation and, therefore had counsel from the State Office of Court Administration.

Walker (the bogus filer/and purported creditor) had taken advantage of UCC Article 9's new user friendly requirements for memorializing secured transactions. To facilitate the electronic filing of financing statements, lien filers are no longer

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required to submit manual signatures. Instead, the debtor must authorize the filing, typically by executing a security agreement, and the parties need only to “authenticate” the relevant records.¹⁴ The basis for the fraudulent authorization and thereby the “security agreement,” was met when Walker simply represented he had notified the prosecutor and judge (the “debtors”) by regular mail with due “notice” that the use of his name without his express consent required them to pay “use fees.” These “use fees,” in turn, created an “implied contract” between Walker and the debtors in the amount of several hundred thousand dollars per usage!¹⁵

Walker’s correspondence to the “debtors” (the judge and ADA) indicated that their failure to respond to his letters would be interpreted as acceptance of the terms of the agreement to pay the use fees and acknowledgment of the debt. The fees added up to a tidy sum --- millions of dollars --- because of the extensive use of the filer’s name in the criminal proceedings. Of course, the alleged implied agreement was a sham and not enforceable in the real world of commercial transactions under any measure of scrutiny. Nevertheless, in the electronic world where no pre-screening exists, the filing automatically created problems with the good credit standing of the judge and prosecutor. Not surprisingly, the bogus filing, as expected and intended, created a certain amount of anxiety in the courthouse. As the legal community grew to learn about the filing scheme, even the defense bar grew concerned that it too would be targeted by unsatisfied clients with plenty of time to learn the scheme in jail.

The Queens District Attorney commenced civil litigation by show cause order and notice of petition against Walker and the DOS filing office as respondents. The petition sought expungement of the UCC-1 record (a remedy not legislatively provided) and, alternately, termination of the UCC-1 as null and void. Plaintiff also sought a court order to enjoin respondents from filing liens of any kind against the “Debtors” by the “Secured Party” without prior court order, and authorization to permit the “Debtors,” to file UCC-3 termination statements against any prospective UCC-1 liens the defendant may file without prior court authorization. Finally, the plaintiff-DA sought an order for statutory damages against the defendant for \$500 pursuant to UCC § 9-625.

To support his argument for expungement of the UCC-1 record, the DA contended that the present legislative remedy – the filing a UCC termination or correction statement -- was wholly inadequate because the termination statement does not differentiate between a legitimate UCC-1 lien and a “bogus” one. The DA pointed out that Walker filed the

UCC-1 to interfere with, obstruct and delay the criminal court proceedings, and intimidate the court and the prosecutor. The plaintiff - DA claimed a violation of the federal constitutional right to due process of the targeted public officials, in that the bogus filing impaired a protected liberty and property interest in reputation, financial security and the concomitant ability to secure credit and establish and maintain one’s credit standing. The plaintiff DA alternately sought for a termination statement to be filed.

In response, DOS took the position that expungement was an unauthorized remedy, and that any remedy available under the UCC must be court-ordered. Respondent Walker asserted the defenses of implied contract, equitable interest and common law copyright protection.¹⁶

On decision day, nearly one year after the lawsuit was initiated, the court found that Walker failed to show the existence of a valid agreement between the parties.¹⁷ The security agreement Walker enumerated in the UCC-1 lien did not provide even the basic requisites of a valid contract - a meeting of the minds, and mutual agreement of its terms. Here, as the court found, Walker filed the UCC-1 lien with the intent to establish an invalid lien and harass the public officials involved.

Although the court rejected Walker’s common law copyright defense, it also denied the plaintiff-DA’s request to expunge the UCC-1 filing.¹⁸ The Court found that the DOS filing office was required by law to accept the UCC-1 for filing because it met the minimum requirements set forth in UCC §9-516 (b). Furthermore, UCC §9-516(b) did not provide a basis for DOS to reject the UCC-1 lien for filing, even when a lien has been adjudicated invalid or bogus. In recognizing that UCC Article 9, as enacted in New York and in most states, simply does not mandate pre-screening of UCC-1 financing statements, the court held that it is the courts, not the state filing office that must determine the validity of a challenged lien.¹⁹

Addressing plaintiff’s due process argument, the court found that the filing did not give rise to any enforceable interest in property and the mere record of a lien does not exert a “cognizable burden” on a person’s interest in his or her reputation or adversely affect a credit rating. Rather than a due process violation, the court held that the statutory remedies provided in the UCC such as a corrections statement (UCC§ 9-519) or a termination statement (UCC§ 9-509) were adequate to remedy the harm to victims of illegal or bogus lien filings.²⁰

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Finally, the court imposed the \$500 statutory damage award against defendant under UCC § 9-625 (b). The corrections department staff at Walker's state prison facility received notification of the UCC-1 scheme and of the damages awarded in the litigation. Interestingly, Walker has only sparingly used his commissary account since the litigation ended, and no subsequent filings have been reported or made against any Queens County ADA or judge. Perhaps the \$500 judgment posed a "real world deterrence" to the paper terrorist and his colleagues whose "in house" commercial lifeline is the valued commissary account?

Conclusion

The gaps created by the crude interface of criminal law and advancing technology are inevitably discovered by motivated and creative criminals. The ever-increasing challenges necessitate continued vigilance by prosecutors. Like the player in the "whack-a-mole" game, prosecutors must be ready for the next outbreak of criminal creativity by the paper terrorist. The use of the UCC-1 as a bogus lien is just the latest scheme. The swift and effective response of law enforcement is required to avert the goal of the paper terrorist – to inflict personal financial hardship on the public official and divert their energies from public duty. Law enforcement must continue to respond actively to these challenges with criminal prosecutions, penological strategies and civil lawsuits to frustrate these unscrupulous schemes as they arise.

(Endnotes)

¹ See, e.g., Mulvihill, *Defendants Say Judges, Prosecutors Owe Them Millions for Speaking Their Names*, New York Newsday, www.nynewsday.com, July 25, 2003; Marzulli, *Inmates Lien on Judges in Copyright Con*, New York Daily News, June 12, 2003; *Felon's Lien Against Prosecutor Is Rejected as Attempt to 'Get Even'*, New York Law Journal, December 2, 1997. Marzulli, *Judge Won't Play Con's Name Game*, New York Daily News, February 16, 2004, page 4; Office of the Texas Attorney General Press Release, *Morales Ends Paper Terrorism of Internal Revenue Service*, October 20, 1997, posted at www.civil-liberties.com/pages/newlaw.html. Mark Pitcavage, Ph.D., *Paper Terrorism's Forgotten Victims: The Use of Bogus Liens against Private Individuals and Businesses* (June 29, 1998) published at <http://www.adl.org/mwd/privlien.asp> (last visited Feb. 10, 2008).

² The UCC's revised Article 9 was enacted by the New York 2001 regular Legislative Session on June 29, 2001.

³ See, e.g., *In the Matter of Bigman*, 217 A.D.2d 322 (2nd Dept. 1995) *app. dsm'd*, 86 N.Y. 2d 711 (1995)(involving a routine execution of a UCC-1 at a house closing).

⁴ The DOS website proclaims:

The Uniform Commercial Code Bureau files and maintains records on financial obligations (including IRS liens) incurred by individuals (in business as a sole proprietor), business entities and corporations. This information is important to any business or financial institution contemplating entering into a lien transaction as the secured party (the party providing funds or financing collateral). Knowing the current financial status of the debtor party (the potential borrower) before extending credit is crucial, and it is the number of active, existing liens already in effect for that particular debtor party that most interests the potential secured party. As a prerequisite for entering into a lien relationship, many secured parties first research

a debtor name to ascertain their credit worthiness and then demand a lien filing in regard to the actual, current transaction. Secured parties routinely include banks, commercial businesses (appliances, autos, boats), and sole proprietors.

See the DOS UCC searchable database at: <http://www.dos.state.ny.us/corp/ucc.html> (last visited Mar. 3, 2008).

⁵ Although the UCC-1 should be specific in property description, the bogus filer usually files it against all of the alleged debtor's property, and the filing offices routinely accept such a filing.

⁶ See UCC § §1-102 (2)(a), 9-509, 9-516, and 9-520.

⁷ See UCC § § 9-509, 9-516, and 9-520.

⁸ See *Ray v Williams*, 2005 U.S. Dist. Lexis 45513 (D.Or. 2005) *aff'd* 2007 U.S. App. LEXIS 14167 (9th Cir. 2007).

⁹ *Hudson v. Caruso*, 2007 U.S. Dist. Lexis 60276, No. 1-05-cv-32, (W.D. Mich. 2007)(court dismissed inmate's civil rights suit against warden who imposed rule prohibiting UCC mailings); See generally, *Beard v Banks*, ___ U.S. ___, 126 S. Ct. 2572 (2006)(Court upholds prison regulation, deferring to the judgment of prison officials that the particular regulation at issue created a significant behavioral incentive); *Turner v Safely*, 482 U.S. 78 (1987)(restrictive prison regulations are permissible if they are "reasonably related to legitimate penological interests and not an "exaggerated response" to such objectives").

¹⁰ See, e.g., *Lundy v. Yost*, 2007 U.S. Dist. Lexis 81736, No. 07 CV 4180 (JBS), (N.J. 2007)

¹¹ *Baxter v. Palmigiano*, 425 U.S. 308 (1976); See 81 Am. Jur. 2d Witnesses 121 (1992).

¹² *Brown v New York State Department of State and James Walker*, ___ Misc. 3d ___, Index No. 5323/ 2004 (Dollard, J., Sup. Ct. Qns. Co. 2005). In the spirit of full disclosure, your humble servant volunteered to litigate this "windmill" and received material guidance in this effort from his law school professor, a nationally renowned UCC authority, Duquesne University School of Law Professor Nick FisFis. See, Peter A. Crusco, *Finding FisFis*, Juris Magazine, 3-5, Fall 2006. See also, *United States v Brum*, 2005 U.S. Dist. Lexis 21208, No. 105 CV 110 (E.D. Tex. 2005).

¹³ See UCC § 9-108 (c), Official Comment 2; UCC §9-520; Christenfeld and Meltzer, *Security Agreements Under Revised Article 9*, NYLJ April 3, 2003, pg. 5, col. 1.

¹⁴ See UCC § § 9-509 (a), 9-102, 9-203; Christenfeld and Meltzer, *Security Interest Opinions Under Revised Article 9*, NYLJ Feb. 5, 2004, p. 5.

¹⁵ The paper terrorist's (filer's) supporting documentation for the UCC-1 at issue that was not filed with the registry office was sent via U.S. mail through a third party to the alleged "debtors," at their government offices, prior to the actual filing of the bogus UCC-1. The paper terrorist subsequently alleged that this mailing and the lack of any response by the alleged debtors to the mailing was proof of an authorization, i.e., that an "implied contract" existed.

¹⁶ See UCC § § 1-207, 9-607; See, e.g., Ben H. Weil and Barbara F. Polansky, *Modern Copyright Fundamentals*, (Van Nostrand Reinhold 1985).

¹⁷ See UCC § § 1-207; 9-607.

¹⁸ The court found that although an Article 9 filing can perfect a security interest and provide priority rights against other creditors, in the case of copyrights, protection can only be obtained by appropriate filing in the copyright office. In any event, defendant's name could not be copyrighted. See, e.g., *MCEG Sterling v Krim*, 646 N.Y.S. 2d 778 (N.Y. Sup Ct. 1996); *In re Peregrine v Capitol*, 116 BR 194 (C.D. Cal. 1990); 17 U.S.C. § 301(a).

¹⁹ Several states do allow for pre-screening of UCC-1's. See, e.g., *State v Lutz*, 2003 Ohio 275 (2003).

²⁰ Under the revised Article 9, financing statements are not removed from DOS records. Instead, additional information in the form of correction and/or termination statements supplements the DOS records. ★