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Minimal Blanket, Maximum Comfort: Less is More When Drafting "All Assets" UCC-1 Descriptions

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The Second Circuit Court of Appeals sent a clear message to secured creditors with its recent decision, *Ring v. First Niagara Bank, N.A. (In re Sterling United, Inc.)*,[1] that in the case of a collateral description in a financing statement for blanket liens covering all of a debtor's assets — less is more. In the case, the secured party, First Niagara Bank, supplemented its "all assets" UCC-1 description with the phrase "including but not limited to, [all assets located at]", followed by a specific address where the collateral was located.[2] When the debtor later moved to a new location, this unnecessary additional phrase almost backfired on the secured party when a bankruptcy trustee moved to avoid the financing statement as a preference.[3] The Court ultimately found after protracted litigation that the collateral description was sufficient, but First Niagara's experience serves as a reminder to creditors (and their attorneys) that a simple "all assets" UCC-1 description limits the risk of future litigation.

By way of factual background, between 2005 and 2007, Sterling Graphics, Inc. entered into three separate loan agreements with First Niagara Bank, to support its printing business.[4] In connection with the loan facility, Sterling granted First Niagara a security interest over all of its assets.[5] To perfect this security interest, First Niagara filed three UCC-1 financing statements, which described the collateral as follows:

All assets of the Debtor *including, but not limited to*, any and all equipment, fixtures, inventory, accounts, chattel paper, documents, instruments, investment property, general intangibles, letter-of-credit rights and deposit accounts now owned and hereafter acquired by Debtor *and located at or relating to the operation of the premises at 100 River Rock Drive, Suite 304, Buffalo, New York,* together with any products and proceeds thereof including but not limited to, a certain Komori 628 P & L Ten Color Press and Heidelberg B20 Folder and Prism Print Management System.[6]

Prior to October 2012, the Debtor changed its name to Sterling United, Inc. and moved its headquarters to 6030 North Bailey Avenue, Amherst, NY.7 First Niagara amended its UCC filings to change the debtor's name and address, but failed to update the collateral descriptions.8 Four months later, First Niagara amended its filings a second time in order to correct the location provided in the original collateral descriptions.9 Unfortunately for First Niagara, however, the debtor filed for bankruptcy 88 days after this second amendment was filed.10 Since Chapter 11 of the Bankruptcy Code allows a bankruptcy trustee to avoid any transfer made within a 90-day period prior to the Petition Date, First Niagara could not perfect its security interests with these latter amendments.11

As a result, the issue presented was whether the original collateral description met the requirements of New York's UCC § 9-504, namely that "a financing statement sufficiently indicate[] the collateral that it covers."[12] Section 9-504 of the UCC typically provides a safe harbor for secured parties, stating that a financing statement

sufficiently indicates the collateral that it covers if the financing statement provides, among other things, "an indication that the financing statement covers all assets or all personal property."[13] The trustee offered two primary arguments to rebut this: (1) that the address limited the coverage of the collateral description and (2) that the incorrect address created a seriously misleading description under NY UCC § 9-506. The Second Circuit, affirming both the district and bankruptcy courts, found neither argument to be persuasive.[14]

First, the Court held that the superfluous detail First Niagara provided illustrated, rather than limited, the "all assets" blanket that it sought. The Court relied heavily on the "including, but not limited to" language to arrive at this conclusion.[15] Although the trustee argued that "a non-exhaustive list of assets can still be, and was, limited to a particular location," the trustee could only make this argument plausible by erasing the conjunction "and" (before the words "located at") from the collateral description.[16]

Second, the Court dismissed the argument that the collateral description caused the financing statement to be "seriously misleading", holding that the trustee failed to find a comparable case on point.[17] In none of the presented cases was a misleading description offered for illustrative purposes paired with an otherwise unambiguous description.[18]

Interestingly, in reaching this conclusion, the Second Circuit sidestepped the debate over a relevant Eighth Circuit case, *ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A.*, that was discussed at length by both parties in their briefs and by the lower courts.[19] In *ProGrowth Bank*, the creditor's financing statements purported to cover all of the debtor's assets and annuity contracts, but incorrectly identified the annuity company and the annuity contract numbers.[20] Despite these errors, the Eighth Circuit held that the financing statements met the liberal requirements of UCC § 9-504.[21] The Court reasoned that the primary role of a UCC-1 collateral description is to put "subsequent searchers on notice," and"[w]here a description can reasonably be interpreted in one of two ways–one of which may cover the collateral at issue and one of which does not–notice filing has served [this] purpose."[22] The conjunction "and" separated the "all assets" blanket lien from the inaccurate annuity contract description, creating two plausible interpretations, and because one of these interpretations put subsequent creditors on notice, the description in its entirety passed muster.

In *Ring*, the Second Circuit implicitly distinguished the *ProGrowth Bank* case by emphasizing the illustrative nature of the address. First Niagara prefaced the address with the "including, but not limited to" language, which was absent from the description in *ProGrowth Bank*. Therefore, the court did not view the collateral description in the *Ring* case as presenting two plausible interpretations.

It is possible that the Second Circuit's decision not to rely on *ProGrowth Bank*–especially when it was cited by both the district court[23] and the bankruptcy court[24] –signals the Second Circuit's hesitancy to adopt such a liberal sufficiency standard for UCC § 9-504. It is unclear whether the Second Circuit would have reached the same conclusion if First Niagara failed to include an illustrative non-exhaustive list in its description. Moreover, the Second Circuit issued a Summary Order in this case, declining to give precedential effect to its holding.[25]

Clients and practitioners should exercise restraint in providing superfluous detail to "all assets" UCC-1 collateral descriptions. Even if future courts do not decide that bankruptcy trustees may avoid such security interest, such superfluous detail provides no benefit to creditors and exposes them to the risk of future litigation. This risk should be avoided, especially given the Second Circuit's narrow holding in this case. Secured parties wishing to perfect a

security interest with an all asset filing should use in their financing statements the simple collateral description "All present and future assets of the Debtor." Finally, the practitioner should bear in mind that while "all asset" collateral descriptions are sufficient for perfecting a lien under Article 9, such collateral descriptions are insufficient under Article 9 to create a security interest in a security agreement.

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[1] Ring v. First Niagara Bank, N.A. (In re Sterling United, Inc.), No. 15–4131–bk (2d Cir. Dec. 22, 2016) (Summary Order).

[2] Id., at * 4

[3] See id.

[4] Ring v. First Niagara Bank, N.A. (In re Sterling, Inc.), 519 B.R. 586, 588 (Bankr. W.D.N.Y. 2014) , aff'd, 2015 U.S. Dist. LEXIS 159414 (W.D.N.Y. Nov. 24, 2015).

[5] Id.

[6] Summary Order, at * 3. (emphasis added).

[7] Brief for Appellant at 13, Ring v. First Niagara Bank, N.A. (In re Sterling United, Inc.), No. 15–4131–bk (2d Cir. Dec. 22, 2016) (Summary Order).

[8] Id.

[9] Id.

[10] Id. at 14.

[11] 11 U.S.C. § 547(b)(4)(A) (2016); Summary Order, at *4.

[12] NY UCC § 9-504 (2016).

[13] NY UCC § 9-504(2) (2016).

[14] Summary Order, at *2.

[15] Id., at *4-5.

[16] Brief for appellant, at 31; Summary Order, at *3.

[17] Summary Order, at *6.

[18] Id.

[19] ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A., 558 F.3d 809 (8th Cir. 2009).

[20] Id. at 813.

[21] Id.

[22] Id. at 813-14.

[23] Ring v. First Niagara Bank, N.A. (In re Sterling, Inc.), 2015 U.S. Dist. LEXIS 159414, at * 4 (W.D.N.Y. Nov. 24, 2015

[24] Ring v. First Niagara Bank, N.A. (In re Sterling, Inc.), 519 B.R. 586, 590-91 (Bankr. W.D.N.Y. 2014).

[25] Summary Order, at *1.

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