

Revisiting Financing Statement Collateral Descriptions

by Steven T. Waterman

Recently, two federal courts issued decisions defining the detail needed in collateral descriptions in financing statements. This is significant because if the collateral description is not sufficient then the financing statement is ineffective, and the security interest in the collateral is not perfected. These recent decisions require more precise descriptions than earlier courts, perhaps easing the inquiry burden on potential future creditors, and requiring secured parties to think carefully about the sufficiency of collateral descriptions.

Drafters of the Uniform Commercial Code (“UCC”) moved away from the requirement of a secured party including an exact description of the collateral (the “serial number rule”) or filing security agreements. Instead, drafters put in place the concept of “simple notice filing”—the requirement of a description of the collateral which would prompt potential creditors to inquire further as to which property, specifically, is subject to the security interest. Section 9-502(a)(3) of the UCC requires that a financing statement “indicate[] the collateral”. UCC § 9-504 provides that a financing statement indicates a sufficient description if it states “all assets or all personal property,” or if it complies with UCC § 9-108. The latter section states that a description of collateral is sufficient if it “reasonably identifies what is described.” That section also provides a non-exclusive safe harbor of five specific ways to reasonably identify collateral, and an additional open-ended option: “any other method, if the identity of the collateral is objectively determinable.”

In *In re 180 Equipment, LLC*¹, the issue for the U.S. Bankruptcy Court for the Central District of Illinois was whether a financing statement that described the collateral as “All collateral described in the [Security Agreement] dated March 9, 2015 between debtor and secured party”, but did not attach the agreement contained a sufficient description of collateral. Acknowledging that the purpose of a financing statement is simple notice, the court went on to say that the “notice” required is a general description of the collateral or the types of property subject to the security interest, unless specific items of collateral are listed or it is an all assets filing. Because the financing statement gave no description of the collateral and only referred to an unfiled security agreement, it was

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insufficient, and the security interest unperfected.

In *Altair Global Credit Opportunities Fund*,² the secured party described the collateral as “the pledged property described in the security agreement attached hereto,” and attached a security agreement which omitted the description of the pledged property. The district court held that the security interests of the bondholders in collateral having a value of \$2.9 billion were unperfected due to the insufficient collateral description. In agreeing with the district court that the original financing statement was insufficient to perfect the security interest, the U.S. Court of Appeals for the First Circuit found that later amendments were sufficient. The First Circuit said that the financing statement must specify (for example, by type) what collateral is encumbered and although the original financing statements failed to do so, the later amendments provided the necessary attachment to the financing statement with the description of the collateral.³

Earlier courts have imposed an obligation on interested third party lenders to contact the secured party or the debtor on a prior filed financing statement to obtain a specific description of collateral, based on simple notice principles.³ The *Altair* court stated that “requiring interested parties to contact debtors at their own expense about encumbered collateral, with no guarantee of a timely or accurate answer, would run counter to the notice purpose of the UCC.” Like the *180 Equipment* court, this is a departure from earlier simple notice cases. The simple notice filing concept created by the UCC requirements, and the duty of third parties on notice, are now being modified to a minimum standard of sufficient information in the financing statements to identify the collateral.

Taken together, *180 Equipment* and *Altair* make clear that reference to an unattached document for the description of collateral without a general description in a financing statement is insufficient, dooming the perfection of a security interest. Both cases determine that reference to an unattached document is a complete failure of description. Simple notice does not relieve a lender from filing a financing statement without at least a general description of the collateral within the four corners of the financing statement.

Whether further erosion of the simple notice principle will occur under future cases remains to be seen. In the interim, there are a few things that a prudent secured party can do to ensure that its security interest is perfected. If possible, provide a general description in the financing statement of the type of collateral and use a reference to an unattached document as limiting the scope of that general description. E.g. “all chattel paper, except as limited by the security agreement between debtor and secured party” or “all equipment, as further described in the security agreement.” Alternatively, a secured party might file the agreement that contains the entire description of the collateral, but this is not possible in many filing offices due to restrictions on the number of pages that can be filed. A secured party with a broad security interest may file an all assets or all personal property description if the security agreement or other authenticated record of the debtor authorizes that type of filing. Reviewing each financing statement to assure at least a minimum collateral description is essential.

¹ In re I80 Equipment, LLC, 591 B.R. 353 (Bankr. C.D. Ill 2018).

² Altair Global Credit Opportunities Fund (A), LLC v. P.R. AAA Portfolio Bond Fund, Inc. (In re Fin. Oversight & Mgmt. Bd.), 914 F.3d 694, 710 (1st Cir. 2019).

³ In re Holladay House, Inc., 387 B.R. 689 (Bankr. E.D. VA 2008).