

The Unfortunate Consequences of Spearing Tool*

By James H. Breay

The Sixth Circuit Court of Appeals has opined that the Internal Revenue Service is not required to use the taxpayer's exact, legal name on a notice of federal tax lien, even if the name used on the notice of federal tax lien is so different from the actual name that it is not disclosed on a financing statement search.¹

As a result, a creditor must consider carefully what, if any, UCC tax lien searches it should obtain, in addition to a search under the debtor's exact, legal name, in order to be reasonably confident that it will find a notice of federal tax lien that is not disclosed by a search under the debtor's exact, legal name. This article will explain the consequences of the court's opinion and suggest procedures that a creditor should take to protect itself.

In *United States v Crestmark Bank (In re Spearing Tool & Mfg Co)* the debtor's correct name was "Spearing Tool and Manufacturing Co."² The notice of federal tax lien was filed under "Spearing Tool & Mfg. Company Inc."³ On several occasions Crestmark requested from the Michigan Secretary of State searches under Spearing's correct name.⁴ The searches did not disclose the notice of federal tax lien because the search logic in the secretary of state's computer system did not equate "and" and "&" (it now does)⁵ and does not equate "Manufacturing" and "Mfg."⁶ Thus, the erroneous name that the IRS used contained two critical variations from the debtor's correct name.

If Crestmark had anticipated the Court's ruling, then, whenever it had to determine whether a notice of federal tax lien was on file, it would have had to obtain four separate searches in order to cover all possible combinations of the two variations:

Spearing Tool and Manufacturing
Spearing Tool and Mfg.
Spearing Tool & Manufacturing
Spearing Tool & Mfg.

The Court's opinion said, "'Mfg.' and the ampersand are, of course, most common ab-

brevisions—so common that, for example, we use them as a rule in our case citations."⁷ This strongly implies that each abbreviation that the Sixth Circuit uses in its case citations is "so common" that a creditor should obtain a search under the abbreviation in addition to the word in the debtor's actual name that it abbreviates.

The abbreviations that the Court uses in its case citations are listed in Table 6 of *The Bluebook: A Uniform System of Citation* ("Bluebook").⁸ That table contains 198 words and an abbreviation for each of those words.⁹ Examples are:

Word	Abbreviation
Construction	Constr.
Consolidated	Consol.
Continental	Cont'l
Development	Dev.
Enterprise	Enter.
Equipment	Equip.
General	Gen.
Independent	Indep.
International	Int'l
Manufacturing	Mfg.
Metropolitan	Metro.
Trans Continental	Transcon.

The Michigan Secretary of State's search logic disregards seven of the 198 listed words if they appear at the end of the debtor's name and indicate the existence or nature of an organization.¹⁰ This reduces to 191 the number of words in the table with abbreviations. If a debtor's name contains one or more of those 191 words, then a creditor will have to obtain searches of all possible combinations of those words and abbreviations.

But the court did not limit its description of "common abbreviations" to words and abbreviations that are listed in Table 6.¹¹ As a result, the court's opinion requires a creditor to carefully examine each word used in a debtor's correct name to try to determine whether it should be abbreviated and, if so, what the abbreviation might be.

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As noted above, under the *Spearing Tool* opinion, Crestmark would have been required, each time that it needed to search for a federal tax lien, to order and pay for four separate searches. Because there were two words in Spearing's name that had "common abbreviations," there were four possible combinations of the two words and their abbreviations.

As the number of words in a name with "common abbreviations" increases, the number of searches that are required to cover all possible combinations of the words and their abbreviations increases exponentially. If a name contains three words with "common abbreviations," then there are eight possible combinations, requiring eight searches. If there are four such words, then there are sixteen possible combinations, requiring a creditor to obtain and pay for sixteen searches.

If, as the court's opinion says, all 191 words listed in Table 6 of the Bluebook have "common abbreviations," then there are many names of businesses that contain two, three or even four or more "common abbreviations" or words that have "common abbreviations." Following is an example of a name that has three variables, two of which are words listed on Table 6 ("Street" and "Pharmaceutical")¹² and a numeral ("44th"), which the Michigan Secretary of State's search logic does not equate with the equivalent words ("Forty Fourth").¹³ Because there are eight possible combinations of the variables, a creditor would be required to conduct eight searches, as follows:

44th Street Pharmaceutical Co.
 44th Street Pharm. Co.
 44th St. Pharm. Co.
 44th St. Pharmaceutical Co.
 Forty Fourth Street Pharmaceutical Co.
 Forty Fourth Street Pharm. Co.
 Forty Fourth St. Pharmaceutical Co.
 Forty Fourth St. Pharm. Co.

If a name contains four words listed on Table 6, there are 16 possible combinations of the words and their abbreviations. Under *Spearing Tool*, a creditor would have to obtain the following 16 searches to determine if a notice of federal tax lien was on file against the debtor:

National Center for Financial Information
 National Center for Financial Info.
 National Center for Fin. Information

National Center for Financial Info.
 National Ctr. for Financial Information
 National Ctr. for Financial Info.
 National Ctr. for Fin. Info.
 National Ctr. for Fin. Information
 Nat'l Center for Financial Information
 Nat'l Center for Financial Info.
 Nat'l Center for Fin. Information
 Nat'l Center for Fin. Info.
 Nat'l Ctr. for Financial Information
 Nat'l Ctr. for Financial Info.
 Nat'l Ctr. for Fin. Information
 Nat'l Ctr. for Fin. Info.

For every word with a "common abbreviation" that is added to the debtor's name, the number of possible combinations, and required searches, doubles. Thus, if there are five words that have "common abbreviations" (e.g., "Academy for Economic and Environmental Education" or "Acad. for Econ. & Env't Educ."), then there are 32 possible combinations of words and abbreviations and therefore 32 required searches. If there are six such words (e.g., "Atlantic and Pacific Steamship Management Partnership" or "Atl. & Pac. S.S. Mgmt. P'ship"), then there are 64 possible combinations and therefore 64 required searches.

In many lending relationships, of course, the lender does not obtain a search on a debtor only at the beginning of the relationship. Rather, a lender will often obtain a search periodically while the credit facility is outstanding.¹⁴ Some asset-based lenders obtain a new search every 45 days, because a federal tax lien takes priority as to advances made and collateral acquired more than 45 days after a notice of the tax lien is filed.¹⁵ Thus, if a debtor's name has three words that have "common abbreviations," then the lender would have to obtain eight searches every 45 days.

Under Article 9 of the Uniform Commercial Code, a financing statement must give either the debtor's correct name or a name that is disclosed by a search under the debtor's correct name.¹⁶ Preparing and filing a financing statement that complies with this requirement is a simple task that can be performed by a clerical employee. Under the opinion in *Spearing Tool*, however, it would be advisable for a lender to hire one or more higher-level individuals to review each loan file and try to determine each word in a loan applicant's name that could have a "common abbreviation" or that could be a "common abbrevia-

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tion” (whether in Table 6 of the Bluebook or otherwise) and then, depending upon how many of those words or abbreviations are in the name, determine each possible combination of the words and abbreviations and then order a search under each combination.

Here is an example of the instructions that, as a result of the opinion in *Spearing Tool*, a lender should give to such an employee as to each applicant for secured credit with respect to which the lender wants to find any filed notices of federal tax liens.¹⁷

- Obtain a copy of the latest edition of the Bluebook (*A Uniform System of Citation*).
- Carefully examine the applicant’s name and identify each word in the name that is listed in Table 6 of the Bluebook (other than the seven words that the secretary of state’s search logic equates with their abbreviations if they appear at the end of the name) and identify the listed abbreviations for that word.
- Identify each numeral (e.g., “2 Men and a Truck”) and each number in words (e.g., “Two Men and a Truck”) and list the corresponding words and numerals.
- Identify all other words in the applicant’s name that might have common abbreviations. Add these to the list.
- Review the lender’s file on the applicant, including all materials submitted by the applicant, to identify each other name under which the applicant does, or ever has done, business.
- Contact other employees of the lender to determine whether they know of any names, other than its correct name, under which the applicant has done business.
- Examine other sources for names under which the applicant has ever done business. This would include telephone books, trade journals and publications, newspapers, and internet resources.
- When all words with “common abbreviations” (including all words listed in Table 6 of the Bluebook), all “common abbreviations,” all numerals, and all numbers expressed in words have been identified, prepare a list of all possible combinations of those words, abbreviations, numerals, and numbers expressed in words.
- Order a search on each possible combination and a search on each other name under which the applicant may have done business.

Even if a creditor conducts all of the due diligence described above, it can never be sure, under *Spearing Tool*, that it has obtained all searches necessary to find a filed notice of federal tax lien. It may have failed, for example, to identify a “common abbreviation” or a name that the debtor used in the past.

In its opinion in *Spearing Tool*, the Sixth Circuit said, “We express no opinion about whether creditors have a general obligation to search name variations. Our holding is limited to these facts.”¹⁸ But the only really unique fact in the case is that on one search someone at the secretary of state’s office handwrote: “You may wish to search using *Spearing Tool & Mfg. Company Inc.*”¹⁹ If the court had stated explicitly that its holding was based on that unique fact, then the decision would be of less concern to lenders. But the court did not do so. To the contrary, the court’s opinion very clearly rejects “[a] requirement that tax liens identify a taxpayer with absolute precision.”²⁰ The message to the lending community is that every lender should put in place procedures like those described above for determining all possible names of a debtor under which it must search for notices of federal tax liens.

In summary, under the opinion in *Spearing Tool*, a notice of federal tax lien may be valid even if it would not be disclosed by conducting a search under the debtor’s exact, legal name.²¹ The court’s opinion forces a lender to use employees at a relatively high level to conduct extensive investigations and analyses to determine what searches, in addition to a search under the debtor’s correct name, must be conducted in order to find a filed notice of federal tax lien. The court’s opinion forces a creditor, in many cases, to conduct multiple searches whenever the creditor needs to determine whether a notice of federal tax lien is on file, which often is every 45 days. In some cases, even multiple searches will not disclose a filed notice of federal tax lien, with the result that a creditor may be forced to absorb a loss on its loan or other extension of credit.

The courts have held that if the IRS fails to use the debtor’s correct name on a notice of federal tax lien, then the incorrect name is valid only if the notice would be disclosed in a “reasonable and diligent search.”²² The opinion in *Spearing Tool* agreed with this standard and concluded that the notice of federal tax lien in *Spearing Tool* would have been disclosed by a “reasonable, diligent search.”²³ As

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a result, it may now be the law (at least in the Sixth Circuit) that if a creditor needs to determine whether a notice of federal tax lien has been filed against a debtor, then it is “reasonable” to require the creditor to conduct the extensive due diligence described above and then to undertake multiple searches under all possible combinations of words and “common abbreviations.”

NOTES

1. *United States v Crestmark Bank*, 412 F3d 653, 656–57 (6th Cir 2005).
2. *Id.* at 654.
3. *Id.*
4. *Id.* at 655.
5. Michigan Search Logic Defined: Tips for a Trouble Free Search, Jan. 1, 2001, <http://digbig.com/4myhm> (summarizing MICH. ADMIN. CODE r. 440.510).
6. *Crestmark Bank*, 412 F3d at 655 & n.2; Michigan Search Logic Defined, *supra* note 5.
7. *Id.* at 656.
8. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 302–03 tbl.T.6 (Columbia Law Review Ass’n et al. eds., 17th ed. 6th prt. 2003).
9. *Id.* Table 6 lists 158 abbreviations. *Id.* But in some cases a single abbreviation may be used for two or more forms of the same word (e.g., “Econ.” is listed as an abbreviation of “Econom[ic,ics,ical,y]”). *Id.* There are 40 of these additional forms of words, resulting in a total of 198 words for which the Table specifies abbreviations. *Id.*
10. *Compare Id.* (listing 198 words with their abbreviations) *with* Michigan Search Logic Defined, *supra* note 5 (including 7 of the 198 words in Bluebook Table 6 in a list of words and abbreviations that the Secretary of State’s standard search logic ignores when they appear at the end of a name and indicate the existence and nature of an organization).
11. *See Crestmark Bank*, 412 F.3d at 656 (stating that a “reasonable, diligent search” would have included “common abbreviations,” including but not specifically limited to those used in case citations).
12. THE BLUEBOOK, *supra* note 8, at 303 tbl.T.6.
13. Michigan Search Logic Defined, *supra* note 5.
14. *See* WILLIAM H. LAWRENCE ET AL., UNDERSTANDING SECURED TRANSACTIONS 283 (3d ed. 2004) (“[T]he only sure way for a secured party to protect itself is by checking for tax-lien filings every 45 days.”).
15. IRC 6323(d) (2000); LAWRENCE ET AL., *supra* note 14, at 281.
16. *See* MICH. COMP. LAWS ANN. §§ 440.9503(1), .9506(1)–(3).
17. Occasionally, of course, a loan applicant will have sufficient financial strength that the lender will conclude that it is not necessary for it to determine whether a notice of federal tax lien is on file with respect to the applicant.
18. *Crestmark Bank*, 412 F3d at 656.
19. *Id.* at 655.
20. *Id.* at 656.
21. *Id.* at 656–57.
22. *E.g.*, *Tony Thornton Auction Serv, Inc v United States*, 791 F2d 635, 639 (8th Cir 1986) (citing *Ameri-*

can Surety Co v Sundberg, 363 P2d 99, 103 (1961)); *Kivel v United States*, 878 F2d 301, 303, 305 (9th Cir 1989).

23. *Crestmark Bank*, 412 F3d at 656.



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