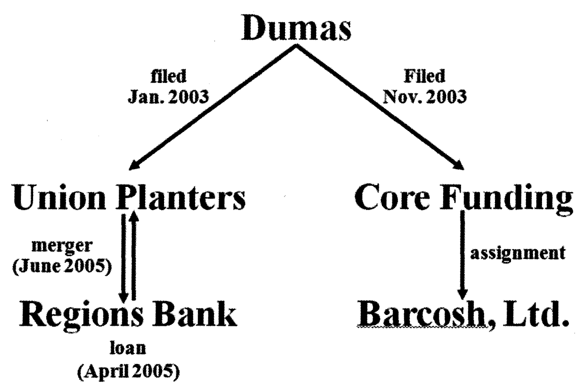
ASSIGNMENTS OF FINANCING STATEMENTS AND FLOATING SECURED PARTIES

One issue that periodically pops up on UCC listservs is whether a filer can assign a financing statement for which there is no outstanding security interest. A recent federal district court decision suggests that the answer is no. That decision is problematic.

The Louisiana case. The case, *Barcosh, Ltd. v. Dumas*, 2010 WL 3172984 (M.D. La. 2010), involved a priority dispute between two putative secured parties, each claiming a security interest in the legal fees earned by a lawyer and his firm. Despite the brevity of the opinion, the facts are a bit complex and can be diagramed as follows:



Core Funding acquired a security interest in some or all of the debtor's future fees. The court did not discuss the security agreement, so it is unclear exactly what the collateral was. Core Funding perfected its security interest by filing a financing statement on November 10, 2003. Core Funding assigned its security interest to Barcosh, Ltd.

The other claimant was Regions Bank, the successor by merger to Union Planters Bank. Union Planters had filed a financing statement against the debtor in January 2003, before Core Funding filed. Shortly before the merger, Regions Bank made a $1.6 million loan to the debtor. However, at the time of the merger, the debtor had no outstanding secured obligation to Union Planters. So, the question became whether Regions Bank could claim the benefit of Union Planters' filing.

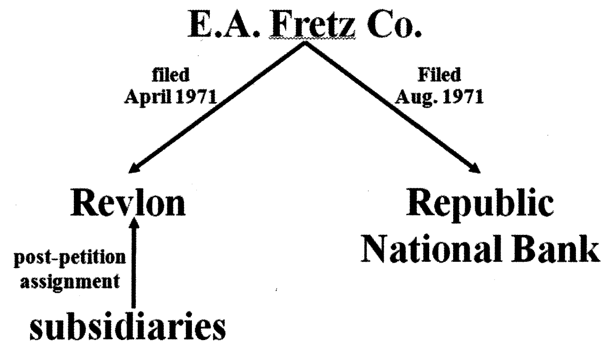
Assignments of naked financing statements? Referencing an earlier ruling on this issue in the case, the court simply stated that Union Planters' financing statement "did not transfer because there was no indebtedness to maintain a security interest at the time of the merger." No analysis or citation to authority was provided, perhaps because the analysis was contained in the court's earlier, unpublished ruling.

The Louisiana case is somewhat confused by the fact that the court did not mention whether Regions Bank even had a security interest, which would seem to be a predicate question to whether its interest was perfected. If what the court was really saying was that Region Bank's *unsecured* loan did not become secured as a result of Region Bank's merger with Union Planters Bank, then the decision might well be sound, depending on the language in the security agreement. If what the court meant was what it actually said, that Union Planters' *filing* could not be assigned, by merger, to Regions Bank because there was no secured obligation owed to Union Planters Bank at the time of the merger, the decision is far more troubling. Nothing in Article 9 directly speaks to the assignment of a naked filing, but it is hard to understand why it should be prohibited. After all, the notice provided by the filed financing statement serves its purpose whether the filing is assigned or not. In either case, the cautious searcher will discover the filing and contact the filer for more information.

There is an even more persuasive reason why filers should be permitted to assign a naked filing. It is beyond question that a security interest perfected by filing remains perfected despite assignment to a new creditor, even if the filing is not amended. *See* UCC § 9-310. In other words, assignment of a security agreement and financing statement together unquestionably works. Yet the existence of both the security agreement and the secured obligation is invisible; it is not something that is evident from the face of the financing statement. Thus, it is far from clear why the failure to assign such invisible rights should impact the efficacy of a filing. If the assignee had to file a new financing statement, the new financing statement would provide no new information other than the name of the assignee, which Article 9 expressly states is not otherwise needed.

The Fifth Circuit's "floating secured parties" decision. Nevertheless, the *Barcosh* decision is a bit reminiscent of the Fifth Circuit's somewhat hyperbolic rejection of "floating secured parties" in *E.A. Fretz Co. v. Republic National Bank*, 565 F.2d 366, 23 UCC Rep. 1 (5th Cir. 1978). In *Fretz*, Revlon had acquired and perfected a security interest in virtually all of the assets of the debtor, E.A. Fretz Co. A few months later, Republic National Bank acquired and perfected a security interest in some of the same assets. Prior to making the loan, Republic had found Revlon's filing and unsuccessfully attempted to obtain a subordination agreement.

Revlon's security agreement purported to cover all debts owed by the debtor either to Revlon or its affiliates. After the debtor filed for bankruptcy protection, two Revlon subsidiaries assigned to Revlon the obligations owed to them by the debtor. The collateral was sold and Revlon sought all the proceeds, claiming priority for not only the amounts due to it, but also the amounts originally due to the subsidiaries and assigned to Revlon post-petition. Republic National objected.



The trial court ruled that Revlon's security agreement did not make the subsidiaries secured creditors. Because of that, the subsidiaries could not have been perfected by Revlon's filing. On appeal, the Fifth Circuit agreed. It expressly noted that Fretz could have granted a security interest to the subsidiaries in the security agreement, but the agreement was not drafted to do that. The court then concluded that the debtor's bankruptcy truncated any possible transformation of the unsecured claims of the subsidiaries into secured claims.

Problematic Fifth Circuit dicta. All of this is perfectly sound and would no doubt be the correct result under revised Article 9 and the Bankruptcy Code. What is notable about the decision in *Fretz* was the Fifth Circuit's dicta. After concluding that the subsidiaries did not themselves have a security interest because the security agreement did not purport to grant them one, the court stated that even if they did, the subsidiaries could not have been perfected by Revlon's filing.

The court acknowledged that Article 9 contemplates and allows "floating collateral" (after-acquired property of the debtor) and "floating debt" (future advances), but ruled that Article 9 does not contemplate "floating secured parties, that is an open-ended class of creditors with unsecured and unperfected interests who, after the debtor's bankruptcy, can assign their claims to a more senior lienor and magically secure and perfect their interests under an omnibus security agreement and financing statement." 565 F.2d at 369.

Impact of Revised Article 9. The *Fretz* decision dealt with a poorly drafted security agreement, not with assignment of a naked filing. Yet some interpret the dicta as expressing hostility to the concept. However, it is useful to understand how the law has changed. Article 9 now expressly provides that a financing statement can be effective if it states the name of a representative of the secured party, rather than the name of the actual secured party. § 9-502(a)(2). Article 9 further provides that "failure to indicate the representative capacity of the secured party or representative of a secured party does not affect the sufficiency of a financing statement." § 9-503(d). Thus, if a security agreement actually grants a security interest to both a creditor and one or more subsidiaries of the creditor (which is what the security agreement in *Fretz* failed to do), a financing statement filed by only one of them should be effective to perfect the security interests of all of them, *provided that the named secured party is in fact a representative of the unnamed secured parties.*

This last, italicized point is important. At least two courts have indicated that while the representative capacity of the named secured party need not appear on the financing statement, the parties must be able to demonstrate some source of the representative's authority. *See In re QuVIS, Inc.*, 2010 WL 2228246, 71 UCC Rep.2d 801 (Bankr. D. Kan. 2010) (after financing statement filed on behalf of noteholders lapsed, individual filings by some noteholders re-perfected their own security interests but were inadequate to perfect the security interests of the other noteholders); *In re Amron Technologies, Inc.*, 2007 WL 917236 (Bankr. M.D. Ga. 2007) (only one of four joint creditors – the one who had filed a financing statement – was perfected because there was no express or implied agency agreement among the creditors that might make the filer's financing statement effective for the other creditors).

This story was written by Stephen L. Sepinuck, Professor at Gonzaga University School of Law and Co-Director of the Commercial Law Center. Professor Sepinuck is the former chair of The UCC Committee of the American Bar Association and served as ABA Advisor to the Joint Review Committee for Article 9 of the UCC.