

Sufficiency of Debtor's Name for Valid UCC Filings: Recent Cases

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I. Introduction

Under former Article 9 ("Former Article 9") of the Uniform Commercial Code ("UCC"), the test for whether a filing under a particular name was effective was whether the incorrect variation of the name was "seriously misleading." In 2001 and early 2002, revised Article 9. ("Revised Article 9") was enacted into law in every state and in the District of Columbia. Revised Article 9 is much longer (approximately 153,000 words) and in some areas is more complex than Former Article 9, and has significantly expanded the scope of property and transactions covered by Article 9. Revised Article 9 has, in some respects, simplified and clarified the rules for the creation, perfection, priority, and enforcement of a security interest and has made electronic commerce easier. But with respect to correct debtor names to be provided in financing statements intended to perfect security interests under Revised Article 9 by filing, Revised Article 9 may actually make life more difficult for the average filing secured party. Section 9-503 of Revised Article 9 explains what the debtor's name is for purposes of a financing statement. Under § 9-506(a) of Revised Article 9, a financing statement is not rendered ineffective by a minor error in the debtor's name unless the error makes the financing statement "seriously misleading." Although this standard is similar to the standard under Former Article 9, §§ 9-506(b) and (c) of Revised Article 9 specify that a name error is seriously misleading unless a search under the correct name using the filing office's standard search logic would disclose the defective financing statement. Several recent cases (both federal and state), have taken a strict view of this requirement, with far-reaching implications for secured parties.

II. The *Kindernecht* Decision

In one of the first decisions under §§ 9-503 and 9-506 of Revised Article 9, the Tenth Circuit Bankruptcy Appellate Panel ("BAP"), in *Clarke v. Deere and Co. (In re Kinderknecht)*, 308 B.R. 71 (10th Cir. B.A.P. 2004), ruled that the bankruptcy court erred in finding a financing statement to be effective to perfect a security interest despite the fact that the financing statement provided the commonly used nickname of the debtor rather than his proper name.

The debtor's correct legal name was "Terrance Joseph Kinderknecht." According to the court, "it is undisputed that the debtor is informally known as "Terry." John Deere, the secured party who held security interests in two farm implements, filed the financing statements in the "appropriate place," listing the debtor as "Terry J. Kinderknecht." *Id.* at 72.

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The debtor then filed a Chapter 7 bankruptcy petition, and the trustee argued that John Deere's alleged security interests in the property were avoidable under Revised Article 9, as in effect in Kansas, because the financing statement was "seriously misleading" and therefore ineffective. The bankruptcy court ruled that the financing statements were sufficient to perfect John Deere's security interests even though the financing statement contained the debtor's nickname. The parties consented (for whatever reason) to having the appeal heard directly by the BAP for the 10th Circuit, bypassing the U.S. District Court.

Interestingly, the Kansas Secretary of State was granted leave to appear and file an amicus brief arguing reversal of the bankruptcy court's decision. According to the court, "Under Kansas law, the Secretary of State is charged with maintaining the data base used to track the filing of financing statements in Kansas, and with promulgating 'standard search logic' for conducting searches of that data base." *Id.* at 73.

The Tenth Circuit BAP stated that "[f]or a financing statement to be sufficient under Kansas law [to perfect its interest in the debtor's property], the secured party must list an individual debtor by his or her legal name, not a nickname." *Id.* The court observed that, because financing statements are indexed by debtor name, notice of a possible secured interest in property is accomplished by making the financing statement available to those searching under the debtor's name. The court referred to the text and comments to Revised Article 9 of the Kansas UCC, which state (in part): "the requirement that a financing statement provide the debtor's name is particularly important"; that if a financing statement "fails sufficiently to provide the name of the debtor," it is "seriously misleading"; and that the revised Article 9 standard for names is meant to "clarify when a debtor's name is correct and when an incorrect name is insufficient." *Id.* at 74.

The Tenth Circuit BAP noted that before the adoption of Revised Article 9 (which requires a stricter standard for names), courts had struggled with the issue of whether debtor names in financing statements (especially trade names) were sufficient to put third parties on notice of a possible security interest, and that many courts applied a "reasonably diligent searcher" test.

The court acknowledged that the Kansas UCC does not provide any detail regarding the name of an individual debtor (it simply states that the "name of the debtor" should be used), which led the bankruptcy court to find that the use of the debtor's nickname was sufficient. But the Tenth Circuit BAP disagreed. It reasoned that Revised Article 9 (which was enacted in part to clarify the sufficiency of the debtor's name in a financing statement), the reading of the section as a whole, and the intention of the drafters to eliminate "fact-intensive tests," required the conclusion that the debtor's exact legal name must be used in financing statements. The court further noted the importance

of correctly naming the debtor in a financing statement "to facilitate the notice filing system and increase commercial certainty." *Id.* at 75.

The court set forth the following additional "practical considerations" for requiring the debtor's correct legal name in financing statements: 1) to simplify the drafting of financing statements; 2) to "simplify the parameters" of UCC searches; 3) to avoid litigation regarding the "commonality or appropriateness" of the debtor's nickname and whether a "reasonable searcher" would or should have discovered the name; and 4) to assure the accuracy of the creditor's search (which would not be "burdensome") for the debtor's name conducted by the creditor before taking a secured interest in the debtor's property. *Id.*

The court also referred to the official Financing Statement Form set forth in the Kansas UCC statute, which (although not mandatory) specifically states that the preparer should include the "DEBTOR'S EXACT FULL LEGAL NAME" [caps in text of statute]. The court reasoned that this form, which was "meant to reduce error," evidenced "an intent to increase certainty in the filing of financing statements by requiring a debtor's legal name." *Id.* at 76.

The court ruled that because of the foregoing considerations, the financing statements did not sufficiently provide the name of the debtor and were "seriously misleading" under the Kansas UCC as a matter of law and, therefore, did not perfect the secured party's security interests. The court further ruled that although a financing statement would not be deemed seriously misleading if a search of filing office records under the debtor's correct name, using the filing office's standard search logic, "would disclose a financing statement that fails sufficiently to provide the name of the debtor," that exception was inapplicable in this case because a search performed by John Deere's legal counsel in the Kansas UCC search systems (both official and unofficial) disclosed no matches for the debtor's correct legal name. This fact, the court stated, "underscores the need for a clear-cut method of searching a debtor's name in UCC filings." *Id.* at 76-77.

But note that in the *Kindernecht* case the court states that "It is undisputed that the debtor's *legal name* is 'Terrance Joseph Kinderknecht,'" and yet two paragraphs later states that the bankruptcy petition filed by Mr. Kinderknecht, "while signed by 'Terry Kinderknecht,' is filed under his *legal name*, 'Terrance J. Kinderknecht.'" *Id.* at 72 (emphasis added). Can these both be correct? If more than one name is correct, must the search be conducted under more than one name? Although search logic will solve the problem in some jurisdictions, it will not do so in others.

III. The *F.V. Steel and Wire Co.* Decision

Several subsequent bankruptcy decisions have followed the holding of the court in *Kindernecht* and invalidated a financing statement that did not have the debtor's correct legal name. In *In re FV Steel and Wire Co.*, 310 B.R. 390, 391-394 (Bankr. E.D. Wis. 2004), the court ruled that the use of the debtors' trade name, "Keystone Steel &

Wire Co.," would be seriously misleading under Revised Article 9 when the debtor's legal name was "Keystone Consolidated Industries, Inc."

The court found that the searcher would not find the creditor's financing statement by searching under the debtor's legal name, and that the creditor was aware of the correct corporate name of the debtor from the beginning of the transaction, but chose to file under a trade name instead. The bankruptcy court stated that, "the secured party is dependent on the kind of computer search logic used by a particular state's filing office. *The simple solution is to get the debtor's name right*" (Emphasis in text). *Id.* at 394.

Although the case was based on facts that implicated Former Article 9, the court reasoned that "with the publicity about the importance of using the debtor's correct legal name, [the secured party] ignored the correct legal name and filed under the trade name at its own peril," and stated that it would be unfair for searchers "to inquire under the trade name, when neither the old nor Revised Article 9 countenances that requirement." *Id.* Revised Article 9 states this conclusion explicitly in § 9-503(c): "A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor." *Cf. Citizens Nat'l Bank & Trust Co. v. Star Automotive Warehouse, Inc. (In re Thriftway Auto Supply, Inc.)*, 39 F.3d 1193 (10th Cir. 1994) (unpublished opinion; reported in full-text format at 1994 U.S. App. LEXIS 31831) at *2-3 (holding that, under Former Article 9, use of trade name that is similar to debtor's legal name is not seriously misleading, and stating that "a reasonably prudent creditor conducting a reasonably diligent search would have formulated a search aimed at revealing filings under substantially similar names"). *See also In re Summit Staffing Polk County, Inc.*, 305 B.R. 347, 354-55 (Bankr. M.D. Fla. 2003) ("Revised Article 9 requires more accuracy in filings, and places less burden on the searcher to seek out erroneous filings. . . . Revised Article 9 rejects the duty of a searcher to search using any names other than the name of the debtor indicated on the public record of the debtor's jurisdiction of organization [in the case of a corporate debtor]").

IV. The Nittolo Land Development Association Decision

Similar to the court's holding in *F.V. Steel and Wire Co.*, *supra*, the bankruptcy court in *In re Nittolo Land Dev. Ass'n*, 333 B.R. 237 (Bankr. S.D.N.Y. 2005) applied Revised Article 9, as adopted in New York, to the creditor's security interest even though the security agreement and financing statement were executed prior to the effective date of Revised Article 9. The court held that under Revised Article 9 "the name of a debtor that is a 'registered organization' (e.g., a corporation) is sufficiently provided in a financing statement 'only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized'". . . *Id.* at 241.

The financing statement listed the debtor's name as "Nittolo Land Development Associates, Inc.," instead of the correct name of "Nittolo Land Development Association, Inc." The court referred to § 9-506(c) of Revised Article 9, which provides that:

If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading.

Id. at 242.

But since the parties did not address the effect of Revised Article 9 on the error in the debtor's name, the court did not reach that issue in its decision and requested that the debtor and the bankruptcy trustee "provide the Court with further submissions regarding whether [the secured party's] financing statement was properly executed, including (1) the Debtor's name as listed on the Debtor's certificate of incorporation and (2) if [the creditor] failed to sufficiently provide the name of the Debtor in accordance with UCC § 9-503(a), whether standard search logic in the filing office (the New York Secretary of State) would disclose Fleet's financing statement." *Id.* at 242. It is likely that since the model search logic effective in many states now requires an exact "match" (except for punctuation and "noise" words), a search at the Secretary of State's office in New York would *not* recognize the mistaken name of the debtor.

V. The *Pankratz Implement Co.* Decision

In *Pankratz Implement Co. v. Citizens Nat'l Bank*, 281 Kan. 209, 130 P.3d 57, (Kan. Sup. Ct., 2006), which was decided shortly after the *Kindernecht* decision, *supra*, the Kansas Supreme Court upheld the decision of the Kansas Appellate Court, which had ruled that a financing statement filed against the debtor, in connection with a purchase-money security interest in farm equipment acquired by the debtor, that misspelled the debtor's name, "Rodger House," by leaving out the letter "d" in the debtor's first name, was seriously misleading under the standard search logic provided by the Kansas Secretary of State. The court ruled that this was the official and only search that determined whether a name was seriously misleading under the Kansas UCC statute.

John Deere filed a financing statement with the Kansas Secretary of State on March 23, 1998, using the misspelled name. On March 4, 1999, Citizens National Bank ("CNB") filed a financing statement against the collateral covered by the John Deere collateral (together with other collateral) under the correct name of the debtor. Mr. House later filed a Chapter 7 bankruptcy proceeding, and shortly thereafter John Deere reassigned its interest in the House note and collateral to Pankratz, who sought a declaratory judgment in the district court against CNB concerning the priority of its purchase-money security interest. The court noted that two types of searches were available to a creditor with respect to the determination of existing liens on specific property: 1) a temporary internet search logic (which would have disclosed the flawed financing statement but was not an "official" search by the Secretary of State) and 2) the standard search logic set forth in the Kansas UCC statute, which the court held was the

“official and only search that determines whether a name was seriously misleading.” Because a search under the statutorily approved search logic did not disclose the financing statement with the incorrect name, the court held that the financing statement was seriously misleading and therefore invalid. According to the court, “the intent of the filing requirements of Revised Article 9 is to shift the burden of filing correctly onto the filers and to allow searchers to rely on one search under the correct legal name of the debtor.” *Id.*, 130 P.3d at 68.

The *Pankratz* decision places the burden squarely on the secured party to make certain that an individual debtor’s name is correct, and leaves no room for error. But individuals do not have “registered names” (unlike corporations, limited partnerships and limited liability companies) and individual names may change for a variety of reasons during an individual’s lifetime (as the result of marriage, legal name changes, “stage” names, etc.). As one article has noted, “A birth certificate, social security card or court order changing the debtor’s name is probably the best evidence.” John K. Pearson and J. Scott Pohl, *If the Name is Bubba, You’d Better Spell it Right*, 25 ABI J. 24, 72 (June 2006).

Several states allow users to conduct their own searches on the internet; some states (such as Kansas) even provide more than one form of search logic on the internet. The internet search logic used for this purpose (as evidenced in the *Pankratz* case) may be different from the search logic used by the state filing office itself when searching and producing certified results. Individuals can in fact have more than one “correct” name and use those names in different contexts, e.g., birth certificates, federal tax returns, driver’s licenses, and passports. The idea that there is a single correct name that will identify different individual human beings simply is not sustainable.

VI. The Asheboro Precision Plastics Decision

In *In re Asheboro Precision Plastics, Inc. (Miller v. Van Dorn Demag Corp.)*, 2005 Bankr. LEXIS 1091 (Bankr. M.D. N. C. March 1, 2005) (cited by the court in *Pankratz, supra*), the creditor filed its financing statement under a derivation of the debtor’s trade name, “Wade Technical Molding, Inc.,” instead of the Debtor’s legal name, “Asheboro Precision Plastics, Inc.” The creditor argued that it was “induced by the Debtor’s president . . . to believe that the name it used on the financing statement was in fact the Debtor’s legal name.” *Id.* at *4.

But the bankruptcy court ruled that the creditor’s reliance on the president’s alleged misrepresentation regarding its correct name was not sufficient to render the filing valid. The debtor testified (which testimony the court agreed with) that he in fact had provided the creditor, prior to the filing of the financing statement, “with copies of the debtor’s recent tax returns and financial statements, which all listed the legal name of the Debtor as ‘Asheboro Precision Plastics, Inc.’” *Id.* at *5. The court noted that “Using a debtor’s correct name is important because financing statements are indexed under the name of the debtor.” *Id.* at *20. The court also noted that before the adoption of Revised

Article 9, “the use of a trade name in a financing statement could be sufficient to perfect a security interest depending on the circumstances of a particular case” (citations omitted), *Id.* at *21, but that this was no longer the case under Revised Article 9 (citing *Kinderknecht, supra*, which forecloses fact-intensive tests). The court further observed that, if a search under the state’s search logic using the debtor’s correct name in fact disclosed a financing statement that failed to sufficiently provide the name of the debtor in accordance with § 9-503(a) of the UCC, the use of that name would not make the financing statement seriously misleading. But the court found that, in this case, a search under the debtor’s correct name clearly did not reveal the creditor’s financing statement.

Although the court ruled that the secured party’s financing statement was seriously misleading and ineffective, it found that there were material issues of fact with respect to whether there had been any misrepresentation or fraud on the part of the debtor that would warrant the imposition of a constructive trust, and ordered a trial on that issue.

See also In re Thriftway Auto Supply, Inc., supra, 39 F.3d 1193, at *2-3 (containing comprehensive discussion of problems involved in searches for debtor’s name under Former Article 9); G. Ray Warner, *Using the Strong-arm Power to Attack Name Errors Under Revised Article 9*, 20-8 AM. BANKR. INST. L.J. 22 (October 2001) (“Under the new standard, a name error is fatal if a search under the correct name, using the filing office’s standard search logic, would not disclose the financing statement.”); Meghan M. Sercombe, *Note: Good Technology and Bad Law: How Computerization Threatens Notice Filing Under Revised Article 9*, 84 TEX. L. REV. 1065, 1068 (2006) (“[T]he drafters of revised Article 9 opted for a bright-line rule, rejecting any language that would have measured validity against principles of fairness or equity”); Steven L. Harris & Charles W. Mooney, Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 AM. BANKR. INST. L. REV. 85, 105 n. 117 (Spring 2001) (explaining that cases arising under Former Article 9 would come out differently under Revised Article 9; even if a manual search of the record would reveal the financing statement, the results of a manual search are irrelevant if the financing statement is not disclosed under the relevant computer search); Terry M. Anderson, Marianne B. Culhane, and Catherine Lee Wilson, *Attachment and Perfection of Security Interests Under Revised Article 9: A “Nuts and Bolts” Primer*, 9 AM. BANKR. INST. L. REV. 179, 204-05 (Spring 2001) (“[I]f the search logic of the office means that a search under ‘AB-C Inc.’ will not find the ABC Ltd. variant, then the financing statement will be seriously misleading and ineffective”); John K. Pearson and J. Scott Pohl, *If the Name is Bubba, You’d Better Spell It Right*, 25 ABI J. 24, 71 (2006) (“the trick is going to be determining when [an individual debtor’s name] is the debtor’s legal name”); 68A AM. JUR. 2D Secured Transactions (2006) § 316 (Substantial Compliance with U.C.C. as Excusing Minor Errors Not Seriously Misleading) and § 321 (Sufficiency of Debtor’s Name); James J. White and Robert S. Summers, *Uniform Commercial Code*, § 31-12 at 174-75 (5th ed. 2002) (“if the standard search logic (when instructed to use the correct name) fails to find a financing statement because the name is incorrect, that renders the financing statement not only non-compliant with §9-502 and §9-503, but also means that it fails ‘substantially’ to satisfy the ‘requirements of this Part’ under §9-506 and so is ‘seriously misleading’”).

VII. The *Host America Corporation* Decision

In *Host Am. Corp. v. Coastline Fin., Inc.*, 2006 U.S. Dist. LEXIS 35727 (D. Utah May 30, 2006), *appeal denied*, 2006 U.S. Dist. LEXIS 46251 (D. Utah July 6, 2006), the court held that the initial financing statement filed by Host America Corporation (“Host America”) was seriously misleading, and that Coastline Financial, Inc. (“Coastline”) had properly perfected its security interest (and therefore had priority over Host America’s security interest) before Host America took action to correct its misspelling of the debtor’s name by filing a new financing statement with the debtor’s correct name.

Host America sought a summary judgment from the court that its security interest in goods owned by K.W.M. Electronics Corporation (“KWM”) was superior to Coastline’s lien, which applied to the same goods. This was so, Host America argued, “because either (1) Host America’s security interest was perfected before Coastline’s lessor’s lien, or (2) Host America has perfected its security interest while Coastline has yet to perfect its lessor’s lien.” *Id.* at *2. In reply, Coastline argued that Host America’s security interest was not in fact perfected at the time the Coastline placed its lessor’s lien on the property, since the financing statement filed by Host America incorrectly listed the debtor’s name and was therefore “seriously misleading.”

KWM, which leased space from Coastline, entered into a financing agreement with Washington Mutual Bank (“WaMu”) and provided WaMu with two security interests in certain of KWM’s collateral. WaMu subsequently assigned these security interests to Coastline. In order to pay off the obligations evidenced by these security interests, KWM obtained alternative financing from Burton M. Sack and granted him a security interest in certain collateral. Because the proceeds were used to pay off the obligations evidenced by the security interests held by Coastline, Coastline released its financing statements on the collateral. After KWM failed to pay the rent due under its lease with Coastline, Coastline obtained a lessor’s lien on KWM’s goods pursuant to Kansas law and seized the collateral on the leased premises. Host America claimed that it had the superior interest in the collateral, because it had acquired the debt and the security interest held by Mr. Sack. But Mr. Sack’s financing statement listed the debtor’s name as “K W M Electronics Corporation.” Host America filed, subsequent to Coastline’s seizure of KWM’s goods, a new financing statement in connection with that debt and security interest, listing the debtor’s name as K. W. M. Electronics Corporation. Two days later, Host America filed an additional financing statement in connection with the debt and security interest it obtained from Mr. Sack, listing the debtor’s correct name, K.W.M. Electronics Corporation.

Host America conceded that the financing statement obtained from Mr. Sack did not contain KWM’s correct name, and therefore “[t]he question before the court is whether the failure to list KWM’s correct name on the financing statement rendered that statement ‘seriously misleading.’” *Id.* at *8. The court, citing *In re Kindernecht, supra*, noted the importance of getting the debtor’s name correct under Revised Article 9. The court also noted that the parties did not agree on KWM’s correct name, i.e., whether KWM’s correct name was “K. W. M. Electronics Corporation” (with spaces between the

periods) or “K.W.M. Electronics Corporation” (with no spaces between the periods). But the court reasoned that resolution of this issue was irrelevant, because Host America conceded that Mr. Sack’s financing statement failed to indicate the presence of any periods, thereby rendering it void because “a search under KWM’s correct name using the filing office’s standard search logic “would not have revealed Mr. Sack’s security interest at any point in time before Coastline seized the goods as part of its foreclosure activities.” *Id.* at *13. Therefore, the court concluded, the “escape hatch,” i.e., the disclosure of an incorrect name by virtue of a search under the filing office’s standard search logic using the correct name, did not apply in this case. The court noted that “[t]he escape hatch provision is expressly tied to the state’s search logic and allows no leeway for financing statements that remain undiscovered due to a creditor’s failure to comply with [§ 9-503 of the UCC, regarding the correct name of the debtor]” *Id.* at *14.

Finally, the court rejected Host America’s argument that Coastline had not properly perfected its landlord’s lien and that therefore Host America’s newly perfected security interest attained priority. The court found that Coastline had taken all the required steps under Utah law to properly perfect its lien, and that “Host America initiated legal action after Coastline seized the goods and short-circuited Coastline’s ability to sell those goods.” *Id.* at *17.

VIII. The Corona Fruits & Veggies Decision

In *Corona Fruits & Veggies, Inc. v. Frozsun Foods, Inc.*, 143 Cal. App. 4th 319 (Cal. App. 2d Dist. 2006), the California appellate court found that the first creditor to file a UCC-1 financing statement failed to properly perfect its security interest in a strawberry crop because the financing statement incorrectly listed the debtor’s name as Armando Munoz; therefore the second filer, who spelled the debtor’s name correctly on its financing statement, had priority.

The court noted that the debtor’s correct name, Armando Munoz Juarez, was listed in the first filer’s business records, was provided to the first filer through photo identification and a green card, and appeared on the first filer’s sublease with the debtor as well as on other documents. The court also noted that “No evidence was presented that the first filer’s financing statement would have been discovered under debtor’s true name, using the filing office’s standard search logic.” *Id.* at 324.

The court also rejected the first creditor’s argument that because the debtor was from Mexico, the name requirement was governed by the naming convention of most Latin American countries (where the surname is formed by listing the first the father’s name, then the mother’s name). The court ruled that the naming convention of Latin American countries is legally irrelevant for UCC-1 purposes, as the strawberry crop was planted and the debt obligation arose in California, not Mexico. The court noted that “The naming convention . . . if accepted, would seriously undermine the concept of lien perfection.” *Id.*

The court concluded that “Appellants are estopped by their pleadings, the contracts, business records, the checks for the cash advances, debtor’s identification papers and tax papers, and the testimony of appellant’s account manager. Appellants could have protected themselves by using both names on their financing statements.” *Id.* at 325. Interestingly, the first filer’s account manager, testified that “I don’t know why I put his [i.e., debtor’s] last name [on the UCC-1 financing statement]. I could have made a mistake....” *Id.* at 324.

Although this decision may seem to suggest that there is one true name for everyone, and places all the burden on the filer instead of the searcher with respect to ascertaining the debtor’s true name, it is probably a good thing for the court to have drawn a “bright line” on the sufficiency and legality of a debtor’s name for UCC filing purposes, to establish predictability and certainty in this area.

IX. The *In re Borden* Decision

In *Genoa National Bank v. Southwest Implement, Inc. (In re Borden)*, 2006 Bankr. LEXIS 2911 (Bankr. D. Neb. Nov. 2, 2006), Genoa National Bank (“Bank”) held a perfected blanket security interest in the debtor’s personal property. Another creditor, Southwest Implement, Inc. (“Southwest”), filed UCC-1 financing statements on two pieces of the debtor’s farm equipment, which financing statements identified the debtor as “Mike Borden” rather than by his legal name of “Michael Borden.” The Bank claimed that this identification made Southwest’s UCC-1 financing statements “seriously misleading,” and therefore ineffective, under § 9-506 of Revised Article 9 as enacted in Nebraska.

The bankruptcy court agreed with the Bank, noting that the debtor “is identified by that name [Michael Ray Borden] or by “Michael R. Borden” on many legal documents (*i.e.*, birth certificate, driver’s license, real estate deeds, bank accounts, tax returns, and bankruptcy petition), although he often signs legal documents . . . as “Mike Borden.” *Id.* at *3. The court then noted that “[a] financing statement that fails sufficiently to provide the name of the debtor is seriously misleading, unless the financing statement would appear in a search of the filing office’s records under the debtor’s correct name using the office’s standard search logic.” *Id.* at *4. Because the financing statements naming “Mike Borden” did not appear among the results when the UCC records were searched under the debtor’s correct name, using the filing office’s standard search logic, the court held that Southwest’s financing statements were misleading and therefore insufficient to protect its security interest. The court rejected Southwest’s arguments that the financing statements were not seriously misleading because Mr. Gordon is commonly known as “Mike” and that the Bank “would gain a windfall and Southwest would be deprived of its collateral.” *Id.* at *4-5.

The court noted further that the legislative intent of § 506 of Revised Article 9 was to shift the burden of getting the debtor’s name right to the party filing the financing statement, and that, as in the *Kindernecht* case, *supra*, the official Nebraska UCC-1 form

“requires the debtor’s exact full legal name.” The court also stated that “[a]n instruction to use the debtor’s ‘first given name’ presumably serves to exclude the use of a nickname or short form of a given name,” *Id.* at *12, and stated further that “[t]o adequately protect itself, the creditor should do its best to ensure that its Article 9 lien documents are filed under the debtor’s legal name.” *Id.* at *14-15.

It is interesting to note that at the beginning of its opinion, the court states that Southwest’s financing statements “identify the debtor as ‘Mike Borden,’ rather than by his legal name of “Michael Borden.” *Id.* at *2. But only a few paragraphs later, the court states that “Mr. Borden’s legal name is Michael Ray Borden, and he is identified by that name or by ‘Michael R. Borden’ on many legal documents.” *Id.* at *3. So exactly what is Mr. Borden’s “legal name” for sufficient search purposes under Revised Article 9?

X. The *Receivables Purchasing Co.* Decision

In *Receivables Purchasing Co. v. R&R Directional Drilling, L.L.C.*, 263 Ga. App. 649 (Ga. Ct. App. 2003), Dillard Smith Construction Company (“Dillard Smith”) hired Network Solutions, Inc. (“Network Solutions”) as a subcontractor on several projects. Network Solutions assigned all rights that it had to payment for this work to Receivables Purchasing Company, Inc. (“Receivables”). But the UCC-1 financing statement filed by Receivables to perfect its security interest in these receivables listed the debtor’s name as “Net Work Solutions, Inc.,” rather than the correct name, “Network Solutions, Inc.”

R&R Directional Dealing, L.L.C. (“R&R”) subsequently performed drilling services for Network Solutions. When R&R was not paid for this work, it obtained a judgment against Network Solutions for \$40,993.74. To determine whether any individual or entity might claim a superior interest in these funds, R&R performed a UCC search under the name “Network Solutions, Inc.,” which failed to reveal any such debtor. R&R then filed a garnishment action against Network Solutions and Dillard Smith. Dillard Smith filed an answer stating that it was holding the sum of \$32,136.84, which funds were now being claimed by both Network Solutions and Receivables. Based on the consent of the parties, this sum was deposited with the trial court until the dispute was resolved.

R&R then asked the Georgia Superior Court Clerks Cooperative Authority (“GSCCCA”) to perform a search (pursuant to an applicable Georgia statute). The GSCCCA did so, under the correct name “Network Solutions, Inc.,” which did not reveal Receivable’s financing statement.

As the appellate court noted, “R&R [argued] that Receivable’s UCC-1 financing statement was not a perfected security interest that could defeat R&R’s lien of the proceeds because Receivables failed to properly name Network Solutions, Inc., as the debtor on the financing statement.” *Id.* at 650-51. The trial court found that the incorrect name made the financing statement seriously misleading under § 506(b) of Revised Article 9, and thus the financing statement was insufficient to perfect Receivable’s

security interest. The appellate court affirmed this holding, and noted that since the enactment of Revised Article 9 by the State of Georgia (which occurred prior to the commencement of this case), “a party filing a financing statement now acts at his own peril if he files the statement under an incorrect name.” *Id.* at 652. The appellate court held that because it was undisputed that a search of the county clerk’s office using the correct name did not reveal the financing statement, § 506(b) of Revised Article 9 mandated the result reached by the trial court, i.e., Receivables did not obtain a perfected security interest because the name of the debtor on the financing statement was seriously misleading.

XI. The *All Business Corp. v. Choi* Decision

In *All Business Corporation v. Choi*, 280 Ga. App. 618 (Ga. Ct. App. 2006), All Business Corporation (“ABC”) was a secured creditor of Sang Woo Gu (“Gu”), and attempted to perfect a security interest in the assets of Gu’s business by filing a UCC-1 financing statement listing the debtor’s name as “Gu, Sang Woo.” Gu later sold his business for \$197,000. The closing attorney representing Gu, Jin Choi (“Choi”), conducted a UCC search under the correct name of the seller, Sang Woo Gu, prior to the closing (although directed not to do so in the sale agreement) and did not find a financing statement under that name. ABC, which (unbeknownst to Choi) was owed \$235,000 by Gu, filed suit against Choi for breach of trust and conversion, seeking a turnover of the funds representing the proceeds of the sale (which ABC claimed it was entitled to by virtue of its filed financing statement).

The appellate court affirmed the ruling of the trial court, which granted summary judgment to Choi because it found there was no breach of trust as there was no evidence that Choi owed a duty to ABC. The appellate court, in the part of its ruling dealing specifically with the issue of whether ABC’s financing statement was seriously misleading, ruled that ABC had not properly perfected its security interest in Gu’s business and that therefore Choi did not have constructive notice of it prior to the sale of the business. The appellate court noted that ABC’s “financing statement incorrectly listed the debtor’s name as ‘Gu, Sang Woo’ and stated the name of the business as ‘CCO Check Cashing-Buford’ rather than ‘CCO Check Cashing.’” *Id.* at 623.

A representative of ABC testified that he searched the records for “Gu” and found the financing statement at issue. But the appellate court discounted that testimony, finding it inapposite because the representative did not conduct the search through the appropriate clerk’s office using the debtor’s correct name, as required by § 506 of Revised Article 9, as effective in Georgia. Because it was uncontradicted that a search under the debtor’s correct name did not reveal the financing statement, the appellate court held that the financing statement was seriously misleading and therefore unperfected and ineffective. The court found that because the evidence showed that Choi was not aware of the true status of the funds at issue or the precise nature of ABC’s security interest, he lacked actual or constructive notice of ABC’s alleged entitlement to the sale proceeds in his possession.

XII. The *Spearing Tool* Decision

While Revised Article 9 creates greater certainty with respect to filings that it governs, liens filed in Article 9 filing offices (such as a Secretary of State's office) but that are not governed by the Revised Article 9 filing regime (such as federal tax liens) may not be subject to the Revised Article 9 rules. In *United States v. Crestmark Bank (In re Spearing Tool & Mfg. Co.)*, 412 F.3d 653 (6th Cir. Mich. 2005), *reh'g, en banc, denied*, 2005 U.S. App. LEXIS 29219 (6th Cir. Dec. 30, 2005), the Sixth Circuit held that the notices filed by the IRS sufficiently identified the debtor as the taxpayer under federal law, regardless of Revised Article 9's requirements, because the IRS used the accepted form (MFG) for the word "manufacturing," and granted the IRS summary judgment.

The debtor's exact name was "Spearing Tool and Manufacturing Company, Inc." Crestmark Bank ("Crestmark") had entered into loan agreements with the debtor and was granted a security interest in all of the debtor's assets, including accounts receivable. Crestmark perfected its security interest by filing a financing statement with the Michigan Secretary of State's office, which contained the debtor's correct legal name. (For a "registered organization," such as a corporation, limited liability company, or limited partnership, the correct name of the debtor is the name "indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized"; for an individual, the correct name is the individual name of the debtor [which is not further defined]. *See* § 9-503(a) of Revised Article 9).

The IRS filed two notices of federal tax lien with the Michigan Secretary of State under "Spearing Tool & Mfg. Company, Inc", which was the name under which the debtor filed some -- but not all -- of its tax returns. Crestmark periodically conducted tax lien notice searches at the Secretary of State's office, using the debtor's exact name. But the electronic search logic used by the Secretary of State was not broad enough to discover a filing against "Spearing Tool & Mfg. Company, Inc." Crestar argued that the IRS filings were ineffective because they did not provide the exact name of the debtor as required by Revised Article 9. The Sixth Circuit ruled that although state law controls the place for filing a tax lien within a state, federal law controls the form and content of that filing; here the IRS properly identified the taxpayer as required by applicable treasury regulations, and the IRS had priority.

The court found that the IRS complied with the applicable federal law requirements by providing information about the taxpayer such that a "reasonable and diligent search would have revealed the notices of the federal tax liens." The court determined that Crestar had notice that the debtor sometimes used the abbreviations in its name that the IRS used in describing the debtor, and noted that the Michigan Secretary of State's office had even sent a notice to Crestmark, along with the search results at the time, *recommending* that a search using the abbreviations be conducted by Crestmark. But the court stated that "We express no opinion about whether creditors have a general obligation to search name variations. Our holding is limited to these facts." *Id.* at 656.

The court also alluded to “policy considerations” in support of its holding, i.e., that it would be “unduly burdensome” to the government’s tax-collection efforts to identify a taxpayer with absolute precision, and reasoned that in any event the UCC did not apply to IRS tax liens but only to transactions “that create a security interest in personal property or fixtures *by contract*” (Citation omitted; emphasis in text.) The court stated that “we conclude from Supreme-Court precedent that the federal government’s interest in prompt, effective tax collection trumps the bank’s convenience in loan collection”. *Id.* at 657. The U. S. Supreme Court has declined to review this case.

As a result of this decision, the searcher must search all reasonable alternatives to the debtor’s name (including those based on facts that only a particular searcher may know, thus yielding different results for different searchers), because if the debtor’s (taxpayer’s) name on the notice of tax lien would comply with the former Article 9 rules, it was good enough for purposes of the federal tax lien.. The search logic of most states will not find a filing that does not contain the debtor’s correct name (except for “noise words”), thereby resulting in the necessity of multiple searches under possible variations of the debtor’s name. Secured parties will need to search under “reasonable” name variations for the debtor as well as the debtor’s correct name. It may even be necessary to obtain the debtor’s current (and perhaps even some past) tax returns and then search under each of the names listed as the taxpayer in the returns. In addition, searchers may need to search records in a state or states other than what would be required in a UCC search under the Revised Article 9 rules, because certain liens that are not subject to the UCC (such as tax liens, judgment liens, state tax liens, and environmental liens) may have filing requirements in jurisdictions other than those governed by the UCC. For example, § 9-307 of the UCC provides that, for the location for search purposes of a security interest filing, “[a] registered organization that is organized under the law of a State is located in that State,” whereas when the IRS files a lien against a taxpayer’s property, it must do so in one office within the State as designated by the laws of such State, in which the property subject to the lien is situated. 26 U.S.C.S. § 6323(f)(1)(A). With respect to the situs of property subject to an IRS lien, property is deemed situated in the case of personal property, at the “residence of the taxpayer at the time the notice of lien is filed, and “the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located.” 26 U.S.C.S. § 6323(f)(2)(B)

See Edmund S. Whitson III, “*Spearing the Secured Creditor: Sixth Circuit Applies “Bluebook” Rule to IRS Lien Notice Requirements*, 24 ABI J. 24 (2005). The author concludes that:

While the holding of *Spearing Tool* is limited to its facts and therefore of questionable precedent, from a policy perspective the ruling is troubling for at least two reasons. This case presented an excellent opportunity for the court to address the modern electronic filing environment and keep tax-collection practices in pace with the evolving changes in state law and private commerce. As it stands,

the ruling only serves to increase the disconnect between state and federal law as the former struggles to adapt and to technical evolution and the latter appears intransigent and unmoved by the resulting dilemma to secured creditors.

Id. at 65. *See also* Lynn M. LoPucki, *The Spearing Tool Filing System Disaster*, 68 OHIO ST. L.J. ____ (2007), in which the author states as follows:

The [*Spearing Tool*] decision applied only to tax liens, not to Article 9 filings. But in all but six or seven states, tax liens and Article 9 filings are mixed together in the same index. The searcher simultaneously searches for both. That simultaneous search will include the steps necessary to find tax liens as well as the steps necessary to find Article 9 filings. Thus, by imposing the reasonable diligent search requirement on those searching for tax liens, *Spearing Tool* imposed it on all searchers. The effect was to resurrect the reasonable diligent search requirement for Article 9 searching.

Discussion

1. Evidence of Proper Name of Registered Entity

As noted by the court in a footnote in the *Kindernecht* case, *supra* (which quoted from the brief filed by the Kansas Secretary of State), Revised Article 9 "allows a searcher to rely on a single search conducted under the correct name of the debtor and penalizes filers only for errors that result in the nondisclosure of the financing statement in a search under the correct name." *In re Kindernecht*, *supra*, 308 B.R. at 76 n.16. But what if there is a discrepancy with respect to a debtor's legal name, i.e., between the information on a Secretary of State's website and the filed articles of a registered organization? Would the name in the filed articles prevail over a name variation in the Secretary of State's website or good standing certificate? There appears to be no clear case law on this issue. Should an attorney's opinion for a UCC transaction include a specific assumption that the name in an entity's articles of incorporation (or other formative or organizational documents) is the same as the name in the public records of the office where a record of the entity's existence is maintained? "Good Standing" certificates often contain abbreviations of an entity's legal name, and should not be relied upon, in general, as verification of the debtor's true legal name. Perhaps the safest strategy would be (1) to obtain a certified copy of the entity's organizational documents (as amended), i.e., its articles of organization, limited liability company agreement, partnership agreement, articles of incorporation, etc., and (2) for the financing statement to provide the name reflected in the organizational documents. If a certificate of good standing issued by the Secretary of State or the Secretary of State's website indicates a different name for the debtor, it

would be prudent for the secured party to file a financing statement providing that name for the debtor as well. And, as noted by one commentator with respect to the information required for a registered entity:

Some states assign an organizational ID number to registered entities, and that number should be included in UCC 1 financing statement filings in both the state of incorporation and in other states where the debtor has assets . . . While failure to include the ID number may not be fatal, it presents an opportunity for litigation that is easily avoidable by including the number at the outset.

John K. Pearson and J. Scott Pohl, *If the Name is Bubba, You'd Better Spell it Right*, *supra*, 25 ABI J. at 71 n.6.

2. Evidence of Proper Name of Individual

Another perplexing issue for searchers is: Exactly how is the “exact legal name” or “correct name” defined for purposes of individuals? Section 9-503(a) of Revised Article 9 provides that a financing statement sufficiently provides the name of the debtor only if it provides the individual name of the debtor (which is not further defined). Certainly nicknames are not exact legal names. But is it the name on an individual’s driver’s license (or passport)? Is it an individual’s first name, middle initial and last name? Or perhaps any combination of initials and/or birth certificate names for the first name and middle name/initial and the individual’s exact last name? (Suffixes such as Sr. or Jr. or “II” or “III” are generally ignored by each state’s search logic and should not affect the validity of the financing statement.) Perhaps the safest (albeit cumbersome and costly) strategy would be, with respect to those instances where there may be a variety of public records with multiple variations of the debtor’s name, to file under each of the variations. Alternatively, in a larger non-consumer transaction where the security interest is in specific collateral used in the individual debtor’s business, the secured party may insist that the debtor form a registered organization, such as a limited liability company, to hold the assets and operate the business and for the registered organization to be the debtor, possibly with a guaranty from the individual.

3. Proper Application of Search Standard

Under § 9-705 of Revised Article 9, an effective financing statement filed before July 1, 2001 continues to be effective until it lapses or until June 30, 2006, whichever occurs first. Thus, a “seriously misleading” filing (effective before July 1, 2001) remained effective until the earlier of June 30, 2006 or the date that it lapsed by its terms. However, current search logic, which uses the stricter standard, will not find such “seriously misleading” but nonetheless effective filings. This posed a problem with respect to filings under Former Article 9 (at least until June 30, 2006) and still remains a problem with

respect to tax liens (and certain other types of liens), which are not subject to the Revised Article 9 standard, and it remains necessary to search for such seriously misleading filings (see the *Spearing Tool* case, *supra*). In addition, some courts (prior to the issuance of *Kindernecht* and the other decisions described in this article) have not applied the Former Article 9 standard to financing statements entered into and effective before July 1, 2001 and incorrectly applied the Revised Article 9 standard. *See, e.g., In re Grabowski*, 277 B.R. 388, 391 (Bankr. S.D. Ill. 2002) (dealing with incorrect legal description and finding that “exceedingly general” standard under Revised Article 9 was sufficient); *Nazar v. Bucklin Nat’l Bank (In re Erwin)*; 2003 Bankr. LEXIS 692 (Bankr. D. Kansas, June 27, 2003), at *22, *29 (holding that use of debtor’s nickname was sufficient under Revised Article 9, but not mentioning standard under Former Article 9; court stated that “[u]ntil the legislature specifically mandates that a ‘legal name’ or ‘full name’ be used in financing statements or otherwise expressly precludes the use of ‘nicknames,’ the Court must give the term ‘name’ its common and ordinary meaning. And in the absence of any further guidance in the type of individual debtor name required under § 9-503(a)(5)(A), the Court can only conclude that Mike Erwin, whether it is characterized as a nickname or not, is a ‘correct name.’”).

4. MARS Search Logic

Under Former Article 9, human judgment was relevant because the courts determined whether an error was seriously misleading by asking whether a hypothetical “reasonably diligent searcher” could discover the erroneous filing. While the old manual search systems could tolerate certain variations in names, the computerized search logic now available and used by the state filing offices results in a precise standard that has little (if any) tolerance for variations. The focus is now solely on the degree of tolerance built into the computerized search logic utilized by the applicable filing office. The search logic could be very liberal, very strict, or somewhere in between. In 2001, the International Association of Corporate Administrators promulgated Model Administrative Rules (“MARS”), which created standard rules for search logic that tend toward the “strict” end of the spectrum. Over 40 states have now adopted some version of MARS, although many states have modified the rules in some respect (which has resulted in a great deal of inconsistency; furthermore, some states have not adopted any rule on search logic at all). In general, when a debtor’s name has been modified by the applicable search logic, the search will produce a financing statement only if the names “exactly match.” If there is no match, the security interest will (as demonstrated by the *In re Kinderknecht* case, *supra*) be “seriously misleading,” and therefore unperfected and susceptible to a “strong-arm” attack by a bankruptcy trustee or debtor-in-possession (see bankruptcy discussion below). Although the MARS search logic ignores punctuation, case, accents, capitalization, spaces, and other “noise words” (such as the word “the” at the beginning), as well as words or abbreviations indicating the nature of the organization at the end of the name (e.g., “Corp.,” “Co.,” “Ltd.,” and “Attorneys at Law”), it does not treat common variations, minor misspellings, or typographical errors as equivalent to the correct name. Under § 9-506(c) of Revised Article 9, an error in the debtor’s name is fatal if a search under the correct name, using the filing office’s standard search logic,

would not disclose the financing statement. As the result of this stricter standard under revised Article 9 and the MARS search logic, there is an appreciably greater risk that failure of perfection will result due to an incorrect spelling of the debtor's name on the financing statement. But the MARS search logic does disregard spaces, as in all punctuation. The *Host America* case, *supra* (Utah) shows clearly that many states still have not adopted the MARS search logic, which would have ignored the spaces between the letters in the debtor's name.

5. Continuing Ineffectiveness of Many Financing Statements

At least one study suggests that a large number of secured parties are still not sufficiently sensitive to Revised Article 9's narrow debtor-name standards for financing statements. According to Carl R. Ernst, CEO of Ernst Publishing Co., LLC (as posted August 8, 2006, on UCC Law-L listserv, ucclaw-l@lists.washlaw.edu):

Depending on how the courts decide to interpret Rev. UCC § 9-506(b),

- (1) if the legal standard for a registered organization "debtor's correct name" is exact, more than 50% of financing statements are seriously misleading;
- (2) if the courts decide that punctuation does not count as part of "debtor's correct name," 33% remain seriously misleading;
- (3) if the filing office provides standard search logic according to Rev. UCC § 9-506(c), 25% of financing statements are still not saved from being deemed ineffective.

Effectiveness and Perfection

As a result of these facts, we can draw conclusions about the effect of these debtor errors on perfection of the underlying security agreement. (Remember ineffective financing statement equals unperfected security interest):

1. If a filing office provides a search using standard search logic, no less than 25% of financing statements that include a registered organization debtor name are ineffective.
2. If a filing office does not provide a form of standard search logic, more than 50% of financing statements

that include registered organization debtor names may be ineffective.

6. Improperly Rejected Financing Statements

Under § 9-516(d) of Revised Article 9 (as was the case under § 9-403(1) of Former Article 9), an improperly rejected financing statement is nonetheless deemed to have been correctly filed and therefore effective. (Unlike Former Article 9, however, § 9-516(d) of Revised Article 9 provides that an improperly rejected filing statement is not effective against a later secured party that obtains a security interest for value in reasonable reliance on the absence of the financing statement from the records.) But there is no recourse against the State (or any state agency) for misindexed or misfiled financing statements against a debtor that are undiscoverable but nonetheless may be valid. Similarly, there is no way of ascertaining for certain from a search report that a termination of a financing statement was, in fact, properly authorized by the secured creditor.

7. Bankruptcy Issues

The failure to correctly name the debtor in the financing statement can have catastrophic results if a bankruptcy petition is later filed by or against the debtor. The goal of every bankruptcy trustee is to obtain and preserve cash and assets, from all available sources, for the benefit of the estate and its general creditors and to pay the expenses of administering the estate. The trustee therefore will pay a great deal of attention to the sufficiency and validity of any security interest claimed against the debtor's collateral, and will challenge the perfection and lien position of such interest wherever possible. For a lender that is relying on the protection provided by its security interest in the debtor's collateral, a successful challenge to the perfection or priority of such interest could have devastating "all or nothing" consequences if its interest is reclassified as an unsecured claim. Since most security interests are perfected by filing a financing statement, the standards for measuring compliance with the filing requirements will be critical in determining whether a security interest can be avoided. Section 544 of the Bankruptcy Code gives the bankruptcy trustee (including a debtor-in-possession), the status of a lien creditor as of the date of the bankruptcy petition. If under nonbankruptcy law, the lien creditor would prevail over a secured party's security interest, the trustee in bankruptcy, by virtue of that status, will prevail over the secured party's interest and treat the obligations secured by the security interest as general unsecured obligations. And under Revised Article 9, of course, a lien creditor prevails over an unperfected security interest. Accordingly, it is extremely important for secured parties to ascertain that financing statements are properly completed and filed to avoid subsequent perfection or priority challenges.

8. Malpractice Concerns

The secured party's counsel also faces severe consequences if a state or federal court determines that the security interest is unperfected – including malpractice liability, damage to the lawyer's (and his or her law firm's) reputation, and loss of future clients and income. Many attorneys concentrate their efforts for their lender-clients on the negotiation and drafting of the legal documents that evidence and govern the financing of the debt secured by the debtor's collateral, and delegate to lower-level associates and paralegals such mundane and “ministerial” (and less lucrative) tasks as preparing, reviewing and filing financing statements. However, the failure to correctly perform these “minor” tasks (or, perhaps, the failure to perform such tasks at all) often results in the most significant – and costly – malpractice exposure faced by attorneys in commercial financing transactions. The unfortunate fact is that an attorney can delegate authority, but not responsibility, for such actions by subordinates. There have been recent court decisions that demonstrate the risks to lenders of relying on third parties, including their attorneys, to properly draft and file documents (or perform searches) to assure the proper attachment, perfection and/or priority of the lenders' security interest in personal property collateral. Although these cases involve legal malpractice issues, limitations on search company liability, and the failure to properly complete or file financing statements, and not specific mistakes or errors with respect to the debtor's name, they are instructive regarding such risks. *See, e.g., Lory v. Parsoff*, 745 N.Y.S.2d 218 (2002) (holding that plaintiff, a former client of defendant and his law firm, was entitled to summary judgment against defendant and his firm for “per se” legal malpractice because of their failure to file UCC-1 financing statement that would have perfected plaintiff's security interest in assets of electronics company sold by plaintiff, which subsequently filed for bankruptcy); *Barnes v. Turner*, 278 Ga. 788 (2004) (ruling that attorney was guilty of legal malpractice for failing to advise client that financing statements were effective for only five years and that they could have been renewed to protect priority of client's security interest); *Shelby County State Bank v. Van Diest Supply Company*, 303 F.3d 832 (7th Cir. 2002) (ruling that creditor's security agreement was ambiguous as to whether it covered after-acquired inventory from other sellers, and was properly construed to limit collateral only to that particular creditor's products by bankruptcy court); *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*, 146 Wn. 2d 428 (2002) (upholding an express limitation of liability for damages to \$25 contained in defendant UCC search company's invoice, and ruling that limitation-on-damages provision in contract between searcher and search company, which would prevent plaintiff from recovering losses it allegedly incurred as result of search company's failure to disclose prior filing by another creditor, was valid and enforceable); *Fleet Nat'l Bank v. Whippany Venture I, LLC (In re The IT Group, Inc.)*, 307 B.R. 762, 767 (D. Del. 2004) (holding, in case decided under Former Article 9, that secured creditor's security interest in proceeds of real estate sale contract was not an “interest in or lien on real estate” of the kind specifically excluded from scope of Article 9, but was in the nature of a general intangible interest; court also ruled that debtor had failed to properly perfect its interest in sale contract, and that “good faith reliance” on address provided by debtor is no defense to failure to file financing statement in proper jurisdiction). In light of the concerns raised in the cases discussed in this article with respect to the proper identification of individual debtors on financing statements, it may

be difficult for (or unreasonable even to ask) an attorney to give an opinion on the correct name of an individual debtor.

9. UCC Search and Filing Services

At least one major title insurer also now offers nationwide UCC search and filing services. With respect to the “assisted search” service, the company also will provide, for a small additional charge, insurance for the accuracy of the search. The searches cover fixture filings, bankruptcy, Federal and State tax liens, civil litigation, corporate records, and more, and are an effective way to determine perfected security interests filed against the borrower. The search service provides a portfolio-management tool designed to improve accuracy, consistency and speed in UCC processing as well as control over all UCC activities, including filing, searching, and document retrieval. The service analyzes search results against the borrower criteria supplied to the insurer and reviews the search results to determine which ones actually affect the lien status of the borrower. The “insured search” service affirmatively insures the search results and the editing conducted by the insurer. Coverage is provided in the amount of \$25,000 for lost or missed liens, misindexing, incorrectly filed financing statements, and other filing-office errors, as well as for loss if items deleted in the review of the search report provided by the insurer did in fact relate to the borrower. Additional coverage up to \$250,000 per search is available for an additional small premium. With respect to the “assisted filing” service offered by the insurer, automated filing of financing statements is provided, including tracking of pending lapse dates. This online filing service automatically populates financing-statement information, including secured-party data and variable collateral descriptions. The insurer will prepare and file the lender’s financing statement (including amendments, continuations and terminations) based on information supplied by the lender, and advise of a pending lapse date. The “insured filing” service, which is available for a small additional fee, includes: \$25,000 in coverage insuring the effectiveness of the filing and against inadvertent lapse; “gap” coverage against intervening liens; insurance (for a registered organization) of the accuracy of the debtor’s name and coverage for significant risk under the “exact name” criteria of Revised Article 9; insurance (for a registered organization, assuming proper attachment) of the perfection of the security interest and that the lender will prevail against any challenge by a trustee in bankruptcy or a creditors’ committee; insurance (for a registered organization) that the financing statement was filed in the correct location under Revised Article 9; and reimbursement of the insured amount of a loss of perfection if the insurer does not alert the lender and the filing lapses. Additional coverage up to \$250,000 per filed UCC financing statement is available for an additional small premium.

10. UCC (and related) Insurance

Some of the large land-title insurance companies now offer Uniform Commercial Code insurance policies, which may minimize or eliminate the risk of an incorrect (or “misleading”) name in a financing statement. UCC insurance provides indemnity

insurance for the attachment, perfection, and priority of the lender's security interest (there is also a buyer's policy available) and transfers the risk of failing to properly create, perfect, or attain the desired priority of, the lender's security interest to the insurer. (These policies may be examined on the websites of the title insurers that offer this product.) For a single premium, the lender who purchases a UCC insurance policy (and its counsel) obtains, in addition to an insurance policy that provides full legal-defense costs, the benefit of systems and procedures specifically designed to assure compliance with the UCC, including legal and procedural changes thereto under Revised Article 9. Revised Article 9 changed the manner in which commercial loan security interests are granted, perfected and enforced, including filing forms, proper filing jurisdictions and in certain cases, the manner in which collateral is described. One of the major benefits of a UCC Insurance Policy is that knowledgeable and experienced personnel provide a "second set of eyes" and engage in a dialog with both the lender and the lender's counsel. They provide assistance and advice during every step of the transaction. The policy benefits also include record searches, document preparation, filing, follow-up, and continuation and tracking services (including timely notice of expiration dates), thereby providing peace of mind to lenders and their counsel. As noted above, the UCC lender's policy insures the priority of a lender's security interest in the collateral of a debtor or debtors. Some of the major title insurers also offer a "buyer's policy," which insures the lien status, or lack of liens, in assets being acquired by a buyer from a seller. The policy can be used in asset acquisitions, mergers and similar transactions. At least one major title insurer also offers a policy that insures available points in non-deeded timeshare programs, and a policy that insures cooperative interests in cooperative real estate projects (but this policy is limited to New York because of the unique provisions regarding cooperatives in New York's Uniform Commercial Code). The author's employer, First American Title Insurance Company, offers all of the aforementioned products and services and has a website dedicated solely to information regarding its Eagle 9th UCC Insurance Policy as well as general information and articles on UCC Article 9 issues. The website can be accessed directly via the following link: <http://www.eagle9.com/>.