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THE FRUITS OF MISCHIEVOUS SEEDS: NOTICE FILING UNDER ARTICLE 9 AND THE CONTINUING PROBLEM OF TRADE NAMES

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I. INTRODUCTION

Earl T. Brushwood was appointed the trustee in bankruptcy of Glasco, Inc.[1] Upon his appointment, Brushwood attempted to ascertain the debtor's financial position, and inquired of the secretary of state of Florida as to whether any article 9 financing statements[2] were on file under "Glasco, Inc."[3] A filing clerk in the secretary of state's office searched the file and reported to Brushwood that no such statements appeared.[4] In fact, however, there was a financing statement on record with the secretary which purported to cover marine engines in the debtor's inventory.[5] The financing statement, however, was filed and indexed under "Elite Boats, Division of Glasco, Inc." and, therefore, was not found.[6]

The trustee, apparently having determined that no financing statements were recorded to perfect any security interests in the debtor's property, sold the marine engines pursuant to his duty under the Bankruptcy Code.[7] The Citizens Bank of Perry, however, claimed the proceeds of the sale, asserting that the financing statement described above, which it had filed with the secretary of state, was sufficient to perfect its interest in the marine engines.[8] Both the bankruptcy court and the district court disagreed with the bank and instead found that the security interest was unperfected because the financing statement was filed under a name other than the debtor's corporate name.[9] The United States Court of Appeals for the Fifth Circuit, in *Brushwood v.*

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1. Brushwood v. Citizens Bank (*In re* Glasco, Inc.), 642 F.2d 793, 795 (5th Cir. 1981).

2. *See* U.C.C. § 9-302 (1972) (governing when a financing statement must be filed to perfect a security interest).

3. *Glasco*, 642 F.2d at 795.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Section 704 of the Bankruptcy Code requires the trustee, *inter alia*, to "collect and reduce to money the property of the estate . . . as expeditiously as is compatible with the best interests of parties in interest . . . ." 11 U.S.C. § 704(1) (1982).

8. *Glasco*, 642 F.2d at 795.

9. *Id.*

Citizens Bank (In re Glasco, Inc.),[10] reversed the lower courts and held that the financing statement was not seriously misleading and thus was sufficient to perfect the bank's security interest in the marine engines.[11]

The decision invoked a prophetic dissent. Judge Elbert Tuttle noted: "The majority eschews technicality to reach what might be considered to be a common sense solution in finding a perfected security interest despite an irregularity in the filing. Because this superficially appealing result contains the seeds for future mischief I cannot concur."[12] The seeds of the Fifth Circuit's decision in *Glasco* have taken root. Moreover, the Fifth Circuit itself has nurtured the rule of *Glasco* to the point where it threatens to become a generally accepted rule for determining whether a financing statement is sufficient to perfect an article 9 security interest when the statement is filed and indexed solely under the debtor's trade name.[13]

This article will address the issues raised by the decision in *Glasco* in light of the specific language of the applicable sections of the Uniform Commercial Code (U.C.C. or Code). In addition, it will consider the effects of the decision on later cases facing the same problem. Finally, this article will propose an analytical framework for the courts to employ in determining whether a financing statement filed under a name other than the debtor's legal name can perfect the creditor's security interest.

II. THE ARTICLE 9 NOTICE FILING SYSTEM

A. *The 1972 Official Text*

Article 9 of the U.C.C. provides three separate ways for creditors to perfect their security interests in debtors' property. The creditor may take possession of the property,[14] the interest may be perfected automatically,[15] or the creditor may file a financing statement.[16] In the vast majority of cases, the last alternative is the only or preferred method of perfecting the security interest.[17]

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10. 642 F.2d 793 (5th Cir. 1981). The decision was rendered prior to the creation of the United States Court of Appeals for the Eleventh Circuit. The case arose in Florida and was governed by Florida law to the extent permitted by the Bankruptcy Code. *See generally* Countryman, *The Use of State Law in Bankruptcy Cases* (pts. 1 & 2), 47 N.Y.U. L. REV. 407, 631 (1972).

11. *Glasco*, 642 F.2d at 796.

12. *Id.* at 797 (Tuttle, J., dissenting).

13. *See, e.g.*, National Bank v. West Tex. Wholesale Supply Co. (*In re* McBee), 714 F.2d 1316 (5th Cir. 1983).

14. U.C.C. § 9-305 (1972). This article will focus exclusively on the 1972 Official Text.

15. *Id.* §§ 9-302(1)(d)–(e), 9-304(4)–(5).

16. *Id.* § 9-302.

17. Security interests in accounts and general intangibles can be perfected only by filing a financing statement. *Id.* §§ 9-302, 9-305. However, there is a limited instance of automatic perfec-

Section 9-402(1) itemizes the requirements for a valid financing statement.[18] The statement must include the names of both the debtor and the creditor, a mailing address for the debtor and an address for the secured party, a satisfactory description of the collateral covered by the statement, and the debtor's signature.[19] The creditor then must file the statement in an appropriate public office pursuant to the local variation of U.C.C. section 9-401.[20] Upon filing,[21] the Code directs the clerk to mark the statement with a number and index it under the debtor's name.[22] Thereafter, any interested third party can obtain information regarding security interests that may exist with respect to the collateral described in the filed financing statements.[23] The searcher determines through the indexing system whether a particular debtor's name appears and then reviews any financing statement identified by number in the index as connected to that debtor.[24] Thus, the article 9 public-notice system rises and falls on the integrity of the debtor-name index that the clerk must maintain.[25] It is the index, after all, that file searchers use to determine whether any financing statements of interest have been put to record. Therefore, the information contained in the index, primarily the debtor's name, is arguably more important than the additional information included on the face of the financing statement itself. The reason for this, quite simply, is that if the index inaccurately describes the debtor, the file searcher may never find the related financing statement to review its contents. Thus, if the index does not lead the searcher to the filed financing statement, no real public notice is effected.[26]

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tion of some security interests in accounts. *Id.* § 9-302(1)(e). Filing is the preferred method for perfecting security interests in many other types of collateral because it allows the debtor to retain possession of the collateral.

18. *See id.* § 9-402(1).

19. *Id.*

20. *Id.* § 9-401. *See infra* notes 29–44 and accompanying text.

21. Filing occurs upon the "[p]resentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer . . . ." U.C.C. § 9-403(1) (1972).

22. *Id.* § 9-403(4).

23. The presence of a financing statement does not necessarily mean that the creditor named on the financing statement has a security interest in the identified collateral of the named debtor. Section 9-402(1) provides that the financing statement may be filed prior to the time that a security interest attaches. *Id.* § 9-402(1). Furthermore, the rule of priority among competing holders of security interests encourages the filing of financing statements prior to the attachment of security interests. *See id.* § 9-312(5). *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 25-4 (2d ed. 1980) (discussing priorities under § 9-312(5)) [hereinafter cited as WHITE & SUMMERS].

24. *See* U.C.C. § 9-403(4) (1972).

25. *See* Huntington Nat'l Bank v. Tri-State Molded Plastics, Inc. (*In re* Tyler), 23 Bankr. 806, 809 (Bankr. S.D. Fla. 1982).

26. Self, *Secured Transactions Under the Florida Uniform Commercial Code: A Call for Procedural Notice*, 13 FLA. ST. U.L. REV. 111, 123 (1985).

In addition to the indexing system, there is another provision in part 4 of article 9 which is of paramount importance to the operation of the notice filing system. File searchers must not only know the debtor's name to search through the index, but they also must know the appropriate office in which to search for the debtor's name.[27] Thus, the file searcher must know not only the debtor's name, but may also be required to know the debtor's business location or residence, and other matters in order to search the appropriate record in the appropriate office.[28]

Section 9-401 of the U.C.C. contains the Code's location of filing rules.[29] Unfortunately, the "uniform" Code section promulgated by the drafters encourages diverse filing location rules.[30] The drafters recognized that "local considerations and policy will determine the choice [of filing location] to be made."[31] Consequently, enacting jurisdictions are permitted to overlook the Code's general policy "to make uniform the law among the various jurisdictions."[32] Furthermore, a number of states have opted entirely out of the alternative filing location rules contained in section 9-401(1) creating significantly different requirements for the location of financing statement filings under article 9.[33] It is beyond the scope of this article to address all of the difficulties raised by the myriad of location filing rules; nevertheless, the Code's somewhat forgiving attitude concerning failures to file financing statements in the proper location[34] provides some support for this article's proposed treatment of financing statements filed in the proper place but under a trade name. As such, it is appropriate to briefly outline those provisions.

The Code's general filing location rules provide for three alternatives: a statewide or centralized filing system,[35] a county by county or

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27. *See* U.C.C. § 9-401 (1972).

28. *See id.* The location of the filing will depend on these additional factors. *See also infra* notes 35–44 and accompanying text.

29. U.C.C. § 9-401(1) (1972). The Official Text of § 9-401(1) provides three alternative filing systems. *See id. See also infra* notes 35–37 and accompanying text. Moreover, a number of states have adopted nonuniform filing provisions that differ from the alternatives provided in the Official Text of the U.C.C. *See generally* U.C.C. § 9-401 (1972), 3A U.L.A. 6, 14-24 (1981) (listing variations of adopting jurisdictions); *id.*, 3A U.L.A. 3, 3–6 (Supp. 1986) (listing variations of adopting jurisdictions).

30. *See supra* note 29 & *infra* notes 35–37 and accompanying text.

31. U.C.C. § 9-401 comment 1 (1972).

32. *Id.* § 1-102(2)(c).

33. *See supra* note 29.

34. *See* U.C.C. § 9-401(2) (1972) ("A filing which is made in good faith in an improper place . . . is nevertheless effective . . . against any person who has knowledge of the contents of such financing statement."). *See also infra* notes 38–43 and accompanying text.

35. U.C.C. § 9-401(1)(b) (1972) (first alternative subsection (1)).

localized filing system,[36] or a dual filing system which requires filing both locally and in a centralized system.[37] Failure to file in the appropriate place or places designated in the particular jurisdiction's section 9-401(1) will render the creditor's security interest unperfected if filing is required for perfection.[38] The Code, however, contains a savings provision which deems locationally incorrect filings effective for a limited purpose.[39] Section 9-401(2) provides that improper filings are "effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement."[40] Thus, even though a creditor files the financing statement in the wrong office, the security interest still may be deemed perfected in a priority conflict with another party who has actual knowledge of the contents of the financing statement.[41] Accordingly, the Code seems to embrace a significant exception to the otherwise strict filing requirements in part 4 of article 9. The savings provision effectively replaces the Code's location filing rules whenever the party asserting an interest in the collateral has knowledge of the contents of the financing statement even though the statement was not filed in the appropriate place.[42] This "relaxation" of the perfection rules can be construed as evidencing a willingness by the drafters of the Code to subordinate the importance of the notice filing system whenever actual notice was effected in a particular circumstance. Nevertheless, other provisions of the Code suggest that the drafters did not intend to adopt any generalized rule that would subjugate the notice-filing system in the face of an interested party's actual knowledge.[43] For the remainder of this article, it will be assumed that the creditor has filed the financing statement in the appropriate filing office unless otherwise stated.

Throughout its history, article 9 has required financing statements to include the name of the debtor as a condition of perfection.[44] In

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36. *Id.* § 9-401(1)(a) (second alternative subsection (1)).

37. *Id.* § 9-401(1)(c) (third alternative subsection (1)).

38. *See id.* § 9-401(1) (first, second, and third alternative subsection (1)) ("The proper place to file in order to perfect a security interest is as follows . . . ."). *See, e.g., In re* Kalinoski, 13 U.C.C. Rep. Serv. (Callaghan) 387 (W.D. Wis. 1973) (security interest remained unperfected when creditor mistakenly filed at wrong location).

39. U.C.C. § 9-401(2) (1972).

40. *Id. See, e.g.*, McKesson Drug Co. v. Marcus (*In re* Mistura, Inc.), 705 F.2d 1496 (9th Cir. 1983), *overruled on other grounds*, McLinn v. F/V Fjord, 739 F.2d 1395 (9th Cir. 1984).

41. *See Mistura*, 705 F.2d at 1498–99.

42. The location filing rule is supplanted only as to the second party who has actual knowledge of the contents of the improperly filed financing statement. *See* U.C.C. § 9-401(2) (1972). The filing remains improper and ineffective against any party who does not have actual knowledge of the contents of the financing statement. *See id.*

43. *See infra* notes 205–11 and accompanying text.

44. Section 9-402(1) has always enumerated the requirements for financing statements. *See*

earlier editions, this requirement was implicit in the provision enumerating the requisites of financing statements[45] and there was no provision in the Code addressing the proper manner of including a debtor's name in the financing statement. The 1972 Official Text, however, specifically addresses the issue and requires that the financing statement give the name of the debtor.[46] Furthermore, the 1972 Code also contains a provision that enumerates the proper way to "name" the debtor in the financing statement.[47] Section 9-402(7) provides, in part, that "[a] financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners."[48] The Code contains no additional directive regarding the manner of naming a debtor in a financing statement. The official comments to section 9-402, however, attempt to shed some light on the appropriate interpretation of that section.[49] Specifically, comment 7 states that the financing statement for individual debtors should be filed only in the individual's name and not under a trade name.[50] The same is true of a filing for a partnership or corporation.[51] The comment notes: "[T]rade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system."[52] The Code does provide elsewhere that a secured party may include a debtor's trade name and may have that trade name added to the index by the filing officer.[53] Comment 7, however, strongly suggests that filing solely under a trade name is insufficient to meet the requirements of section 9-402(1).[54]

U.C.C. § 9-402(1) (1972). The Official Texts promulgated in 1952, 1957, 1958, and 1962 each required that the financing statement be signed by the debtor but did not otherwise require that the debtor's name appear on the statement. *See id.* § 9-402(1) (1952, 1957, 1958 & 1962). The Official Texts also required the clerk to maintain an index of the statements according to the debtor's name. *Id.* § 9-403(4). The 1952 Official Text of § 9-403(4) also required the clerk to index the statements according to the secured party's name. *Id.* § 9-403(4) (1952). However, this dual indexing requirement was not carried through to the 1972 Official Text. *See id.* § 9-403 (1972) ("[T]he filing officer shall index the statement according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.").

45. *See, e.g.*, McMillin v. First Nat'l Bank & Trust Co. (*In re* Fowler), 407 F. Supp. 799 (W.D. Okla. 1975). *See generally* 9 R. ANDERSON, ANDERSON UNIFORM COMMERCIAL CODE § 9-402:16 (1985).

46. U.C.C. § 9-402(1), (7) (1972).

47. *Id.* § 9-402(7).

48. *Id.*

49. *See id.* § 9-402 comments 7–9.

50. *Id.* § 9-402 comment 7.

51. *Id.*

52. *Id.*

53. *See id.* § 9-403(5).

54. *See id.* § 9-402 comment 7. *See also supra* notes 50–52 and accompanying text.

Arguably, section 9-402(7) does not preclude the perfection of security interests by filing a financing statement identifying the debtor by a trade name.[55] That section simply provides that a filing in the legal name of the debtor is sufficient to satisfy the requirements for a financing statement contained in section 9-402(1).[56] It does not, however, specifically provide that filing of the trade name is not sufficient to satisfy section 9-402(1).[57] Nonetheless, the strong language of comment 7 and the logical consistency between the Code and that comment suggest that the argument that trade name filings may be sufficient is inappropriate. Furthermore, there is evidence that the addition of section 9-402(7) to the Code in 1972 was *not* intended to enhance the likelihood that financing statements setting out only the debtor's trade name would be sufficient to perfect the claimed security interest.[58] Consequently, although the 1972 version of section 9-402(7) could permit a court to consider trade name financing statements sufficient, more persuasive arguments should lead to a rejection of this theory.

The courts need not look much beyond section 9-402(7), however, to find statutory support for permitting trade name financing statements to perfect security interests. Section 9-402(8) provides: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."[59] Thus, if a financing statement identifies a debtor only through his trade name, a court could consider the statement effective if the failure to include the debtor's legal name is a minor error which is not seriously misleading.[60] A number of courts have adopted this analysis.[61]

B. Codifications Prior to the 1972 Official Text

The problem of defective filings is not a recent development under the U.C.C.—similar problems existed under prior statutory schemes that included notice-filing systems.[62] Nevertheless, the early Official

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55. WHITE & SUMMERS, *supra* note 23, § 23-16, at 959.

56. U.C.C. § 9-402(7) (1972).

57. *See id. See also* WHITE & SUMMERS, *supra* note 23, § 23-16, at 959.

58. *See infra* notes 143–51 and accompanying text. *See also* U.C.C. Article 9 General Comment 1-9, 3 U.L.A. 49 (1970).

59. U.C.C. § 9-402(8) (1972).

60. *See id.*

61. *See, e.g.*, National Bank v. West Tex. Wholesale Supply Co. (*In re* McBee), 714 F.2d 1316 (5th Cir. 1983); Brushwood v. Citizens Bank (*In re* Glasco, Inc.), 642 F.2d 793 (5th Cir. 1981); Borg-Warner Acceptance Corp. v. Fedders Fin. Corp. (*In re* Hammons), 614 F.2d 399 (5th Cir. 1980); Records & Tapes, Inc. v. Argus, Inc., 8 Kan. App. 2d 255, 655 P.2d 133 (1982); *In re* Nara Non Food Distrib. Inc., 66 Misc. 2d 779, 322 N.Y.S.2d 194 (Sup. Ct. 1970), *aff'd mem.*, 36 A.D.2d 796, 320 N.Y.S.2d 1014 (1971).

62. *See, e.g.*, General Motors Acceptance Corp. v. Haley, 329 Mass. 559, 109 N.E.2d 143

Texts of the U.C.C. did not include any savings provision that protected statements containing minor errors that were not seriously misleading.[63] The language in current U.C.C. section 9-402(8) was added to the Code in the 1957 Official Text as section 9-402(5).[64] The same statutory codification was contained in the 1962 Official Text.[65]

The impetus for the addition of this savings provision came not from the Permanent Editorial Board for the U.C.C., but instead resulted from a suggestion made by the New York Law Revision Commission.[66] The Revision Commission undertook a comprehensive study of the 1952 Code to determine whether it should have been adopted in New York.[67] The Revision Commission study took place from 1954 to 1956 and, in its 1955 report, it noted that the then existing U.C.C. might alter New York law.[68] At that time, New York law required only "a substantial compliance" with the filing provisions for "perfection" of security interests in certain personal property.[69] The Revision Commission noted this potential discrepancy between New York law and a possible interpretation of the U.C.C. and, in 1956, it proposed that "a provision be added [to section 9-402], stating that minor errors in a financing statement, which would not mislead a reasonable person,

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(1953); Bloch Bros. Paper Co. v. Efficient Direct Mail Serv., 198 Misc. 669, 102 N.Y.S.2d 1003 (N.Y. City Mun. Ct. 1950). *See generally* Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing"*, 47 IOWA L. REV. 289 (1962); McLaughlin, *"Seek But You May Not Find": Non-UCC Recorded, Unrecorded and Hidden Security Interests Under Article 9 of the Uniform Commercial Code*, 53 FORDHAM L. REV. 953 (1985); Note, *Uniform Commercial Code: Secured Tansactions: After-Acquired Property and Notice Filing: National Cash Register Co. v. Firestone & Co., ___ Mass. ___, 191 N.E.2d 471 (1963)*, 50 CORNELL L.Q. 128, 130 n.29 (1964) (listing cases which held pre-Code security interests unperfected because of creditor failures to meet strict, formal requirements in filings). *But cf.* Refrigerator Discount Corp. v. Tatelbaum (*In re* Nickulas), 117 F. Supp. 590 (D. Md. 1954) (statement of trust receipts financing indexed under trade name rather than individual proprietor's name was sufficient because it was the filing officer's duty to index the statement and there was no evidence that any creditor was misled by the filing).

63. Section 9-402(8) of the 1972 Code was not included in the 1952 or 1956 Official Texts of the U.C.C. *See infra* notes 67–80 and accompanying text.

64. *See* U.C.C. § 9-402(5) (1957) (amended 1972).

65. *See id.* § 9-402(5) (1962) (amended 1972).

66. The 1952 Official Text of the U.C.C. did not contain any savings provision in § 9-402. *See id.* § 9-402(5) (1952). The earliest appearance in the U.C.C. of the savings language came in the 1957 Official Text which was promulgated nearly two years after the New York Law Revision Commission identified the problem and one year after the Revision Commission specifically proposed adding the provision to the Code. *See id.* § 9-402(5) (1957). *See infra* notes 68–70 and accompanying text.

67. *See generally* STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE (1954).

68. 3 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1955—STUDY OF THE UNIFORM COMMERCIAL CODE 2069 (1955).

69. *Id.*

do not impair its effectiveness."[70] The drafters of the U.C.C. adopted this proposal and promulgated section 9-402(5) in the 1957 Official Text of the Code.[71]

The Revision Commission had expressed concern that the U.C.C. would embrace the rule adopted in *General Motors Acceptance Corp. v. Haley*.[72] In that case, the Massachusetts Supreme Judicial Court held that a trust receipt filing statement which identified the trustee as "E. R. Millen Co.," rather than by the corporation's actual name, "E. R. Millen Co., Inc.," was insufficient under the Uniform Trust Receipts Act.[73] This strict reading of the requirement for a proper filing was at odds with New York statutory law and judicial interpretations of the New York provision.[74] For instance, the New York statute that rendered effective filings which were in substantial compliance with the requirements of the law had been interpreted to protect a filing made under the name "Efficiency Direct Mail Service, Inc.," when the debtor's correct name was "Efficient Direct Mail Service, Inc."[75] Furthermore, the "typographical" error contained in the debtor's name was later corrected prior to the time any party raised an issue as to the propriety of the filing.[76] The court held that the plaintiff who asserted that the filing was insufficient made no claim and offered no proof that he was misled by the allegedly erroneous filing.[77] In addition, the New York court noted that the address of the debtor was correctly listed and that "no name similar to that of the debtor existed at the debtor's address."[78] The court seemingly placed the burden of showing a filing to be insufficient on the party asserting the failure of the statement to meet the strict requirements of the statute.[79] Given this interpretation of New York law, the Revision Commission recommended that any New York adoption of the U.C.C. include a provision similar to the savings provision. Ultimately, the savings provision was included in the

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70. STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1956—REPORT RELATING TO THE UNIFORM COMMERCIAL CODE 481 (1956).

71. U.C.C. § 9-402(5) (1957).

72. 329 Mass. 559, 109 N.E.2d 143 (1953). *See* 3 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1955—STUDY OF THE UNIFORM COMMERCIAL CODE 2069 (1955).

73. *Haley*, 329 Mass. at 565–66, 109 N.E.2d at 147.

74. *See* 3 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1955—STUDY OF THE UNIFORM COMMERCIAL CODE 2069 (1955).

75. *Bloch Bros.*, 198 Misc. at 670–71, 102 N.Y.S.2d at 1005. *See* N.Y. PERS. PROP. LAW § 45 (McKinney 1954) (repealed 1964) (this section is now covered by article 9 of the U.C.C.).

76. *Bloch Bros.*, 198 Misc. at 671, 102 N.Y.S.2d at 1005.

77. *Id.* at 672, 102 N.Y.S.2d at 1006.

78. *Id.*

79. *See id.* at 671, 102 N.Y.S.2d at 1005.

1957 Official Text of the Code.[80]

The Code drafters' acceptance of the New York Law Revision Commission's proposed addition to section 9-402 could arguably be construed as an acceptance of not only the addition of the statutory language, but also of the interpretation of the provision which placed the burden of persuasion regarding the sufficiency of a financing statement on the party claiming that the statement did not meet the statutory prerequisites for effectiveness. Other provisions of the Code, however, indicate that it would be inappropriate to construe the Code drafters' acceptance of the statutory revision as an acceptance of the New York judicial interpretation of a similar provision. Specifically, when section 9-402(5) was added to the Code, section 9-312(5) provided that when two secured creditors perfect security interests by filing financing statements, the first to file an effective financing statement has priority.[81] This rule, which still exists, applies regardless of either secured party's knowledge of the existence of the other party's claim.[82] Section 9-312(5) suggests that each party has the burden of proving the effectiveness of their own filing in order to establish their priority position under that section. This conflicts with the pre-Code interpretation given by the New York courts to the New York statute that required only substantial compliance with the filing provision for the filed notice to be effective. Therefore, section 9-402(8), which comprises the 1957 version of section 9-402(5), should not be considered as shifting the burden of proving the sufficiency of the financing statement to anyone other than the creditor who is relying on the financing statement for perfection of their own security interest.[83]

The addition of section 9-402(5) to the 1957 Code did not resolve the problem of whether financing statements filed under a debtor's trade name were sufficient to perfect security interests represented by those filings. Indeed, a number of cases arose in which the courts were required to determine whether trade name financing statements contained only minor errors that were not seriously misleading.[84] Although no single method of analyzing the problem became widely adopted, the early decisions under the 1957 and 1962 Codes attempted to make

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80. STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1956—REPORT RELATING TO THE UNIFORM COMMERCIAL CODE 481 (1956). *See* U.C.C. § 9-402(5) (1957).

81. U.C.C. § 9-312(5) (1957).

82. *See* First Nat'l Bank & Trust Co. v. Atlas Credit Corp., 417 F.2d 1081 (10th Cir. 1969); U.C.C. § 9-312 comment 5, examples 1 & 2 (1972). *See also* WHITE & SUMMERS, *supra* note 23, § 25-4, at 1037. *See generally* G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 34.2 (1965).

83. *See* Kay Automotive Warehouse, Inc. v. McGovern Auto Specialty, Inc., 51 Bankr. 511 (E.D. Pa. 1985); *In re* Brawn, 6 U.C.C. Rep. Serv. (Callaghan) 1031 (D. Me. 1969).

84. *See generally* Annot., 99 A.L.R.3d 478 (1980).

judgments about the likelihood of a searcher finding the financing statement containing only the debtor's trade name.[85] The courts frequently indicated that the financing statement would be sufficient if a reasonably prudent searcher would have found the trade name financing statement in a search of the appropriate records.[86] Of course, the courts promulgated a variety of opinions regarding how "prudent" a searcher had to be when reviewing the filed financing statements in an appropriate recording office. Some courts focused on the similarity between the debtor's legal name and trade name and held financing statements under the similar trade name sufficient to perfect security interests.[87] Other courts, however, held that such financing statements would be insufficient, even under section 9-402(5).[88] In several other cases, the courts considered matters extrinsic to the financing statement to determine whether the financing statement contained only minor errors which were not seriously misleading.[89] For example, the courts in several cases relied on the rural or small town location of the filing system to find that reasonably prudent searchers would uncover trade name financing statements which did not include the debtor's legal name.[90] Other courts also held that financing statements filed under trade names were sufficient to perfect security interests if the financing statements were signed by the debtor in his or her individual capacity.[91] In those cases, the courts held that the clerk had erroneously indexed the financing statement because the debtor's legal name was contained in the signature required by section 9-402(1).[92] Given the

85. *See, e.g.*, John Deere Co. v. William C. Pahl Constr. Co., 34 A.D.2d 85, 310 N.Y.S.2d 945 (1970) (security interest was unperfected and unenforceable when the name of the debtor on the handwritten, nonstandard form was so illegible that the filing clerk filed the financing statement under "Ranelli," instead of under the proper spelling "Ranalli"—the court held that a "standard search" would not have uncovered the error).

86. *See, e.g., id.* at 88, 310 N.Y.S.2d at 948. *See generally* Annot., 99 A.L.R.3d 478 (1980).

87. *See, e.g., In re* Platt, 257 F. Supp. 478 (E.D. Pa. 1966) (debtor's name was Henry Platt and the financing statement identified the debtor as "Platt Fur Co.").

88. *See, e.g., In re* Lintz W. Side Lumber, Inc., 655 F.2d 786 (7th Cir. 1981); Kreling v. First Nat'l Bank & Trust Co. (*In re* Webster), 20 U.C.C. Rep. Serv. (Callaghan) 802 (W.D. Mich. 1976); *In re* Wishart, 10 U.C.C. Rep. Serv. (Callaghan) 1296 (W.D. Mich. 1972).

89. *See, e.g., Glasco*, 642 F.2d 793 (5th Cir. 1981) (debtor held itself out to the community and to creditors under a trade name; checks, stationery, and bank accounts all contained the trade name). *Cf. In re* Bengtson, 3 U.C.C. Rep. Serv. (Callaghan) 283, 287 (D. Conn. 1965) (financing statement of debtor, Bruce R. Bengtson, identified as "Bruce's Vernon Circle Serv., Vernon Corner," contained sufficient mailing address because "Vernon Circle is a well known landmark and mail would be delivered there").

90. *See, e.g., In re* Hatfield Constr. Co., 10 U.C.C. Rep. Serv. (Callaghan) 907 (M.D. Ga. 1971).

91. *See, e.g.*, McMillan v. First Nat'l Bank & Trust Co. (*In re* Fowler), 407 F. Supp. 799 (W.D. Okla. 1975).

92. *See, e.g., id.* at 804. *See also* U.C.C. § 9-402(1) (1972).

virtually unlimited scope of minor errors, the courts had a number of opportunities to establish a relatively comprehensive analytical rule to resolve whether technically insufficient financing statements could still be considered effective because they contained only minor errors which were not seriously misleading.[93] Nevertheless, no more specific rule than the "reasonably prudent searcher" rule developed from these earlier cases.

III. *In re Glasco* AND *In re McBee*

In the absence of a definitive rule, the courts continued to struggle with the issue of whether section 9-402(5) of the 1962 Code,[94] and its successor under the 1972 Code, section 9-402(8),[95] would render effective financing statements filed only under a debtor's trade name. The decision of the United States Court of Appeals for the Fifth Circuit in *In re Glasco*,[96] and its more recent decision, *In re McBee*,[97] evidence a trend toward applying the savings provision very liberally to protect trade name filings. In *Glasco*, the court noted that the debtor held itself out to the community and to its creditors as "Elite Boats, Division of Glasco, Inc."[98] This name appeared on all of the debtor's stationery, checks, and related items.[99] Consequently, the court held that "listing the debtor by the sole name in which it did business was not misleading, because any reasonably prudent creditor would have requested the Secretary of State to search under 'Elite Boats' in addition to 'Glasco, Inc.' "[100] The court also noted that because the debtor was a corporation, cases involving individuals engaged in business under trade names were not analogous to the *Glasco* facts and the trade name need not be similar to the legal, corporate name to be effective.[101] According to the Fifth Circuit, an individual engaged in business

> is necessarily held out to the credit community under two names, that of the individual and of the business. The individual's credit for personal needs is unrelated to the business. A personal creditor would not necessarily be aware of the business or trade name, and thus may not discover

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93. *See generally* Note, *The Effect of Errors and Changes in the Debtor's Name on Article Nine Security Interests*, 1975 DUKE L.J. 148; Annot., 99 A.L.R.3d 478 (1980).

94. U.C.C. § 9-402(5) (1962).

95. *Id.* § 9-402(8) (1972).

96. Brushwood v. Citizens Bank (*In re* Glasco, Inc.), 642 F.2d 793 (5th Cir. 1981).

97. National Bank v. West Tex. Wholesale Supply Co. (*In re* McBee), 714 F.2d 1316 (5th Cir. 1983).

98. *Glasco*, 642 F.2d at 795.

99. *Id.* at 796.

100. *Id.*

101. *Id.*

security interests filed solely under the business name.[102]

The court then noted that in *Glasco*, the debtor had held itself out only under one name—"Elite Boats."[103] Consequently, the court held the financing statement to be sufficient under the Florida equivalent of section 9-402(5) of the 1972 Code.[104]

In his dissent, Judge Tuttle indicated that some trade name filings had, in his opinion, been appropriately upheld.[105] He described a case in which the debtor's legal name and trade name were substantially similar.[106] In that instance, he indicated the similarity would be such "that a searcher would be put on notice despite the technical error."[107] For example, a searcher attempting to determine whether any financing statements were on record against Henry Platt should be on notice of financing statements filed under the name "Platt Fur Co."[108] While this analysis may also be too liberal, unlike the majority's opinion, it recognizes the alphabetical limitations of an indexing system.[109] Finally, Judge Tuttle warned:

> A searcher versed in the operation of the UCC would know that the filings should be under the debtor's legal name. He would have no reason to look under a trade name, even if he is aware of the trade name's existence, because he should be able to rely on the . . . [secured creditor] to submit the legal name and not a trade name. Future creditors must now anticipate mistakes by would-be secured creditors in order not to be ensnared in the hindsight of courts.[110]

Thus, Judge Tuttle noted that the future mischief that could detract from the appropriate operation of the notice-filing system in article 9 is the application of judicial hindsight to the scope of record searches for financing statements.[111]

Judge Tuttle's warnings about the future application of judicial hindsight fell on deaf ears, however, even in his own circuit. Two years after the *Glasco* decision, in *In re McBee*,[112] the Fifth Circuit again addressed the issue of whether a trade name financing statement was

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102. *Id.*
103. *Id.*
104. *Id.* at 795.
105. *Id.* at 797–99 (Tuttle, J., dissenting).
106. *Id.* (citing *In re* Platt, 257 F. Supp. 478 (E.D. Pa. 1966)).
107. *Id.* at 797.
108. *See id.* (quoting *Platt*, 257 F. Supp. at 482).
109. While a debtor's real name and trade name may be similar, they may not be adjacent to each other in the filing index system. Therefore, a file searcher may not locate a financing statement filed under a trade name if he or she is searching under the debtor's correct name.
110. *Glasco*, 642 F.2d at 799 (Tuttle, J., dissenting).
111. *See id.*
112. 714 F.2d 1316 (5th Cir. 1983).

sufficient to perfect a security interest in the inventory of a gun shop owned by an individual. Relying heavily on *Glasco*, the *McBee* court held that a financing statement identifying the debtor as "Oak Hill Gun Shop" was sufficient to perfect a security interest in the inventory of that store although the debtor's name was Cynthia K. McBee.[113] While the facts are somewhat complex, the court in *McBee* had to determine whether a trade name financing statement was sufficient when a business was owned by an individual.[114] The court noted that the business had been conducted under the same name both when it was owned by McBee and when it was owned by her predecessor in title, who also was an individual.[115] This consistent use of the name was cited by the court as its reason for finding that a reasonably prudent searcher would search under the trade name prior to lending money on the basis of the business assets.[116] The court compared the consistent use of the trade name in *McBee* with the consistent use of the trade name in *Glasco* and found the "Oak Hill Gun Shop" financing statement sufficient under the Texas version of U.C.C. section 9-402(8).[117]The court did not note, however, that lenders of the individ-

113. *Id.* at 1325.

114. *See id.* at 1318–20. The facts in *McBee* are as follows: Joe Ben Colley owned and operated the Oak Hill Gun Shop from January, 1979, until May, 1980. Meanwhile, in January, 1979, McBee approached the National Bank of Texas for a loan stating that she was Colley's partner in the gun shop. Although no partnership existed, the bank made a loan to the gun shop as debtor with McBee executing the documents as a partner in the enterprise. The bank then filed a financing statement in the proper place under the name "Oak Hill Gun Shop." *Id.* at 1318. The loan was secured by the inventory of the gun shop. Thereafter, West Texas Wholesale Supply Company sold goods to the gun shop on a credit basis, filing a financing statement identifying the debtor as "Joe B. Colley d/b/a Oak Hill Gun Shop." *Id.* Included among the collateral for this loan was the inventory of the shop. Colley later transferred his interest in the gun shop to McBee. *Id.* The transfer agreement provided that McBee would comply with the bulk transfer provisions of article 6 of the U.C.C. *Id.* McBee obtained a loan from RepublicBank-Austin, again granting a security interest in the inventory as well as other assets of the gun shop. *Id.* at 1318–19. RepublicBank filed its financing statement designating the debtor as "C. K. McBee dba Oak Hill Gun Shop." *Id.* at 1318.

The relative complexity of the fact situation served to confuse the court in its resolution of the problem. For example, the court spent a significant portion of its opinion addressing the issues raised by McBee's failure to comply with the bulk sale provisions of the U.C.C. *See id.* at 1325–31. The court did not consider, however, the effect of the Texas equivalent of U.C.C. § 9-306(2) which provides that the security interest of the gun shop under Colley's ownership would continue to attach to the collateral even after its transfer to McBee. This attachment would continue even if the security interest was unperfected. While secured creditors are not excluded from the protections provided by the bulk transfer article, their security interests and the operation of § 9-306(2) provide much greater protection for those creditors than the provisions of article 6. Therefore, the court's extended analysis of article 6 issues suggests that it did not appreciate the operation of § 9-306(2) and the interplay between articles 6 and 9 of the U.C.C.

115. *McBee*, 714 F.2d at 1323–24.

116. *Id.* at 1325.

117. *Id.* at 1324–25.

ual proprietor for nonbusiness purposes still might have some reason for determining whether the debtor's business assets were subject to security interests. Of course, those creditors searching the records under the individual's legal name would not ascertain the existence of the trade name financing statements. Therefore, to some degree the *McBee* court's reliance on *Glasco* is misplaced. Most importantly, however, the decision in *McBee* reinforces the notion that financing statements filed only under a trade name may be sufficient to perfect security interests in the debtor's assets. As noted by Judge Tuttle in his *Glasco* dissent,[118] the havoc this notion may wreak is enhanced by the subsequent interpretation of U.C.C. section 9-402(8) in *McBee* and the scope of a reasonably prudent search.

Glasco and *McBee* certainly evidence a dangerous trend in the interpretation of the minimum requirements for perfecting security interests by filing financing statements. While there are a number of other decisions which do not grant the leeway for trade name filings that these cases have awarded,[119] a number of courts have adopted the *Glasco/McBee* analysis to find trade name financing statements sufficient to perfect a security interest even when there is no similarity between the debtor's legal and trade names.[120] These decisions are dangerous precisely for the reason that Judge Tuttle noted in his dissent—searchers now are directed to conduct article 9 searches under a variety of names beyond that of the debtor's legal name.

While the cases may be read narrowly to permit trade name financing statements only when the debtor has held itself out under a single trade name, even this restrictive analysis of the cases would not provide protection for all subsequent searchers of the U.C.C. records. For example, Glasco could have sought additional funding from a lender with whom it had not previously dealt. Furthermore, this lender could have been located across the country from Glasco's place of business. Thus, the potential lender might not be aware of the debtor's historical usage of a trade name. It is conceivable that Glasco would iden-

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118. *Glasco*, 642 F.2d at 797–99 (Tuttle, J., dissenting).

119. *See, e.g.*, Northern Commercial Corp. v. Friedman (*In re* Leichter), 11 U.C.C. Rep. Serv. (Callaghan) 673 (2d Cir. 1972); Citizens Bank v. Ansley, 26 U.C.C. Rep. Serv. (Callaghan) 223 (M.D. Ga.), *aff'd*, 604 F.2d 669 (5th Cir. 1979); Bank of Miss. v. Panzetti (*In re* Hill), 13 U.C.C. Rep. Serv. (Callaghan) 724 (N.D. Miss. 1973); *In re* Wishart, 10 U.C.C. Rep. Serv. (Callaghan) 1296 (W.D. Mich. 1972); *In re* Swati, Inc., 54 Bankr. 498 (Bankr. N.D. Ill. 1985); Bell v. AmeriTrust Co. (*In re* Moore), 21 Bankr. 898 (Bankr. E.D. Tenn. 1982).

120. *See, e.g.*, Pearson v. Salina Coffee House, Inc. (*In re* Beacon Realty Inv. Co.), 44 Bankr. 875 (Bankr. D. Kan. 1984); Warner/Elektra/Atl. Corp. v. Sounds Distrib. Corp. (*In re* Sounds Distrib. Corp.), 42 Bankr. 274 (Bankr. W.D. Pa. 1984); First Nat'l Bank v. McDonald (*In re* Lane), 41 Bankr. 285 (Bankr. N.D. Tex. 1984); Records & Tapes, Inc. v. Argus, Inc., 8 Kan. App. 2d 255, 655 P.2d 133 (1982).

tify itself solely by the name Glasco, Inc., as this was the corporation's legal name.[121] Of course, it is more likely that the loan negotiations would include correspondence between the parties with the debtor's stationery containing the name "Elite Boats, Division of Glasco, Inc." In that event, the potential lender faces the dilemma of conducting a search of the records under either "Elite Boats," "Glasco, Inc.," or both names. Certainly, it is prudent to search under both names. Arguably, this is what some courts that have upheld trade name financing statements have indicated.[122] That, however, does not end the analysis. In order to preserve the integrity of the filing system, the maximum required scope of a search should be the minimally prudent search. In this circumstance, the minimally prudent search would be undertaken under the legal name, Glasco, Inc. The following discussion will demonstrate both why the "Glasco, Inc." search is the minimally prudent search and why the minimally prudent search is the appropriate standard to employ in determining whether a particular financing statement is effective even though it contains minor errors which are not seriously misleading.

IV. THE MINIMALLY PRUDENT SEARCH

The minimally prudent search standard is the appropriate standard for courts to employ when determining whether particular financing statements are sufficient for article 9 purposes. This standard is appropriate because it enhances the integrity of the filing system and is consistent with the statutory requirements for the filing and indexing of financing statements. Section 9-402(1) requires that the financing statement contain the debtor's name.[123] The debtor's name on the financing statement is the most crucial item of information required by the article 9 notice-filing system because it is only through the debtor's name that a subsequent searcher of the records can determine whether any parties claim a security interest in the debtor's assets.[124] Consequently, the first duty of a filing officer after accepting the financing statement[125] is to "index the statement according to the name of the debtor and . . . note in the index the file number and the address of the

121. *See Glasco*, 642 F.2d at 796.

122. *See, e.g., Beacon Realty Inv. Co.*, 44 Bankr. at 879; *Lane*, 41 Bankr. at 288.

123. U.C.C. § 9-402(1) (1972).

124. This is because § 9-403(4) requires the filing officer to maintain an index according to the debtors' names and to make the index available for public inspection. *Id.* § 9-403(4).

125. *See id.* § 9-403(1). A financing statement is filed simply by presenting the statement to the appropriate filing officer and tendering the filing fee. *Id.* Therefore, if the officer fails to index the financing statement or improperly indexes the statement, the financing statement is nonetheless effective. *See* McLaughlin, *supra* note 62, at 972, 983–86.

debtor given in the statement."[126] Thus, a subsequent searcher will attempt to ascertain whether any financing statements are on record under the name which the searcher has chosen to use in the search. If the index includes any financing statements listed under the name chosen by the searcher, the actual financing statement itself is then available for inspection.[127] At this time, the searcher can ascertain the description of collateral, the identity of the secured creditor, and any additional information included on the statement. If the name chosen by the searcher is not included in the index, the searcher will receive no notice of financing statements that may otherwise be filed.[128]

Article 9 employs a notice-filing system which does not require creditors to describe in complete detail the provisions of their agreement with the debtor.[129] Instead, only skeletal information regarding the underlying transaction is required. The financing statement need only contain a listing of collateral by item or by type that may be subject to a security interest.[130] Furthermore, article 9 countenances broad descriptions of collateral as sufficient for section 9-402(1) purposes.[131] Thus, a creditor who has a security interest in two drill presses pursuant to a written security agreement with the debtor may describe the collateral in the financing statement as "all equipment."[132] The description will be sufficient to perfect the security interest in the two machines, although it will not operate to perfect a security interest in machines other than those covered by the security agreement executed by the parties.[133] In addition, the creditor need not include any indication on the financing statement regarding the extent of the indebtedness owed by the debtor nor the payment terms or final payment date for any loan made to the debtor and secured by the described collat-

126. U.C.C. § 9-403(4) (1972).

127. *See id.*

128. Upon searching the records, the searcher would conclude that there are no financing statements covering the debtor's personal property. While this would not ensure that no security interests exist, in many instances it would provide sufficient notice for the searcher to go forward with a secured transaction. *See generally* McLaughlin, *supra* note 62.

129. *See* G. GILMORE, *supra* note 82, at 471–80; Coogan, *supra* note 62, at 317–19.

130. *See* U.C.C. § 9-402(1) (1972).

131. *See id.* § 9-110. The description of the collateral need not be exact; rather, it is sufficient "if it reasonably identifies what is described." *Id. See generally* WHITE & SUMMERS, *supra* note 23, § 23-16, at 961–64.

132. *See supra* note 131. *See also* Waterfield v. Burnett (*In re* Burnett), 21 Bankr. 752 (Bankr. D.N.M. 1982).

133. *See In re* Platt, 3 U.C.C. Rep. Serv. (Callaghan) 275, 279 (Bankr. E.D. Pa.) ("A description of the collateral in the financing statement that is broader than that contained in the security agreement does not have the effect of enlarging or broadening the security interest beyond that granted in the security agreement."), *vacated on other grounds*, 257 F. Supp. 478 (E.D. Pa. 1966).

eral.[134] In that sense, the article 9 notice-filing system requires only a brief sketch of the transaction between the secured creditor and the debtor. Given the significance of the debtor's name to the indexing system, however, generalities as to the identification of the debtor are inappropriate.

The Code specifically provides that file searchers cannot rely completely on the description of collateral in a financing statement as evidencing a security interest in those particular assets of the debtor.[135] Moreover, section 9-402(1) provides that a creditor may file a financing statement prior to the time that any security interest attaches.[136] Indeed, the priority provisions encourage this pre-transaction filing.[137] Thus, the collateral listed on a financing statement may not be subject to any security interest. Because searchers may not rely completely on the information contained in the financing statement to determine the status of security interests in the debtor's property, the Code includes a system for obtaining that information elsewhere.[138] If a searcher identifies a financing statement in which a security interest in some of the debtor's property is claimed, the creditor can, through the debtor, obtain information from the other secured party regarding the extent of the collateral and debt existing between the debtor and the secured creditor who filed the financing statement.[139] This information retrieval system supplants the need for detailed information about actual collateral claimed and the amount of outstanding indebtedness in the skeletal notice filing system. The information is nonetheless crucial, and the Code provides a means to obtain that information.[140] The Code cannot and does not, however, contain any means for finding financing statements other than by beginning the search with knowledge of the debtor's name.

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134. *See* U.C.C. § 9-402(1) (1972). Georgia, however, has recently amended its version of § 9-402(1) by adding a requirement that the financing statement include the maturity date of the obligation or indicate that the secured obligation is not subject to a maturity date. *See* GA. CODE ANN. § 11-9-402(1) (Supp. 1985). *See generally* Carson, Conrad & Dobbs, *H.B. 712: New Requirements for Financing Statements and Continuation Statements Filed in Georgia*, 22 GA. ST. B.J. 6 (1985).

135. *See supra* notes 129–34 and accompanying text.

136. U.C.C. § 9-402(1) (1972).

137. Section 9-312(5) provides that in a priority contest between creditors holding non-purchase money security interests in the same collateral, the first creditor to either file a financing statement or otherwise perfect the security interest in the collateral has the superior claim. *Id.* § 9-312(5). This priority rule combines with the authorization of pre-attachment filings of financing statements in § 9-402(1) to encourage the filing of financing statements at the earliest possible time.

138. *See id.* § 9-208.

139. *Id.*

140. *Id.*

V. U.C.C. SECTION 9-402(7)

Section 9-402(1) requires that the financing statement include the debtor's name;[141] however, it does not define precisely what constitutes a debtor's name. Rather, the 1972 amendments to article 9 added section 9-402(7) to clarify the issue of the appropriate name to identify debtors in financing statements.[142] The Review Committee for article 9 noted in its report:

> A perpetual question has existed whether in filing against sole proprietorships or partnership debtors one may use a trade name, or whether the individual name of a proprietor is required, and whether the names of partners are required to be shown as debtors. There is substantial lack of uniformity in state instructions to filing officers with respect to these matters. The Committee hopes to clarify these issues by its proposed Section 9-402(7) that one files against a partnership by the name in which it is known and that one files against an individual by his individual name. Neither the names of partners nor a trade name for individuals or partnerships need be shown. The Committee has considered the California provision that a trade name should be shown, but it seems to create too great a risk of insufficient filing, because a secured party may not know of a trade name sometimes informally used by a debtor. Trade name statutes vary so widely in scope and in the effects of compliance or non-compliance that it has not seemed feasible to tie any requirements as to trade names to the existence of such statutes.[143]

The official comments to the 1972 Code employed similar language to explain the addition of subsection (7) to section 9-402. Comment 7 states in part:

> Subsection (7) undertakes to deal with some of the problems as to who is the debtor. In the case of individuals, it contemplates filing only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system. However, provision is made in Section 9-403(5) for indexing in a trade name if the secured party so desires.[144]

Thus, the drafters of section 9-402(7) intended to resolve the problem of trade name financing statements by directing that financing statements be filed under the individual, partnership, or corporate name

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141. U.C.C. § 9-402(1) (1972).
142. *See id.* § 9-402(7).
143. U.C.C. Article 9 General Comment I-9, 3 U.L.A. 49, 49 (1981).
144. U.C.C. § 9-402 comment 7 (1972).

of the debtor and not under a trade name. Certainly, the drafters could have adopted more direct language to resolve the problem.[145] Nevertheless, their failure to do so should not allow one to infer that the drafters condoned the practice of filing financing statements solely under the debtor's trade name.

The addition of section 9-402(7) to the U.C.C. was intended not only to resolve the problems evidenced by trade name cases throughout the country,[146] but was also in response to the California provision which, at that time, required the inclusion of the debtor's trade name on financing statements.[147] The California Commercial Code then provided that financing statements had to include a trade name or style if the debtor was conducting business under a trade name or style.[148] California has since retreated from this position and presently only "encourages" creditors to include any known trade name or style of the debtor.[149] The California statute, however, further provides that "a failure to include such trade name or style shall not under any circumstances affect the validity of the financing statement."[150] This suggestion in the California Commercial Code, that trade names be included on the financing statement when known, is consistent with the U.C.C. Section 9-403(5) of the U.C.C. provides: "The secured party may at his option show a trade name for any person . . . ."[151] Both this section of the U.C.C. and section 9402(1) of the California Commercial

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145. *See* Note, *Trade Name Filing: Should It Be Sufficient to Perfect a Security Interest Under U.C.C. Section 9-402?*, 35 CASE W. RES. L. REV. 51, 60 (1984). This student commentator observed:

> It seems apparent that the Code drafters could have created a per se rule. The Alabama version of the Code contains an absolute requirement: "The name of the debtor in the financing statement *shall* be the individual, partnership or corporate name of the debtor, regardless of trade names or the names of partners."

Id. (quoting ALA. CODE § 7-9-402(7) (1984)).

146. *See* U.C.C. Article 9 General Comment I-9, 3 U.L.A. 223–24 (1978); U.C.C. § 9-402 comment 7 (1972).

147. *See* U.C.C. Article 9 General Comment I-9, 3 U.L.A. 223–24 (1978). *See also* CAL. COM. CODE § 9402(1) (West 1972) (amended 1974).

148. CAL. COM. CODE § 9402(1) (West 1972) (amended 1974). The statute provided, *inter alia*, that "[t]he financing statement shall also set forth . . . if the debtor is doing business under a trade name or style, such trade name or style." *Id. See* National Cash Register Co. v. Danning (*In re* Thrift Shoe Co.), 502 F.2d 1211, 1213 (9th Cir. 1974) (mandate of pre-amended § 9402(1) is mandatory disclosure of trade names).

149. CAL. COM. CODE § 9402(1) (West Supp. 1986). The California Legislature amended the statute in 1974 to provide currently: "A financing statement should include the debtor's trade name or style, if any, if known to the secured party, but a failure to include such trade name or style shall not under any circumstances affect the validity of the financing statement." *Id. See* Chartered Bank v. Diamant (*In re* Del Norte Depot, Inc.), 716 F.2d 557, 560 (9th Cir. 1983) (amended § 9402(1) allows permissive listing of trade names).

150. CAL COM. CODE § 9402(1) (West Supp. 1986).

151. U.C.C. § 9-403(5) (1972).

Code encourage creditors to add trade names to financing statements, but neither requires the inclusion of the trade name.[152] The same is true of section 9-402(7) of the U.C.C. Therefore, it is inappropriate to suggest that section 9-402(7) authorizes or validates financing statements containing only the debtor's trade name.

At the time of the initial proposal of section 9-402(7), one commentator noted that under the new provision, "[i]f the debtor operates a business as sole proprietor under a trade name it will be essential that the debtor's individual name be used whether or not his trade name is added . . . ."[153] The commentator further noted:

> The better practice will be to use both the debtor's own name and the trade name and to have the filing officer index the financing statement against each. If double indexing is impractical, separate financing statements may be filed, one showing the debtor's individual name and the other the trade name.[154]

The suggestion that the debtor's trade name be included on the financing statement was not made to indicate that it was legally necessary for perfection. Rather, it is the "better practice" to include the trade name because it would render the financing statement more discoverable and essentially immune from any claim that the creditor's security interest was not perfected. The cost of cross-indexing or an extra filing is de minimus compared to the costs of defending, even briefly, an action in which another party asserts that the creditor's filing was insufficient.

Thus, the addition of the trade name represents an act of prudence by the secured creditor making the filing, and not an act of prudence in a record search by a subsequently interested party. That is not to suggest, however, that it is not prudent to conduct a search under the trade name.[155] Nonetheless, the inclusion of a debtor's trade name by a filing secured creditor is not for the purpose of compliance with the filing statute; rather, the purpose of the inclusion is to obtain added "insurance" against a subsequent attack on the security interest. The commentator's recognition of this practice, along with the references in U.C.C. section 9-402(7) and in California Commercial Code section 9402(1)—that trade names may be included on the financing statement or cross-indexed in the clerk's files—are consistent and recognize the "protective" nature of the inclusion of the debtor's trade name on the financing statement.

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152. *See id.*; CAL. COM. CODE § 9402(1) (West Supp. 1986).

153. Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code*, 27 BUS. LAW. 321, 330 (1971).

154. *Id.*

155. *See infra* notes 173–83 and accompanying text.

VI. THE SAVINGS PROVISION: U.C.C. SECTION 9-402(8)

As section 9-402(7) does not provide realistic support for a court to find that a debtor's trade name on a financing statement is sufficient, by itself, to render the financing statement effective, other statutory support is necessary to permit the court to find trade name financing statements effective for article 9 purposes. The courts have employed the savings provision of U.C.C. section 9-402(8)[156] to find trade name financing statements effective.[157] Reliance on that "savings provision" is erroneous.

Section 9-402(8) operates only when a financing statement is technically deficient.[158] It renders effective a financing statement that contains minor errors which are not seriously misleading to a subsequent searcher of the record.[159] Thus, application of the section to save an otherwise insufficient financing statement requires that the party asserting the validity of the financing statement prove that the error is a minor one and that it does not render the financing statement seriously misleading.[160] The section does not, however, contain any description or listing of minor errors.

As noted previously, financing statements must contain six basic items of information: the name of the debtor, the name of the secured party, the debtor's signature, an address of the secured creditor, the debtor's mailing address, and a description of the collateral.[161] Of these six items of information, the first enumerated item is the most important. The system depends on the debtor's name to make pertinent information available to interested parties. Financing statements are indexed under the debtor's name, and it is under that name that subsequent record searchers will focus their attempts to determine the status of secured claims. Consequently, a lesser degree of error is permissible with respect to a debtor's name than with respect to any other

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156. U.C.C. § 9-402(8) (1972).

157. *See, e.g.*, National Bank v. West Tex. Wholesale Supply Co. (*In re* McBee), 714 F.2d 1316 (5th Cir. 1983); Brushwood v. Citizens Bank (*In re* Glasco, Inc.), 642 F.2d 793 (5th Cir. 1981); Pearson v. Salina Coffee House, Inc. (*In re* Beacon Realty Inv. Co.), 44 Bankr. 875 (Bankr. D. Kan. 1984); Warner/Elektra/Atl. Corp. v. Sounds Distrib. Corp. (*In re* Sounds Distrib. Corp.), 42 Bankr. 274 (Bankr. W.D. Pa. 1984); First Nat'l Bank v. McDonald (*In re* Lane), 41 Bankr. 285 (Bankr. N.D. Tex. 1984); *In re* Maples, 33 Bankr. 14 (Bankr. W.D. Mo. 1983); Records & Tapes, Inc. v. Argus, Inc., 5 Kan. App. 2d 255, 655 P.2d 133 (1982).

158. *See* U.C.C. § 9-402(8) (1972). The savings provision provides: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." *Id.*

159. *Id.*

160. *See* Kay Automotive Warehouse, Inc. v. McGovern Auto Specialty, Inc., 51 Bankr. 511 (Bankr. E.D. Pa. 1985).

161. U.C.C. § 9-402(1) (1972). *See supra* notes 18–19 and accompanying text.

item of information required in the financing statement.[162]

Section 9-402(8) clearly directs the courts to overlook minor errors that secured creditors might make in completing the required information for the financing statement. Errors in the debtor's or secured creditor's address generally would not be seriously misleading to a subsequent searcher of the U.C.C. records.[163] Likewise, if a creditor attempts to describe the collateral in the financing statement by means of a lengthy serial number for a particular good and mistakenly transposes two of the nine numbers in the serial number, the error is minor and would not be seriously misleading.[164] Transposing two letters in a debtor's name, however, could very likely be seriously misleading. Several examples will show the extent to which a subsequent file searcher can be misled by that transpositional error.

Assume for example that the debtor's name is "Hedrick." If a secured creditor incorrectly identified the debtor as "Hedirck," a subsequent file searcher might not discover a financing statement filed under the incorrect name.[165] When the transpositional error occurs at the beginning of the name, the likelihood of the incorrect filing being seriously misleading increases dramatically. Thus, a financing statement filed under the name "Naglin" would not be discovered in a search under the debtor's correct name, "Anglin." Therefore, the liberal treatment which the courts have accorded to financing statements that contain incorrect descriptions of collateral due to erroneous serial numbers are not authority for rendering financing statements with transposed letters in a debtor's name effective for article 9 purposes.[166]

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162. *See In re* Brawn, 6 U.C.C. Rep. Serv. (Callaghan) 1031 (D. Me. 1969); Bank of N. Am. v. Bank of Nutley, 94 N.J. Super. 220, 227 A.2d 535 (1967). *See also* D. BAKER, A LAWYER'S BASIC GUIDE TO SECURED TRANSACTIONS 102–06 (1983); B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 2.9[1], at 2-34 (1980).

163. *See, e.g.*, Young v. Republic Nat'l Factors Corp. (*In re* Lucasa Int'l, Ltd.), 13 Bankr. 600 (Bankr. S.D.N.Y. 1981). If the financing statement omits the addresses, however, the statement may be held defective. *See* First Nat'l Bank v. Niccum (*In re* Permian Anchor Serv., Inc.), 649 F.2d 763 (10th Cir. 1981); *In re* Keefer, 26 Bankr. 597 (Bankr. D. Idaho 1983). *But see* Rooney v. Mason, 394 F.2d 250 (10th Cir. 1968); *In re* French, 317 F. Supp. 1226 (E.D. Tenn. 1970).

164. *See, e.g.*, Adams v. Nuffer, 550 P.2d 181 (Utah 1976). *Cf.* Appleway Leasing, Inc. v. Wilken, 39 Or. App. 43, 591 P.2d 382 (1979). Transposition of numbers within a serial number could be seriously misleading, however, if the number, as transposed, identifies another item of the debtor's equipment. *See id.* at 47, 591 P.2d at 384. But in *Appleway Leasing*, an incorrect or nonexistent serial number was apparently not seriously misleading when the farmer-debtor owned only one tractor because the description of the collateral was otherwise sufficient to reasonably identify it. *See id.*

165. The financing statement presumably would be located in a significantly different position in the index as a result of the transposition of the letters thereby preventing a searcher from finding the statement.

166. *Cf.* Putterbaugh v. Fournier (*In re* Happy Jack's Restaurant, Inc.), 29 U.C.C. Rep. Serv. (Callaghan) 653 (Bankr. D. Me. 1980) (transposition of debtor's and creditor's names on the

It would be misleading to suggest, however, that section 9-402(8) is not intended to validate financing statements containing incorrect names for debtors. The section exists largely in response to cases in which a minor error in a debtor's name operated to render ineffective a notice filing even though the name contained on the notice probably was not misleading.[167] Thus, the heritage of section 9-402(8) of the 1972 Code includes among its purposes a protection of minor errors in debtor names. Nonetheless, the name errors described in the drafting history of section 9-402(8) generally are not comparable to the errors resulting when a creditor identifies a debtor solely by the debtor's trade name.

The interpretation of U.C.C. section 9-402(8) requires courts to balance competing interests. On the one hand, the Code has adopted a notice-filing system,[168] and a rule that requires strict adherence to the form of financing statements provided would enhance the integrity of the notice-filing system. On the other hand, insistance on totally error-free filings could result in a secured creditor who has made a good faith effort to comply with the Code requirements and whose financing statement has not, and would not, mislead subsequent searchers, being deprived of an opportunity to recover its claim out of the collateral.[169] Section 9-402(8) specifically rejects the latter analysis. The Code does, however, limit a court's authority to find defective financing statements sufficient to instances in which the defects are minor and not seriously misleading. The nature of the error is paramount in determining the extent to which it might mislead subsequent searchers. Therefore, as noted previously, a mistake in a serial number generally will not be seriously misleading, while a mistake in the spelling of a debtor's name oftentimes would be misleading.[170] In analyzing the defective financing statements presented to them, the courts have focused primarily on whether the financing statement would seriously mislead a "reasonably prudent searcher."[171] The application of this test has proven to be especially problematic when the asserted defect in the financing statement is the use of a trade name for the debtor rather than the debtor's actual legal name.[172]

Those courts that have employed section 9-402(8) to render effec-

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financing statement renders the filing ineffective).

167. *See supra* notes 72–79 and accompanying text.

168. *See generally* Coogan, *supra* note 62.

169. *See* U.C.C. § 9-402 comment 9 (1972).

170. *See supra* notes 163–66 and accompanying text.

171. *See, e.g.*, Dietrich-Post Co. v. Alaska Nat'l Bank (*In re* McCauley's Reprographics, Inc.), 638 F.2d 117 (9th Cir. 1981); *In re* Southern Supply Co., 405 F. Supp. 20 (E.D.N.C. 1975). *See also* WHITE & SUMMERS, *supra* note 23, § 23-16, at 947–58.

172. *See* Note, *supra* note 145, at 56.

tive trade name financing statements that do not include the debtor's actual name have found that a reasonably prudent searcher would have located the financing statement in question.[173] In several cases, the debtor's trade name and legal name were substantially similar.[174] When there was a substantial disparity between those names, however, the courts generally held that the financing statement was insufficient to perfect the creditor's security interest.[175] More recently, however, the courts have been more favorably disposed towards expanding the scope of a search expected of a reasonably prudent creditor to include a search of the records under a trade name which is dissimilar to the debtor's legal name.[176] For example, in both *In re McBee*[177] and *In re Glasco*,[178] the United States Court of Appeals for the Fifth Circuit held that a reasonably prudent searcher would have located financing statements filed under dissimilar trade names.[179]

In both cases, the court addressed its attention to a reasonably prudent searcher who would conduct the most cautious and all-encompassing search of the U.C.C. records.[180] The court did not consider at any length the ability of the filing secured creditor to ascertain the debtor's correct legal name.[181] Instead, the court determined that persons investigating the debtor would become aware of the debtor's trade name.[182] Because those searchers would be cognizant of the trade name, the court determined that the financing statement filed under the trade name was sufficient to provide notice to those searchers.[183]

While a searcher who investigated the debtor's business and financial affairs sufficiently to determine the existence of a trade name

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173. *See, e.g., McCauley's Reprographics*, 638 F.2d 117 (9th Cir. 1981); *Southern Supply Co.*, 405 F. Supp. 20 (E.D.N.C. 1975).

174. *See, e.g., In re* Platt, 257 F. Supp. 478 (E.D. Pa. 1966); *In re* Hatfield, 10 U.C.C. Rep. Serv. (Callaghan) 907 (Bankr. M.D. Ga. 1971). *But see, e.g.*, Citizens Bank v. Ansley, 467 F. Supp. 51 (M.D. Ga.), *aff'd*, 604 F.2d 669 (5th Cir. 1979); *In re* Wishart, 10 U.C.C. Rep. Serv. (Callaghan) 1296 (W.D. Mich. 1972).

175. *See, e.g.*, Northern Commercial Corp. v. Friedman (*In re* Leichter), 471 F.2d 785 (2d Cir. 1972); *In re* Hill, 13 U.C.C. Rep. Serv. (Callaghan) 724 (N.D. Miss. 1973); *In re* Wilhoit, 29 U.C.C. Rep. Serv. (Callaghan) 1697 (Bankr. E.D. Tenn. 1980). *But see, e.g., In re* Kann, 6 U.C.C. Rep. Serv. (Callaghan) 622 (E.D. Tenn. 1969); *In re* Bengtson, 3 U.C.C. Rep. Serv. (Callaghan) 283 (Bankr. D. Conn. 1965).

176. *See, e.g.*, First Nat'l Bank v. McDonald (*In re* Lane), 41 Bankr. 285 (Bankr. N.D. Tex. 1984).

177. National Bank v. West Tex. Wholesale Supply Co. (*In re* McBee), 714 F.2d 1316 (5th Cir. 1983).

178. Brushwood v. Citizens Bank (*In re* Glasco, Inc.), 642 F.2d 793 (5th Cir. 1981).

179. *McBee*, 714 F.2d at 1321; *Glasco*, 642 F.2d at 796.

180. *McBee*, 714 F.2d at 1321; *Glasco*, 642 F.2d at 796.

181. *See McBee*, 714 F.2d at 1321; *Glasco*, 642 F.2d at 796.

182. *McBee*, 714 F.2d at 1323–25; *Glasco*, 642 F.2d at 796.

183. *See McBee*, 714 F.2d at 1323–25; *Glasco*, 642 F.2d at 796.

would be prudent and would likely have notice of the trade name financing statement, the real issue is whether a less comprehensive investigation would also be prudent even though the trade name filing would not be discoverable. A party interested in determining whether there are any particular financing statements on record must conduct both a legal and factual investigation. Legally, the searcher must determine the classification of the collateral,[184] the location of the collateral,[185] the debtor's location,[186] and the debtor's name.[187] Of course, those legal judgments cannot be determined without factual support. Therefore, the searcher must take appropriate steps to obtain the factual information requisite to determining the legal issues. The searcher must ascertain factually the use to which the collateral is being put,[188] the present and immediate past locations of the collateral,[189] the present and prior location of the debtor,[190] and the debtor's current and former names.[191]

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184. Section 9-401 of the U.C.C. provides three alternative provisions to determine the correct location for filing financing statements. *See* U.C.C. § 9-401(1) (1972). In each alternative, the appropriate filing office is established wholly or partially according to the nature or classification of the collateral. *Id.*

185. For example, if the collateral is a fixture or minerals, or if the debtor is a nonresident of the state, the financing statement must be filed in an office locationally related to the collateral. *See id.* § 9-401(1). Furthermore, alternative subsection (3) of § 9-401 provides that security interests perfected by filing can become unperfected if the collateral is moved to another location within the state. *Id.* § 9-401(3) (alternative subsection (3)). Finally, the interstate movement of certain collateral can render financing statements ineffective. *See id.* § 9-103(1)(b). Therefore, the location of the collateral determines the proper place to file a financing statement in many instances.

186. The third alternative subsection (1) of § 9-401 provides that the place of filing depends on the debtor's location unless the debtor has more than one place of business in the state. *Id.* § 9-401(1)(c) (third alternative subsection (1)). Moreover, the location of the debtor establishes the filing rules for nonpossessory security interests in mobile goods, accounts, general intangibles, and chattel paper. *See id.* § 9-103(3)(b).

187. *See infra* notes 193–95 and accompanying text.

188. The classification of collateral is often crucial to the filing location decision, see *supra* note 184, and that classification frequently turns on the debtor's use of the collateral. *See, e.g., In re* Morton, 9 U.C.C. Rep. Serv. (Callaghan) 1147, 1148 (D. Me. 1971) (jeep bought primarily for personal use is a consumer good). *See generally* WHITE & SUMMERS, *supra* note 23, § 23-13.

189. A searcher needs to be aware of the current location of the collateral to determine the appropriate office in which to conduct a search. The searcher also needs to know the immediate past location of the collateral because it may still be covered by financing statements filed where the collateral had been located. *See* U.C.C. §§ 9-401(3), 9-103(1)(b) (1972). *See also supra* note 185.

190. A searcher must be aware of the debtor's location to determine the appropriate filing office to search. For example, the third alternative subsection (1) of § 9-401 requires filing in both a centralized and local office if the debtor has a place of business in only one county in the state. U.C.C. § 9-401 (1972) (third alternative subsection (1)). Thus, the searcher must know the location or locations of the debtor's business to determine the appropriate filing office. Furthermore, if the collateral consists of mobile goods, accounts, general intangibles, or chattel paper which are not in the creditor's possession, the debtor's location will govern the choice of law rules that determine perfection. *See id.* § 9-103(3), (4).

191. Because the indexing system is based on the debtor's name, the searcher needs that

Upon concluding this investigation and analysis, however, the creditor should be in a position to determine whether any security interests exist in the debtor's property.[192] By combining the factual information with legal analysis of the filing requirements, the searcher can determine the appropriate filing office in which to search for financing statements as well as the location within that filing office where any financing statements must appear.

As indicated above, the U.C.C. directs creditors to file financing statements under the debtor's legal name.[193] While it may also be "prudent" to seek out trade names,[194] the statute does not require it. Thus, it should also be considered prudent or reasonable to focus the investigation and analysis on determining the debtor's correct legal name.

Once the searcher determines the appropriate office in which to search and the appropriate place within that office where the financing statement should appear, it only remains for the searcher to conduct the physical search of the record. Nonetheless, the scope of the search physically conducted should be limited greatly by the searcher's pre-search investigation and analysis. Consequently, the searcher should receive notice of only those financing statements which a search of the particular records in the determined scope would disclose. If the financing statement is not indexed within the parameters of the "prudent scope and search," then the financing statement should not be rendered effective by section 9-402(8). Rather, the defective financing statement is seriously misleading because the searcher cannot discover it.

Once the scope of the search is determined, it then becomes neces-

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information. *See supra* notes 18–26 and accompanying text. The file searcher also needs to know any previously used names of the debtor because a financing statement previously and properly filed under the prior name remains effective as to the collateral described in the financing statement as well as to any other collateral obtained by the debtor within four months after the name change occurred. U.C.C. § 9-402(7) (1972). *See generally* Westbrook, *Glitch: Section 9-402(7) and the U.C.C. Revision Process*, 52 GEO. WASH. L. REV. 408 (1984). Thus, if the collateral is a piece of equipment and is properly described in a financing statement properly filed under the debtor's name, that financing statement will remain effective for that equipment for five years, even though the debtor changes its name one day after the financing statement is filed. *See id.* § 9-403(2). *But cf.* Burnett v. H.O.U. Corp. (*In re* Kalamazoo Steel Process, Inc.), 503 F.2d 1218 (6th Cir. 1974) (filing under name of a corporation which immediately intends to change its name renders the financing statement ineffective if the secured creditor has knowledge of the impending name change).

192. A file search may not, however, turn up all security interests in the property. *See supra* note 125.

193. *See* U.C.C. §§ 9-302, -305, -401, -402, -403, -405 (1972). *See also supra* notes 18–26 and accompanying text.

194. It is "prudent" to conduct the search under the trade name because it may lead the searcher to a claimed security interest of a third party. The searcher then could evaluate the "prior" claim to determine whether to extend credit to the debtor. The existence of the filing, albeit defective, renders it likely that a subsequent party could face a priority contest in the event that the debtor fails or is unable to pay off all related debts.

sary to consider the form of the information retrieval system to determine whether the searcher would find the financing statement in question. For example, a retrieval system operated by a "literal" computer search would not disclose the same information as would a search conducted manually. Thus, the scope of the search must then be tested against the form of the retrieval system to determine if an otherwise defective financing statement contains only minor errors that are not seriously misleading.

In a manual retrieval system, the searcher would have personal access to the U.C.C. index. At a minimum, the searcher *must* look carefully at two names. Consider, for example, a filing system index containing only the following names:

Adams
Booth
Carr
Davis
Edwards

Assuming that the pre-search investigation and analysis has led the searcher to this particular index, the status of the index at the time the search is conducted will determine whether a financing statement is properly filed. Suppose, for example, the debtor's name for purposes of this search is Chester. The reasonably prudent searcher must view two names in the index: Carr and Davis. The searcher need not, however, look at any other names in the index. Whenever a manual search of an alphabetical index occurs, the maximum number of names that the searcher must view in the index to complete a prudent search is two plus the number of names corresponding with the search request. Therefore, if there were three financing statements indexed under the name Chester in the foregoing example, the searcher would have to look at five financing statements to complete a reasonably prudent search. The two additional index names must be examined in order to determine to a certainty that no other financing statements are on file under the name Chester. Therefore, if the financing statement was erroneously filed under the name Donahue, the searcher would not discover the financing statement as it would be outside the scope of the reasonably prudent search.

Of course, not all filing systems are available for private inspection by the searcher[195] or even in typewritten form. Either the clerk in the

195. *See, e.g., In re* Raymond F. Sargent, Inc., 8 U.C.C. Rep. Serv. (Callaghan) 583 (D. Me. 1970). In this case, the clerk conducted the record search based on the name or names supplied by the interested party. *Id.* at 592. The interested party, however, did not have access to the index. *Id.* at 591–92.

recording office may conduct the manual search on behalf of the creditor, or the records may be kept in a computer file.[196] If the clerk performs the index search, it is likely that he or she would report only those financing statements indexed in the exact form contained on the creditor's search request.[197] Arguably, it would be more appropriate to report a finding on exactly the same lines as the searcher's manual search described immediately above. Nevertheless, the searcher normally has no control over the search policy of the recording office although he or she could request that the clerk provide the names in the index that would appear immediately before and immediately after the specific name contained on the search request.

The introduction of computers into the process should not alter the analysis. Again, once the scope of a prudent search is established, the mechanical search should be undertaken in that system. If the financing statement in question would be discovered through that search, then the statement should be effective under section 9-402(8). Frequently, the search request will be taken literally by the computer and will generate only information on financing statements containing the exact name contained in the request. In that sense, the computer is similar to the clerk who is operating under the strict search guidelines of the recording office. Like the clerk, the computer can be instructed to conduct the search consistent with the manual search that the actual searcher would undertake. That is, the computer could be programmed to display the indexed financing statements that appear in the index immediately before and immediately after the name contained in the search request. Again, if the financing statement appears on that list, it should arguably be rendered effective even if it contains minor errors.

Employing this analysis to determine whether specific financing statements are sufficient under section 9-402(8) would add greatly to the integrity of the filing system. The courts and parties could determine with much greater certainty whether a particular financing statement is sufficient. This should benefit the operation of the notice filing system. Of course, the analysis proposed would increase the burdens on the searcher to ascertain the debtor's correct name.

Placing this burden on the filing secured creditor is appropriate. In fact, the Code already has placed that burden on the creditor.[198] Furthermore, it is the filing secured creditor who is seeking the protection

196. If the filing information is held in computer files, access to the index is restricted to the specific information requested. *See* Note, *supra* note 145, at 56 n.46, 70–71.

197. *See supra* note 195. *See also* Self, *supra* note 26, at 125–26 ("Information searches conducted by the [U.C.C.] Bureau by rule include only filings that *exactly* match the name and address requested to be searched.") (emphasis added).

198. *See supra* notes 81–83 and accompanying text.

of the notice-filing system.[199] Requiring relatively strict compliance with the requirements for naming the debtor in the financing statement is a small price to pay for the protection received.

Moreover, the subsequent searcher of the records receives absolutely no assistance if he or she fails to ascertain the debtor's correct legal name in the context of the search. That is, if the subsequent searcher misspells the debtor's name, the search will not locate financing statements otherwise properly filed. In a subsequent priority contest with the previously filed creditor, the searcher will not receive any benefit from the fact that the mistake made in conducting the search was made in good faith. Likewise, if the searcher relies on a generally publicized trade name of a debtor and conducts a search under that name, that would not render a financing statement previously filed under the debtor's correct legal name insufficient. As a result, the subsequent searcher would again be subordinate to the previous-filing secured creditor.[200] In each instance, the searcher's failure to conduct the search under the debtor's correct legal name results in a subordinate position to the prior filed creditor. The analysis suggested in this article is a mirror image of this treatment. Simply stated, when the prior filing secured creditor places a financing statement in the notice system in such a manner that a reasonably prudent search would not disclose the statement, the creditor has not filed an effective financing statement and its security interest is unperfected.

It might be argued that section 9-402(8) is a "savings" provision and should be construed liberally to protect those who may come within its sphere.[201] The foregoing analysis does not prevent such liberal application. It simply limits the liberality to the items of information required in financing statements other than the debtor's name. With respect to the debtor's name, however, the liberality should be tempered by the purpose of including the debtor's name on the financing statement in the first place. If the name included on the financing statement is incorrect and would not be disclosed in a search of the

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199. The filing creditor is seeking to establish priority for his claim to the debtor's assets described in the security agreement and financing statement. *See* Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53 (1983).

200. The financing statement would be sufficient even if it omits the debtor's trade name. *See* U.C.C. § 9-402(7) (1972). *See also* WHITE & SUMMERS, *supra* note 23, § 23-16, at 959. The general priority rule contained in § 9-312(5) would render the first creditor's security interest superior to any subsequently filed security interest. *See* U.C.C. § 9-312(5) (1972).

201. *Cf.* WHITE & SUMMERS, *supra* note 23, § 23-15, at 950–51. One of these authors describes § 9-401(2) as a savings provision which is intended to operate as "a backward-looking provision that allows the judge to clean up a mess after the fact." *Id.* Consequently, he urges that the provision be broadly construed to validate technically deficient financing statements. *Id.* A similar argument could be made respecting § 9-402(8).

debtor's correct legal name, the error is not a minor one and, furthermore, is seriously misleading.[202] Only if the incorrect name would be found through a minimally prudent search of the index should the name error be considered minor and not seriously misleading.

VII. A Second Savings Provision: U.C.C. Section 9-401(2)

A comparison of section 9-402(8) with another savings provision of article 9—section 9-401(2)[203]—further supports the application of the analysis proposed in this article. Section 9-402(8) will save a financing statement whether or not the subsequent searcher is aware of the financing statement.[204] Section 9-401(2), on the other hand, renders improperly located financing statements effective only as against parties who "have knowledge of the contents of the financing statement."[205] That section is the only provision in article 9 that permits actual knowledge to override the operation of the notice-filing system.[206] In a sense, it scraps the notice-filing system in favor of determining priorities based on the knowledge of the competing claimants. Moreover, it substitutes this knowledge only when the financing statement meets all of the informational requirements of section 9-402(1). The only mistake that the filing secured creditor makes is in choosing the appropriate filing office. Moreover, since the improperly filed statement is effective only when the conflicting claimant has knowledge of its contents, the Code anticipates that both the initial filing secured creditor and the subsequent searcher erroneously determined that a particular filing office was the appropriate location for filing. Therefore, since the parties each filed or searched in the same incorrect filing office, there arguably is good reason to permit the financing statement to be effective as between those two parties. The determination of the appropriate office in

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202. *See* Van Dusen Acceptance Corp. v. Gough (*In re* Thomas), 466 F.2d 51 (9th Cir. 1972); *In re* LFT, Ltd., 36 Bankr. 411 (Bankr. D. Hawaii 1984). *But see McBee*, 714 F.2d 1316 (5th Cir. 1983); *Glasco*, 642 F.2d 793 (5th Cir. 1981).

203. U.C.C. § 9-401(2) (1972). This section provides:

> A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

Id.

204. *Id.* § 9-402(8). *See also supra* notes 156–202 and accompanying text.

205. U.C.C. § 9-401(2) (1972). *See, e.g.*, Marcus v. McKesson Drug Co. (*In re* Mistura, Inc.), 24 Bankr. 586 (Bankr. 9th Cir. 1982), *aff'd*, 705 F.2d 1496 (9th Cir. 1983), *overruled on other grounds*, McLinn v. F/V Fjord, 739 F.2d 1395 (9th Cir. 1984).

206. Actual knowledge of a seriously misleading financing statement will not render the financing statement effective under § 9-402(8), even as against the party having actual knowledge. *See* U.C.C. § 9-402(8) (1972).

which to file is a much more difficult decision in the absence of a centralized filing system than is determining the debtor's correct legal name. Judgment decisions regarding the number and location of the debtor's business outlets and the forms of business being conducted can lead to the filing of a financing statement in the wrong place.[207] Of course, the secured creditor can always take the prudent course and file financing statements in all of the possibly correct locations. Nonetheless, section 9-401(2) saves the incorrectly filed financing statement, arguably because the decision of where to file can be very difficult and has caused a subsequent searcher to search in the same records.[208] Thus, the subsequent searcher's actual knowledge is deemed sufficient to provide the notice necessary to render the statement effective.

The same is not true, however, for section 9-402(8) purposes. For example, if a secured creditor files a financing statement in the correct place with all of the information required by section 9-402(1) except for the correct description of the collateral on the financing statement, a subsequent creditor who has knowledge of the contents of the financing statement may not be subject to the secured creditor's claim. If the financing statement describes collateral in which the secured creditor does not have a security interest because it was not included in the security agreement,[209] the subsequent party will not be subordinate to the prior filer simply because of the knowledge of the contents of the statement. Likewise, if a secured creditor inadvertently switches the debtor's and secured creditor's names on the financing statement, a subsequent creditor who has actual knowledge of the contents of the financing statement nonetheless will defeat the prior filed secured creditor in a contest over the collateral which each creditor claims.[210] The switching of names is not a minor error; therefore, section 9-402(8) is not applicable. Furthermore, knowledge of a prior security interest is irrelevant in resolving priority disputes between security interests in the same collateral.[211] Thus, the use of a name in a financing statement

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207. *See supra* note 190.

208. *See, e.g., In re* Enark Indus., Inc., 86 Misc. 2d 985, 383 N.Y.S.2d 796 (App. Term. 1976).

209. If the security agreement does not include a description of the collateral listed on the financing statement, no security interest will attach to the property and the filing will not perfect any interest in the property. *See* U.C.C. §§ 9-203(1), 9-303 (1972). Because the security interest did not attach to the collateral, any subsequent secured creditor would have a superior claim to the property. *See id.* § 9-201. *See also In re* Platt, 3 U.C.C. Rep. Serv. (Callaghan) 275 (Bankr. E.D. Pa.), *vacated on other grounds*, 257 F. Supp. 478 (E.D. Pa. 1966).

210. The filing creditor's security interest would be unperfected. Putterbaugh v. Fournier (*In re* Happy Jack's Restaurant, Inc.), 29 U.C.C. Rep. Serv. (Callaghan) 653, 660 (Bankr. D. Me. 1980). Because the security interest is unperfected, it would be subordinate to the later perfected security interest in the same collateral. *See* U.C.C. § 9-301(1)(a) (1972).

211. *See supra* notes 81–82 and accompanying text.

that would not appear in the minimally prudent search of the records under the debtor's name should not operate to perfect that filing creditor's security interest, nor should it be sufficient to afford priority to that creditor's claim over the claim of a subsequently searching secured creditor.

VIII. CONCLUSION

The foundation of article 9 ostensibly is the notice-filing system.[212] If one accepts the premise that the notice filing system is the crux of article 9, then it is appropriate to construct analyses of its operation that enhance the integrity of the notice filing system. Permitting financing statements filed solely under the debtor's trade name to be effective undermines that integrity.

Amendment of the U.C.C. to clarify further the requirement that financing statements contain the debtor's legal name seems unlikely. Nevertheless, employment of the analysis proposed in this article by courts determining the validity of financing statements obviates the necessity of any amendment. Furthermore, it would inject a greater degree of certainty into the area of secured transactions.

Parties searching the U.C.C. records are doing so in the hopes of *not* finding financing statements covering property of the debtor. The ideal search will disclose that no financing statements are on record. At the very least, the searcher, in a personal and manual review of the record, must review at least two names on the index. If the debtor's name does not appear, the searcher rightfully should conclude that no financing statements are on record for the particular debtor. The notice-filing system fundamentally recognizes this search purpose. The courts should construe section 9-402(8) of the Code consistently with this purpose and find that financing statements filed under a debtor's trade name that would not be disclosed in a minimal and reasonable search by a prudent searcher are insufficient to perfect a security interest in the debtor's property.

212. *See generally* Baird, *supra* note 199, at 60, 65. Professor Baird observes: "Benefits to secured creditors may be the primary justification for the present notice-filing system." *Id.* at 60. "Article 9's notice-filing system meshes perfectly with its first-to-file rule." *Id.* at 65.