

THE EFFECT OF ERRORS AND CHANGES IN THE DEBTOR'S NAME ON ARTICLE NINE¹ SECURITY INTERESTS

As part of their plan to make commercial law simple, clear, modern, and uniform,² the drafters of the Uniform Commercial Code (UCC) adopted "notice filing" in Article Nine.³ Under this system, a lender (the "secured party" under the Code)⁴ may acquire a perfected security interest⁵ in specified collateral without placing all the details of the loan agreement on record for public inspection.⁶ Rather,

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

ALI, NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1972 OFFICIAL TEXT WITH COMMENTS AND APPENDIX, 1972 CHANGES IN TEXT [hereinafter cited as UCC];

ALI, NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAW, UNIFORM COMMERCIAL CODE: 1962 OFFICIAL TEXT WITH COMMENTS [hereinafter cited as UCC (1962 version)];

R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE (2d ed. 1971) [hereinafter cited as ANDERSON];

R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE (Supp. 1974) [hereinafter cited as ANDERSON (Supp. 1974)];

R. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (1973) [hereinafter cited as HENSON];

J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (1972) [hereinafter cited as WHITE & SUMMERS].

1. Article Nine was extensively amended in 1972. The following states have enacted the 1972 revisions: Arkansas, California (effective January 1, 1976); Illinois; Iowa (effective July 1, 1975); Nevada (effective July 1, 1975); North Dakota; Oregon; Texas; Virginia; West Virginia (effective July 1, 1975); Wisconsin. Earlier versions remain in effect in the rest of the states and the District of Columbia, with the exception of Louisiana, which has not enacted the UCC.

2. UCC §§ 1-102(a), (c).

3. *Id.* § 9-402, Comment 2, which provides in pertinent part: "What is required to be filed is . . . only a simple notice which may be filed before the security interest attaches or thereafter."

4. *Id.* § 9-105(1)(m); UCC § 9-105(1)(i) (1962 version).

5. "A security interest is perfected when it has attached and when all the applicable steps required for perfection have been taken." UCC § 9-303(1). Perfection will most often be accomplished by filing a financing statement. WHITE & SUMMERS § 23-5, at 796; *see* UCC § 9-302(1). However, a secured party may perfect a security interest in certain categories of collateral by taking possession of the collateral, *id.* § 9-305, and possession is normally a requirement for perfection of a security interest in money or instruments other than chattel paper, *id.* § 9-304(1). *See generally* HENSON §§ 4-1 to -33.

The most important benefit of having a perfected security interest is priority over a trustee in bankruptcy with respect to the collateral covered by the security agreement. WHITE & SUMMERS § 23-5, at 796. *See note 23 infra.*

6. *See generally* Coogan, *Public Notice under the Uniform Commercial Code and*

the document to be recorded, *i.e.*, the financing statement,⁷ need only give notice of the security interest; if further information is desired, it must be acquired from sources outside the filing office.⁸

Financing statements are indexed in the records according to the debtor's name.⁹ If the debtor is not properly identified in the financing statement, a misfiling may result.¹⁰ When this happens, one searching the records under the correct name will be unable to locate the financing statement, and no notice will be given. A failure to give public notice of a security interest could result in the creation of a "secret lien," which courts historically have refused to uphold.¹¹ Therefore, correct identification of the debtor is crucial for the functioning of the notice filing system and for the perfection of a security interest.¹²

Other Recent Chattel Security Laws, Including "Notice Filing," 47 IOWA L. REV. 289 (1962).

7. See UCC § 9-402; WHITE & SUMMERS § 23-16, at 833.

8. UCC § 9-402, Comment 2; Coogan, *supra* note 6, at 317. The comment indicates that "[f]urther inquiry from the parties concerned [secured parties of record and the prospective debtor who owns the collateral in question] will be necessary to disclose the complete state of affairs [with respect to the nature of the discovered security interest]."

9. UCC § 9-403(4).

10. Another type of misfiling results when the filing clerk makes an error in filing the financing statement despite the fact that it was properly prepared. See note 50 *infra*.

11. Coogan, *supra* note 6, at 289; see *General Motors Acceptance Corp. v. Haley*, 329 Mass. 559, 109 N.E.2d 143 (1952); *cf.* *Rowley v. Bartholemew*, 37 Iowa 374 (1873) (error in description of collateral).

12. The 1962 version of Article Nine did not specifically require that the debtor's name appear on the financing statement, but virtually every court concluded that this was necessary. See, *e.g.*, *In re Gibson's Discount Pharmacy, Inc.*, 15 UCC Rep. Serv. 233, 234 (Bankr. Ct. E.D. Tenn. 1974); *In re Brawn*, 6 UCC Rep. Serv. 1031, 1037-38 (Bankr. Ct. D. Me. 1969); WHITE & SUMMERS § 23-16, at 837. However, the decisions are inconsistent when both erroneous and correct versions of the debtor's name appear in different places in the same financing statement. One view is that the security interest will be perfected when the debtor's signature is legible and correct, even though the filing is improper because of an incorrect name in another part of the financing statement. See *In re Bengtson*, 3 UCC Rep. Serv. 283, 287 (Bankr. Ct. D. Conn. 1965); WHITE & SUMMERS § 23-16, at 838-39. Another view holds the security interest perfected where the signature is proper unless a showing is made that a misfiling resulted from the other, improper debtor identification. Compare *In re Vaughan*, 4 UCC Rep. Serv. 61, 65 (Bankr. Ct. W.D. Mich. 1967), with *In re Joues*, 11 UCC Rep. Serv. 249, 252-53 (Bankr. Ct. W.D. Mich. 1972). A third position is that a printed identification of the debtor's name is required, absent proof that somehow the financing statement was properly indexed. See *In re Eichler*, 9 UCC Rep. Serv. 1400, 1404 (Bankr. Ct. E.D. Wis.), *aff'd*, 9 UCC Rep. Serv. 1406 (E.D. Wis. 1971); *In re Merrill*, 9 UCC Rep. Serv. 757, 759 (Bankr. Ct. D. Neb. 1971); *In re Brawn*, 7 UCC Rep. Serv. 565, 571-72 (Bankr. Ct. D. Me. 1970). The 1972 revision has adopted this third view. See UCC § 9-402(1).

Since the financing statements are indexed according to the debtor's name, an error in the identification of the secured party will usually be unimportant. HENSON § 4-

Problems involving the debtor's name can arise in two ways. First, the financing statement may not correctly identify the debtor. Second, a financing statement which originally gave the correct name may become misleading as a result of a change in the debtor's name.

ERROR ON THE FINANCING STATEMENT

The UCC allows a financing statement which "substantially" complies with the requirements for validity to be effective, even though it contains minor, non-misleading errors.¹³ Apparently, the drafters intended that this substantial compliance test should apply to errors in the identification of the debtor. A comment to section 9-402¹⁴ specifically disapproves the holding in *General Motors Acceptance Corp. v. Haley*.¹⁵ That case was decided under the Uniform Trust Receipts Act and involved a filed statement of trust receipt financing which listed the trustee as E.R. Millen Co., when its correct name was E.R. Millen Co., Inc. The court held that the omission was serious enough to render the filing ineffective and to void the security interest.¹⁶

In view of the critical function which the debtor's name performs in the operation of the notice filing system, at least one commentator suggested that *Haley* was unwisely chosen as an example of the strict standard which the substantial compliance test was intended to replace.¹⁷ If this commentator's view were followed, any defect in the debtor's name would be per se misleading. The substantial compliance standard would then operate only when an error was made in an item not required to be furnished in the financing statement. For example, if the debtor is correctly identified by his individual name, and his trade name is also given even though not required, an error in the latter need not be fatal to the perfection of the security interest.¹⁸

6, at 42; WHITE & SUMMERS § 23-16, at 841; see *In re Wilco Forest Mach., Inc.*, 491 F.2d 1041 (5th Cir. 1974).

13. UCC § 9-402(8); UCC § 9-402(5) (1962 version).

14. UCC § 9-402, Comment 9.

15. 329 Mass. 559, 109 N.E.2d 143 (1952).

16. *Id.* at 563-65, 109 N.E.2d at 146-47. Comment 9 to section 9-402 characterized the purpose of the substantial compliance rule of subsection 8 as "designed to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves." The drafters indicated that the *Haley* opinion was "an example of the sort of reasoning which this subsection [8] rejects."

17. Coogan, *supra* note 6, at 292-93 n.5.

18. *National Cash Register Co. v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963); cf. *Still Associates Inc. v. Murphy*, 358 Mass. 760, 267 N.E.2d 217 (1971) (error in description of collateral).

The California version of the UCC includes a requirement that the financing state-

However, the case law has generally followed the suggestion of the Code comment, and the substantial compliance test has been held applicable to errors in the identification of the debtor. The leading case for this proposition is *In re Excel Stores, Inc.*¹⁹ The financing statement in that case gave the debtor's name as Excel Department Stores when in fact it was Excel Stores, Inc. Both the debtor and a corporation named Excel Enterprises, Inc. did business at the same address. The district court stressed the fact that the erroneous name made it impossible for a file searcher to ascertain which corporation was the debtor and held the security interest to be unperfected.²⁰ The Second Circuit Court of Appeals reversed, emphasizing that the UCC simply requires notice and that sufficient notice would be given when a file searcher came to the name "Excel" in the records.²¹

Whether an error in the debtor's name is so substantial that it should be deemed seriously misleading necessarily entails an ad hoc approach.²² The test which has been adopted is whether, under all the facts, the filing would have given a file searcher sufficient notice to justify placing a duty upon him to make further inquiry concerning the possible lien.²³ Such a test certainly will not produce any automatic

ment give the debtor's trade name. CAL. COMMERCIAL CODE § 9402(1) (West 1964). Where the financing statement fails to give the correct trade name, the security interest has been held unperfected, despite the fact that the debtor's true name was correctly listed. *In re Thrift Shoe Co.*, 502 F.2d 1211 (9th Cir. 1974).

19. 341 F.2d 961 (2d Cir. 1965).

20. *In re Excel Stores, Inc.*, 1 UCC Rep. Serv. 616 (D. Conn. 1963), *rev'd*, 341 F.2d 961 (2d Cir. 1965).

21. 341 F.2d at 963-64.

22. *In re Hatfield Constr. Co.*, 10 UCC Rep. Serv. 907, 911 (Bankr. Ct. M.D. Ga. 1971); 4 ANDERSON § 9-402:27, at 493.

23. *See, e.g., In re Excel Stores, Inc.*, 341 F.2d 961, 963 (2d Cir. 1965). The test is phrased in this manner because it is generally not necessary to show that the improperly filed financing statement actually caused a subsequent lender to be misled about the debtor's financial situation. The sufficiency of the notice given by the financing statement becomes an issue most frequently in bankruptcy proceedings; the trustee in bankruptcy has the status of a judgment creditor as of the date of bankruptcy, whether or not such a creditor actually exists. Bankruptcy Act § 70(c)(1), 11 U.S.C. § 110(c)(1) (1970). The UCC includes the trustee in bankruptcy in its definition of "lien creditor." UCC § 9-301(3); UCC § 9-301(3) (1962 version). Under the 1962 version of Article Nine a lien creditor takes priority over an unperfected security interest provided that the lien creditor is without knowledge of the security interest. UCC § 9-301(1) (1962 version). But, since the trustee's status is a hypothetical one, this provision causes no problems for him. *In re Leichter*, 471 F.2d 785, 787 (2d Cir. 1972); *In re Thomas*, 466 F.2d 51, 53 (9th Cir. 1972). Under the 1972 Code, a lien creditor's knowledge of the unperfected security interest is immaterial. *See* UCC § 9-301(1). Moreover, since an unperfected security interest in given collateral will be subordinated to a perfected security interest in the same collateral no matter which version of the Code is in effect, HENSON § 5-1, at 71, a secured party who has incorrectly identified

answers. The simpler situations are fairly clear. Where an individual debtor's first name was spelled Shelia rather than Sheila, this was "obviously" a minor, non-misleading error.²⁴ But the reversal of the names of the debtor and secured party on the financing statement, where the two names were completely different, would cause a misfiling wholly ineffective to give notice to subsequent file searchers and would thus be seriously misleading.²⁵ In closer cases, great weight is attached to the similarity between the listed name and the correct one. If the name under which the financing statement will be indexed is correct, the security interest will almost always be held perfected even if other parts of the name are incorrect. Thus, a financing statement which gave the debtor's name as Nara Distributing, Inc. was sufficient to perfect a security interest against Nara Non Food Distributing, Inc.²⁶ However, where the debtor's name was Brawn, a financing statement listing it as Brown was seriously misleading.²⁷

his debtor may discover that his claim cannot take priority over those of later secured parties who listed the debtor's name properly, even though those lenders had actual knowledge of the existence of the prior, unperfected security interest. See *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967). See also *National Cash Register Co. v. Mishkins, Inc.*, 65 Misc. 2d 386, 317 N.Y.S.2d 436 (N.Y. County Ct. 1970). In *National Cash Register Co. v. Mishkins, Inc.*, 65 Misc. 2d 386, 317 N.Y.S.2d 436 (N.Y. County Ct. 1970), a creditor was denied the special priority the Code gives to purchase money secured parties because of a failure to supply the debtor's correct name on the financing statement. A purchase money secured party who complies with the procedure set forth in the Code takes priority in collateral which is also covered by the after-acquired property clause of an earlier security agreement, and there is nothing that the prior secured party can do to prevent his security interest in this collateral from being subordinated. UCC §§ 9-312(3), (4); UCC §§ 9-312(3), (4) (1962 version). Thus, in *Mishkins*, there was no possibility that the prior secured party was misled in any way by the subsequent lender's error in identifying the debtor.

24. *Beneficial Fin. Co. v. Kurland Cadillac-Oldsmobile, Inc.*, 57 Misc. 2d 806, 811, 293 N.Y.S.2d 647, 652 (Sup. Ct. 1968), *rev'd on other grounds*, 32 App. Div. 2d 643, 300 N.Y.S.2d 844 (1969).

25. *In re Uptown Variety*, 6 UCC Rep. Serv. 221 (Bankr. Ct. D. Ore. 1969).

26. *In re Nara Non Food Distrib., Inc.*, 66 Misc. 2d 779, 322 N.Y.S.2d 194 (Sup. Ct. 1970); *accord*, *In re A & T Kwik-N-Handi, Inc.*, 12 UCC Rep. Serv. 765 (Bankr. Ct. M.D. Ga. 1973).

27. *In re Brawn*, 6 UCC Rep. Serv. 1031 (Bankr. Ct. D. Me. 1969); *accord*, *In re Gibson's Discount Pharmacy, Inc.*, 15 UCC Rep. Serv. 233 (Bankr. Ct. E.D. Tenn. 1974) (financing statement listed debtor as Gibco Discount Drugs, Inc. instead of Gibson's Discount Pharmacy of Bristol, Tennessee, Inc.); *Bank of N. America v. Bank of Nutley*, 94 N.J. Super. 220, 227 A.2d 535 (1967) (debtor listed as Kaplas instead of Kaplan); *John Deere Co. v. William C. Pahl Constr. Co.*, 59 Misc. 2d 872, 300 N.Y.S.2d 701 (Sup. Ct. 1969), *aff'd*, 34 App. Div. 2d 85, 310 N.Y.S.2d 945 (1970) (debtor listed as Ranelli Construction Co. instead of Ranalli Construction Co.); *National Cash Register Co. v. Valley Nat'l Bank*, 5 UCC Rep. Serv. 396 (N.Y. Sup. Ct. 1968) (debtor listed as Boywald instead of Borgwald); *National Cash Register Co. v. Mishkins, Inc.*, 65 Misc. 2d 386, 317 N.Y.S.2d 436 (N.Y. County Ct. 1970) (debtor listed as Mishkins Drug, Inc. instead of Aberdeen Drugs, Inc.). *Contra*, *In re Causer's*

Factors other than the similarity between listed and correct names can also enter into consideration. In *In re Gustafson*,²⁸ the individual debtor's true name was Gustafson. When he moved to Oklahoma, he obtained a chauffeur's license on which his name was spelled Gustavsen. Following an unsuccessful attempt to have the license corrected, the debtor began to use the improper spelling routinely in his transactions. Finding an absence of bad faith or carelessness on the part of the secured party, the court ruled that a financing statement giving the incorrect spelling was sufficient to perfect a security interest.²⁹ In *In re Hatfield Construction Co.*,³⁰ the company was the actual debtor but the financing statement was filed under the name of its president, Wayne L. Hatfield. In an opinion which blithely ignored the separate identity of the corporation, the court held that the security interest was perfected. The court justified this result by pointing out that the case involved a local filing;³¹ subsequent file searchers would have had actual access to the records and the file contained only a few financing statements.³² In view of these facts, the court regarded the identity between the president's surname and the corporate name as sufficient to require an interested party to make further inquiry.³³

On the other hand, a few courts have rejected the ad hoc approach and have taken a dim view of any error in identifying the debtor. For example, *In re Raymond F. Sargent, Inc.*³⁴ held a security interest unperfected because the financing statement improperly included "Co." in the corporate debtor's name.³⁵ Nevertheless, proof that the financ-

Town & Country Super Mkt., Inc., 2 UCC Rep. Serv. 541 (Bankr. Ct. N.D. Ohio 1965) (debtor listed as Robert Causer and Grace Causer dba Causer's Town & Country Super Market, Inc. instead of corporate name alone); see *In re Vaughan*, 4 UCC Rep. Serv. 61 (Bankr. Ct. W.D. Mich. 1967) (financing statement gave debtor's name as both Vaught and Voughn rather than Vaughan); cf. *In re Green Mill Inn, Inc.*, 474 F.2d 14 (9th Cir. 1973) (per curiam) (actual notice available because of state practice of cross-indexing).

28. 14 UCC Rep. Serv. 231 (Bankr. Ct. W.D. Okla. 1973).

29. *Id.* at 232-33.

30. 10 UCC Rep. Serv. 907 (Bankr. Ct. M.D. Ga. 1971).

31. The Georgia version of the UCC requires filing to be made on a county-by-county basis instead of having a central, state-wide filing office. GA. CODE ANN. § 109A-9-401(1)(b) (1962).

32. 10 UCC Rep. Serv. at 911-12.

33. *Id.*

34. 8 UCC Rep. Serv. 583 (Bankr. Ct. D. Me. 1970).

35. *Contra, In re A & T Kwik-N-Handi, Inc.*, 12 UCC Rep. Serv. 765 (Bankr. Ct. M.D. Ga. 1973) (omission of "Inc." in debtor's name).

The *Sargent* decision has not found favor with the commentators. See HENSON § 4-6, at 42 n.23 ("[p]erhaps the least defensible decision in this area"); WHITE & SUMMERS § 23-16, at 840-41 ("[t]he referee wholly misconstrues the function of [the 1962 version of] 9-402(5)").

ing statement was filed in the same place in which it would have been filed if no error had been made might influence these courts to find that the security interest was perfected. In other litigation arising out of the bankruptcy of the ill-starred Raymond F. Sargent Corporation, the referee held that a financing statement listing the debtor as Sargent, Raymond, F., Inc. was sufficient because the filing clerk had gratuitously made a cross-indexing under the proper name.³⁶ However, the referee could have held such a filing to be immaterial since the statutorily required notice was not given.³⁷

The ad hoc approach has also generally prevailed in a line of cases in which the filing was made under the trade or business name of an individual debtor.³⁸ Here, too, the dispositive factor has often been the similarity between the listed and correct names. So, where the individual debtor, Henry Platt, did business both as Platt Furniture Co. and Kenwell Fur Novelty Co., a financing statement using the former name was adequate to perfect a security interest, but the use of the latter would have been insufficient.³⁹

Some cases have taken a more favorable view of a trade name filing. *In re Bengtson*⁴⁰ upheld a security interest filed under Bruce's Vernon Circle Service where the debtor's name was Bruce Bengtson. The court acknowledged that such a filing would not reveal the existence of the security interest, but since the 1962 version of the Code

36. *In re Raymond F. Sargent, Inc.*, 8 UCC Rep. Serv. 746 (Bankr. Ct. D. Me. 1970).

37. *See In re Wishart*, 10 UCC Rep. Serv. 1296 (Bankr. Ct. W.D. Mich. 1972).

38. In cases involving partnerships, it has been generally assumed that filing should be made under the partnership name. HENSON § 4-6, at 41; *see, e.g., In re Humphrey*, 12 UCC Rep. Serv. 986 (Bankr. Ct. E.D. Tenn. 1973). The 1972 version of Article Nine codifies this rule. *See* UCC § 9-402(7).

39. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966); *accord, In re Leichter*, 471 F.2d 785 (2d Cir. 1972) (debtor's surname was Leichter; trade name was Landman Dry Cleaners); *In re Hill*, 363 F. Supp. 1205 (N.D. Miss. 1973) (debtor's surname was Hill; trade name was Carolyn's Fashions); *In re Firth*, 363 F. Supp. 369 (M.D. Ga. 1973) (debtor's surname was Firth; trade name was National Photocopy Equipment Co.); *In re Jones*, 11 UCC Rep. Serv. 249 (Bankr. Ct. W.D. Mich. 1972) (debtor's surname was Jones; trade name was The Tape Shack); *In re Eichler*, 9 UCC Rep. Serv. 1400 (Bankr. Ct. E.D. Wis.), *aff'd*, 9 UCC Rep. Serv. 1406 (E.D. Wis. 1971) (debtor's surname was Eichler; trade name was Carriage Card & Record Shop); *In re Merrill*, 9 UCC Rep. Serv. 757 (Bankr. Ct. D. Neb. 1971) (debtor's surname was Merrill; trade name was Reliable TV Service); *In re Levins*, 7 UCC Rep. Serv. 1076 (Bankr. Ct. E.D.N.Y. 1970) (debtor's surname was Levins; trade name was F. & F. Luncheonette); *In re Thomas*, 310 F. Supp. 338 (N.D. Cal. 1970), *aff'd*, 466 F.2d 51 (9th Cir. 1972) (debtor's surname was Thomas; trade name was West Coast Avionics); *In re Osborn*, 6 UCC Rep. Serv. 227 (Bankr. Ct. W.D. Mich. 1969) (debtor's surname was Osborn; trade name was H & M Distributing Co.).

40. 3 UCC Rep. Serv. 283 (Bankr. Ct. D. Conn. 1965).

contained no requirement that the debtor's name be given, the court could perceive no defect in the filing.⁴¹

Other courts have adopted a stricter standard. *In re Wishart*⁴² held a security interest to be unperfected where the financing statement listed the debtor as Wishart Equipment Co. The debtor's surname was Wishart and the filing clerk had cross-indexed the financing statement under the individual name, though not required to do so. The court did not consider either of these facts to be relevant.⁴³ Likewise, in *In re Brawn*,⁴⁴ a financing statement indexed under Brawn's Super Market was held seriously misleading despite the fact that the debtor was named Wendall P. Brawn. However, the referee indicated that, had a gratuitous cross-indexing been made under the latter name, the security interest would have been perfected.⁴⁵

One commentator has argued in favor of a distinction between a "casual" or "random" trade name and an "established" trade name, maintaining that a filing made using the latter should be sufficient.⁴⁶ There is authority both for and against this position.⁴⁷ However, the better approach would avoid such a distinction. Otherwise, added confusion will be introduced into the law since courts would be forced to deal with the question of what constitutes an "established" trade name,⁴⁸ and there is already more ambiguity in this area than would be desirable in light of the Code policies of "simplicity, clarity, and uniformity."⁴⁹

41. *Id.* at 287. The 1972 version of Article Nine would require a different result. See UCC § 9-402(1).

42. 10 UCC Rep. Serv. 1296 (Bankr. Ct. W.D. Mich. 1972).

43. *Id.* at 1298, 1300-01.

44. 7 UCC Rep. Serv. 565 (Bankr. Ct. D. Me. 1970).

45. *Id.* at 572-73.

46. 4 ANDERSON § 9-402:31, at 500-01.

47. Compare *In re Thomas*, 466 F.2d 51 (9th Cir. 1972), with *In re Kann*, 6 UCC Rep. Serv. (Bankr. Ct. E.D. Pa. 1969). See also *Douglas-Guardian Warehouse Corp. v. Esslair Endsley Co.*, 10 UCC Rep. Serv. 176 (W.D. Mich. 1971).

48. See generally HENSON § 4-6, at 41.

49. UCC § 1-102(2); see Hawkland, *Article 9 Methodology*, 9 WAYNE L. REV. 531, 536 (1963). The amended version of Article Nine provides that the financing statement is sufficient if it gives the individual debtor's name, whether or not it includes the trade name. UCC § 9-402(7). Mr. Anderson has argued that this amendment only establishes a "harmless surplusage" rule which does not reach the situation of a filing made in the trade name alone. ANDERSON § 9-402:31, at 1314 (Supp. 1974). However, it appears that the intent of the drafters of the amendment was to disapprove filings made only under trade names. See UCC § 9-402, Comment 7, which provides in pertinent part: "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."

Moreover, as long as the secured party is careful to identify his debtor properly, he will be able to acquire a perfected security interest.⁵⁰ To this extent, the law is in fact simple, clear, and uniform. Where the secured party does not take such care and makes an error in naming the debtor, the fact that the security interest may have an uncertain fate should not be too disturbing. The secured party was in a position to guard against this result,⁵¹ and any difficulty which flows from his failure to do so ought not give him cause for complaint.

DEBTOR'S CHANGE OF NAME

The justification for the uncertain status of the security interest when the financing statement never correctly identified the debtor does not necessarily exist when, after the filing, the debtor acquires a new name which is materially different from the original one.⁵² Such a post-filing name change could arise as a result of legal proceedings in the case of an individual debtor (*e.g.*, divorce), or by a merger, consolidation, or charter amendment in the case of a corporate debtor. As long as the initial filing was made using the debtor's then-correct name,⁵³ the creation of a secret lien following the change cannot be attributed to the secured party's failure to insure the perfection of the

50. A misfiling which is attributable solely to the filing clerk's error should not cause the security interest to be unperfected.

[U]nder Section 9-403(1) the secured party does not bear the risk that the filing officer will not properly perform his duties: under that section the secured party has complied with the filing requirements when he presents his financing statement for filing and the filing fee has been tendered or the statement accepted by the filing officer. UCC § 9-407, Comment 1;

accord, *In re Royal Electrotyping Corp.*, 485 F.2d 394 (3d Cir. 1973) (holding that the UCC has changed the Pennsylvania common law rule); *In re May Lee Indus., Inc.*, 380 F. Supp. 1 (S.D.N.Y. 1974), *aff'd*, 501 F.2d 1407 (2d Cir. 1974); *see* UCC § 9-403, Comment 1.

51. *See In re Thomas*, 310 F. Supp. 338, 340 (N.D. Cal. 1970), *aff'd*, 466 F.2d 51 (9th Cir. 1972).

52. If the new name is not materially different from the old one, the security interest can be held perfected under the substantial compliance test. ANDERSON § 9-402:31.2, at 1315 (Supp. 1974); *see Borg-Warner Acceptance Corp. v. Bank of Marin*, 36 Cal. App. 3d 286, 111 Cal. Rptr. 361 (1973).

53. A bizarre case in which a financing statement error was combined with a change of name is *In re A-1 Imperial Moving & Storage Co.*, 350 F. Supp. 1188 (S.D. Fla. 1972). There the debtor did business under the trade name A-1 Imperial Moving & Storage Co., Inc. and this was the only name listed on the financing statement. About two weeks after the financing statement was filed, the debtor incorporated under the name 6105 Corporation but continued to use the former trade name. Subsequently, the debtor adopted the trade name as its official corporate name, thereby causing the name listed on the financing statement to correspond to the true name. The secured party was unaware of any of these transactions. The court, somewhat hesitatingly, concluded that the final name change "breathed life" into the previously invalid security interest, *id.* at 1189.

security interest at the time the financing statement was prepared. To the contrary, the secured party has complied with all the requirements necessary for the perfection of the security interest, and the question is whether the debtor's act in changing its name can cause the security interest to become unperfected.⁵⁴

The 1962 version of Article Nine provided no guidance for the resolution of this issue. There seems to be agreement that the security interest will be deemed perfected, at least as to the pre-change collateral, if the secured party is unaware of the name change.⁵⁵ But the courts have taken inconsistent positions when the secured party has knowledge of the use of a new name by the debtor but takes no action to give notice to subsequent file searchers. Some courts have held the secured party's knowledge to be immaterial. In *In re Gac*,⁵⁶ an individual debtor granted a security interest in a piano to a credit union. At that time the debtor's name was Charlotte A. Mead, and it was so listed on the financing statement. Later she divorced and her maiden name, Charlotte A. Gac, was restored to her in the divorce proceedings. The secured party was aware of this but did nothing to correct its financing statement. The referee was unable to ascertain any difference between this situation and one in which the secured party had no knowledge of the debtor's name change since the predicament of subsequent file searchers would be the same in either event.⁵⁷ Thus, the security interest was held perfected.⁵⁸

A different attitude toward the effect of the secured party's knowledge was manifested in *In re Veith's, Inc.*⁵⁹ There, the individual debtor, Kuhn, did business under the trade name Veith's. The financing statement was filed only under the individual name. The debtor then incorporated his business as Veith's, Inc. and transferred the collateral to the corporation. The secured party knew of these transactions but took no action. The referee found that the secured party's knowledge was tantamount to an authorized disposition of the collateral

54. The UCC contemplates that certain acts done by the debtor can invalidate a security interest. For example, a sale of the collateral made in the ordinary course of the debtor's business will usually result in the loss of a security interest in that collateral. UCC § 9-307(1).

55. See *In re Veith's, Inc.*, 9 UCC Rep. Serv. 943, 948 (Bankr. Ct. E.D. Wis. 1971); *In re The Grape Arbor, Inc.*, 6 UCC Rep. Serv. 632, 633 (Bankr. Ct. E.D. Pa. 1969).

56. 11 UCC Rep. Serv. 412 (Bankr. Ct. W.D. Mich. 1972).

57. *Id.* at 414.

58. *Accord, In re Pasco Sales Co.*, 77 Misc. 2d 724, 354 N.Y.S.2d 402 (Sup. Ct. 1974) (corporate debtor amended charter to change name from Pacific Supply Co. to Pasco Sales Co.).

59. 9 UCC Rep. Serv. 943 (Bankr. Ct. E.D. Wis. 1971).

which voided the security interest.⁶⁰

Veith's could be limited to the situation where there is a change of the entity of the debtor (e.g., from individual to corporate) followed by a transfer of the collateral to the new entity.⁶¹ A different type of decision, one clearly suggesting ramifications beyond the specific facts of the case, is *In re Kalamazoo Steel Process, Inc.*⁶² In that case, the secured party was Kalamazoo Steel Process, Inc. and the debtor was Roman Industrial Corporation. At the time the security agreement was entered into, both parties were planning to make a name change: the debtor was to adopt the name of the secured party and vice versa. Although the security agreement demonstrated that each was aware of the other's plans, the financing statement listed only Roman Industrial Corporation as the debtor. The contemplated name changes were made after filing. Relying on the good faith obligation set forth in section 1-203, the Sixth Circuit held that the secured party had not perfected its security interest:

When a secured party has knowledge at the time the security agreement is executed that the debtor intends to change its name, and the new name is known to him, the secured party must act in good faith to insure that the filing under the Code not only discloses the current and correct name of the debtor but also reflects the pending name change of which the parties are aware.⁶³

Although the court was careful to emphasize that its decision did not reach the situation where the secured party learns of the new name after filing the financing statement,⁶⁴ its sensitivity to the need for an accurate identification of the debtor⁶⁵ and its conception of good faith as at times requiring affirmative action on the part of the secured party⁶⁶ strongly indicate that a similar good faith test would be applied in the *Gac* situation.

60. *Id.* at 946-48; see UCC § 9-306(2).

61. See *In re Gac*, 11 UCC Rep. Serv. 412, 415 (Bankr. Ct. W.D. Mich. 1972). If this is the correct interpretation of *Veith's*, it is not a change of name case at all. The security interest would also have become unperfected had Kuhn incorporated as Kuhn, Inc. and transferred the collateral to the corporation with the secured party's knowledge, even though the filing could be held not seriously misleading pursuant to the substantial compliance test. Viewed in this way, *Veith's* has been overruled by the 1972 amendments. See UCC § 9-402(7).

62. 503 F.2d 1218 (6th Cir. 1974).

63. *Id.* at 1222.

64. *Id.* at 1224.

65. *Id.* at 1221.

66. *Id.* at 1222, quoting King, *Policy Decisions and Security Agreements Under the Uniform Commercial Code*, 9 WAYNE L. REV. 556, 561 (1963). See also *John Deere Co. v. William C. Pahl Constr. Co.*, 34 App. Div. 2d 85, 89, 310 N.Y.S.2d 945, 949 (1970).

The 1972 amendments to Article Nine include a sentence which speaks directly to the problem created by the debtor's change of name:

Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time.⁶⁷

No reported decision has applied this provision. One commentator has suggested that the amendment establishes a rule whereby the security interest will be perfected as to the pre-change collateral and collateral acquired within the four-month period, but it will be unperfected with respect to collateral acquired more than four months after the change unless a new filing is made.⁶⁸ This reading would establish a *Gac* rule subject to a four-month limitation on perfection of a security interest in after-acquired collateral. That is, the security interest in the pre-change collateral and collateral acquired during the four-month period would be perfected irrespective of the secured party's knowledge.

However, a comment to the 1972 version of the Code suggests a contrary interpretation. The comment states that the security interest should be deemed perfected as to the pre-change collateral if the financing statement is "legally still valid under the circumstances" and as to collateral acquired during the four-month span if the financing statement is "still operative under the particular circumstances."⁶⁹ If any content is to be given to these phrases, the best sources would seem to be found in the policy against the creation of secret liens and the requirement of good faith, the crucial factors in the rule suggested by *Kalamazoo*. By basing the interpretation of the amendment on these two factors, it is possible to avoid both undeserved leniency to a secured party who has knowingly acquiesced in the continued existence of a secret lien, as well as undue harshness to a secured party who honestly believes his financing statement is still capable of giving notice. Accordingly, the four-month period would represent the time during which an unaware secured party could acquire a perfected security interest in after-acquired collateral. In other words, if the secured party has not refiled within four months, the amendment creates a conclusive presumption that he has either been negligent or has acted in bad faith,

67. UCC § 9-402(7). This apparently represents the first statutory attempt to deal with the change of name problem. HENSON § 4-6, at 41.

68. ANDERSON §§ 9-402:31.3-A, at 1315-16 (Supp. 1974).

69. UCC § 9-402, Comment 7.

and he is prevented from continuing to take advantage of the secret lien. But, if the secured party was without knowledge until it was too late to matter (*e.g.*, until the debtor files a petition in bankruptcy), the security interest would nevertheless be held perfected with respect to both the pre-change collateral and collateral acquired within four months of the name change. On the other hand, if the secured party learned of the new name but failed to make a refiling, the security interest would become unperfected as to all the collateral, whenever acquired, because the secured party did not act in good faith to make his financing statement effective to give notice.⁷⁰

Therefore, under both the 1962 and 1972 versions of the UCC, courts are in a position to choose between conflicting rules. The *Gac* opinion contained several justifications for holding that the secured party's knowledge is immaterial. First, it was asserted that the secured party should not be required to prove a negative, that is, the absence of knowledge.⁷¹ Second, the court pointed out that hardship would be imposed on the secured party if the debtor refused to sign a new financing statement; in that event, the secured party could not possibly correct the misleading filing.⁷² Finally, it was suggested that file searchers were under a duty to inquire about any prior name of the debtor.⁷³

The first argument can easily be met by requiring the party seeking to avoid the security interest to establish the secured party's knowledge. If the opposing party cannot meet this burden, the secured party would have a perfected security interest in the pre-change collateral and in either all the after-acquired collateral (under the 1962 Code) or the collateral acquired during the four-month period (under

70. The discussion in the text assumes a conflict between a trustee in bankruptcy and a secured party with knowledge who has not made a filing at all. If the secured party made a refiling after the four-month interval, but before the date of bankruptcy, the secured party should prevail over the trustee, since sufficient notice was available at the time the latter's hypothetical lien creditor status arose. *Cf. In re A-1 Imperial Moving & Storage Co.*, 350 F. Supp. 1188, 1189 (S.D. Fla. 1972).

If a subsequent creditor properly perfects a security interest in the encumbered collateral, he would take priority both as to pre- and post-change collateral. If the prior secured party was without knowledge, however, the priority of the subsequent lender would extend only to collateral acquired after the four-month interval. Where the 1972 amendment is not in effect and the secured party does not have knowledge of the new name, he would have priority as to all the collateral, whether acquired before the name change, during the four-month post-change interval, or after the four-month period. See note 74 *infra* and accompanying text.

71. *In re Gac*, 11 UCC Rep. Serv. 412, 414 (Bankr. Ct. W.D. Mich. 1972).

72. *Id.*; see UCC § 9-402 (1962 version). The 1972 amendments have eliminated this problem. The secured party does not have to obtain the debtor's signature on the corrected financing statement. UCC § 9-402(2)(d).

73. 11 UCC Rep. Serv. at 414-15.

the 1972 amendment).⁷⁴ However, once the secured party's knowledge is established, the burden would be on him to show that he acted in good faith to give notice to later file searchers. The good faith standard would eliminate the problem of the uncooperative debtor under the 1962 Code.⁷⁵ If the secured party put forth his best efforts, he would be protected even though these efforts were unsuccessful.

The third argument is also unpersuasive since it is the filed financing statements which are to place file searchers on inquiry. The UCC should not be read to require a search outside the filing office unless there is something inside the office to spark it.⁷⁶ Thus, a duty to discover a debtor's prior names should not be imposed.⁷⁷

The only real advantage of the *Gac* rule that the secured party's knowledge is irrelevant is that it creates a "bright line" test. Such a rule would be easy to administer, produce readily predictable results, establish certainty and clarity in commercial law, and tend to eliminate litigation. All of these may be said to be goals of the UCC.⁷⁸ A rule which requires an inquiry into the secured party's knowledge and good faith, on the other hand, would necessitate an ad hoc examination of the facts of each case. Still, there is a significant difference between a case involving a secured party with knowledge and a case involving a secured party without knowledge, and this difference compels the rejection of *Gac*. In the former situation, the secured party realizes that he has a secret lien. Punishing this secured party by voiding the security interest will advance the goals of notice filing by discouraging the recurrence of this variety of secret lien.⁷⁹ Punishing a secured party

74. Mr. Anderson maintains that the name change should cause the security interest to become unperfected as to all after-acquired collateral under the 1962 Code. ANDERSON § 9-402:31.4, at 1316 (Supp. 1974). There does not seem to be any justification for this result when the secured party was without knowledge of the name change. In such a situation the secured party has done everything he could do to comply with the Code, and holding the security interest unperfected will do nothing to discourage the creation of that type of secret lien. Cf. *In re Gustafson*, 14 UCC Rep. Serv. 231 (Bankr. Ct. W.D. Okla. 1973). See notes 79-80 *infra* and accompanying text.

75. Where the 1972 amendments are in effect, this problem will not arise. See UCC § 9-402(2)(d).

76. See WHITE & SUMMERS § 23-16, at 833; Coogan, *supra* note 6, at 318 n.100.

77. *Contra*, *In re Pasco Sales Co.*, 77 Misc. 2d 724, 727, 354 N.Y.S.2d 402, 405 (Sup. Ct. 1974).

78. See Hawkland, *supra* note 49, at 536.

79. Cf. *John Deere Co. v. William C. Pahl Constr. Co.*, 34 App. Div. 2d 85, 310 N.Y.S.2d 945 (1970). In that case, the filing clerk sent an acknowledgement copy of the financing statement to the secured party which showed that an erroneous identification of the debtor had been made. The court regarded the secured party's failure to take action to correct the error after thus learning of it as justification for not giving the secured party the benefit of a perfected security interest. *Id.* at 89, 310 N.Y.S.2d at 949.

who was unaware of the name change would serve no similar deterrent function.⁸⁰ By failing to appreciate this difference and holding the secured party's knowledge to be immaterial, a court invites the proliferation of secret liens. Such a holding cannot be defended on the grounds that it produces certainty and clarity, for its result must inevitably be contrary to the purpose of the notice filing system.

CONCLUSION

The lessons to be learned by the would-be secured party from a review of the law relating to errors and changes in the debtor's name are clear. If the potential secured party wishes to take the least possible risk, he should first make a careful inquiry into the precise identity of the contemplated debtor. A search of the filing system should then be made under this name as well as similar names, and any possible pre-existing security interests that are uncovered should be investigated. It would also be wise to attempt to discover any prior name of the debtor and to conduct a similar search of the files as to it. Even though this step is not a Code requirement, it is recommended since there is no guarantee that a prior security interest, filed under a former name of the debtor, will be subordinated to that of a later secured party.

If these inquiries do not reveal the presence of any other secured party, the would-be secured party may proceed, but he should be careful to make certain that his financing statement lists the precise name of the debtor. One suggested procedure for the secured party to follow would be to present the financing statement for filing before the transaction is consummated. Shortly before closing the deal another search of the files should be made. In this way the secured party could ascertain whether his financing statement had been properly indexed, as well as discover any security interests which might have been filed after the initial search.⁸¹

Pahl is distinguishable from *In re Royal Electrotpe Corp.*, 485 F.2d 394 (3d Cir. 1973), where an error in the debtor's name was reflected on the receipt the secured party received from the filing clerk. In the latter case, the court stated that the error did not come to light until after the debtor had become bankrupt. *Id.* at 395.

80. *Cf. In re Gustafson*, 14 UCC Rep. Serv. 231 (Bankr. Ct. W.D. Okla. 1973).

81. This idea was proposed by Professor John Weistart in his commercial law class at Duke Law School. Professor Weistart recognizes that there are two sources of difficulty with this procedure. First, in the case of a creditor who customarily makes a large number of relatively small loans, the cost of the extra record search may not be justified. Second, debtors are not likely to be receptive to the practice of placing a notice of a lien against the collateral prior to actually receiving the loan proceeds.