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Filing Provisions of Revised Article 9

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FILING PROVISIONS OF REVISED ARTICLE 9

*John J. Eikenburg, Jr.**

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"Neither a borrower nor lender be,
For loan oft loses both itself and friend. . ."

William Shakespeare
Hamlet (Act I, Scene III, Polonius to Laertes)

I. INTRODUCTION

THE irony of Shakespeare's sage advice in *Hamlet* is as applicable today as it was to the first audience to profit from these words of wisdom. It is nearly impossible for one involved in business to carry on without becoming either a borrower or a lender. But there is an inherent conflict between the two players. The debtor wishes to gain as much credit as possible while risking as little collateral as necessary.¹ The creditor wants to ensure that the loan will be repaid.² Additionally, the creditor wants to be certain that he has priority over other creditors on any debt against the debtor's collateral.

Striking a balance between the rights of the creditor and the debtor and meeting both parties' business objectives has been the aim of hundreds of years worth of statutes written to facilitate secured transactions. The Uniform Commercial Code ("UCC"; the "Code") addresses these issues today. Article 9 of the UCC is officially titled: Secured Transactions.³ Article 9 was initially drafted in 1952, but the current amended version was completed in 1972. All jurisdictions have adopted Article 9 in nearly the same form.

Considered by some to be the most innovative article of the UCC, Article 9 provides an integrated framework for secured credit in the manufacturing, retailing, and service sectors of the U.S. economy.⁴ Article 9 applies to transactions ranging from financing a typical consumer loan for items such as cars to applications for working capital business credit secured by inventory and receivables.⁵ Article 9 was a combination of pre-

1. See 4 THOMAS D. CRANDALL ET AL., UNIFORM COMMERCIAL CODE § 23.1 (1996).

2. See *id.*

3. See U.C.C. § 9-101 (1995).

4. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 (1992) [hereinafter PEB STUDY GROUP].

5. See *id.*

vious statutes regulating “such security devices as chattel mortgages, conditional sales, trust receipts, factor’s liens and assignments of accounts receivable.”⁶ The drafters of the original Article 9 responded to a proposal in 1938 by the Merchants Association of New York City for a federal sales act to govern interstate sales.⁷ The latest revisions are in part due to similar concerns in interstate commerce.

In early 1990, the Permanent Editorial Board for the Uniform Commercial Code (“PEB”) determined that Article 9 was in need of revision.⁸ Since the promulgation of the 1972 revisions, there has been unprecedented growth and innovation in the secured credit markets. The PEB attributes this growth to a new codification of bankruptcy law and phenomenal acceleration in the access to information through the use of computers.⁹

Commercial transactions have changed drastically since the last drafting of Article 9. In response to these changes, the new proposed Article 9 offers extensive changes. This Comment will address those changes in Article 9 that deal with the filing provisions. The Comment will discuss the problems with the 1972 filing provisions and will also discuss how the revised version of Article 9 will handle those problems.

II. BACKGROUND TO UCC ARTICLE 9 FILING RULES

A. GENERAL BACKGROUND

The UCC simplified the pre-Code filing rules. A brief look backward shows the great strides that the first UCC provisions brought to the filing system. The states recognized a multitude of security devices before Article 9 went into effect.¹⁰ Each device had unique filing mechanisms to ensure the secured party’s priority against the debtor and third parties. A secured party was mired in a morass of legislation regulating each of these security devices. This complication increased the costs of a secured transaction and decreased the certitude of a secured party’s priority.¹¹

The aim of the initial Article 9 was to provide a simple and unified structure that could absorb the present-day secured financing transaction. The ultimate goal of the Article was to provide more certainty to creditors than the pre-Code practices.¹²

In order for a creditor to maintain the priority of his rights over the rights of other creditors, he must perfect his security interest in the collateral. “A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken.”¹³ At-

6. U.C.C. § 9-101 cmt. (1995).

7. See RAY D. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 1-1 (2d ed. 1979).

8. See PEB STUDY GROUP, *supra* note 4, at 1.

9. See *id.*

10. See U.C.C. § 9-101 cmt. (1995).

11. See *id.*

12. See *id.*

13. *Id.* § 9-303(1).

tachment occurs when a binding agreement is made between the creditor and the debtor.¹⁴ Where the secured party has possession, the agreement may be oral.¹⁵ Otherwise, most types of collateral require the following: (1) a security agreement describing the collateral signed by the debtor; (2) value must be given; and (3) the debtor must have rights in the collateral.¹⁶

Filing is not the only way for a secured party to perfect a security interest. For certain types of collateral, it is impossible to perfect by filing. To perfect a security interest in money or instruments, a secured party must take possession of the collateral.¹⁷

The most common form of perfection occurs automatically upon attachment.¹⁸ Related, but not the same, is temporary perfection, as with a purchase money security agreement in consumer goods.¹⁹ A possessory security interest can be perfected in accordance with the Code.²⁰ Perfection by filing²¹ and compliance with state certificate of title entails the closest attention to the Code.²²

There is an important difference between attachment and perfection. Attachment establishes a secured party's rights in the collateral as against the debtor.²³ On the other hand, perfection establishes a secured party's rights in the collateral as against third parties.²⁴ This requires attachment and one of the following: (1) a filing in the proper place of a financing statement describing the collateral;²⁵ (2) the taking of possession of the collateral;²⁶ or (3) automatic perfection as dictated by statute.²⁷

B. BACKGROUND TO THE UCC FILING PROVISIONS

The most common way to perfect is by filing a financing statement in a public office. The policy behind filing in a public office is to put future secured parties on notice that the primary secured party may hold a security interest in the described collateral. It is not necessary that the secured party file the security agreement itself because only limited notice is required.²⁸

The more difficult issue arises when one must determine where to file the financing statement. There are over 4,300 filing offices in the United

14. *See id.* § 9-203.

15. *See id.* § 9-203 cmt.

16. *See id.* § 9-203(1)(a)-(c).

17. *See id.* § 9-304(1).

18. *See id.* § 9-302(1)(d).

19. *See id.* § 9-304(4).

20. *See id.* §§ 9-302(1)(a), 9-305.

21. *See id.* § 9-302(1).

22. *See id.* § 9-302(3)(c).

23. *See id.* § 9-203(2).

24. *See id.* § 9-303.

25. *See id.* § 9-401.

26. *See id.* § 9-305.

27. *See id.* § 9-302(3)(a), (4).

28. *See id.* § 9-402 cmt. 2.

States.²⁹ Each state has a central and many local filing offices. Standard advice to secured parties is to “file everywhere possibly required.”³⁰ While this is sound advice, it is not practical. In some cases, the time and expense of a “belt and suspenders” approach would nullify the advantages of securing the transaction.

III. PROBLEMS WITH THE CURRENT FILING SYSTEM

Filing can be costly and time consuming considering that most filings are rarely challenged.³¹ When first drafted, the filing system may have been adequate, but currently many problems exist with the system. The major problems can be grouped into three areas—filing search delays, risk of human error, and expense.³²

A. FILING SEARCH DELAY

A creditor cannot be assured of his priority until the creditor receives a search showing the priority of the creditor’s financing statement. This is a result of the UCC’s first-to-file-or-perfect rule.³³ The rule makes it necessary to file a financing statement before attachment. In this way the two parties can conclude the formalities of the transaction while the secured party can ensure priority from the date of filing as long as there is subsequent attachment. In most jurisdictions, the delay from when one files the financing statement to when the financing statement appears in a search is only a few days.³⁴ But in those jurisdictions where the volume of filings is high, it may take several weeks for the filing to show up in a search, which can cause problems. Where there are significant delays, lenders may have to close transactions without being certain of their priority.³⁵ The problem occurs when creditor A does a search and finds that there are no prior claims and subsequently files a financing statement only to find out later that creditor B had filed a few days (or weeks) earlier, but the financing did not show up in a search because of the delay

29. See Lynn M. Lopucki, *Why the Debtor’s State of Incorporation Should be the Proper Place for Article 9 Filing: A System Analysis*, 79 MINN. L. REV. 577, 579 (1995).

30. *Id.*

31. See *id.*

32. See Peter A. Alces & Robert M. Lloyd, *An Agenda for Reform of the Article 9 Filing System*, 44 OKLA. L. REV. 99, 105-08 (1991).

33. See U.C.C. § 9-312(5) (1995).

[P]riority between conflicting security interests in the same collateral shall be determined according to the following rules: (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time security interest is first perfected whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection. (b) So long as conflicting security interests are unperfected, the first to attach has priority.

Id.

34. See Alces, *supra* note 32, at 105.

35. See *id.*

in the filing office.³⁶

Problems like those mentioned above are not uncommon. The revised Article 9 attempts to speed the filing process and avoid delay.

B. RISK OF HUMAN ERROR

In the current system there is a great potential for human error. Although properly filed by a creditor, a financing statement can be mis-indexed by a filing officer. In jurisdictions where filing officers enter data from a lender's filing, there is the possibility for faulty input of information.³⁷ Another area for human error can occur during the search where the wrong name or spelling is searched or the proper filing is simply overlooked.³⁸

Not only is there great potential for negligent human error, but there is also the danger of fraud. One such example is the practice of backdating by filing officers. This practice takes place after a secured party makes it known to the officer that he or she has improperly rejected the filing. The officer subsequently backdates the second filing to the date of the wrongfully rejected initial filing. This creates a gap where a search made during the time between the original submission date and the date that the statement was finally accepted would not produce any prior claim.³⁹

C. EXPENSE

The fee for a single filing alone is not expensive, but due to inefficiencies in the present system, there are many hidden costs that may increase both parties' overall costs.⁴⁰ Before filing, a lender must make a search to see if there are any preexisting filings. While filing officers do searches for lenders, the response time is considerable. As a result, lenders frequently use the services of private search firms.⁴¹ For large transactions the cost is rather low, but in small transactions the proportional cost of the searches may be prohibitive.

Trade names are another area that incur unexpected cost. It is not clear in some jurisdictions if trade name—as opposed to debtor name—filings are valid. This ambiguity increases the time it takes to search. It takes time first to discover the trade names and second to complete a new search on the newly found trade name.⁴² The discovery of trade names is frequently done by an attorney and is billed at standard attorney rates.⁴³

36. See *Wegner v. Grunewaldt*, 821 F.2d 1317, 1323 (8th Cir. 1987) (describing a case where a lender lost priority by failing to search through the date of its filing).

37. See Alces, *supra* note 32, at 106; Harry C. Sigman, *Putting Uniformity into—and Improving the Operation of—the Uniform Commercial Code: The New National Financing Statement Form*, 51 BUS. LAW. 721, 723 (1996).

38. See generally *Borg Warner Acceptance Corp. v. Secretary of State*, 731 P.2d 301 (Kan. 1987).

39. See Alces, *supra* note 32, at 107.

40. See *id.*

41. See, e.g., Capitol Services, Inc., 1212 Guadalupe, Suite 102, Austin, Texas 78701.

42. See Alces, *supra* note 32, at 108.

43. See *id.*

Often the completion of a successful search may hinge on minor differences in spelling. For example, in a search for "Voyageur Trading Co.," "Voyager Trading Co." did not reveal the security interest.⁴⁴ Distinctions like this only increase the amount of time that an attorney must spend making an exhaustive search by checking possible alterations that a court might decide were "minor errors which are not seriously misleading."⁴⁵

D. DUAL FILING

All the above is subsequently exacerbated by the problem of local and dual filing.⁴⁶ There is the cost of paying the lawyer to determine if local filings are needed in addition to a central filing; and then there is the actual cost of the filing itself.⁴⁷

IV. CURRENT PROCEDURE FOR FILING—§ 9-402(1)

A. NAMES OF THE DEBTOR AND SECURED PARTY

Both the names of the secured party and the debtor must be included in the financing statement.⁴⁸ Minor errors in the names are admissible as long as they are not seriously misleading.⁴⁹ A new filing is required when the debtor changes his name. There is a grace period of four months where the existing filing will continue to protect the collateral acquired before the name change. There is no need for a new filing when the debtor sells the collateral. This has the effect of making any sale of the collateral subject to the security interest.⁵⁰

B. SIGNED BY THE DEBTOR

The financing statement is invalid unless signed by the debtor.⁵¹ The "signature" need not be a formal one; it may include any symbol that expresses the party's intention to authenticate the writing. Moreover, the signature need not be witnessed nor does it need to be notarized. Thus, the signature is essential, but the requirement is liberally construed.⁵²

The debtor signature requirement is waived in several circumstances: (1) when the filing is to perfect a security interest in collateral that is already subject to another security interest in another state or when the debtor's location is changed from one state to another; (2) when the filing is to perfect an interest in the proceeds of the original perfected collat-

44. See *Corporate Financers, Inc. v. Voyageur Trading Co.*, 519 N.W.2d 238, 242-43 (Minn. 1994).

45. U.C.C. § 9-402(8) (1995) ("a financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."); see also Alces, *supra* note 32, at 108.

46. See Alces, *supra* note 32, at 108.

47. See Todd C. Nelson, *Article Nine Goes Online*, 32 ARIZ. ATT'Y 35 (1996).

48. See U.C.C. § 9-402(1).

49. See *id.* § 9-402(8).

50. See *id.* § 9-402(7) cmt. 7.

51. See *id.* § 9-402(1).

52. See *id.* § 9-402 cmt. 3.

eral; (3) when the filing is to perfect an interest in collateral where the original filing has lapsed; or (4) when the filing is to perfect an interest in collateral after the debtor has changed its name.⁵³

C. ADDRESSES OF THE SECURED PARTY/DEBTOR

The addresses of the secured party and the debtor are required.⁵⁴ Generally, an omission of either address will render the filing insufficient. The address becomes critical to the debtor at foreclosure when the secured party is required to send notice.

D. DESCRIBING THE ITEMS OF COLLATERAL

The financing statement must "contain[] a statement indicating the types, or describing the items, of collateral."⁵⁵ The description need only be general. For example, "All inventory of debtor" is a sufficient description.

E. COPY OF THE SECURITY AGREEMENT IS SUFFICIENT

A copy of the security agreement is sufficient as a financing statement if it contains the information required in a financing statement.⁵⁶ The signature is still required.⁵⁷

F. PROCEEDS OF COLLATERAL

Generally, perfection of the collateral also perfects the proceeds.⁵⁸ The Code mandates automatic perfection of proceeds in most cases. This allows the security interest in materials to follow into the finished goods. This also allows for cash from the sale of collateral to be secured.⁵⁹

G. DURATION OF A FILING STATEMENT

Once properly filed, a financing statement is valid for five years.⁶⁰ Amendments may be made to the agreement, but the amendments must be signed by both parties.⁶¹ This requirement prevents either party from unilaterally altering the agreement to the detriment of the other party.⁶² Within six months of lapse of a filing, a secured party may file a continuation statement.⁶³ Only the secured party must sign the continuation statement. An effectively filed continuation statement will extend the

53. See *id.* § 9-402(2)(a)-(d).

54. See *id.* § 9-402(1).

55. *Id.*

56. See *id.*

57. See *id.*

58. See *id.* § 9-306(3).

59. See *id.*

60. See *id.* § 9-403(2).

61. See § 9-402(4).

62. See *id.* § 9-402 cmt. 4.

63. See *id.* § 9-403(3).

original filing for another five years.⁶⁴ When there is no longer any secured obligation on the part of the debtor, the debtor can demand a termination statement from the secured party.⁶⁵ Such a statement concludes the secured transaction.

H. FILING OFFICERS' RESPONSIBILITIES

Upon receipt of a financing statement, the filing officer indexes the statement in the name of the debtor.⁶⁶ As statements lapse, the filings are to be removed from the index.⁶⁷ The officer is to collect the appropriate fee associated with the filing.⁶⁸ Once the filing officer has accepted the filing and the fee, the secured party no longer bears the risk of any officer error.⁶⁹ Possible mistakes that officers may make include improperly filing the statement or improperly refusing to accept an adequate statement.

V. MECHANISMS OF CHANGE FOR FILING

The mandate of the revising committee was broad. The committee recommended that "[t]he sponsors of the UCC should encourage and support the ongoing efforts to improve and make more uniform the various state systems of filing financing statements and conducting searches for them."⁷⁰ The committee included in this broad mandate a long list of areas to consider:

The Drafting Committee should revise the text of Part 4 of Article 9 as may be appropriate to improve the operation of the filing systems. The Drafting Committee should give attention to existing problems in the following areas, among others: (i) purging of filed financing statements from the records; (ii) the volume and detail of information provided in response to a search request; (iii) the discretion that filing officers exercise, particularly in determining whether financing statements are "presently effective" (§ 9-407(2)) and in determining whether to refuse to accept a financing statement for filing; (iv) obtaining termination statements when the secured party no longer exists or cannot be found; (v) the duration of the effectiveness of financing statements; (vi) "paper neutral" filing standards that would accommodate existing and future innovations in information technology; (vii) provision for administrative regulations to regulate some aspects of the filing system; (viii) clarification that changes in a secured party's name never renders a financing statement seriously misleading; (ix) clarification of how the filing system deals with successors to a secured party (*e.g.*, the Resolution Trust Corporation); (x) indexing financing statements according to numbers (*i.e.*, social

64. *See id.*

65. *See id.* § 9-404(1).

66. *See id.* § 9-403(4).

67. *See* § 9-403(3).

68. *See id.* § 9-403(5).

69. *See id.* § 9-403(1).

70. PEB STUDY GROUP, *supra* note 4, at 88.

security or tax I.D. numbers), either in addition to or instead of names; (xi) circumstances when signatures are required and, in a variety of contexts, the appropriate party to sign; (xii) external, remote access to filing systems for the purpose of searching and filing; (xiii) filing against partnerships that do not have names; (xiv) filing against trusts; (xv) improved provisions for the payment of fees; (xvi) consequences of assignments and partial assignments, particularly with respect to termination statements; (xvii) the impact of bankruptcy on filed financing statements; (xviii) subsequent filings that affect an original filing but contain identifying information that differs from the original (e.g., termination statement filed after the party has changed its name); (xix) expansion or removal of the 6-month pre-lapse period for filing continuation statements; (xx) the effect, if any, of a change in the address of a secured party; (xxi) the need for a means of effecting "global" amendments to financing statements (e.g., amending all financing statements filed against a particular debtor by filing a single document); and (xxii) extension, as appropriate, to other Part 4 provisions of the principle, contained in § 9-402(8), of effectiveness notwithstanding "minor errors which are not seriously misleading."⁷¹

These issues address shortcomings in the existing filing provisions, and, in some cases, the suggestions above address aspects of filing that were not implicated in the current statute.

A. TOOLS FOR IMPLEMENTING CHANGE TO ARTICLE 9

The driving force behind the need for a new Article 9 is the rapid advance in technology. Today's technical environment offers opportunities to facilitate filing that the drafters of the initial Article 9 could not have contemplated. Before the wide-spread use of computers, the distance between the searcher and the filing offices was a primary concern. Local offices were necessary to allow local residents to complete searches. The distances were too great for a central filing system to be economically effective.⁷² Computers have largely eradicated the need for local filing. The distance from the searcher and the filing office becomes immaterial if the search can be done on-line.

The one exception may be fixture filings. Section 9-313 defines a "fixture filing" as the "filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of section 9-402."⁷³ Section 9-402 states that "a financing statement filed as a fixture filing where the debtor is not a transmitting utility . . . must recite that it is to be filed . . . in the real estate records, and the financing statement must contain a description of the real es-

71. *Id.* at 89-90.

72. See Alces, *supra* note 32, at 110-11; Robert Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1828 (1994).

73. U.C.C. § 9-313(1)(b) (1995).

tate.”⁷⁴ If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner.”⁷⁵

B. ELECTRONIC DATA INTERCHANGE

One of the tools that will make remote searching a reality is Electronic Data Interchange (“EDI”). EDI allows computers running different systems and software to transfer data to each other using a common language.⁷⁶ This technology has a proven track record in industries such as banking.⁷⁷ With the appropriate software providing an EDI interface, a filer may complete the filing process from any remote location.

1. *How Does the System Work?*

With the software, a filer can make a UCC filing electronically by placing an EDI order with the software provider’s filing manager. The filing information is stored on the provider’s host computer. In periodic intervals, filing information is formatted into the standard UCC data transfer set and sent to the electronic mail box of the state filing office. The state system then gathers all EDI transmissions sent to its mailbox and electronically verifies that all required information is included. The state system generates either an electronic confirmation with a filing number and filing date, or a rejection and explanation. The data for accepted filings is electronically transferred to the state’s public record database. The state filing office then sends an electronic confirmation once every hour to the filer’s provider’s electronic mailbox. The provider then retrieves the EDI confirmation information and electronically transfers it to the host computer. The filer can then retrieve the electronic UCC EDI filing confirmation using the filer’s software.⁷⁸

2. *Application in the Field*

The system described above would make paper-based filing obsolete. Several jurisdictions have instigated pilot EDI filing programs. Texas adopted an EDI system in February 1996 and serves as the test case for the Article 9 Filing Project’s UCC/EDI Initiative.⁷⁹ The Initiative seeks to encourage other jurisdictions to adopt paperless EDI filing systems.

The Initiative has met with considerable success in Texas, but not without some complications. The first step toward electronic filing is the use of a national standard form.⁸⁰ Texas adopted the National Standard UCC Form. The form seeks to achieve four goals: (1) improve the present filing system; (2) help to forge a functionally national filing system; (3) facil-

74. *Id.* § 9-402(5).

75. *Id.*

76. See Caroline A. Rourke, *The Future of Electronic Filing*, 40 *ADVOC.* 28, 28 (1997).

77. See *id.*

78. See *id.*

79. See Nelson, *supra* note 47, at 36.

80. See Sigman, *supra* note 37, at 722.

itate the move to advanced technologies in the operation of the system; and (4) facilitate the transition to an operation under Revised Article 9.⁸¹

While few states have begun electronic filing, almost all states accept the national standard form.⁸² Despite efforts to minimize ineffective filings, the Office of the Texas Secretary of State estimates that "25,000 financing statements filed per year might be ineffective."⁸³ Most of the ineffective filings using the National form are relatively easy to avoid.

C. THE UCC/EDI INITIATIVE

Some states, such as Texas, have already initiated electronic filing mechanisms. Texas has done so under the UCC/EDI Initiative. EDI means electronic data interchange. True EDI is based on transaction sets and standards adopted by the Data Interchange Standards Association (DISA). Over the past 20 years EDI has been used by major industries to conduct critical business transactions such as purchasing and billing. The transaction set standard developed for use for filing under the Uniform Commercial Code is referred to among EDI aficionados as X12/154.⁸⁴ In addition to the standard transaction set, users including both filing officers and UCC filers have developed a national uniform implementation guide. The implementation guide is a how-to guide to formatting a UCC filing electronically for acceptance by any EDI capable filing office. Use of uniform filing standards and guides greatly facilitates filing office and filer implementation of EDI as it reduces effort on the part of all users to invent their own electronic filing methods. Further, uniform EDI standards and implementations minimize variation of filing policy among the nation's state filing offices, easing the burden of knowledge of local rules necessary for many filers that deal with more than one filing office.

EDI is simply computer to computer communication of information that comprises a particular business transaction such as a purchase order or an invoice. The X12/154 transaction set includes the necessary UCC filing elements of information such as the debtor name, secured party, collateral description, and debtor's authorization. Instead of a filer typing or printing the information onto a financing statement form, mailing it to the filing office, and then waiting days for a confirmation from the filing office, the filer can transmit the same information via computer and receive confirmation within an hour or two. The increase in efficiency is due to the fact that the filing office, upon receipt of an EDI filing, does not need to key the information into the filing office computer system manually. In fact the entire recording process for EDI filings can be au-

81. See *id.*

82. See generally *National Standard UCC Form Update*, 9:4 CAP. TIMES 1 (1998).

83. Wallis N. Bogus, *Debtor Name Quality Control Needed: Texas Central Filing Officer Predicts Many Financing Statements Likely Ineffective*, 9:4 CAP. TIMES 5, 6 (1997).

84. See *Frequently Asked Questions About UCC/EDI* (visited Apr. 2, 2000) <<http://www.sos.state.tx.us/function/ucc/edifaq.htm>>.

tomated eliminating manual intervention and all potential processing bottlenecks.⁸⁵

There are many ways filers can send EDI filing to an EDI filing office. The best way depends upon the filer's needs. Assuming that the filer's organization is experienced with EDI and the organization uses an in-house system for loan management and UCC filing preparation, an organization may choose to integrate EDI into its existing system. Numerous translator products are available for integration purposes. Such products allow mapping the proprietary data format to an X12 standard format and back. If the organization is not familiar with EDI, the organization can evaluate the use of third party software and services.⁸⁶

One of the benefits of EDI filing in Texas is the cost. Paper-based filing fees in Texas are \$10 for a standard form and \$25 for any other form, plus in each case, \$5 per each additional debtor name. All EDI filings are considered standard form filings subject to a flat \$15 recording fee, which lowers overall filing fee costs.⁸⁷ Additionally, since EDI filings are not manually indexed the additional debtor name indexing fee is waived. Therefore, an EDI filing can contain any number of debtor names and can include virtually any collateral description for a flat \$15 recording fee.⁸⁸ Further reduction in statutory filing fees will be sought through the state legislature as use of EDI reduces operational costs of the filing office.

Texas also has alternative electronic filing methods. Texas's Office of the Secretary of State offers a service called Secretary of State Direct Access (SDA).⁸⁹ The SDA system allows customers the ability to obtain a direct computer link-up to the agency's mainframe, allowing access to information regarding corporations, limited partnerships, corporate assumed names, and centrally filed UCC financing statements. SDA was created to meet the increasing public demand for information from the Secretary of State. Any individual or business can connect to the agency's computer with their personal computer equipped with a modem and communication software. SDA provides the same information that would be retrieved by a telephone call or written inquiry to the Secretary of State. When the Secretary of State's staff files a document, the computer databases are updated instantaneously. Searching the system will provide up to the minute information.⁹⁰

The ramifications of electronic filing are far reaching. For instance, excluding the need for local filing for collateral intimately associated with land, such as fixtures and agriculture, the need for local filing will become increasingly less important. Secured parties will be able to file and search

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *See Direct Computer Access* (visited Apr. 4, 2000) <<http://www.sos.state.tx.us/function/ucc/sda.htm>>.

90. *See id.*

filings with ease using their own office computers. Local filing in most cases will no longer be necessary.

But technology does not exist in a vacuum. Employing the technology to reduce the need for local filing would decrease revenue generated from local filing. More important, the technology would eliminate many employment positions in the local filing offices.

D. COMMON FILING ERRORS USING THE NATIONAL FORM

The most common error is the use of a trade name to identify a debtor in the "entity box" rather than using the individual debtor. Unless the trade name is a corporate name or legal entity, the financing statement will not show up in a filing officer's search. To avoid this problem, place the individual's name in the first blank for debtor. Although not required by law, the trade name can be included in the additional debtor name box.⁹¹

Another error is citing the wrong debtor type. This error occurs when the filer enters the individual's name in the box designated for the entity's name or vice versa.⁹² Related to this type of error are errors that occur when there are multiple debtors. The solution is, one debtor per box. If there are more than two debtors, the filer should submit an addendum. The final area that makes filings ineffective is the inclusion of superfluous information. The general rule is to "[p]rovide nothing more and nothing less than the legal name of the debtor . . . filing instructions should be spelled out in a transmittal letter" rather than in the information box.⁹³

The National Standard UCC form and the EDI technology are the critical tools necessary to revamp the filing system. Article 9 had to be rewritten in order to manipulate these tools. The revised Article 9 part on filing has been expanded from eight provisions⁹⁴ to twenty-seven provisions.⁹⁵ In the revised Article 9, filing comprises Part 5.⁹⁶

VI. CHANGES TO ARTICLE 9 REGARDING FILING

A. FILING OFFICE: REVISED § 9-501

Revised Article 9 seeks to eliminate any confusion as to the proper office for filing. The general rule will be to file in the central office of the jurisdiction where the debtor is located. The only exception to this general rule is for fixtures and other real estate related collateral. Local filing will only be necessary for fixtures and other real estate related collateral.⁹⁷ This will limit local filings to collateral, such as minerals, tim-

91. See Bogus, *supra* note 83, at 6.

92. See *id.*

93. *Id.*

94. See U.C.C. §§ 9-401 to 9-408 (1995).

95. See U.C.C. §§ 9-501 to 9-527 (Proposed Official Draft 1999).

96. See *id.*

97. See *id.* § 9-501.

ber to be cut, mineral-related accounts, and fixtures.⁹⁸ This may prove to be a political stumbling block in some states. Many filing offices will become obsolete making many filing officers expendable. But the cost of secured transactions will drop because creditors' time searching through local filing offices will be reduced.⁹⁹

B. LOCATION OF DEBTOR: REVISED § 9-307

Determining the debtor's location will be similar to the current methods, but there are some minor revisions in the revised Article 9. An individual will still be located at the individual's principal residence.¹⁰⁰ But registered corporations are considered to be located in the state in which the entity is registered, regardless of the corporation's physical presence.¹⁰¹ This will absolve secured parties from having to evaluate where the corporation's chief executive office is located.¹⁰² This simplification will help contain the cost of filing by decreasing the number of filings necessary to secure a claim.

C. SIGNATURE REQUIREMENT: REVISED § 9-502(a)

One of the most significant changes, facilitating the change to electronic filing is that a signature is no longer required on the financing statement.¹⁰³ This will eliminate the inconvenience of obtaining an actual signature from the debtor and the expense of developing software for a digital signature. The formal filing requirements are limited to "(1) the debtor's name; (2) the name of the secured party or its representative; and (3) an indication of the collateral."¹⁰⁴

D. NAME OF THE DEBTOR/SECURED PARTY: REVISED § 9-503

Currently, UCC financing statements are sufficient if they correctly state the debtor's name.¹⁰⁵ But when the financing statement is entered under the trade name, confusion can occur. Some courts have created ambiguity by ruling that a filing under the trade name is sufficient. Revised Article 9 unequivocally eliminates the confusion caused by the judicial decisions by requiring the debtor's correct name and stating that "[a] financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor."¹⁰⁶ Failure to comply with the revised Section 9-503 requirement to file using the correct name of

98. See *id.* § 9-501(a)(1)(A & B).

99. See Alan M. Christenfeld & Shephard W. Melzer, *Get Ready for New Article 9 Part II*, 24 N.Y. L.J. 5 (1997).

100. See U.C.C. § 9-307(b) (Proposed Official Draft 1999).

101. See *id.* § 9-307(e).

102. See Christenfeld & Melzer, *supra* note 99, at 5.

103. Compare U.C.C. § 9-402 (1995) with U.C.C. § 9-502 (Proposed Official Draft 1999) (eliminating need for debtor's signature).

104. U.C.C. § 9-502 cmt. 3 (Proposed Official Draft 1999).

105. See U.C.C. § 9-402 (1995).

106. See U.C.C. § 9-503(c) (Proposed Official Draft 1999).

the debtor will be regarded as "seriously misleading."¹⁰⁷ A "seriously misleading" filing will be ineffective in securing a creditor's priority.

E. INDICATION OF COLLATERAL: REVISED § 9-504(a)

Under the current Article 9, ambiguity exists as to the validity of the use of supergeneric terms to describe collateral in the financing statement. Revised Article 9 specifically allows such descriptions as "all assets or all personal property."¹⁰⁸

F. OPEN DRAWER POLICY

Revised Article 9 initiates an "open drawer" policy on filings by limiting filing officers' discretion.¹⁰⁹ Filing officers must accept all UCC filings meeting the minimum statutory requirements.¹¹⁰ In addition, the filing office must maintain a record of all subsequent filings referencing an original file number until the original file lapses.¹¹¹ Revised Article 9 has no requirement for verification of amendments, assignments, continuations, and terminations.¹¹² "[T]he filing officer will make no determination that the debtor and a secured party match those on the referenced filing. As long as a valid file number is indicated, the financing statement will be accepted and attached to that record."¹¹³ Where filings are rejected when they should have been accepted, they will be considered effective "except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files."¹¹⁴

G. TERMINATION/FILING ENTITLEMENT: REVISED § 9-509(d)

Revised Article 9 gives debtors authority to file termination statements under some circumstances. Debtors may file termination statements if creditors fail to file the statements when required to do so.¹¹⁵ A debtor's termination statement is only effective if the debtor was entitled to the termination by the creditor.¹¹⁶ In keeping with the "open drawer" policy, termination statements will remain part of the record, and the record will remain open until the lapse date of the original filing.¹¹⁷ The net result of the proposed "open drawer" policy regarding termination is that effective termination will be a legal issue and not an administrative one.

107. *See id.* § 9-506(b).

108. *See id.* § 9-504(2).

109. *See id.* § 9-516(d).

110. *See id.*

111. *See id.* § 9-512.

112. Compare U.C.C. § 9-402(4) (1995) with U.C.C. §§ 9-501 to 9-527 (Proposed Official Draft 1999).

113. *Open Drawers*, CAP. TIMES (visited Oct. 9, 1998) <<http://www.capitol-services.com/times>>.

114. U.C.C. § 9-516(d) (Proposed Official Draft 1999).

115. *See id.* § 9-509(d)(2).

116. *See id.* § 9-509(d).

117. *See id.* § 9-522; *Open Drawers*, *supra* note 113.

H. ROLE OF THE FILING OFFICERS

The goal of the “open drawer” policy is to shift responsibility from the filing officers and searchers to the secured parties. No longer will filing officers have to attempt to find errors in financing statements. Neither will the filing officers have the power to pass judgment on the filings’ legal sufficiency.¹¹⁸ Under Revised Article 9, it will be the secured parties’ responsibility to prepare their filings correctly and searchers will have to determine for themselves whether or not the filings are effective.¹¹⁹

I. SECURED PARTIES’ OBLIGATIONS

Revised Article 9 demands more from the secured parties. The general rule regarding termination is only slightly changed. Within twenty days of receiving an authenticated demand from the debtor, the secured party of record must send a termination statement to the debtor or file the termination statement.¹²⁰ The current code requires a response within ten days.¹²¹

The added obligations pertain to the notice requirements upon disposition by the secured party of the non-consumer good collateral. Not only must a secured party send notice to the debtor and secondary obligors who have made themselves known to secured parties, but under the revised code, the secured party must seek out any other secured party or lien holder who held a security interest or lien ten days before the notification date.¹²² The secured party, who is making the disposition of non-consumer good collateral, must now be pro-active in finding parties who may have an interest in the disposition.

VII. CONCLUSION

The current Article 9 is in need of revision. The heart of Article 9 lies in the filing provisions, which no longer reflect the realities of the day. Technology has made the provisions antiquated. Compliance is more of a limitation to constructive business practices than a facilitator to safe business practices.

There is still a need for filing, but the current system needs overhauling. The proposed revision of Article 9 fulfills this need. The proposed new filing provisions are clear enough to provide direction for state legislatures but flexible enough to allow for local variances. The proposed new provisions would meet the needs of commercial institutions as well as the needs of unsecured creditors.

118. *See Open Drawers, supra* note 113.

119. *See id.*

120. *See* U.C.C. § 9-513 (Proposed Official Draft 1999).

121. *See* U.C.C. § 9-404 (1995).

122. *See* U.C.C. § 9-611 (Proposed Official Draft 1999).

Enactment of the proposed Article 9 will not occur without a political struggle in all jurisdictions. The filing offices have long been used as political handouts. Filing officers and those who use the positions as grease for the political wheels will resist changes to the nature of the duties of the filing office. The proposed provisions are sound and ultimately all jurisdictions will benefit from their adoption.