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THE NAME GAME — PLAYING TO WIN UNDER § 9-402 OF THE UNIFORM COMMERCIAL CODE

Julianna J. Zekan*

I. INTRODUCTION

Section 9-402 of the Uniform Commercial Code1 appears to be straightforward and simple to interpret.2 Yet it has provoked extensive litigation, generated thousands of pages of judicial opinions, and created unnecessary uncertainty arising from non-uniform practices and decisions.3 This Article examines the requirements of Section 9-

1. U.C.C. § 9-402 (1989) [hereinafter “Code” or “U.C.C.”]. All references are to sections of the U.C.C. as numbered in the 1989 Code, unless otherwise noted.

2. Section 9-402(1) provides that “[a] financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, . . . gives a mailing address of the debtor.” U.C.C. § 9-402(1) (1989). For the balance of the relevant text of Section 9-402(1), see infra text accompanying note 20. Section 9-402(8) articulates the standard to evaluate legal sufficiency as follows: “A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.” U.C.C. § 9-402(8) (1989). The absence of a consistent application of this standard belies the simplicity of its statement.

3. Compare In re Excel Stores, Inc., 341 F.2d 961 (2d Cir. 1965) (finding that only a minor error occurred when the name “Excel Department Stores” was used instead of “Excel Stores, Inc.”) with First Manufactured Hous. Credit Corp. v. Clarkson Mobile Home Park, Inc., 148 A.D.2d 565, 539 N.Y.S.2d 529 (1989) (holding that in order to perfect a security interest, it is seriously misleading to list the debtor’s middle and last names on the financing statement without also listing the debtor’s first name); compare Willson v. Habershaw Bank, 111 Bankr. 368 (N.D. Ga. 1990) (holding that under Georgia law, filing the financing statement in the trade name rather than the legal name was sufficient) with Cain v. L.B. Smith, Inc. (In re Stebow Construction Co., Inc.), 73 Bankr. 459, 464-67 (Bankr. D.N.J. 1987) (hold-
402, analyzes judicial approaches to the problems arising thereunder with respect to notice, and suggests judicial, administrative and legislative reforms. It concludes that the judiciary should apply a two-tier test to interpret § 9-402(8) and deny perfected status in the absence of the availability of actual notice, that the administrative offices should cooperate to establish consistent routine procedures and conventions with respect to filing and retrieval methods, and that the Code should be amended to specifically require the use of the debtor's legal name on the financing statement.

A. Article Nine's Notice Filing System

Article Nine, now the law in all fifty states, governs virtually all transactions secured by an interest in personal property given through the consent of the debtor to the secured party. It provides
for a self-sufficient system whereby potential creditors may learn of
the existence of any security interest in the debtor's personal prop-
erty by reference to financing statements filed in the public record. A
properly completed and filed financing statement is the key to the
total notice filing system upon which Article Nine relies because it
provides the link between subsequent creditors and existing secured
parties who have given value to the debtor.

Absent such a filing, the potential for defrauding future credi-
tors exists, particularly if the debtor retains the collateral in its pos-
session. A potential creditor, unaware of the interest in the collat-
eral claimed by the earlier creditor, may lend to the debtor in the
belief that the property is unencumbered. The filing and retrieval
of a properly completed financing statement permits the secured
party to establish its seniority and prevents a subsequent creditor
from being misled by the appearance of assets in the debtor's posses-
sion. The financing statement thereby protects both the filer and the
subsequent creditor who searches the record.

in satisfaction of the debt pursuant to U.C.C. §§ 9-503 and 9-504.

6. A financing statement is a notice of the potential existence of a transaction between
the debtor and a secured party. See U.C.C. § 9-402 official comment 2 (1989). Article Nine
simply requires the filing of a notice of the transaction and does not require the filing of the
entire document describing the transaction between the debtor and the secured party. Id. § 9-
302.

7. The proper place to file in the state is identified in Section 9-402(1) of the Code.

515 (Bankr. E.D. Tenn. 1988).

9. Notice filing enables the debtor to retain possession, the creditor to establish its se-
niority, and a prospective creditor not to be misled by the appearance of assets in the debtor's
possession. See id. at 519 (discussing the purpose of a financing statement). To motivate the
creditor to publish notice of its interest for the protection of others the creditor is denied
protected status of its own interest unless the notice provisions of the statute are satisfied. The
basic premise of Article 9 is to invalidate secret consensual liens. Johnson, Changes in the

10. Traditionally, a secured transaction took the form of a pledge in which the debtor
delivered to the creditor physical possession of the personality securing the debt at the time the
debt was incurred. Possession of the collateral by the secured party prevented the debtor from
using the same collateral to obtain additional credit from another source. Retention by the
debtor of pledged property was perceived as a fraud against all others not party to the initial
credit transaction, because possession by the debtor could potentially mislead others into think-
ing that the possessor had exclusive rights to the property. This principle is illustrated by the
famous Twyne's Case, Star Chamber, 3 Coke 80b, 70 Eng. Rep. 809 (1601), which was des-
cribed under the fraudulent conveyance statute of 13 Eliz., ch. 5 (1571).

11. For a discussion of the protections that were contemplated by the drafters, see Con-
sideration of Proposed Final Draft of the Uniform Commercial Code (May 18, 1950), in
Transcript of Discussion on the Uniform Commercial Code, Joint Meeting: The
American Law Institute and the National Conference of Commissioners on Un-
iform State Laws 241-50 (May 1950), reprinted in Karl Llewellyn Papers, Sec. J,
The independent reference system created by Article Nine\textsuperscript{12} hinges upon the proper identification of the debtor to guard against the potential dangers of "hidden liens."\textsuperscript{13} The debtor's name functions as the password to effective communication between the subsequent creditor and the filer. The debtor is identified by name on the financing statement\textsuperscript{14} which is then filed alphabetically by the debtor's name.\textsuperscript{15}

By searching under the debtor's name one would expect to retrieve the financing statements filed against the debtor to determine the existence of prior claims. However, if one name is used for the debtor in filing, and a different name is used in the search process the filing may not be discovered. For example, the filing may have been made under a misstated name, an incorrectly spelled name, or under the debtor's trade name.\textsuperscript{16} By contrast, the subsequent creditor may search only for filings made under the debtor's legal name, and the filings under a name other than the legal name may not be disclosed. Since a debtor may have more than one name, the only truly reliable password representing the debtor is the debtor's legal name.

U.C.C., roll 14, at J.XII.1.i (microfilm).

12. Reliance on an independent public system of notice instead of on the debtor operates as a deterrent against collusion between debtor and creditor to recharacterize their situation to one more favorable than the facts justify. See Baird & Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 Stan. L. Rev. 175, 184-86 (1983).


15. U.C.C. § 9-403(4) (1989) (providing that "the 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.").

16. A trade name is a name under which a person conducts business. Synonyms for trade names include fictitious or assumed names. For example, the local laundromat owned by Joan E. Jones may be known as "Willie's Wishee Washee Laundry." This sole proprietorship may be indicated on a document as "Joan E. Jones d/b/a Willie's Wishee Washee Laundry." "D/b/a" is the acronym for "doing business as." Corporations and partnerships may also do business under trade names. The trade name "Willie's Wishee Washee Laundry" has no resemblance to the legal name Joan E. Jones. A corporate name, such as "Laundry and Dry Cleaning Network, Inc." may be misstated as "Laundry Network, Inc."
Moreover, the ever increasing volume of filings and steady conversion to electronic data input and retrieval systems17 practically compel the use of the debtor's legal name on the financing statement. The key to the successful operation of the notice filing system, then, is the debtor's legal name on the financing statement.

If the debtor is misnamed on the financing statement, a priority conflict may ensue between competing creditors. Such conflicts are too frequent to be ignored, and have occasioned judicial amazement at the creativity of creditors to invent new ways to state the debtor's name.18 The profusion of judicial responses attests to the gravity of the debtor name issue, and to the ambiguities of Section 9-402. Courts have yet to reach consensus on the meaning of § 9-402 or even on the approach to interpretation.19 If the system is to operate effectively there must be consensus on the basic requirements.

B. Section 9-402 Ambiguities

Section 9-402 describes the basic elements of a financing statement as follows:


(1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches . . . . A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor.20

The section caption notwithstanding,21 the absence of explicit mandatory language invites debate on what constitutes a legally sufficient financing statement. A financing statement is "sufficient" if it contains the information described in Section 9-402, but "sufficient"
is not defined. The ambiguous wording suggests that a financing statement might be sufficient if it offers less information or information other than that specified in Section 9-402(1). It is clear that a financing statement will be "sufficient" if it contains the information described, but it is not as clear that all of the items listed are necessary. Moreover, the sufficiency language leaves open the possibility that a financing statement might be sufficient if it offers information other than that specified in Section 9-402(1). Borrowing from another context in the Code, the test of sufficiency might be that the financing statement do the job assigned to it—that the financing statement make possible the notice to a subsequent creditor of a pre-existing security interest in the debtor's collateral. In order to provide notice, the financing statement must be discoverable in response to a request for any financing statements filed in the name of the debtor. The search depends upon proper identification of the debtor at the time the financing statement is filed, so that the financing statement is in the location that will be searched. In order to "do the job assigned to it," the legal sufficiency of the financing statement is therefore dependent upon compliance with the "name of the debtor" requirement in a manner calculated to give effective notice.

It is not clear why the Code speaks in terms of "sufficiency" rather than "requirements." In part, the sufficiency language may have been selected to emphasize the new Code rule that it was enough to file a notice of the transaction instead of the pre-Code obligation to place the entire agreement of the parties on public record. The drafters were concerned that a technically imperfect fi-


23. See U.C.C. § 9-110 official comment (1989) (stating that "[t]he test of sufficiency of a description... is that the description do the job assigned to it—that it make possible the identification of the thing described."). Section 9-110 applies to the description of personal property. Id. § 9-110.

24. The financing statement must also satisfy the other requirements set forth in U.C.C. § 9-402(1) (1989), which include a proper description of the collateral, the signature of the debtor, and the name and address of the secured party.

25. See Carlson, Rationality, Accident, and Priority Under Article 9 of the Uniform Commercial Code, 71 MINN. L. REV. 207 (1986). Professor Carlson posits that with respect to Article 9 there was no single legislative intent, and that the statutory language of Article 9 priorities was the product of unintended drafting error. Id. at 207-210. But see In re Osborn, 6 U.C.C. Rep. Serv. (Callaghan) 227, 231 (W.D. Mich. 1969) (stating that “[i]t was the intent of the drafters that the filing officer be furnished with a 'name of the debtor.'” ).

nancing statement might be invalidated by the courts,\textsuperscript{27} and that rigid language might encourage too strict a construction. The sufficiency language appears to be drafted in reaction to improvident decisions that construed requirements strictly without regard to substantive effect.\textsuperscript{28} The sufficiency language is not intended to abolish requirements, but to enforce requirements to the degree necessary to promote attainment of the purpose for which they were imposed.\textsuperscript{29} Despite the technical absence of explicit mandatory language, it is no longer seriously questioned whether the debtor’s name must be stated on the financing statement, but rather, which name of the debtor must be provided and to what extent deviations will be tolerated.\textsuperscript{30}

Differing perceptions of the objectives of Section 9-402(1) generate opposing views on the legal sufficiency of a financing statement. A financing statement protects the status of the person filing the financing statement and provides notice to subsequent interested parties.\textsuperscript{31} The goals of protection and notice are theoretically consistent and mutually reinforcing. But where legal sufficiency of the financing statement is at issue, the underlying conflict between the two goals surfaces in the judicial approach to the analysis of competing claims. This is particularly evident from a comparison of the decisions analyzed from the different perspectives. From the perspective of the secured party filer, the errors in naming the debtor appear minor, and protection of the filer assumes prominence. Analyzed

\textsuperscript{27} See U.C.C. § 9-402(8) & official comment 9 (1989) (discouraging “fanatical” and “impossibly refined” readings of statutory requirements by the courts); see also Recent Decisions, 38 St. John’s L. Rev. 171, 173 (1963) (stating that courts had come to view filing as a ritual which was to be rigidly adhered to, and had lost sight of the true purpose of filing, which was notice). This attitude has been called “fanatical” and “impossibly refined.” U.C.C. § 9-402(8) official comment 9 (1989).


\textsuperscript{29} Frisch, U.C.C. Filings: Changing Circumstances Can Make a Right Filing Wrong. But Can They Make a Wrong Filing Right?, 56 S. Cal. L. Rev. 1247, 1253 n.28 (1983).

\textsuperscript{30} Occasionally courts find the name requirement in U.C.C. § 9-402(3), the sample form, or in the mailing address of the debtor. See, e.g., In re DG & Assocs., Inc., 9 Bankr. 94, 96 (Bankr. E.D. Tenn. 1981). But see In re Bengtson, 3 U.C.C. Rep. Serv. (Callaghan) 283 (D. Conn. 1965) (holding that only the signature and mailing address of the debtor, and not a separate statement of the debtor’s name, were required under the 1962 Code).

\textsuperscript{31} Through filing and completing the steps specified in Sections 9-302 and 9-303 the filing secured party may achieve perfected status and the priorities awarded in Part 3 of Article Nine. See U.C.C. §§ 9-301, 9-312 (1989). The purpose of the filed financing statement is to provide notice to subsequent interested persons. Id. § 9-402 official comment 2.
from the perspective of the subsequent searcher, the likelihood of actual notice is the paramount concern, and errors that interfere with notice are seriously misleading.

The technical vagueness of the statute permits courts to choose between these competing goals of protection and notice. Favoring protection over notice unfairly shifts transactional burdens and burdens of proof to the subsequent searchers. Therefore, to the extent a choice must be made, it should be in favor of notice. Optimally, consensus should be reached on an approach that unites both goals to preserve and promote the reliability of the system.

Section 9-402 admits the possibility of using another name for the debtor such as a trade name, fictitious name, assumed name, common name, commonly used name, or alias. However, Section 9-402 must presuppose the use of the legal name of the debtor because the system can only operate effectively if it is based on fundamental assumptions that the name identifies the debtor, does not change over time, is universally known, and is verifiable by reference to a reliable official public record. Judicial validation of the use of a name other than the debtor’s legal name through application of Section 9-402(8) challenges fundamental assumptions and undermines the reliability of the system which depends upon the use of one name only for the debtor.

C. Legislative Action

The earliest version of the U.C.C. did not set forth the “name of

33. See also id. ¶ 2.09(1), at 2-68 to -70. See generally McLaughlin, supra note 13, at 976 n.137 (noting that “it was the intent of the drafters [of the U.C.C.] to require the use of the individual, corporate or partnership name.”). The record of the proceedings of the drafting of the U.C.C. did not reveal the reason for omitting a specific reference to the name of the debtor. Karl Llewellyn did raise the potential problem as one that should be discussed, but there is no record of any discussion nor any change to reflect the concerns he expressed. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND AM. LAW INST., UNIFORM COMMERCIAL CODE: PROCEEDINGS IN COMMITTEE OF THE WHOLE 55 (Sept. 1949), reprinted in KARL LLEWELLYN PAPERS, SEC. J, U.C.C., roll 12, at J.XI.9.d. (microfilm). Predecessor statutes similarly offered no explanation.
34. If multiple or variable names for one debtor are judicially permitted to satisfy Code requirements, the scope of the search and the corresponding obligations are greatly expanded. Imposing increased burdens on the searcher in effect shifts the burden of establishing the gravity of error from the secured party filer to the searcher in direct conflict with the express language of Section 9-402(8). Section 9-402(8) requires the secured party searcher to establish that the error is “minor” and “not seriously misleading,” not that the searcher establish that the error is “major” and “seriously misleading.” See U.C.C. § 9-402(8) (1989).
the debtor" as a separate item of information in the text of Section 9-402(1), although it was set forth in the form. The omission may have been an oversight, or may have been implicit in the requirement of the mailing address of the debtor which would include the name, or may have been instinctively identified among literate persons as inherent in the signature of the debtor.

The significance of the omission, of course, is that decisions governed by the 1962 Code were compelled to overcome the technical deficiency of Section 9-402(1). Liberally construing the debtor name requirement, courts may have been reluctant to invalidate financing statements for failure to properly state the name of the debtor when the statute itself did not advise creditors of the critical need to do so. The imperative need to fill, by judicial interpretation, the void


36. See U.C.C. § 9-402(3) (1989). This section provides that: "A form substantially as follows is sufficient to comply with subsection (1):
   Name of debtor (or assignor)
   Address
   Name of secured party (or assignee)
   Address.”

Id. The signature is required at the bottom, after the description of collateral and other information. Id. The portion of Section 9-402(3) relevant to this analysis has remained unchanged through nearly forty years. Compare U.C.C. § 9-402 (Draft 1951) with U.C.C. § 9-402 (1962) and U.C.C. § 9-402 (1972) and U.C.C. § 9-402 (1989).

37. Courts held the name of the debtor to be a requirement by virtue of the form set forth in U.C.C. § 9-402(3), which requests the name of the debtor as the first item on the form. In re DG & Assoc., 9 Bankr. 94 (Bankr. E.D. Tenn. 1981); see also Walker, Creation, Perfection, and Enforcement of Security Interests Under the "Tennessee" Commercial Code, 48 Tenn. L. Rev. 819, 824-25 (1981) (noting that although Tennessee does not specifically require that the name of the debtor appear on the financing statement, it does require the debtor's address to appear and a name is needed in order for the address to be sufficient).

38. See In re Vaughan, 4 U.C.C. Rep. Serv. (Callaghan) 61, 65 (W.D. Mich. 1967) (stating that "if a signature is clear, any indexing under a wrongful spelling [of the debtor's name] would be the fault of the Register of Deeds"). Extrapolating the name requirement from the signature requirement posed difficulties, however, since a signature may not necessarily state any name at all for the debtor by virtue of the Code definition. See U.C.C. § 1-201(39) (1989) (defining "signed" to include "any symbol").

39. See, e.g., In re Bengston, 3 U.C.C. Rep. Serv. (Callaghan) 283 (D. Conn. 1965) (holding that the 1962 Code excused the absence of the correct name of the debtor on the
created by legislative omission during the Code’s infancy has seldom been recognized when evaluating the true weight that should be accorded to these early decisions. Their applicability to current problems in a modern context should be seriously reconsidered and accorded limited precedential value.

The 1972 Official Text of the Code was revised to include a specific reference to the debtor’s name, but several more years elapsed before the respective state legislatures adopted the 1972 Code.\(^4\) Section 9-402(7) was also introduced in the 1972 Code to solve the problems facing courts and counselors with respect to the debtor’s name. Section 9-402(7) provides 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.”\(^4\) This provision indirectly urges the use of the proper legal name of the debtor and eschews the use of trade names or names of individual partners.\(^4\) The Official Comments reinforce this interpretation.\(^4\) But Section 9-

\(^4\) The 1989 Code retains the option of filing a security agreement as a financing statement in Section 9-402(1). Names may be more casually stated on a security agreement, where the identification of the parties to one another is not usually an issue. “The statutory test for the sufficiency of a security agreement, [as opposed to a financing statement], is only that of reasonable identification, ... [and] does not include the prohibition of ‘seriously misleading’ statements ... because a security agreement does not purport to ‘lead’ anyone to anything.” First State Bank v. Shirley AG Service, Inc., 417 N.W.2d 448, 451 (Iowa 1987). To avoid defeating notice, only a security agreement which states the legal name of the debtor should be effective as a financing statement.

\(^4\) U.C.C. § 9-402(7) (1989). This section also states that:
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. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

\(^4\) The text of Section 9-402(7) remains unchanged since its introduction in 1972.

\(^4\) See id. § 9-402(7) official comment 7.

\(^4\) Id. Official Comment 7, unchanged since 1972, provides:
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.
402(7) does not specifically preclude the use of trade names as a sufficient rendition of the debtor’s name, and leaves the ambiguities of Section 9-402 unresolved. 44

D. The Two-Tier Test of Section 9-402(8)

Whatever the requisites set forth in Section 9-402(1), (3), or (7), with respect to the debtor's name, Section 9-402(8) provides a mechanism for redeeming defective financing statements. Section 9-402(8) provides that “[a] financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.” 46

Section 9-402(8) establishes the foundation of the legal standard for evaluating the legal sufficiency of a financing statement. Section 9-402(8) requires only “substantial compliance” with statutory requirements, 46 in contrast to the “exact compliance” standard demanded in General Motors Acceptance Corp. v. Haley, 47 which was decided under pre-code law. Haley invalidated a filing that omitted the suffix “Inc.” from the name of the debtor. 48 The court

44. California adopted a non-uniform amendment which required the “trade name or style,” if one was used, on the financing statement. CAL. COM. CODE § 9402(1) (Deering 1974). In 1974, the United States Court of Appeals for the Ninth Circuit invalidated a filing for failure to include the correct legal name, even though the trade name was provided. National Cash Register Co. v. Danning (In re Thrift Shoe Co.), 502 F.2d 1211 (9th Cir. 1974). The California legislature swiftly repealed the amendment in 1974 to allow, but not require, inclusion of the trade name on the financing statement. CAL. COM. CODE § 9402(1) (Deering 1990). Evidently, the attempt to improve discoverability of the financing statement for anyone searching under the trade name was not worth the sacrifice of invalidating filings made in the legal name only.


46. U.C.C. § 9-402(8) (1989). Compare Bank of Carbondale v. Terry Pierson, Inc. (In re Terry Pierson, Inc.), 84 Bankr. 533, 535 (Bankr. S.D. Ill. 1988) (stating that “the name under which the financing statement is filed must be sufficiently similar to the debtor's name 'so that a reasonably prudent subsequent creditor would be likely to discover the prior security interest.'”) and Lieberman Music Co. v. Hagen, 394 N.W.2d 837 (Minn. Ct. App. 1986) (holding that a financing statement filed by a bank prior to debtor's incorporation was not subsequently made seriously misleading) with General Motors Acceptance Corp. v. Haley, 329 Mass. 559, 109 N.E.2d 143 (1952) (requiring exact compliance with U.C.C. § 9-402(8)).


concluded that the debtor was not properly identified and that the secured party failed to meet its burden of proof that the filing would be located through a search of the record.\(^{49}\) Haley further opined that the filing would be ineffective to perfect the security interest even if it could be found, simply because the name was technically incorrect by virtue of the missing "Inc."\(^{50}\) The decision outraged commercial lenders.\(^{61}\) Drafted in rebellion against Haley, Section 9-402(8) directs the courts not to use technical grounds to invalidate a financing statement that otherwise meets the objectives of notice filing.\(^{62}\) The substantial compliance test established in Section 9-402(8) for evaluating the legal sufficiency of a financing statement should therefore be applied only to promote the purpose of providing effective notice.

Section 9-402(8) invites a two-tier evaluation of a disputed financing statement: (1) the financing statement must substantially comply with Section 9-402(1) requirements, and (2) any error in the financing statement must be minor and not seriously misleading. An evaluation of the gravity and consequence of any error in naming the debtor should be made only if substantial compliance with the requirements has been achieved.\(^{63}\) Under the second tier, any error must be "minor" and "not seriously misleading."\(^{64}\) This formulation suggests that the potential effect of the error on a subsequent person must be considered, because "misleading" necessarily involves another person. It also implies that the burden of proving that the error is "not seriously misleading" rests on the secured party relying on the filing for protection. Shifting the burden to the subsequent searcher to prove that the error is seriously misleading contradicts the statutory mandate.

Differing views on evaluating the error and imposing the burdens have compromised Section 9-402(8) as a standard for determin-

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49. Id. at 564-65, 109 N.E.2d at 146-47.
50. Id.
51. See generally 1956 RECOMMENDATIONS, supra note 45, at 298-300, reprinted in UNIFORM COMMERCIAL CODE: DRAFTS, supra note 45, at 322-24 (discussing the 1956 U.C.C. proposed final Draft).
53. See Wheels, Inc. v. Otasco, Inc. (In re Otasco, Inc.), 111 Bankr. 976, 991 (Bankr. N.D. Okla. 1990) (stating that the purpose of § 9-402(8) is to validate essentially complete and correct financing statements).
54. See supra text accompanying note 45 (reproducing U.C.C. § 9-402(8)).
ing the effectiveness of a properly filed financing statement. Interpretation is further complicated by the tautological nature of Section 9-402(8). Substantial compliance appears synonymous with errors that are not seriously misleading. If the error is seriously misleading, there can be no substantial compliance. If the error is minor, the financing statement substantially complies with Code requirements. But an error that appears to be minor may be seriously misleading and the financing statement therefore would not substantially comply with Code requirements. Difficulties in defining the terms and deciding whose definitions should prevail continue to perplex the courts. Straightforward progress in interpreting this apparently circular provision may be made through implementation of this two-tier analytical process.

E. The Need for Uniform Interpretation

Although analysis of the sufficiency of defective financing statements has almost universally involved a discussion of Section 9-402(8), the standard enunciated therein has neither been applied nor interpreted in a uniform manner. Conflicting interpretations threaten the certainty of perfected status, thwart the predictability of outcomes to disputes, and increase administrative burdens. Expansive interpretations foster confusion with respect to the legal obligations of a secured party and subsequent searchers. Holding that a name other than the debtor’s legal name is not seriously misleading by application of Section 9-402(8) in effect retroactively expands the scope of the search burden imposed on the subsequent searcher. Correspondingly, it diminishes a secured party’s perceived need to accurately state the name of the debtor on the financing statement. Excessive tolerance of deviations in stating the name of the debtor on the financing statement undermines the usefulness of the U.C.C. as a system, threatens its efficiency, and contravenes basic policies of the Code.

55. See infra notes 56-319 and accompanying text.

56. To be certain of protection, additional filings may be made in different names of the debtor, consuming labor, time, space and natural resources. All creditors are burdened including those who rely upon § 9-402(8) in a given dispute because in other transactions they may themselves be the subsequent secured creditors.

57. A system depends on the use of standard information in order to operate, and to operate successfully requires agreement on the key provisions.

58. Volume filings to cover variations serve no useful purpose for the majority of credit transactions, which conclude without incident.

One of the underlying purposes and policies of the Act is "to make uniform the law among the various jurisdictions."\textsuperscript{60} Requiring the use of the legal name on the financing statement, either through legislation or judicial interpretation, will advance the goal of uniformity and improve the reliability of the notice filing system.\textsuperscript{61} While implementation of this policy, with its objective of facilitating commercial transactions, seems obviously directed to the state legislatures,\textsuperscript{62} the statute clearly envisions judicial responsibilities to construe the Code consistently with its underlying purposes and policies.\textsuperscript{63} Courts have recognized their role in promoting uniformity by customarily reviewing opinions without regard to traditional jurisdictional boundaries.\textsuperscript{64} The adoption of a consistent method of analysis should resolve many interpretive difficulties. However, completely uniform interpretations are not likely among the jurisdictions as long as underlying administrative systems of each state are different.\textsuperscript{65}

\textsuperscript{60} Id. § 1-102(2)(c). Even the title of the Uniform Commercial Code proclaims its aspirations for uniformity and concludes with a proclamation of its intention "to make uniform the law" with respect to the subject matter it covers. Id. The other purposes are "(a) to simplify, clarify and modernize the law governing commercial transactions; [and] (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." Id. § 1-102(2).

\textsuperscript{61} 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, 57, 66-67 (1984) (authored by Lawrence Bach) (advocating a per se rule for use of the legal name, but allowing for the approach taken in In re McBee). In National Bank v. West Texas Wholesale Supply Co. (In re McBee), 714 F.2d 1316 (5th Cir. 1983), the Fifth Circuit held that even though the security interest was filed in the sole proprietor's trade name, it was properly perfected. The per se approach invalidates the financing statement for omission of the debtor's legal name. Note, supra, at 57.

\textsuperscript{62} The Uniform Commercial Code was drafted for enactment by each state's legislature. For a discussion of the difficulties in maintaining uniformity of the Code when amendments are made, see Kripke, Mr. Levenberg's Criticism of the Final Report of the Article 9 Review Committee: A Reply, 56 MINN. L. REV. 805, 806-08 (1972).

\textsuperscript{63} See U.C.C. § 1-102(1) (1989) (stating that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies."). The Official Comments thereto advise courts that "proper construction of the Act requires that its interpretation and application be limited to its reason." Id. official comment 1.

\textsuperscript{64} Such boundaries have occasionally been invoked to discharge an unwanted result. See, e.g., Citizens Bank v. Ansley, 467 F. Supp. 51 (M.D. Ga. 1979) (noting that although the Uniform Commercial Code was enacted "to establish standard business laws throughout the United States" and although Georgia courts should apply the Code in uniformity with other jurisdictions, "such reasoning when carried to the extreme would result in Georgia being consistently wrong simply for the sake of consistency, an obviously intolerable result. Georgia should not follow bad Code precedent from other jurisdictions."), aff'd, 604 F.2d 669 (5th Cir. 1979).

\textsuperscript{65} The systems for processing and retrieving financing statements vary significantly. They include manual operations, word processing of the information onto microfilm or into the
Nonetheless, if judicial consensus can be reached on the respective obligations of the parties and on the relevant factors to be considered and routinely applied, the predictability of outcome will yield a measure of certainty that can facilitate transactions and settlement of disputes without unnecessary litigation. A consistent judicial approach, such as the adoption of the two-tier analysis of Section 9-402, would advance the goal of uniformity and improve the reliability of the notice filing system.

II. OVERVIEW OF JUDICIAL APPROACHES

To a large extent, courts agree in theory that a financing statement filed in the name of the debtor should be discoverable by a searcher. The traditional judicial formulation of the Section 9-402(8) standard parallels the statutory language. A financing statement must substantially comply with requirements, and a financing statement that "contains minor errors that are not seriously misleading" is sufficient to perfect the security interest of the secured party filer.66 This universal restatement of the principle cloaks a multitude of complex and interlocking variables. Almost as numerous as the cases in controversy, judicial approaches can, however, be grouped into three broad categories.

The first category holds that the use of the legal name of the debtor is always appropriate and legally sufficient. The legal name substantially complies with Code requirements,67 whether or not trade names appear on the financing statement, and irrespective of

memories of various types of computers, or image processing whereby sophisticated equipment visually scans the financing statement and reads relevant information into data banks. The procedures may also differ. For example, different files may be maintained for business debtors and for personal debtors, or different protocols may be followed with respect to alphabetizing the financing statements. See J. Zekan, supra note 17. A name that is similar to the debtor's legal name may be discovered by "thumbing through the files" in a manual system in which personal and business files are integrated, but may not be discovered if the files are separated or if the office is computerized. Id. A court that interprets Section 9-402(8) on the assumption of a manual system may conclude that an error is minor and not seriously misleading, whereas a court that interprets Section 9-402(8) to require evaluation of the financing statement in the context of a computerized system and actual notice may conclude otherwise with respect to the same debtor name error.

67. See First Manufactured Hous. Credit Corp. v. Clarkson Mobile Home Park, Inc., 148 A.D.2d 901, 539 N.Y.S.2d 529 (1989) (holding that the legal name is required and substantially complies with the statute provided it is properly presented in traditional form: first name, middle initial, last name; a form which was not present in this case).
68. See U.C.C. § 9-402(7) official comment 7 (1989) (stating that "[t]rade names are deemed to be too uncertain and too likely not to be known to the secured party or person
any error that may appear in the trade name. The second category consists of a few, highly influential opinions that hold that the requirement for the "name" of the debtor under Section 9-402(1) may, under special circumstances, be satisfied by the use of the debtor's trade name. Such use does not constitute any error at all under Section 9-402(8) no matter how different the trade name appears to be from the legal name. In both the first and second categories, the decisions turn on the first tier of the analysis: the substantial compliance component of the legal sufficiency standard.

The third category generally acknowledges that deviations from the debtor's legal name constitute error, but the defects are not necessarily fatal. In the struggle to define contours of acceptable deviation these courts apply modified forms of the "sufficiently related" or "substantial similarity" test first articulated in In re Platt to compare the defective name against the debtor's legal name. However, some courts place more emphasis on the notice function of the financing statement and on realities of the filing system than on apparent name similarity. Two basic analytical frameworks reflecting these divergent approaches have emerged in the third category. Legal sufficiency of a financing statement is viewed either from the perspective of the secured party who prepares and files the financing statement, or from the perspective of the potential creditor who subsequently searches the public record. In both, the second tier of the

69. Brushwood v. Citizens Bank (In re Glasco, Inc.), 642 F.2d 793 (5th Cir. Unit B Apr. 1981); see also In re Simpson Motor Co., 101 Bankr. 813 (Bankr. N.D. Ga. 1989) (holding that the filing of a financing statement in debtor's trade name rather than the legal name of the corporation is not per se improper under Georgia law), aff'd sub nom. Willson v. Habershaw Bank, 111 Bankr. 368 (N.D. Ga. 1990). Contra Pearson v. Salina Coffee House, Inc., 831 F.2d 1531 (10th Cir. 1987) (holding that a security interest was unperfected where the filing was made under debtor's trade name rather than its legal name).

70. For a description of a trade name and an example, see supra note 16.

71. The first major case to articulate this view was Brushwood v. Citizens Bank (In re Glasco, Inc.), 642 F.2d 793 (5th Cir. Unit B Apr. 1981), discussed at infra notes 117-34 and accompanying text.


73. See, e.g., Bank of Carbondale v. Terry Pierson, Inc. (In re Terry Pierson, Inc.), 84 Bankr. 533 (Bankr. S.D. Ill. 1988) (holding that since financing statements are indexed according to the debtor's name, "the name under which a filing is made must be . . . [one] 'that a reasonably prudent subsequent creditor would be likely to discover.'").

74. Compare In re Excel Stores, Inc., 341 F.2d 961 (2d Cir. 1965) (holding that a
Section 9-402(8) analysis figures prominently, but with different emphasis. An analysis from the preparer’s perspective tends to minimize the magnitude of the error, whereas an analysis from the searcher’s perspective tends to concentrate on the seriously misleading consequences of the error. This latter, functional approach is consistent with the liberal treatment of most of the requirements of § 9-402(1), but it does demand a generally strict reading with respect to the key feature — the name of the debtor — so that the filing will not be seriously misleading to a subsequent searcher.

There is no unified approach in this third category, which copes with interpreting Section 9-402(8) through diverse assessments of a variety of factors. Apart from the varying perspectives of review, courts have differed in their perceptions of relevant facts and allocation of legal burdens. Some courts have rejected consideration of

security agreement which would have permitted any interested person searching the record to be put on notice that there was an outstanding lien and that communication with the officer who signed it may be appropriate was a “minor error” which was not “seriously misleading”) and Northern Commercial Corp. v. Friedman (In re Leichter), 471 F.2d 785 (2d Cir. 1972) (holding that a subsequent creditor searching under the debtor’s legal name would not find the security interest which was filed and indexed under the debtor’s trade name) with Dietrich-Post Co. v. Alaska Nat’l Bank of the North (In re McCauley’s Reprographics, Inc.), 638 F.2d 117 (9th Cir. 1981) (holding that while the usual approach is to make a factual inquiry into the extent to which an error in the financing statement would be misleading to one undertaking a reasonable search, due to the peculiar circumstances in this case, i.e., the name of the debtor listed erroneously as a partnership rather than a corporation, the court must determine whether the financing statement was seriously misleading).


76. Cf. Kay Automotive Warehouse, Inc. v. McGovern Auto Specialty, Inc. (In re Mc-
administrative procedures and policies while other courts have found them outcome determinative. Results may differ depending upon whether the type of system in operation is manual or electronic; these facts should be considered in reviewing opinions across jurisdictional boundaries. Advanced technological filing and search systems do impact on the commercial realities of the situation, and judicial interpretation of 9-402(8) should be flexible enough to accommodate these innovations. Opinions differ on whether the transactional burdens with respect to a filed financing statement should rest more heavily on the preparer to prepare a more accurate financing statement or on the searcher to expand the scope of the search. The analysis should focus, however, not only on the respective burdens between the disputing claimants but even more so on the effect of burden allocation on the system as a whole.

Because of the complexity of issues, cases do not comfortably fit within specific categories. Cases have also been analyzed in the courts by reference to the type of error: misspellings, partial rendition of the debtor's actual name, omission of corporate suffixes, or the use of the trade name instead of the true name. The name used may not be the perfectly correct form of the name; for example, a hyphen might be present or absent, the word "company" might be present, absent or abbreviated, or a vital name might be abbreviated when it should have been spelled out in full. Error classification,
however, leads to fact specific decisions that only invite subjectivity and virtually preclude objective application of the standard for legal sufficiency of a financing statement. While investigation of the type of error may be very instructive with respect to formulating computer programs to minimize the effect of the error, analysis through error classification does not significantly advance the development of a consistent standard that may be applied regardless of the type of error involved.

The lack of consensus on these issues contributes significantly to the proliferation of interpretations of Section 9-402 provisions. The courts are in general agreement that the dispositive question to determine a financing statement’s legal sufficiency with respect to the debtor’s name is “whether a . . . search under the debtor’s . . . name would uncover the filing.”81 Courts do not agree on what name must be used, what constitutes the scope of a legally sufficient search, what facts must be considered, who bears the transactional burdens, the search burdens, and burdens of proof; and courts do not agree on whether the errant financing statement should be compared to the correct form only or reviewed within the context of the actual filing system. The perspective from which the court reviews these issues plays a significant role in the analysis.

A. The First Category: The First Tier Test of Substantial Compliance

A challenge to the use of the debtor’s legal name on the financing statement evokes a straightforward application of Section 9-402. The “name” in Section 9-402(1) is construed to mean the “legal name” of the debtor; its use “substantially complies” with requirements under the first tier of the § 9-402(8) test and there is no error to evaluate under the “seriously misleading” test of the second tier.82

81. In re Davadick, 82 Bankr. 391, 393 (Bankr. W.D. Pa. 1988); see also Dietrich-Post Co. v. Alaska Nat’l Bank of the North (In re McCauley’s Reprographics, Inc.), 638 F.2d 117, 119 (9th Cir. 1981) (stating that “[w]hen the name of the debtor has been erroneously listed on the financing statement, the dispositive question is usually whether or not a reasonable search under the debtor’s true name would uncover the filing.”); In re Hinson & Hinson, Inc., 62 Bankr. 964, 966 (Bankr. W.D. Pa. 1986) (quoting the rule from McCauley’s Reprographics). But see Brushwood v. Citizens Bank (In re Glasco, Inc.), 642 F.2d 793 (5th Cir. Unit B Apr. 1981) (not confining the name requirement or the search to the legal name of the debtor); National Bank v. West Texas Wholesale Supply Co. (In re McBee), 714 F.2d 1316 (5th Cir. 1983) (same).

82. See supra notes 52-55 and accompanying text (explaining the two-tier evaluation test of U.C.C. § 9-402(8)).
1. The Debtor's Legal Name.—In *In re Penn Housing Corp.*, the earlier secured party filed in the debtor's legal name. The challenger argued that the financing statement did not substantially comply with requirements and that the financing statement was legally insufficient because it contained the debtor's true name instead of the debtor's trade name. The challenger, the later purchase money secured party, filed in the debtor's trade name but failed to give actual written notice to the earlier secured party of its purchase money interest. The purchase money holder claimed it was excused from giving notice because the earlier creditor had used the debtor's true name and not the commonly known trade name that the debtor used in its transactions with its suppliers. The court struck down the challenge and held that the earlier secured party's filing in the true name perfected its interest and provided sufficient notice of the earlier creditor's interest. Priority was denied to the purchase money secured party. The court construed “name” in Section 9-402(1) to clearly encompass “the legal name” of the debtor and held that use of the legal name substantially complies with the § 9-402(1) requirement.

The use of the debtor's legal name on the financing statement has not yet been held against the secured party filing such statement. Where the debtor's legal name was properly stated on the financing statement, attempts to invalidate financing statements due to errors in the trade names have consistently been rebuffed. In one of the earliest cases, the court held that misstating the trade name as

84. *Id.* U.C.C. § 9-312(5) (1989) awards priority to the first secured party to perfect its security interest. U.C.C. § 9-312(3) reverses the general rules of priority stated in § 9-312(5) and enables a purchase money secured party in inventory, who perfects later in time, to take priority over an earlier perfected party if it satisfies special requirements, including the giving of actual written notice to prior parties of record concerning its intended purchase money interest in the inventory of the debtor.
85. Abbreviations of the legal name may also suffice, at least where the indexing system produces the filing in response to a request in the legal name. *In re Southern Supply Co. of Greenville, N.C.*, Inc., 405 F. Supp. 20, 23 (1975); *see also* Citizens Nat'l Bank v. Wedel, 489 N.E.2d 1203, 1207 (Ind. App. 1986) (holding that the elimination of the article “The” in the corporate name “The Post, Inc.” was a minor error and not seriously misleading, and that the test of legal sufficiency is a question of law, not of fact).
86. *See In re Farm & Home Supply Co.*, 22 U.C.C. Rep. Serv. (Callaghan) 1081, 1086 (W.D. Pa. 1977) (stating that “[w]e have been unable to find any [cases] in which a filing in the debtor’s real name is insufficient”). *Farm & Home Supply* sustained the validity of the secured party's filing in the legal name of the corporation over the challenger's claim that the filing should have been made in the debtor's trade name, which had been the name of the partnership prior to incorporation. *Id.*
“Cozy Kitchen” instead of “Kozy Kitchen” was at most a minor error which was not seriously misleading because the debtor’s name Edmund Carroll was properly provided and the financing statement would have been correctly indexed under “Carroll.” If the financing statement is filed under the debtor’s legal name, the original financing statement continues to be effective even if the trade name listed on a financing statement changes completely into a different trade name.

2. Errors in Stating the Debtor’s Legal Name.—The use of the legal name is not without its difficulties, however, even if no trade name is involved. In Central National Bank & Trust Co. v. Community Bank & Trust Co., the debtor James Lee Anderson obtained four loans from three different financial institutions using the same automobile as collateral. The debtor obtained a loan from the first bank under the name “Lee Anderson,” and another loan from a second bank under the name “James L. Anderson.” To determine whether the error was “seriously misleading” under Section 9-402(8) the court applied common law estoppel to place the loss upon the one who by his conduct created the circumstances which enabled the debtor to perpetrate the wrong or cause the loss. Because the first bank did not take steps to protect against the wrongs perpetrated by the debtor and failed to use the proper legal name of the debtor, the first bank’s interest was held inferior to that of the

87. National Cash Register Co. v. Firestone & Co., 346 Mass. 255, 259, 191 N.E.2d 471, 474 (1963) (stating that the trade name was “merely part of the name and style under which the debtor, an individual, did business”). For an in depth discussion of National Cash Register, which was a case of first impression under the Massachusetts U.C.C. interpreting the legal sufficiency of description of collateral with respect to after acquired property, see Case Note, 13 De Paul L. Rev. 172 (1963-64).

88. This phrase, “True name filings in a D/B/A case,” was borrowed from Drysdale v. Cornerstone Bank, 562 S.W.2d 182, 184 (Mo. App. 1978) who coined it as the “jargon of commercial lawyers.” Id.; see also Hemminger v. Allied Farm Equip. (In re Hemminger), 20 Bankr. 357 (Bankr. W.D. Pa. 1982) (finding that under § 9-402(7) a seriously misleading change in the name of the debtor necessitates a new filing only if the true name, not the trade name, changes); Borg-Warner Acceptance Corp. v. Wolfe City Nat’l Bank, 544 S.W.2d 947 (Tex. Civ. App. 1976) (ruling that the filing against debtor Lloyd E. Nations continued to be effective even after the sole proprietor changed its trade name from Nations’ David Brown Tractor Company to Nations’ Tractor Company).

89. 528 P.2d 710 (Okla. 1974).
90. Id. at 713.
91. Id. at 712. The filing and retrieval systems treated the names as belonging to two different people. See id.
92. Id. at 713. The court called this principle the “two innocent persons” principle, or the “doctrine of estoppel by negligence,” and regarded both the filer and the searcher as innocent parties. Id.
second bank. The Court impliedly reviewed the sufficiency of the financing statement from the perspective of the searcher and concluded that reasonable diligence would not require the second bank “to examine all the secured transaction[s] index[ed] under the name ‘Anderson.’” The scope of the search was limited to the proper legal name of the debtor, and the use of “Lee Anderson” instead of “James L. Anderson” was seriously misleading. Under Anderson, the proper legal name of the debtor consists of a first name and last name, and the proper legal name is not only legally sufficient; it is legally necessary.

In re Arnold was “just another in a long line of cases dealing with the debtor’s name.” Filing under the name “Jack Arnold” was held not to perfect a security interest under “Herschel J. Arnold” because the names were perceived as identifying two different persons, and a search for one name would not lead to discovery of filings for the other’s name. Since it was not the policy to look at signatures, the fact that the Jack Arnold financing statement was signed “Herschel J. Arnold” was irrelevant. Cases that declined to review the signature for clarification of the debtor’s name signified a departure from the lenient interpretation prevalent during the Code’s infancy. Those cases that resorted to the comparison of the name with the signature presumed that the financing statement would be discovered in the first place. Such presumptions of discovery are no longer valid due to the sheer volume of filings. Moreover, advanced technology virtually precludes such immediate comparison. Greater accuracy and stricter construction is required. The legal name must be used, and it must be stated in the first line of the form, not in the signature.

Recently, the courts reinforced this concept of the proper legal name in First Manufactured Housing Credit Corp. v. Clarkson Mobile Home Park, Inc. The subsequent secured party, who had used the debtor’s full legal name, prevailed over the earlier creditor whose

93. Id.
94. Id.
95. See id.
96. See id.
98. Id. at 1484.
99. See id. at 1480 (relying upon the testimony of the filing registrar to determine the likelihood of discovery of the financing statement as filed).
financing statement only partially stated the name. The challenged financing statement referred to the debtor by her middle and last name, “Gail Keaton,” and was signed “Charline Gail Keaton,” the debtor’s usual signature. To determine whether the earlier creditor’s error was seriously misleading, the court queried whether a reasonably diligent searcher would be likely to discover the financing statement when searching for the debtor’s correct name. The court measured the extent of the discrepancy between the true name and the name listed in the context of the filing system. Since the listings were alphabetical, the use of the incorrect first name “Gail” on the financing statement would have prevented discovery of the financing statement in question, absent an examination of all of the financing statements on record under the last name “Keaton.” The court held that such an examination would impose unreasonable burdens on the searcher. The scope of the search was limited to the proper legal name of the debtor. Failure to state the first name of the debtor in the earlier creditor’s financing statement constituted a major and seriously misleading error and the financing statement was therefore not “saved” by § 9-402(8).

By contrast, the defendant’s error in describing the debtor on the financing statement as “Charlene Keaton,” instead of “Charline Keaton,” was held to be minor because the error in the first name did not interfere with the discovery of the financing statement in the context of the system. “Charlene” and “Charline” would be recognizable as referring to the same person. As in Central National Bank & Trust Co. v. Community Bank & Trust Co. and In re Arnold, Clarkson regards the legal name as the first and last


102. See also Beneficial Fin. Co. v. Kurland Cadillac-Oldsmobile, Inc., 57 Misc. 2d 806, 293 N.Y.S.2d 647 (Sup. Ct. 1968), rev’d on other grounds, 32 A.D.2d 643, 300 N.Y.S.2d 884 (1969) (holding that “Shelia” was not seriously misleading for “Sheila”).

103. By contrast, even if only one letter is incorrectly stated in the debtor’s last name, the error is seriously misleading because the possibilities for searching are limitless. John Deere Co. v. William C. Pahl Constr. Co., 59 Misc. 2d 872, 300 N.Y.S.2d 701 (Sup. Ct. 1969) (holding “Ranelli” to be a seriously misleading error for the name Ranalli”), aff’d, 34 A.D.2d 85, 310 N.Y.S.2d 945 (1970). Where the debtor’s name was Boisclair Corporation, the insertion of a blank space rendering the debtor’s name on the financing statement as Bois Clair Corporation was the equivalent of a misspelling and constituted fatal error. Chemical Bank v. Title Services, Inc., 708 F. Supp. 245 (D. Minn. 1989) (reaffirming the rule that a searcher has no duty to anticipate spelling errors of the secured party).

104. 528 P.2d 710 (Okla. 1974).

name of a debtor, at least where that name is uniformly used to sign documents.\textsuperscript{106}

3. \textit{Intentional Errors, Omissions, and Common Names}.—At least one court has stated in no uncertain terms its refusal to tolerate intentionally misleading information on a financing statement. In \textit{In re Parks}, which involved the removal of collateral from California to Ohio, the financing statement was falsified to show, among other things, an erroneous date which was put on the financing statement even though no date was required.\textsuperscript{107} The falsifications were an “attempt to impeach, desecrate, tamper with and profane a public record, and . . . are major errors and as such are neither excused nor forgiven [by Section 9-402(8)].”\textsuperscript{108} Presumably, if bad faith could be shown on the part of a secured party who intentionally erred in naming the debtor, this court, and perhaps others, would find the error per se major and seriously misleading.

By contrast, intentional deviations from accuracy were not regarded as “errors” at all in \textit{Wheels, Inc. v. Otasco, Inc. (In re Otasco, Inc.)}\textsuperscript{109} and, therefore, did not qualify for the savings provision of § 9-402(8) and were not excused. Even if they were errors, they would be major and would prevent perfected status.\textsuperscript{110}

The omission of a debtor’s legal name is a fatal defect.\textsuperscript{111} In rejecting trade name substitution for the debtor’s legal name, the Ninth Circuit explained, in \textit{Van Dusen Acceptance Corp. v. Gough (In re Thomas)},\textsuperscript{112} that “[i]f the debtor's name is not given, the pur-

\textsuperscript{1479} (W.D. Mich 1977).


\textsuperscript{108}. \textit{Id.} at 445 (Emsley, Ref., order on rehearing) (construing \textbf{OHIO REV. CODE ANN.} § 1309.39(e) (Baldwin 1967)).

\textsuperscript{109}. 111 Bankr. 976, 992 (Bankr. N.D. Okla. 1990) (stating that “the certificates of title misname[d] the secured party as the ‘owner,’ [did] not contain the real owner’s name or address at all, and [did] not disclose the existence, let alone the date, of any security agreement. These misstatements and omissions [were] not inadvertent but [were] deliberate and intentional, committed in furtherance of a scheme to misrepresent the true nature of the transaction.”).

\textsuperscript{110}. \textit{Id.}

\textsuperscript{111}. \textit{Van Dusen Acceptance Corp. v. Gough (In re Thomas)}, 466 F.2d 51, 52 (9th Cir. 1972). Such errors in the secured party's name are not necessarily fatal because they may not result in a failure of notice to subsequent searchers. \textit{See Unsecured Creditors Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.), 907 F.2d 1430 (4th Cir. 1990). But see id. at 1435 n.6 (cautioning that “secured parties should use their legal names rather than trade names in order to prevent any possible confusion and subsequent litigation.”)}.

\textsuperscript{112}. 466 F.2d 51 (9th Cir. 1972).
pose of the statutory scheme of requiring [the] security interest to be perfected by filing a financing statement — to give notice to future creditors of the debtor — would be seriously undermined.”

A financing statement in the debtor’s true name is legally sufficient even if the debtor is generally known in the community by another name. For example, in United States v. Smith, the fact that the debtor was known in the community as “Malcolm Hurt” could not be used to defeat the perfected status of the secured party who had filed its financing statement in the debtor’s legal name, “James M. Hurt.” An argument that the commonly known name should be used instead of the legal name “undermines the notice filing scheme contemplated by the U.C.C. and . . . it must be rejected.” Use of the legal name of the debtor has always been sustained. From the foregoing cases and the minimal litigation over the sufficiency of the legal name, one is hard pressed to justify the use of any name other than the true legal name of the debtor.

B. The Second Category: The First Tier Test and the Glasco Approach

The foregoing analysis of sister courts notwithstanding, Brushwood v. Citizens Bank (In re Glasco, Inc.) held that the use of the debtor’s trade name instead of the legal name substantially complied with Section 9-402(1) requirements. The Glasco decision is remarkable because it parted from the usual cases which allowed trade

113. Id. at 52; accord New York Credit Men’s Adjustment Bureau, Inc. v. Hempstead Bank (In re Pasco Sales Co.), 52 A.D.2d 138, 383 N.Y.S.2d 42 (1976). Contra Brushwood v. Citizens Bank (In re Glasco, Inc.), 642 F.2d 793 (5th Cir. Unit B Apr. 1981) (finding that the use of the trade name “Elite Boats, division of Glasco, Inc.” perfected the security interest, as, in the court’s view, it sufficiently put future creditors on notice). The financing statement in Pasco Sales for an entity representing itself as “Pacific Supply Co., division of P.S.C. Products Corp.” was filed by the Register of the county, in literal compliance with the statute, only as the name appeared, and was not cross-indexed against the corporate name. Pasco Sales, 52 A.D.2d at 140, 383 N.Y.S.2d at 43. The trade name filing did not comply with the Code requirements, and the defect was fatal to the secured party’s claim of perfection. Id. at 143, 383 N.Y.S.2d at 45.


115. Id.

116. Id. at 508.

117. 642 F.2d 793 (5th Cir. Unit B Apr. 1981). Glasco has been the subject of extensive commentary. See, e.g., DeKoven, Annual Survey of the Uniform Commercial Code: Secured Transactions, 37 Bus. Law. 1011, 1033-34 (1982) (discussing how Glasco leads away from uniform practice in this area of the law); Del Duca & Del Duca, Judicial Highlights, 15 U.C.C. L.J. 84, 88 (1982) (discussing whether a reasonable search under the debtor’s true name would uncover a filing).
names if they closely resembled the legal name.\textsuperscript{118} In \textit{Glasco}, the disputed financing statement stated the debtor's trade name as "Elite Boats, Division of Glasco, Inc." instead of the legal name, "Glasco, Inc."\textsuperscript{119} Application of the traditional name similarity approach would disqualify the financing statement as legally insufficient because "Elite Boats" is not similar to "Glasco," and the lack of similarity from an alphabetical perspective would render the error seriously misleading.\textsuperscript{120} The \textit{Glasco} Court, however, applied a different approach that bypassed the name similarity test.

The trade name effectively qualified as the "name," and substantially complied with § 9-402(1) requirements under the first tier of the Section 9-402(8) test if it satisfied the \textit{Glasco} criteria of notoriety, consistency, exclusivity, and business use.\textsuperscript{121} Alternatively, if it was error to use a surrogate name, such error was only minor and not seriously misleading under the second tier of the § 9-402(8) test because a reasonably prudent searcher would conduct a search in the trade name as it was the only name the debtor used.\textsuperscript{122} As such, the trade name filing would be discovered even in the absence of any similarity to the debtor's legal name and would provide notice of the security interest described in the financing statement. The \textit{Glasco} Court agreed with the filer's contention that since the debtor's name "Elite Boats" was well known, consistently applied, and was the only name used by the corporate debtor, the use of such trade name on the financing statement was sufficient to perfect the security interest in the debtor's collateral. The court agreed in part because the debtor was a business, not an individual, and the loan was for business purposes. \textit{Glasco} distinguished between an individual debtor\textsuperscript{123} using a

\begin{footnotes}
  \item[118] See the discussion of \textit{In re Platt} at infra notes 204-16 and accompanying text.
  \item[119] \textit{Glasco}, 642 F.2d at 795. The secured party floor planned the debtor's inventory of marine engines for the debtor, who was a manufacturer and seller of boats in Florida. \textit{Id.} The promissory notes, security agreement, and financing statement were all executed in the debtor's trade name, and the financing statement was so indexed. \textit{Id.}
  \item[120] At the time of the \textit{Glasco} filing, no separate fees were charged for cross-indexing, and there appeared to be no fixed policy on cross indexing. \textit{See Self, supra note 19, at 120, 121 & n.54. But since 1981, Florida's forms were revised to provide sufficient space to separately index names, and each separate name is cross indexed with a separate fee charged. See id.}
  \item[121] \textit{Glasco}, 642 F.2d at 796. \textit{But see Bank of Mississippi v. Pongetti (In re Hill), 363 F. Supp. 1205 (N.D. Miss. 1973)} (rejecting the trade name even though it satisfied those tests).
  \item[122] \textit{Glasco}, 642 F.2d at 796.
  \item[123] U.C.C. § 9-105(1)(d) (1989) defines "debtor" as "[t]he person who owes payment or other performance of the obligation secured."
\end{footnotes}
trade name, and an artificial person\textsuperscript{124} using a trade name, on the theory that the trade name of an individual was the equivalent of a second entity, and would be seriously misleading.\textsuperscript{126} Under this theory, one entity, the individual, engages in personal transactions unrelated to business activities such as buying food, paying rent, and contracting various debts in the individual's own name. The other entity, the trade name, is an extension of the person for business purposes and may be unknown to persons who engage in personal transactions with the individual. The individual's business debts are contracted in the individual's own name, even if a trade name is used, and the individual is personally responsible for the "business" debts. But because personal creditors may not know of security interests filed under a name different from the individual's name, the trade name acts as a separate entity, and is or can be misleading.\textsuperscript{126} Therefore, under this "two entity" theory, the use of only a trade name on a financing statement to represent an individual debtor is ineffective to perfect a security interest.\textsuperscript{127} However, since the debtor in\textit{Glasco} was a corporation, all prudent creditors would be expected to look for a business name and not be misled by the use of a trade name instead of the debtor's legal name.\textsuperscript{128}

The \textit{Glasco} analysis is superficially appealing. The reasons for the secured party's use of the trade name on the financing statement

\textsuperscript{124}U.C.C. § 1-201(30) (1989) includes "an individual or an organization" in the definition of "person." An "Organization" includes "a corporation, government, . . . partnership, . . . two or more persons having a joint or common interest, or any other legal or commercial entity." \textit{Id.} § 1-201(28).

\textsuperscript{125}\textit{Brushwood v. Citizens Bank (In re Glasco, Inc.),} 642 F.2d 793, 796 (5th Cir. Unit B. Apr. 1981); \textit{see also Siljeg v. National Bank of Commerce (Henry House Packing, Co.),} 509 F.2d 1009, 1012 (9th Cir. 1975) (noting that an individual debtor carries on personal transactions apart from his business while an artificial entity does not); \textit{Northern Commercial Corp. v. Friedman (In re Leichter),} 471 F.2d 785, 787 (2d Cir. 1972) (holding that a filing in the trade name of an individual debtor rather than in the debtor's legal name was insufficient even though the debtor conducted his business under the trade name).

\textsuperscript{126}For a variation on this theory, see \textit{National Bank v. West Texas Wholesale Supply Co. (In re McBee),} 714 F.2d 1316 (5th Cir. 1983) (holding that a filing of a security interest in the sole proprietor's trade name was sufficient where the trade name was consistently and ostensibly used to refer to the business).

\textsuperscript{127}\textit{See Glasco,} 642 F.2d at 796; \textit{see also Hobart Corp. v. North Cent. Credit Serv., Inc.,} 29 Wash. App. 302, 628 P.2d 842 (1981) (holding that a financing statement that listed the trade name "Country Market" instead of the individual's name "Dean Nielson," was seriously misleading). \textit{But see McBee,} 714 F.2d at 1321-25 (holding that the filing made under the trade name only was not seriously misleading even though the debtor was an individual because "any reasonably diligent searcher would probably have been more likely to discover this filing than one in either individual's name.").

\textsuperscript{128}\textit{Glasco,} 642 F.2d at 796.
appear justified, or at least reasonably understandable. The function of notice appears to be served. Glasco, however, marks an enormous departure from a traditional approach to the issues of legal sufficiency and errs in its fundamental assumptions.

By definition, a trade name cannot be the only name used because of the parallel existence of a true legal name of the person responsible for the debt.129 Requiring a search in the trade name presupposes the very knowledge that the searcher lacks because a trade name exclusively used at the time of filing may no longer be exclusive or even in existence at the time of search.130 Even if Glasco infers exclusivity at both points and at all times during the life of the financing statement, a searcher cannot be sure that such use was exclusive and may not even be aware of its use. The obligation to search the trade name unfairly burdens the searcher and the filing system. Further, the searcher is unfairly burdened because the obligation to search in the trade name is imposed retrospectively, by a court that subsequently determines what the search obligations should have been.131 At the time a particular search must be made, a particular searcher may be operating under the assumption that he has complied with the general rule which limits the scope of a reasonable routine search to the debtor’s legal name.132 Such a searcher, who has relied upon the results of a search conducted in the debtor’s legal name, may be unfairly surprised by a court’s subsequent imposition of an expanded obligation in his particular case.133 If searchers

129. In Glasco, the debtor was a corporation. Id. at 795. The Articles of Incorporation, By-Laws and Corporate Resolutions must bear the corporate name. See H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 118, at 272-75, § 133, at 306-10 (3d ed. 1983 & Supp. 1986). The corporate name is used in correspondence with the Secretary of State regarding payment of annual dues to remain in good standing. Any law suits pending against the debtor must be brought in the debtor’s corporate name. Id. § 352, at 1020.

130. Conversely, a trade name exclusively used at the time of a search may not have been so used at the time of filing. U.C.C. § 9-402(7) official comment 7 (1989) rejects trade names as “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, U.C.C. § 9-403(5) (1989) provides for indexing in a trade name if the secured party so desires.


132. The general rule limiting the scope of the search to the debtor's legal name was applied in Northern Commercial Corp. v. Friedman (In re Leichter), 471 F.2d 785 (2d Cir. 1972).

133. See, e.g., Glasco, 642 F.2d at 795; McBee, 714 F.2d at 1319. But see Note, supra note 61, at 68-69. The author suggested that Glasco used a notice analysis because Glasco
become aware of the potential risks of post hoc review, they may begin to routinely conduct searches in the debtor’s trade name. In effect *Glasco* imposes on every searcher the burden of discovering the debtor’s trade name and conducting a search in the trade name of the debtor, as well as in the legal name.

This burden is all the more unfair because there is no reliable way for a searcher to discover what trade name or names the debtor uses. The efficiency of an entire system should not be jeopardized for the sake of justifying a filer’s use of a trade name. All searchers will be unfairly burdened. Moreover, the multitude of search requests will add to everyone’s costs, unduly burden the operation of the system and produce only marginal benefits.

1. *Expansion of the Glasco Approach.*—Although the *Glasco* decision has generated substantial criticism, it has been followed in the Fifth Circuit and in the Eleventh Circuit. *National Bank v. West Texas Wholesale Supply Co. (In re McBee)* expanded the *Glasco* analysis and suggested that a trade name filing might actually provide better notice of a prior security interest than a legal name.

imposed the condition that the creditors know the debtor’s trade name. *Id.* at 58-59. However, notice that presumes knowledge essentially begs the question of notice.

134. Even a searcher who is aware of the debtor’s trade name is not expected to search for such name because of its inherent unreliability, the language of U.C.C. § 9-402(7) and views expressed in the Official Comments thereto, and usual commercial practice. There is no reliable way to discover what trade name the debtor uses. Fictitious name registration statutes only provide a mechanism for discovering the true name of the debtor if the trade name is already known; there is no mechanism for discovering the trade name if only the true name is known. Moreover, not all jurisdictions have assumed, trade, or fictitious name registration statutes. See Weise, *U.C.C. Article 9 - Personal Property Secured Transactions, 45 Bus. Law. 2475 (1990)* (criticizing a rule which would require a subsequent creditor to search for even a widely-used fictitious name registration).

135. One author succinctly expressed his view of the secured party filer’s responsibility to state the debtor’s name properly on the financing statement: “Is it asking too much of secured parties, in order to preserve their security interests, to get one thing right?” Note, *supra* note 61, at 71.


138. 714 F.2d 1316 (5th Cir. 1983).
name filing. Moreover, *McBee* applied *Glasco* to validate the use of a trade name for an individual debtor, a view that *Glasco* expressly rejected.

*McBee* involved three creditors, two debtors, and a transfer of ownership of the collateral. In January 1979, Cynthia K. McBee obtained a loan from National Bank of Texas on behalf of Joe Ben Colley which was collateralized by equipment and inventory of the business he operated under the trade name "Oak Hill Gun Shop." The financing statement listed the debtor as "Oak Hill Gun Shop" and was signed by McBee as "partner." National Bank perfected by filing a financing statement against "Oak Hill Gun Shop." West Texas Wholesale Supply Co. subsequently extended goods on credit and filed a financing statement securing the same collateral and listing "Joe B. Colley d/b/a Oak Hill Gun Shop" as debtor. Colley then transferred all of his interest in the business to McBee. RepublicBank-Austin then loaned against the same collateral and it filed a financing statement against "C.K. McBee dba Oak Hill Gun Shop" as debtor. It should be noted that in the hotly contested priority dispute that ensued, the two financing statements which accurately stated the legal name of the debtor went completely unchallenged, and were legally sufficient. The priority dispute turned on whether the name "Oak Hill Gun Shop" was seriously misleading and whether the Oak Hill financing statement was legally sufficient. Applying the *Glasco* criteria, the court held that the trade name filing was valid. *McBee* expanded *Glasco* by holding that a trade name of an individual debtor was a proper name to be searched. Even more boldly, *McBee* stated that in some cases, use of the trade name might actually provide better notice than the debtor's own name, because all creditors knew the trade name. This view suggests that the legal name of the debtor is not legally

140. *McBee*, 714 F.2d at 1318.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 1321-22. The *Glasco* Court opined that such use would be seriously misleading. *Brushwood v. Citizens Bank (In re Glasco, Inc.)*, 642 F.2d 793, 796 (5th Cir. Unit B Apr. 1981).
147. *McBee*, 714 F.2d at 1321.
sufficient, a view that is abundantly unsupported by the decisions.\textsuperscript{148}

Moreover, the element of knowledge as a critical factor in the court's analysis presents a conflict with the federal standard of review in bankruptcy and creates separate tests based on the status of a litigant. The \textit{Glasco/McBee} approach refers to a trustee in bankruptcy as a "reasonably prudent" creditor.\textsuperscript{149} The \textit{Glasco} approach presumes that a searcher would have knowledge of a trade name comprehensively used by the debtor, and that a creditor should use this knowledge in the course of its investigation of the debtor. This knowledge is imposed even on a trustee in bankruptcy, whom \textit{Glasco} considers to be in the position of a "hypothetical but prudent creditor."\textsuperscript{150} The federal Bankruptcy Code provides that a trustee has extensive powers "without regard to any knowledge of the trustee."\textsuperscript{151}

Therefore, a trustee should not be treated as having knowledge of a debtor's trade name. The attribution of knowledge of the trade name to a searcher who is not a trustee bifurcates the test for "seriously misleading" financing statements based on the status of the conflicting claimant as secured party or trustee. However, Section 9-402 does not contemplate one test for searches by trustees and a separate test for knowledgeable searchers. Consequently no subsequent searchers should be penalized with knowledge of the debtor's trade name. The absence of legislative authority for a bifurcated test based on the status of disputing claimants demands a contraction of the scope of the search. Without knowledge of the trade name, the search obligation must resume its original contours under Section 9-402 and be confined to a search in the debtor's legal name only. Without an expanded search obligation, the use of the trade name must be scrutinized under the second tier test for seriously misleading error,\textsuperscript{152} and the \textit{Glasco/McBee} approach must therefore be rejected.

The \textit{McBee} approach involved much more than Article 9 issues and its precedential value should be limited by its facts. The transfer of property from Colley to McBee constituted a Bulk Sale under Texas law, triggering application of the Bulk Sales provisions of Ar-

\textsuperscript{148} See \textit{supra} pp. 383-89.

\textsuperscript{149} See \textit{Glasco}, 642 F.2d at 796; \textit{McBee}, 714 F.2d at 1321.


\textsuperscript{152} See \textit{supra} notes 45-55 and accompanying text (discussing the two-tier test of § 9-402(8)).
The transferee, McBee, failed to comply with her obligations under Article 6 to notify the transferor's creditors of the impending sale. This precluded Colley's creditors from protecting their collateral or from filing new financing statements publicizing their security interest. Article 6 provides such creditors with a six month grace period, as opposed to a four month period under Article 9, to realize and act upon their interests. Reasoning that a whole Article should not be emasculated by a minor provision, the McBee Court resolved to reach a result that effectuated Article 6 without unduly disturbing Article 9. From the perspective of Colley's creditors, McBee's creditor should have been aware of the trade name and the probable existence of prior creditors. The McBee Court reasoned that a search in the trade name would not be unreasonable since such a search would disclose the filing made in the trade name. The error, therefore, if it existed at all, was not seriously misleading. Consequently the trade name filing was upheld principally to effectuate Article 6 principles, not Article 9.

2. The Glasco Approach: Eleventh Circuit Application.—In

154. Id. at 1326-27; see TEX. BUS. & COM. CODE ANN. §§ 6.104, 6.105 (Vernon 1968).
155. McBee, 714 F.2d at 1326-27.
156. TEX. BUS. & COM. CODE ANN. § 9.402(g) (Vernon 1982-83) (providing a four month period for refiling upon the name change of the debtor).
158. See generally Morris, supra note 139. Professor Morris, observing that the court should have considered U.C.C. § 9-306(2) which provides much greater protection than Article 6, stated that "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." Id. at 254 n.114.
160. See id.
161. Other factors were not directly evident but may have guided the court to use this approach. Colley's wife, Rita, obtained a decree of divorce the same month as Colley opened his business and Colley refused to make alimony payments. See Ex Parte Colley, 621 S.W.2d 649, 650 (Tex. Civ. App. 1981); McBee, 714 F.2d at 1318 (nothing that Colley operated his business from Jan. 1979 until May 1980). Judgment on this issue in favor of his wife roughly coincided with Colley's transfer of his business to his girlfriend, Cynthia McBee, with whom he lived. See Colley v. Colley, 597 S.W.2d 30 (Tex. Civ. App. 1980) (stating that judgment was entered on April 12, 1979); McBee, 714 F.2d at 1318 (noting that on May 5, 1980 Colley assigned his interest in the business to McBee). RepublicBank, whom the court held inferior to the other claimants, testified that it had failed to inquire about the transaction. The McBee opinion leaves much open to inference.
1990, the United States District Court of Georgia resurrected the *Glasco* analysis\(^{162}\) which was previously adopted by the Eleventh Circuit.\(^{163}\) Despite strenuous and well reasoned arguments to the contrary, the district court in *Willson v. Habersham Bank*,\(^{164}\) affirming the bankruptcy court’s decision in *In re Simpson Motor Co.*,\(^{165}\) held that a financing statement was legally sufficient even though it listed the trade name “Cornelia Car City” instead of the debtor’s legal name “Simpson Motor Company, Inc.”\(^{166}\) Both the debtor’s status as a corporation\(^{167}\) and the “total absence of any existence or business under any name other than [the debtor’s] trade name” were critical to the holding.\(^{168}\) The *Simpson* Court found that the first tier of the § 9-402(8) test, substantial compliance,\(^{169}\) was met, deciding that it was not error to use the trade name.\(^{170}\) Applying the second part of the test, whether potential creditors would have been misled by the debtor’s name listed in the bank’s financing statement,\(^{171}\) the *Simpson* Court considered how the debtor was known in the community by reference to the signs on the debtor’s place of business, advertising, telephone listing, checks, sales orders, inventory schedules, designation as payee on bank drafts and other instruments, and its reputation in the community.\(^{172}\) The *Willson* Court held that the trade name was not misleading because “a reasonably prudent creditor would have requested a search under the [debtor’s] trade name as well as the legal name.”\(^{173}\) Obviously, this presumes that the searcher knows the trade name or would discover

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162. See supra notes 117-34 and accompanying text.
163. See supra note 137 (discussing the Fifth Circuit split and the subsequent ruling by the Eleventh Circuit which makes decisions of the Fifth Circuit issued prior to Sept. 30, 1981 binding as precedent for the Eleventh Circuit).
166. *Willson*, 111 Bankr. at 368.
167. The distinction between individual and corporate debtors was “crucial.” Compare *Simpson*, 101 Bankr. at 815-16 with *Brushwood v. Citizens Bank (In re Glasco, Inc.),* 642 F.2d 793, 796 (5th Cir. Unit B Apr. 1981).
169. See U.C.C. § 9-402(8); see also supra notes 45-55 and accompanying text.
170. *Simpson*, 101 Bankr. at 815 (emphasizing the searcher’s option to check the trade name index).
171. See U.C.C. § 9-402(8); see also supra notes 45-55 and accompanying text.
it in the course of business. *Simpson* qualified the trade name as "the name" because it satisfied the criteria set forth in *Glasco* and *McBee* regarding consistent, exclusive, and notorious use.174

The *Glasco* approach and its permutations enables the court to find in favor of the earlier secured party by ostensibly using the traditional tests set forth in Section 9-402(8). By the *Glasco* definition, use of the trade name substantially complies with requirements for naming the debtor. There is no error to be evaluated and a financing statement filed in the trade name cannot be misleading to a searcher who must conduct the search in the trade name. Thus, the financing statement is legally sufficient and perfects the security interest of the secured party filer. This circular approach reflects a preference for defending the status of an earlier secured party over subsequent creditors who depend upon the functioning of the general notice system. While *Simpson*, *McBee*, and *Glasco* appear to be concerned with the notice function175 of the financing statement by couching their evaluation in search terms, they actually ignore the fact that a search in the legal name of the debtor would not reveal the disputed financing statement. Rather, *Simpson* excuses the filer's failure to use the legal name by expanding the subsequent searcher's obligation to search under the trade name.176

3. Additional Difficulties with the *Glasco*/*Simpson* Approach.—The *Glasco* line of reasoning does not properly address the substantial compliance test of Section 9-402(8). Instead, the requirement of the debtor's name is perceived as a function of the actual or imputed knowledge of the disputing parties, not as an objective item of information that must be provided in response to legislative direction and systemic needs. The criteria of notoriety, consistency, exclusivity, and business use establish knowledge of the trade name in order to justify the preparer's use of the trade name or to justify the

174. *See supra* note 121 and accompanying text. Not only should the trade name be well known, but according to one commentator a court reviewing the facts should allow the *McBee* approach only if it "is positive" that all creditors were aware of the debtor's trade name and would naturally have searched under that name. *Note*, *supra* note 61, at 66-67.

175. When *Simpson* reached the district court on appeal, the court noted that *Glasco* was "concerned with . . . '[t]he purpose of the filing system [which] is to give notice.'" *Wilson* v. *Habersham Bank*, 111 Bankr. 368, 370 (N.D. Ga. 1990) (quoting *Brushwood* v. *Citi-izens Bank* (*In re* *Glasco, Inc.*), 642 F.2d 793, 795 (5th Cir. Unit B Apr. 1981)).

176. *In re* *Simpson Motor Co.*, 101 Bankr. 813, 815 (Bankr. N.D. Ga. 1989), *aff'd sub nom.* *Wilson* v. *Habersham Bank*, 111 Bankr. 368 (N.D. Ga. 1990). In response to the trustee's argument that the filer should have been more careful and filed in the legal name, which it knew, the court ruled that the filing was acceptable unless it was "so egregious as to breach [the filer's] obligation of good faith." *Id.* at 816.
imposition of the additional burden to search for financing statements under the debtor's trade name. With these justifications, the errors seem minor or nonexistent, and both tiers of the § 9-402(8) test are easily satisfied. However, the proper inquiry under Section 9-402 concerns the legal sufficiency of the financing statement, not whether a creditor must expand the scope of its search. Converting the seriously misleading test from a direct discovery issue into a scope of search question substantially changes the analysis and shifts the burdens from the filer to the searcher. The searcher is obligated to look for filings against the debtor; the searcher should not be obliged to undertake additional burdens to correct the mischief caused by the filer's error. Under *Glasco*, *McBee*, and *Simpson*, a search conducted in the trade name would reveal a financing statement filed in the trade name, but just as certainly, a search in the legal name of the debtor would not have revealed the earlier filing. If a filer can rely upon the legal name of the debtor as legally sufficient, then so too should the searcher be able to rely upon the sufficiency of its search conducted in the debtor's legal name.

This *Glasco* obligation to search in the trade name is premised on the condition that the debtor uses no other name and, therefore, no creditor would be misled by the name used. As none of the courts have defined the point in time at which exclusive use is determined, additional confusion is sure to result. Perfected status under the Code dates from the time of filing. It would be logical to find that the sufficiency of an instrument upon which filing depends, and therefore, exclusive use, should also be determined as of the date of filing. The debtor's exclusive use of its trade name would tend to explain a secured party's use of that name on the financing statement at that time. However, the search obligation should more realistically be linked to exclusivity at the time of the search. But if exclusivity is determined at the time of the search, then the secured

177. *See Glasco*, 642 F.2d at 796 (stating that "where the company does business only under one name, the opportunity for creditors to be misled is substantially reduced.").
179. This understandable error is probably why problems arise in the first place. The heart of the solution is encouraging awareness of the substantive purpose of preparing and filing financing statements instead of excusing procedural compliance that defeats underlying Code objectives. That is an ultimate U.C.C. irony: in the pursuit of elevating substance over form, the Code is liberally construed to save defective financing statements that elevate form over substance. If the financing statements are prepared without conscious regard for the notice purpose, the mere ritual of completing the form should not be rewarded where the potential for defeating notice is likely.
party’s perfected status depends upon events subsequent to filing; the continued exclusivity of the debtor’s trade name compelling searchers to search for filings in that name.

Justification of the secured party’s use of a debtor’s trade name on the financing statement by reference to exclusivity of use is ex post facto reasoning, since the determination of what name to use is made before it can be determined whether the debtor will have used only one name by the time the searcher subsequently looks for the financing statement. Such reasoning should be rejected. The effectiveness of the financing statement should not turn on later events; it should be independent of later events. The legal sufficiency of a financing statement should be measured against the standard legal requirements, and should be tested for substantial compliance and for the seriously misleading nature of any errors.\(^{180}\) If the statute stated explicitly that the legal name is required, even amateurs could easily comply. There is virtually no additional burden placed on a secured party filer to provide the legal name on the financing statement. Loans should be properly documented and the “reasonably prudent” standard should apply to preparers as well as to searchers. Moreover, if legal sufficiency depends upon exclusive use, as is the case in Glasco, perfected status is in the hands of the debtor, who could destroy exclusive use and perfected status by adopting additional names. Finally, even if perfected status once attained is not subject to defeasance by virtue of the debtor’s conduct, serious questions arise regarding the searcher’s obligations which the searcher cannot answer with reasonable certainty. If the debtor has more than one name at the time a potential creditor is expected to search, the search will not be extended beyond the legal name under Glasco,\(^ {181}\) and the standard search will not reveal financing statements in the trade name. It would be unreasonable to expect a searcher to determine when or whether a debtor used a trade name exclusively.\(^ {182}\)

4. **Tri-Partite Disputes and the Circular Priority Problem.**—Suppose the corporate debtor’s legal name is “Man in New Dimensions, Inc.,” and that the name on the financing statement is

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181. See Brushwood v. Citizens Bank (In re Glasco, Inc.), 642 F.2d 793, 796 (5th Cir. Unit B Apr. 1981). The Glasco criteria include the finding of exclusivity. See discussion at infra notes 186-87 and accompanying text.

182. The debtor may not remember other trade names, nor should a secured party be expected to rely on the debtor. Furthermore, fictitious registration systems do not enable discovery of trade names.
the trade name "MIND, INC.," which is based on the acronym for the corporate name. Assume that the financing statement was filed by the secured party First Bank in the appropriate places\(^{183}\) on July 13, 1988. Assume that in August, 1990 the debtor opened a new establishment in a neighboring county under the name "Mind Over Matter." Both establishments sell computers and related equipment and software. Under \textit{Glasco}, if a routine search were made in 1989, the subsequent potential creditor would be obliged to conduct a search in the legal name and trade name of the corporation, and First Bank would have a perfected security interest as against Second Bank. But if Second Bank searched in September, 1990, what is the effect and status of First Bank's 1988 filing?

Did First Bank have a perfected security interest for two years, until 1990 when the debtor began using another trade name? If so, the debtor can actually destroy the perfected status by his own actions.\(^{184}\) Or did the subsequent use of an additional trade name, making the earlier trade name's use non-exclusive, mean that First Bank had no perfected status at all, even from the beginning of those two years? Perfection cannot be a creation that springs into being or evaporates based on events subsequent to the filing. The time for imposing the obligation to expand the search to include the trade name, if the obligation is imposed at all, is the time that the subsequent creditor enters into the transaction with the debtor. This time frame will necessarily determine perfected status, by application of Section 9-402(8) as interpreted by \textit{Glasco} and \textit{Simpson}. A subsequent creditor who is under no obligation to search in the trade name will, in searching under the debtor's legal name only, not discover a trade name that is substantially different from the legal name, and will not take subject to the undiscovered earlier filing. Conversely, a subsequent creditor obligated to search under the trade name by virtue of the debtor's exclusive use of it at the time of the subsequent creditor's transaction with the debtor, will lose to the prior discovered secured party. The operation of the \textit{Glasco} rule conflicts with the statutory rules for priority, which relate to the dates of the filings, not to the dates of any search obligations or creditor

\(^{183}\) Pursuant to § 9-401 of the applicable state Code, filing may be made locally in the county, centrally in the Office of the Secretary of State, or in both places. See U.C.C. § 9-401 (1989).

\(^{184}\) This ignores for the moment the creditor's own actions regarding the name on the financing statement.
This hypothetical illustrates that besides exclusivity, the *Glasco* elements of notoriety and consistency are also open to question. A name well known in 1988 will not necessarily be remembered in 1991. The status quo is not a prediction of the future. Yet it is the future creditor for whom the filing must provide notice. A popular public name may change. Even a legal name may change; but there is a mechanism for tracing the legal name reliably, whereas there is no such system for tracing trade names if they are not already known. The only reliable standard for a system is the legal name at the time of filing. Moreover, the *Glasco* analysis disintegrates in a priority conflict involving more than two claimants, as illustrated by continuing the hypothetical.

If the trade name “MIND, INC.,” is consistently and exclusively used at the time of First Bank’s filing, First Bank might be said to have perfected status under *Glasco*. Subsequently, Second Bank files in the debtor’s legal name even though the debtor, “Man in New Dimensions, Inc.,” still uses the trade name “MIND, INC.,” exclusively and consistently. Under *Glasco* Second Bank would lose to First Bank because Second Bank could have discovered First Bank’s security interest by searching under the trade name.

If Trinity Bank files in the legal name of the corporation in January, 1991, while the debtor is using both trade names, neither trade name remains consistently or exclusively used. Trinity Bank is therefore under no obligation to search for MIND, INC. and First Bank’s filing would remain hidden. First Bank would lose to Trinity Bank, but Trinity Bank would lose to Second Bank. Both Second Bank and Trinity Bank perfected in the legal name and the standard priority rules render the victory to the first perfected, here Second Bank over Trinity Bank. Since First Bank was not discoverable at the time of Second Bank’s filing, the circular priority loop renders First Bank superior to Second Bank, Second Bank superior to Trinity Bank, and Trinity Bank superior to First Bank.

This hypothetical illustrates that the *Glasco* analysis produces inconsistent and anomalous results. In the tripartite dispute, First Bank is perfected with respect to Second Bank, but unperfected with

185. See U.C.C. § 9-301 (1989) (listing the rules of priority between creditors); id. § 9-312 (setting forth priority rules between conflicting secured parties dependant upon the date of filing or perfection).

186. Once the legal name is used by Second Bank, exclusive and consistent use is destroyed by definition, since the debtor has just used a name other than the trade name to transact business.
respect to Trinity Bank. This dual and contradictory status has no statutory basis and is at odds with the concept of an organized and reliable system. Where the fundamental purpose of the system is to provide notice of the potential existence of prior claims, contradictory status cannot be countenanced.

This contradictory status of “floating perfection” flows from the Glasco requirement of searching in the debtor’s trade name where the use of such name is exclusive. Perfected status depends upon the scope of the search of the subsequent creditor. Where the trade name was exclusively used, as it was at the time Second Bank perfected its security interest, Second Bank would be obligated to conduct a search under the trade name as well as the legal name, and would be inferior to First Bank’s status. At the time of Trinity’s interest, however, the use of the trade name was non-exclusive, and Trinity’s search would be sufficient if conducted under the legal name only. Trinity would therefore prevail over First Bank although it would be inferior to Second Bank who had perfected under the debtor’s legal name. Second Bank would be defeated by the person who lost to the party over whom Second Bank prevailed. There is no method in the Glasco analysis to resolve the circular priority contest. The analysis fails to provide a logically consistent method for resolving priority disputes, and the Glasco test therefore fails to establish a meaningful standard for interpreting the seriously misleading test of Section 9-402(8). Any name similarity test is also potentially subject to this circular priority, because the discoverability depends upon circumstances that may change over time. The integrity of a system based on name similarity, although not perfect, is more defensible than one based on a trade name/legal name dichotomy because it is independent of any individual debtor’s manipulation. In name similarity cases, the circumstances may relate to volume of filings, type of system, or size of the community, factors which are not within the control of the debtor.

By contrast, in Glasco and in Simpson, the nonexclusive use of the trade name is totally within the control of the debtor, even though the system is designed to protect creditors. The circular priority problem would not arise in a system that requires the use only of the debtor’s legal name. The use of the debtor’s legal name is particularly desirable in an electronic data system, which measures the searched name against the target name through comparison of
electronic impulses not through human perception.\textsuperscript{187}

5. The Impact of Section 9-402(7) on Trade Name Cases, and Non-Uniform Amendments.—Section 9-402(7) was enacted to encourage the use of the debtor's legal name.\textsuperscript{188} Despite Florida's enactment of Section 9-402(7) subsequent to \textit{Glasco}, the \textit{Willson} Court regarded \textit{Glasco} as controlling\textsuperscript{189} because Section 9-402(7) does not explicitly state that filing under the trade name is insufficient.\textsuperscript{189} According to \textit{Willson}, since 9-402(7) does not require the legal name, the Florida amendment did not affect the precedential authority of \textit{Glasco}.\textsuperscript{190} The \textit{Willson} Court observed that the Georgia legislature declined to retire the use of the trade or true name when it adopted the standard U.C.C. § 9-402(7) despite extensive debates over which name should be used on the financing statement.\textsuperscript{192} Had the legislature intended a trade name filing to be insufficient, concluded \textit{Willson}, the Georgia legislative could have written the statute accordingly.\textsuperscript{193}

Texas recently adopted an amendment that requires the use of the debtor's legal name or a name that is so similar that the financing statement would be discovered upon a search conducted in the debtor's legal name.\textsuperscript{194} The Texas modification requires a trade name filing to withstand vigorous review including identification of the debtor, substantial resemblance to the debtor's name, and dis-


\textsuperscript{188} For a discussion and the text of Section 9-402(7), see supra notes 41-44 and accompanying text.

\textsuperscript{189} \textit{Glasco}, a Fifth Circuit case, became binding as precedent in the Eleventh Circuit under Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981). See supra note 137.

\textsuperscript{190} \textit{Willson} v. Habersham Bank, 111 Bank. 368, 369 (N.D. Ga. 1990). \textit{Glasco} was decided under Florida law prior to enactment of § 9-402(7). See \textit{id}. The governing provisions of the Georgia statute in \textit{Willson} were identical to the Florida statute as amended. See \textit{id}. The Official Comments urging non-use of the trade name were tersely dismissed as "not the law," and not applicable to corporations since only partnerships and proprietorships were mentioned in § 9-402(7). \textit{Id}. But see U.S. Cylinders, Inc. v. Vital Breathing Prod., Inc. \textit{(In re Vital Breathing Prod., Inc.)}, 98 Bankr. 97 (Bankr. N.D. Ga. 1988) (removing itself from \textit{Glasco}'s grip in reliance on the post-\textit{Glasco} Florida amendment and other distinguishing facts).


\textsuperscript{192} \textit{Willson}, 111 Bankr. at 369.

\textsuperscript{193} \textit{Id}.

\textsuperscript{194} \textit{TEx. BUS & \textsc{COM. CODE ANN.} § 9.402(g) (Vernon Supp. 1990) (stating that "[f]iling under a trade name or assumed name alone shall not be sufficient to perfect a security interest unless the trade name or assumed name is so similar to the debtor's legal name that the trade name or assumed name filing would be discovered in a search of the filing officer's records."). The Texas amendment became effective Sept. 1, 1989. \textit{Id}.}
closure in response to a routine search of the debtor's legal name.\textsuperscript{195} The Texas amendment clearly limits the scope of a reasonable search to requests in the debtor's legal name, thereby shifting to the secured party filer the risk of using a name other than the debtor's legal name. By referring to discovery of the financing statement through a search of the filing officer's records,\textsuperscript{196} the legislature conveyed its expectation that an evaluation of legal sufficiency should consider actual filing practices. Its non-uniform language notwithstanding, the Texas statutory response to the confusion attending Section 9-402 is a most welcome step to satisfying the goals of uniform practice and interpretation.\textsuperscript{197} Enactment of non-standard variations of the U.C.C. in order to clarify the ambiguities of Section 9-402 may, ironically, lead to a more uniform application and interpretation.

6. \textit{Shifting Burdens}.—The burden of obtaining the correct name and determining the business structure is minimal, usually requiring nothing more than a Certificate of Good Standing from the Secretary of State's Office and a review of current corporate or partnership documents. In a properly documented transaction these documents are routinely reviewed\textsuperscript{198} so the additional burden is nonexistent. The only purpose for relieving the secured party filer of this burden is to affect the outcome of litigation in order to protect the secured party filer despite its failure to provide the proper name on the financing statement.

Imposing the burden on the subsequent creditor to search under various names because the secured party filer was relieved by the court of any obligation it may have had to file under the correct name of the debtor, creates tremendous system wide inefficiencies, promotes litigation, and is unfair. At the time of entering into the

\textsuperscript{195} For a discussion of these criteria, see \textit{In re} Waters, 90 Bankr. 946 (Bankr. N.D. Iowa 1988), discussed at \textit{infra} notes 321-28 and accompanying text, and \textit{In re} Platt, 257 F. Supp. 478 (E.D. Pa. 1966), discussed at \textit{infra} notes 204-16 and accompanying text.


\textsuperscript{197} \textit{See} American Savings \& Loan Ass'n \textit{v.} Schepps, No. 01-88-00570-CV (Tex. Ct. App. Apr. 7, 1990) (LEXIS, States library, Tex file) (noting that if the amended Texas Code § 9.402(g) had been in effect at the time the secured party filed its financing statement in the debtor's trade name, its filing would not have been effective). The court held that the trade name was not seriously misleading, however, it should be noted that since \textit{American Savings} is an unpublished decision, pursuant to Rule 90(i) of the Texas Rules of Appellate Procedure, it has no precedential value.

\textsuperscript{198} Review is recommended, if for no other reasons than to determine that borrowing for the designated purposes is authorized and within the scope of the business, and to reduce concern over non-payment of taxes and other fees.
transaction with the debtor the subsequent creditor does not know that litigation will result; the subsequent creditor does not even know that it is "subsequent" if the results of its search do not indicate a previous claimant. Retroactive imposition of additional search obligations operates as a penalty on a person who is not aware of the existence of the obligation at the point in time when it might have been capable of fulfillment. Penalizing a person for failure to fulfill an obligation that such person did not even know existed is not within the spirit of the U.C.C., which specifically rejects punitive damages measures.\textsuperscript{199} The only way to preclude a post hoc invalidation result\textsuperscript{200} is for the subsequent creditor to conduct multiple searches with respect to all transactions with all debtors, because it does not know in advance which debtor transactions will eventually be litigated. This burden will affect all creditors at the time of entering into transactions with all debtors, because no creditor can be sure of its status unless all avenues of search have been exhausted. Since any number of trade names may be used, the searches are potentially limitless, and there is no certainty in knowing whether or when a search is complete. The suggestion that an expanded search is necessary only where one trade name is used does not mitigate the searcher's burden, since exclusive use of only one name may also be open to debate. A debtor may no longer use only one trade name, trapping the searcher into believing that there may not have been a time of exclusive use of one name.

At the very least there may be legal disputes over the existence and duration of exclusive use, attendant problems of knowledge and proof, and interpretation of the new burden fostering further uncertainty over the nature and extent of obligations. To say that the scope of a reasonable search in the usual case consists of a search in only the legal name, but that in this particular dispute the scope of the search includes additional search obligations, creates a non-system of "floating obligations," which is a legal oxymoron. Obligations must be fixed and known in advance to provide a reasonable opportunity for the obligor to fulfill the obligations. The retrospective imposition of search obligations should be judicially and legislatively

\textsuperscript{199} U.C.C. § 1-106(1) (1989). While not exactly punitive damages, the concept is broad enough to apply, where in effect the subsequent claimant is damaged to the extent of the loss of its interest and the value thereof, as a penalty for failing to meet extended burdens.

\textsuperscript{200} By retrospectively imposing an increased burden of search that the subsequent creditor failed to meet, the court may divest the subsequent creditor of rights it thought it had in the debtor's collateral.
discouraged.
Finally, the imposition of a general obligation to search all of the debtor's names, or more than the debtor's legal name, is inefficient in the extreme. Most transactions identify the debtor by the correct name, so searches for other names would be fruitless or redundant. Most transactions reach successful conclusion without dispute, and searches beyond the minimum are, therefore, of no consequence.

C. The Third Category: The Second Tier Test of Minor and Not Seriously Misleading Errors

At least two different formulations of the two-tier test have developed. One approach applies the Section 9-402(8) test from the perspective of the secured party filer. This test provides that the name of the person legally responsible for the debt should be used unless names are so similar that a prospective creditor, upon seeing the trade name in the records, would be alerted that there might be a prior security interest in the involved collateral. This approach assumes discovery and relies upon the subjective perceptions of a searcher to make a connection between the name stated on the financing statement and the debtor's name. If the name used appears similar to the legal name, the error is regarded as minor. This approach suggests coincidental discovery, because the error is viewed on its face and not in the actual context of that state's filing system.

By contrast, other courts structure the analysis from the perspective of the subsequent searcher. This formulation of the seriously misleading test of Section 9-402(8) inquires whether, in the course of a routine search for the debtor's name, the errant filing would be revealed. This approach employs an objective standard to investigate whether the errant filing would be discovered by reference to specific facts and constraints of the applicable filing and search system and calls for systematic discovery as a prerequisite to legal sufficiency.

Both perspectives focus on the second tier of the analysis, with different emphasis on the elements. The filers tend to view errors as

201. Such searches would not reveal any additional useful information. See National Bank v. West Texas Wholesale Supply Co. (In re McBee), 714 F.2d 1316, 1321 (5th Cir. 1983).

minor; the searchers may regard the same errors as seriously misleading. The more modern cases focus less on whether the names are similar and more on whether the similarity will routinely lead to actual notice.203

1. Minor Errors and Name Similarity: Platt and Progeny.—In re Platt204 continues to be relied upon as the principal case validating the use of the debtor's trade name provided it closely resembles the debtor's legal name. "The Platt decision stands for the proposition that where the debtor's trade name is substantially similar to the debtor's true name, the failure to include the true name with the trade name is not a seriously misleading error."205 Ironically, the referee in Platt referred to the name issue as only "satellite to the central question,"206 which concerned the sufficiency of the collateral description concerning after-acquired property.207 With respect to the name issue, the referee in bankruptcy noted that the first secured party, a bank, had properly perfected by filing financing statements under the names Henry Platt and Platt Fur Company, and that the financing statements had been indexed under both names. The filing by the junior creditor, F.C.A., named only Platt Fur Company as the debtor. A search of the public records under the name of the debtor Henry Platt would not have disclosed the junior creditor's financing statement.208 Since the earlier secured party received priority by the referee's decision on the after-acquired property issue, the referee concluded that the name issue did not affect the outcome. In an ambiguous statement, the referee noted the absence of any evidence that would "affect the effectiveness of

203. See infra notes 320-47 and accompanying text.
207. The question in Platt was whether the financing statement was sufficient to perfect a security interest in the debtor's after-acquired inventory, accounts receivable, and proceeds where the financing statement described the collateral simply as "inventory and accounts receivable." The referee held that the financing statement need not contain a specific reference to after-acquired property and that the first secured party, the bank, was entitled to retain the collected receivables, since in the hands of the secured party they lost their character as proceeds. Id. at 280-282. The district court reversed the referee on this point and precluded the bank's recovery of certain proceeds, holding that the bank's failure to claim proceeds on the financing statement was "gross negligence" and "seriously misleading." In re Platt, 257 F. Supp. 478 (E.D. Pa. 1966).
F.C.A's financing statement as being seriously misleading"\(^{209}\) and seemed to explain the absence in terms of the earlier creditor, the bank, having no obligation to search the public records for subsequent filings.

The district court construed the referee's brief comments as a finding by the referee that the name "Platt Fur Company" was "not seriously misleading,"\(^{210}\) despite the fact that F.C.A's interest would not have been disclosed by a search of the public record. The district court held that the designation of Henry Platt as Platt Fur Co. was "sufficiently related to the name of the debtor, Henry Platt, to require those who search the records to make further investigation."\(^{211}\) The name similarity test articulated by *Platt* compared the name used on the financing statement to the legal name, on the assumption that if the names were similar, the financing statement would be found.\(^{212}\)

That a name on a financing statement may be "sufficiently related" to the name of the debtor presumes either (1) that the defective filing has been discovered so that there is something to compare, or (2) that discovery is irrelevant because the comparison is made *prima facie*, without regard to discovery. A *prima facie* comparison would tend to justify the insignificance of the error from the preparer's viewpoint, without regard to the impact of the error. *Platt* appears to have made a *prima facie* comparison because the presumption that the financing statement was discovered ran contrary to the Referee's finding of fact. On the other hand, the *Platt*'s reference to further investigation suggested that the obligation to make further inquiry depended upon finding the financing statement in the public records.

The *Platt* decision achieved instant prominence as the first opinion applying the seriously misleading standard to trade name usage. *Platt*'s disproportionate impact on trade name filing cases remains visible even in current decisions, which seem compelled to mention *Platt*'s "sufficiently related" test\(^{213}\) or the *Platt* decision generally.\(^{214}\)

\(^{209}\) Id.

\(^{210}\) *Platt*, 257 F. Supp. at 482.

\(^{211}\) Id.

\(^{212}\) See *id. Platt* presumed that the searcher would discover the filing and be bound to examine the financing statement. Coca-Cola Bottling Plants, Inc. v. Tabenken (*In re Brawn*), 7 U.C.C. Rep. Serv. (Callaghan) 565, 573 (D. Me. 1970).

What is rarely mentioned, however, is that Platt overlooked the problem of actual non-disclosure of the trade name filing in the public records while simultaneously suggesting that disclosure was necessary. Platt illustrated dissimilarity by pointing out that while "Platt Fur Company" was similar to Henry Platt, "Kenwell Fur Company," Henry Platt's other trade name, would not be "sufficiently related" to the debtor's true name to be discoverable, and therefore would be seriously misleading. The "sufficiently related" test is alternatively stated in terms of "substantial similarity." Following Platt, trade names, particularly those that commence with the debtor's last name, have been upheld. Many other trade names fail the similarity test for obvious reasons. For example, "Kalthoff Heating & Cooling" bears no similarity to "James White." The dissimilarity may be so great that the financing statement does not substantially comply with Code requirements.

2. The Necessary Evolution of the Name Similarity Test.— Earlier cases such as In re Nara Non-Food Distributing Inc. and In re Excel Stores, Inc. and the recent case, In re Strickland, Bankr. 898 (Bankr. N.D. Miss. 1988) (holding a financing statement effective if the trade name is substantially similar to the debtor's true name).


216. See Brown v. Belarus Mach., Inc. (In re Service Lawn & Power, Inc.), 83 Bankr. 515, 518 (Bankr. E.D. Tenn. 1988) (articulating its version of Platt: the financing statement is effective to perfect the security interest if the true name and trade name are "so substantially similar that a diligent creditor upon searching under the true name would likely discover the filing.").


218. In re White, 51 Bankr. 514 (Bankr. E.D. Tenn 1985) (stating that the dissolution of a partnership requires a new filing in the debtor's real name); see also Bell v. Ameritrust Co. (In re Moore), 21 Bankr. 898 (Bankr. E.D. Tenn. 1982) (stating that a filing in only one of the debtor's trade names, instead of the debtor's correct name, was insufficient); Carter v. Greene County Bank (In re Wilhoit), 6 Bankr. 574 (Bankr. E.D. Tenn. 1980) (holding that a filing in a creditor's trade name did not perfect its security interest in the debtor's equipment).

219. In re Eichler held that the use of "Carriage Card & Record Shop" instead of Carl Eichler, Jr. did not comply with U.C.C. § 9-402 because it was merely a title, and not the name of the debtor, who is a person. In re Eichler, 9 U.C.C. Rep. Serv. (Callaghan) 1406 (E.D. Wis. 1971).


221. 341 F.2d 961 (2d Cir. 1965).
typify the former approach, and continue to be cited as principal cases. The use of similar names generally constituted only a minor error. *Nara* and *Excel* presumed that the name would be found because of the similarity. "Nara Dist. Inc." was held substantially similar to the true name "Nara Non-Food Distributing Inc." because anyone who thumbed through the index would discover the defective filing. Once found, the searcher was expected to make the connection that the defective financing statement intended to refer to the debtor, and one could therefore conclude that the financing statement effectively provided notice. In *Excel*, the secured party filed a conditional sales contract bearing the signature "Excel Department Stores by Andrew F. Machado" instead of "Excel Stores, Inc. by Andrew F. Machado, Treasurer." The district court held that, while the conditional sales agreement was valid and binding between the parties, the errors in failing to use the correct corporate name and failing to designate the official capacity of the officer were seriously misleading to creditors entitled to rely upon the public record. The circuit court reversed the district court, construing the absence of corporate designation as a minor error. The court held that the conditional sales contract gave the minimum information necessary to put searchers on notice. In the court's view, the defective filing would be found because the name used was similar to the true name. Furthermore, as in *Nara*, the name was an unusual name. The court presumed that a person knowledgeable about the debtor Excel Stores, Inc. would discover the Excel Department Stores filing, recognize the signature, and would have obtained further information from the corporate officer.

The *Excel* filing was made less than three months after the

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225. *In re Excel Stores, Inc.*, 1 U.C.C. Rep. Serv. (Callaghan) 616, 620 (D. Conn. 1963), rev'd, 341 F.2d 961 (2d Cir. 1965). In the absence of U.C.C. guidelines on this issue the district court applied general principles of Connecticut corporate law. *Id.*

226. *In re Excel Stores, Inc.*, 341 F.2d 961, 962 (2d Cir. 1965).

227. *Id.* at 963. *But see* First State Bank v. Shirley AG Serv., 417 N.W.2d 448, 451 (Iowa 1987) (distinguishing a security agreement from a financing statement because a security agreement "does not purport 'to lead' anyone to anything.").

228. *Excel*, 341 F.2d at 963.
U.C.C. became effective in Connecticut in 1961, and in the context of the infancy of the filing system of the time, these presumptions approached probable certainty. Moreover, the secured party's errors were understandable in view of the differing roles of a security agreement and financing statement. The sole function of a financing statement is to provide notice, but security agreements create the substantive transaction. It is unlikely that the immediate parties to the agreement were aware of the significance of a precise name designation on their agreement, and even less aware of any particular consequence to third parties. Even the Code did not specifically set forth a separate requirement for the name of the debtor, and the emphasis on the name of the debtor is far less obvious in a security agreement than in a financing statement, where the form highlights the need to state the name separately from the signature. Although the security agreement may be binding on the parties even if it does not accurately state the name of the debtor, such a security agreement if filed as a financing statement is not sufficient protection against subsequent creditors.

The use of the security agreement is specifically sanctioned by the Code as a filing instrument without modification. Where the security agreement is effective between the parties, and especially

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231. In re Penn Hous. Corp., 367 F. Supp. 661, 665 (W.D. Pa. 1973) (stating that the security agreement was executed in the debtor's trade name Erie Builders Supply Company and was effective to create the security interest sufficient for attachment purposes; the financing statement was filed in the debtor's correct corporate name, Penn Housing Corporation).


233. See U.C.C. § 9-402(1) (1989) (permitting the security agreement signed by both parties to operate as a financing statement if it meets the requirements of § 9-402(1)).

234. The casual use of a completely different name in lieu of the debtor's real name on the conditional sales contract would not defeat the agreement between the immediate parties because they are easily identifiable to one another; it will, however, preclude perfection even though the debtor's name on the financing statement is extracted from the conditional sales contract. See National Cash Register Co. v. Mishkin's 125th St., Inc., 65 Misc. 2d 386, 317 N.Y.S.2d 436 (N.Y. Civ. Ct. 1970). In Mishkin, the seller of equipment sued the seller of the
where actual notice is likely to result despite errors, the reluctance
of a court to set aside perfected status of a secured party who had
taken the steps required by the Code, is understandable. However,
such leniency in interpretation may no longer be justified. Conse-
sequently, cases applying Section 9-402(8) to save defective security
agreements filed as financing statements should be of limited prece-
dential value, particularly if those decisions were rendered during
the Code's early years. Liberal construction should not be necessary
in this mature age of U.C.C. filings.

The Excel decision, which in effect justified the actions of the
secured party, spawned decisions that tolerated wide deviations in
recitation of the debtor's name. More recently, Heckathorn Con-
struction Co. v. Bass Mechanical Contractors, Inc. (In re Bass
Mechanical Contractors, Inc.), held a financing statement suffi-
cient under the Nara and Excel branch of the Platt name similarity
test. The only similarity between the legal name and the name used
on the financing statement was the first word. But in the court's
view, "[a] reasonable person making a lien search would have been
expected to look under the alphabetic letter 'B' [for "Bass"] and
would have noticed the similarity of names," between the name dis-
covered, "Bass Plumbing, Heating & Cooling, Inc." and the existing
legal name, "Bass Mechanical Contractors, Inc." In the court's
view, the searcher was on notice of the similarity, and the searcher
should have contacted the secured party named in the errant filing.
Presumably, the searcher should have inquired whether "Bass
Plumbing" was the same entity as "Bass Mechanical," or whether
the secured party had intended to perfect a security interest in "Bass
Mechanical" even though the financing statement said "Bass Plumb-
ing." Since this was the type of search the trustee, or any claimant,
should reasonably have conducted, the Bass Court held that the

236. Id. This of course presumes that the searcher must look through an entire list of
"Bass" entries and not stop after "Bass M . . ." the way one normally would if consulting a
telephone list, for example, for the business "Bass Mechanical Contractors, Inc."
237. Id. The search described actually was conducted by the debtor's attorney while
preparing to file a bankruptcy petition on behalf of his clients, a corporation and its two share-
holders, a married couple. The court regarded this search to be the type of search a secured
party should conduct.
error in the name of the debtor was minor and not seriously misleading.

The presumptions of discovery and recognition inherent in the Nara,\textsuperscript{238} Excel,\textsuperscript{239} and Bass\textsuperscript{240} approach are not valid given today's volume of filings nor are they valid in computerized systems. The mere fact that the searcher in Bass would have “noticed” the similarity suggests more than mere observation. It presumes discovery, for without discovery there could be no comparison. It presumes review and comparison of "similar" statements. In a third level of assumption, the Bass analysis presumes a subjective cognitive element on the part of the searcher. Anticipating that a connection will be made in the searcher's mind speaks not to the legal sufficiency of a financing statement but to the subjective knowledge of the searcher or to the discretion of a search clerk. Since perceptions vary significantly, the effectiveness of the financing statement is made to depend, under this analytical approach, not on its own inherent value but on a subjective recognition factor and other variable circumstances. Under this post hoc review of name similarity, legal sufficiency is made to depend not on the application of a legal standard of review, but on coincidence of discovery and individual subjective perceptions of name similarity. The integrity of a system is undermined by such coincidence and conjecture. A potential secured party searcher should not be vulnerable to an ex post facto decision of the court that the searcher should have had the hindsight cognitive wisdom of the court. A searcher should be able to rely on the system to determine status at the time of engaging in the transaction with the debtor.

The Bass Court determined that the names “Bass Plumbing, Heating & Cooling, Inc.” and “Bass Mechanical Contractors, Inc.” were similar and therefore not seriously misleading.\textsuperscript{241} The Bass Court awarded perfected status to the earlier creditor despite the defective filing, and in so doing the court limited the rights of subsequent creditors. It is therefore critical to reexamine the operation of the name similarity test.

\begin{itemize}
  \item \textsuperscript{239} In re Excel Stores, Inc., 341 F.2d 961 (2d Cir. 1965).
  \item \textsuperscript{241} Id.
\end{itemize}
3. Examination of the Name Similarity Test: Illustration by Hypothetical and Expanded Searches.—Suppose that a search of the files would reveal:

- Bass Fishing Supplies Co., Inc.
- Bass Furniture Ltd.
- Bass Office Supplies, Inc.
- Bass Office Equipment
- Bass Plumbing, Heating & Cooling, Inc.
- Bass Refrigeration Units Discount House.

Are the names above any more or less similar to one another than “Bass Mechanical Contractors, Inc.” and “Bass Plumbing, Heating & Cooling, Inc.,” those that the Bass Court concluded were similar?242 How is similarity defined - by alphabetical order, substantive content, or another category? Other than identity of words, there are no guides for determining the similarity of names. Similarity of spelling, pronunciation, identity of certain words, or substantive meaning may be nothing more than coincidence. Must the searcher nevertheless contact each of the named secured parties? If the name “Smith” were substituted, should the searcher’s obligations be redefined? It is far from clear which names are “unusual,” a relevant factor in Nara, Excel, and apparently in Bass. Seventy-six filings appeared under the name “Ansley” in Citizens Bank v. Ansley.243 Is “Ansley” an unusual name that warrants further investigation? What search obligation should be imposed if “Ansley” were the first word in the example above? The Ansley Court distinguished Nara and Excel on the grounds that the names on the financing statements and the legal names were all business names with the same unusual first name, and therefore subsequent creditors could be expected to examine all the filings under that unusual name. Since

242. The first two entries might be alphabetically similar, but heating & cooling and refrigeration might be substantively similar in type of business. “Bass Mechanical Contractors, Inc.” is not on the list because no filing was made in the debtor’s legal name and therefore it would not be revealed in a search of the files. Under Bass, if the names in this hypothetical list had been revealed, the searcher would probably be required to investigate whether “Bass Refrigeration Units Discount House” or any of a number of other listings represented the debtor because of potentially similar business operations.

243. 467 F. Supp. 51 (M.D. Ga.), aff’d, 604 F.2d 669 (5th Cir. 1979). The court in McMillin v. First Nat’l Bank & Trust Co. (In re Fowler), 407 F. Supp. 799, 803 (W.D. Okla. 1975), held that the financing statement must show the name of the debtor legally responsible for the debt “unless the trade name and the individual debtor’s name are so similar that a prospective creditor, upon seeing the trade name in the records, would be alerted that there might be a prior security interest in the involved collateral.” Similarity is in the perception of the holder, interpreted by the court.
the legal name in Ansley was a personal, not business name, and was fairly common, the searcher was relieved of any obligation to conduct inquiries regarding any filings not in the debtor's true name.\textsuperscript{244} It should be apparent that a different court, or a different searcher, might be justified in concluding that the names were not similar, except for the coincidental first word.

Identity of the first word is not a guarantee of similarity, however, as demonstrated by Sencore, Inc. v. Pongetti (In re Columbus Typewriter Co.).\textsuperscript{245} Despite the identity of the first word, "Columbus Business Machines" was "too dissimilar" from "Columbus Typewriter Company, Inc." under the court's interpretation of the seriously misleading standard to save the defective filing. The Columbus Court focused on the dissimilarity: "Is the debtor's trade name so materially different from its correct corporate name that creditors who search the Uniform Commercial Code (UCC) records under the debtor's corporate name would be unable to locate a financing statement filed under the debtor's trade name?"\textsuperscript{246} Columbus combined the similarity, or dissimilarity, test with the standard search test,\textsuperscript{247} which asks "would a subsequent creditor looking under [the debtor's true name] be led to find the security interest filed and indexed under [the trade name, or name given on the financing statement]?"\textsuperscript{248} Answering in the negative, the Columbus Court intimated that the status of the debtor as a corporation or a natural person affects the boundaries of name similarity and that geographical names are too common.\textsuperscript{249} This in itself illustrates the serious limitations of a "name similarity test." Boundaries are not defined and too many rules are invented to fit the facts. There should be a unitary, consistent, legally sound approach interpreting the provisions of Section 9-402(8) that applies standard tests in a systematic, uniform fashion.

\textsuperscript{244} Ansley, 467 F. Supp. at 52, 55.
\textsuperscript{245} 75 Bankr. 834 (Bankr. N.D. Miss. 1987).
\textsuperscript{246} Id. at 836.
\textsuperscript{247} Id. at 838. The Columbus Court, two years later, delivered Strickland, which seemed to apply the standard search test but rejected evidence of the actual operation of the system. Pongetti v. Deposit Guar. Nat'l Bank (In re Strickland), 94 Bankr. 896 (Bankr. N.D. Miss. 1988). "Strickland" as a shared first word was sufficient, but "Columbus" as the shared first word was not.
\textsuperscript{248} Northern Commercial Corp. v. Friedman (In re Leichter), 471 F.2d 785, 787 (2d Cir. 1972), cited in Columbus, 75 Bankr. at 836.
\textsuperscript{249} See Sencore, Inc. v. Pongetti (In re Columbus Typewriter Co.), 75 Bankr. 834 (Bankr. N.D. Miss. 1987). It is not clear which geographical names this disqualification would apply to nor what other names are suspect.
Would a court, comparing all of the choices listed above, rather than only two, still conclude that the two names were similar? If "substantial similarity" is to be a meaningful test, the perception of similarity should not change simply because additional choices are available or absent. In a system that depends upon assumptions of discovery, perceptions of similarity, and "mental leaps," connecting the discovered filing to the debtor depends upon too many assumptions. A "test" that tolerates too many assumptions lacks integrity and is no test at all.

The Bass analysis provokes serious questions about the scope of a reasonable search. If the search were limited to the initial and terminal points within which an alphabetized entry should be located, the defective filing might not have been discovered in Bass. A reasonable search that required the searcher to look only between "Bass Furniture Ltd." and "Bass Office Supplies, Inc." would not produce a listing under "Bass Plumbing, Heating & Cooling, Inc." which was the trade name. If the search must instead encompass the entire "Bass" listing or scan all the "B's," the probability of discovering the errant filing increases and the gravity of error correspondingly decreases. Pursuant to the Excel or Bass approach, the degree to which an error is seriously misleading is inversely related to the scope of a reasonable routine search. The scope of a reasonable search varies from case to case. Upon discovery, what is the scope of the inquiry? Must an inquiry be made concerning all similar filings? It should be limited to the search for the debtor's correct legal name only, with clearly defined initial and terminal points. The scope of the search should be defined by the name itself.

Reference to the legal name is critically important if the search is to be conducted by computers. The advent of electronic search systems necessitates adjustments in the mechanics of filing and searching and a substantial review of legal tests that use name similarity concepts to determine whether a name error is seriously misleading. A re-evaluation of the viability of tests and relevant pro-

251. The search for "Bass Mechanical" would have ended with the filing under "Bass Office Supplies, Inc." See supra p. 414.
252. But see Morris, supra note 139, at 269 (stating that computers should not alter analysis, but that computer programs should be adjusted to show the target name, and the name before and after to accommodate the name similarity test). This view is not convincing. Even if computers could be easily programmed to do so, it is not at all clear that results would be predictable, or that notice would be available, because new filings could change the adja-
visions of the Uniform Commercial Code is consonant with the explicit provisions of the Code to modernize and encourage efficiency and development.\textsuperscript{253}

The recent case \textit{In re Strickland}
\textsuperscript{254} takes an even more extreme approach than its predecessors. \textit{Strickland} applies the name similarity test to the errors in the financing statement from the perspective of the secured party filer. Under apparent concern for the discoverability of the filing, \textit{Strickland} ignores the operation of the filing system altogether. The \textit{Strickland} Court holds that a financing statement can be effective to perfect the security interest even if the clerks who file and search for the financing statement are misled by the name designation.\textsuperscript{255} In the court's view, a \textit{prima facie} comparison of the names establishes their similarity and the financing statement is "deemed" to be not misleading.\textsuperscript{256} The \textit{Strickland} Court ignores the fact that the searcher cannot personally thumb through the filings.\textsuperscript{257} Instead \textit{Strickland} presumes that when the searcher discovers the trade name filings, "Strickland Builders MFG Company" and "Strickland Builders and Supply Company" the searcher would recognize the similarity to "James T. Strickland," and be on notice to inquire further. The court rejects the "exact name only" retrieval system in place in the jurisdiction and ignores the fact that the disputed filings would not in fact be discovered. Moreover, the \textit{Strickland} Court is untroubled by the fact that the trade names on the financing statements were not even those used by the debtor, but were variations of the trade name "Strickland Builders Supply." The \textit{Strickland} approach places potential creditors at serious risk of losing priority battles to undiscoverable prior creditors. While couched in traditional language of "reasonably prudent search," the \textit{Strickland} opinion in practical terms expands the searcher's obligation to include a search of all the trade names and their variations. The scope of this search exceeds even that of \textit{In re Glasco}\textsuperscript{258} and \textit{In re

\textsuperscript{253} See U.C.C. § 1-102 (1989); id. official comments 1 & 2.


\textsuperscript{255} \textit{Id.} at 902-03.

\textsuperscript{256} \textit{See id.} at 903.

\textsuperscript{257} \textit{See id.} (stating that "when faced with determining whether a financing statement which improperly names the debtor is misleading, a court must disregard the fact that a governmental employee may conduct the search on behalf of an interested creditor.").

\textsuperscript{258} Brushwood v. Citizens Bank (\textit{In re Glasco, Inc.}), 642 F.2d 793 (5th Cir. Unit B Apr. 1981).
which demands a search of only one trade name under special circumstances. This expanded burden arises in large part from Strickland's intrusion into the non-judicial arena by imposing additional filing and search obligations on clerks, and by its refusal to consider actual administrative procedures. Strickland's rejection of actual administrative procedures insults the executive branch and destabilizes creditors' obligations and expectations.

Strickland ironically resembles Haley. Haley invalidated a filing on technical grounds even though its substantive purpose could be achieved. Strickland validates a technically deficient filing even though its substantive purpose is not achieved. The Strickland approach should be rejected as too extreme and as a misapplication of the Section 9-402(8) standard because the substantive purpose of notice filing, and therefore of Section 9-402(8), is defeated.

4. Misidentification of the Debtor and Name Similarity.—The issue of name similarity intersects with issues of debtor identity. The dominant test dictates the outcome of the dispute. Where name similarity is the paramount criteria, the name of a natural person on the financing statement may be sufficient to perfect a security interest in a corporation. Name similarity may not be the sole criteria, however. If the administrative system segregates personal and business names, the financing statement that incorrectly omits corporate status will be seriously misleading despite name similarity. If, however, emphasis is placed on the identity of the debtor, the similarity between the true name and the name used will not justify the error as minor or not seriously misleading. For example, a financing statement that incorrectly names the partnership as the debtor may not perfect a security interest in the corporate debtor's collateral, even though the names of the partnership and the corporation are virtually identical. On the other hand, an analysis


261. See, e.g., In re Hatfield Constr. Co., 10 U.C.C. Rep. Serv. (Callaghan) 907 (M.D. Ga. 1971) (holding that the name “Wayne L. Hatfield” was sufficient to perfect a security interest in “Hatfield Construction Company”).

262. The name “Terry Pierson,” may be virtually identical to “Terry Pierson, Inc.” but the former represents an individual whereas the latter identifies the corporation. See Bank of Carbondale v. Terry Pierson, Inc. (In re Terry Pierson, Inc.), 84 Bankr. 533 (Bankr. S.D. Ill. 1988).

that requires proper identification of the debtor focuses carefully on
the entire phrase in Section 9-402(1), which requests the "name of
the debtor." A "debtor" is the person legally responsible for the
debt.264 A name other than that of the person legally responsible for
the debt does not substantially comply with the requirements of Sec-
tion 9-402(1). The error is the failure to properly identify the debtor
and is not minor. The error in other name similarity cases, by con-
trast, is in the misstatement of the debtor’s name, and the extent of
such error is measured by the difference between the name used and
the correct name.

Debtor identification and name similarity issues may simultane-
ously arise in other configurations. For example, a financing state-
ment filed against the sole shareholder instead of the corporate
debtor could be disqualified either by application of the name simi-
larity test265 or on the grounds that the debtor was the corporation,
not the shareholder.266 Failure to state a “sufficiently related” or
“substantially similar” name would constitute a seriously misleading
error under 9-402(8), resulting in a finding of legal insufficiency. Al-
ternatively, in focusing on the identity of the debtor, failure to state
the name of the debtor required by 9-402(1) would be a failure to
substantially comply with requirements under 9-402(8).

A measure of uniform interpretation has evolved with respect to
financing statements that improperly provide the name of an individ-
ual instead of the name of the corporate debtor. Various theories
have been advanced to support the holding that such error is fatal to

265. See, e.g., Goger v. United States (In re Janmar, Inc.), 4 Bankr. 4, 7-8 (Bankr.
N.D. Ga. 1979). In Janmar, Julian Eady was President and sole shareholder of Janmar, Inc.
The defendant filed a financing statement against the corporate debtor under the name Julian
Eady. The Janmar court stated that "[w]hile courts have allowed some minor errors in the
debtor's name in both the financing statement and the indexing of it, 'the distinction drawn
... is whether the name as it appears on the financing statement is only slightly different than
the debtor's real name in which case parties searching the records would be placed on notice
by such entry.' " Id. at 8 (quoting In re Firth, 363 F. Supp. 369, 372 (M.D. Ga. 1973)). Thus,
the court held that the financing statement was insufficient to perfect defendant's security
interest, since "[t]he difficulty of finding a financing statement filed under 'Eady' while search-
ning for a filing under 'J' is clear." Id. The name used was not similar to the debtor's legal
name, and a search in the debtor’s legal name would not disclose the security interest.
266. In Janmar, the debtor was Janmar, Inc., and naming the debtor as Julian Eady on
the financing statement misidentified the debtor. Goger v. United States (In re Janmar, Inc.),
4 Bankr. 4 (Bankr. N.D. Ga. 1979); see also In re Hinson & Hinson, Inc., 62 Bankr. 964, 968
(Bankr. W.D. Pa. 1986) (holding that a financing statement in the name of a natural person is
insufficient to provide notice of a security interest in corporate assets since a corporation is a
separate legal entity, which "has rights and obligations which do not inure to the individual.").
the effectiveness of the financing statement in the absence of name similarity. The corporation is a separate legal entity and filing against corporate officers or stockholders is not effective to perfect the security interest or is seriously misleading. The name given does not identify the person who is the debtor, and the financing statement therefore does not substantially comply with requirements. Taking these theories one step further the Court of Appeals for the Seventh Circuit held in In re Lintz West Side Lumber, Inc., that individuals and corporations are legally distinct entities despite similarity in names; as such, even if a creditor did discover the filings, the creditor would reasonably assume that corporate obligations are not those of individuals, and that the searcher would be relieved of further inquiry. Even if the corporate signature or address properly appears on the financing statement, the error in failing to state the debtor's name misidentifies the debtor and is seriously misleading.

In the converse situation, where the debtor is an individual, but a corporate name is stated on the financing statement, the financing statement has been held ineffective in the absence of similarity between the true name and the listed name on the grounds that either

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267. See Janmar, 4 Bankr. at 8; see also Brown v. Belarus Machinery Inc. (In re Service Lawn & Power, Inc.), 83 Bankr. 515, 520-21 (Bankr. E.D. Tenn. 1988) (holding that financing statements filed against the president and secretary of a corporation where debtor was the corporation were insufficient to perfect a security interest).

268. Limerick v. Limerick (In re Answerfone, Inc.), 48 Bankr. 24, 30 (Bankr. E.D. Ark. 1985) (holding that a financing statement naming the corporate shareholder of the debtor as the debtor was insufficient to perfect a security interest in the debtor's assets).

269. See, e.g., In re My Place or Yours, Inc., 34 Bankr. 197, 199 (Bankr. D. Vt. 1983); see also Service Lawn & Power, 83 Bankr. at 515.

270. 655 F.2d 786, 791-92 (7th Cir. 1981).

271. Id. at 791 (holding that "[a] creditor would ordinarily, and could reasonably, assume that corporate assets would not be encumbered by a security interest filed under the names of . . . individuals despite the similarity in the names." (emphasis in original)).

272. See My Place or Yours, 34 Bankr. at 198 The financing statement was signed "My Place or Yours, Inc., by Richard H. Storm," but named the debtor as "Rich Storm & Rob Niebling d/b/a My Place or Yours." Id. at 197-98. Since the debtor was My Place or Yours, Inc., the financing statement was held seriously misleading despite a proper signature. Id. at 198-99.

273. See, e.g., Bank of Carbondale v. Terry Pierson, Inc. (In re Terry Pierson, Inc.), 84 Bankr. 533, 536 (Bankr. S.D. Ill. 1988) (stating that even if the financing statement contained the address of debtor's business location, a name other than the corporate debtor would cause a search to fail to reveal the financing statement).

274. See, e.g., In re World Fin. Serv. Center, Inc., 78 Bankr. 239 (Bankr. 9th Cir. 1987) (holding that where the business debtor's name was misstated and the address appeared to be that of an individual's apartment, not a business address, the financing statement was seriously misleading), aff'd, 860 F.2d 1090 (9th Cir. 1988).
the corporation was not the owner of the collateral, or that a creditor of an individual would not be alerted to check for a filing against a corporation. Where the financing statement listed a corporate debtor before it came into existence, the court applied common law principles of ratification to construe the financing statement as having been properly executed.

Financing statements that are correct when filed may become vulnerable to attack by virtue of post filing changes in the name or structure of the debtor. In *Warner/Elektra/Atlantic Corp. v. Sounds Distributing Corp.* (In re Sounds Distributing Corp.), the security agreement was signed by an individual doing business under a trade name and was filed as the financing statement. It became inaccurate only after the debtor incorporated and adopted the former trade name as the new corporate name. The Code then in existence did not require refiling upon a seriously misleading change in name or business structure and the *Sounds* Court held that the filing was not misleading. It may be that the original unamended filing in

276. See, e.g., Grant v. Citizens First Bank (In re Eisaman), 90 Bankr. 528, 531 (Bankr. M.D. Fla. 1988) (stating that "it could not be seriously argued that a hypothetical creditor of [an individual] would be alerted to check for filing[s] against [a corporation]."). The *Eisaman* Court held that a financing statement filed against the corporation was ineffective to perfect a security interest in the individual principal's property. *Id. Contra* Lines v. National Cash Register Co. (In re Green Mill Inn, Inc.), 474 F.2d 14 (9th Cir. 1973). In *Green Mill*, the financing statement named the corporation's president as an individual debtor, but was signed by the corporation (the true debtor). The court held that the financing statement was sufficient to perfect a security interest in the corporation's property, despite the dissimilarity of name, because of California's cross-indexing procedures. The financing statement was cross-referenced by the corporate name noted in the signature. The filing could be located under both the individual and corporate names, and thus "actual notice was . . . available to anyone interested in the filing." *Id.* at 15. The court held that "the defective, or ambiguous filing, aided by the probability of actual notice, substantially complied with the statutory requirements, and thus preserved the security interest of the seller against rival creditors." *Id.*
277. The debtor, therefore, was technically an individual.

278. See John Deere Co. v. First Interstate Bank, 147 Ariz. 256, 709 P.2d 890 (Ct. App. 1985); see also Turk v. Wright & Babcock, Ltd., 174 Ill. App. 3d 139, 528 N.E.2d 993 (1988) (stating that a financing statement which misstated the corporate name was valid where it also named an individual debtor who had signed in his capacity as corporate officer); cf. Bankers Trust Co. v. Zecher, 103 Misc. 2d 777, 426 N.Y.S.2d 960 (Sup. Ct. 1980) (holding that the doctrine of *de facto* corporations applied to uphold a security agreement executed prior to the time of filing of the certificate of incorporation and that the debtor was properly identified on the financing statement).


280. *Id.* at 276. A discussion of name changes and the interplay between U.C.C. §§ 9-402(7) and 9-306(2) is beyond the scope of this article. For in-depth discussions of the duty to refile, see Burke, *The Duty to Refile Under Section 9-402(7) of the Revised Article 9*, 35 Bus. Law. 1083 (1980); McLaughlin, *supra* note 13, at 973-79; Westbrook, *Glitch: Section 9-
Sounds was not misleading because the trade and corporate names were effectively identical\(^{282}\) and may even have been cross-referenced, thereby giving sufficient notice.\(^{282}\)

The balance between name similarity and debtor identification has not been firmly established. Name similarity was more important than debtor identification in *In re Hatfield Construction*.\(^{283}\) Applying *In re Platt's* name similarity test,\(^{284}\) *Hatfield* held that the name "Wayne L. Hatfield" on the financing statement was similar enough to perfect a security interest in "Hatfield Construction Company." The court believed that in searching for "Hatfield Construction Company" a searcher would come across the filing for "Wayne L. Hatfield," and that such discovery made the searcher responsible for inquiring further whether the discovered filing against the individual was intended to represent a security interest in the debtor corporation.

By contrast, *Bank of Carbondale v. Terry Pierson, Inc. (In re Terry Pierson, Inc.)*\(^{285}\) illustrates the importance of debtor identification and the limitations of the name similarity test in at least some jurisdictions. In *Pierson*, a filing against "Terry Pierson" was ineffective to perfect a security interest in the debtor corporation "Terry Pierson, Inc." even though the names were virtually identical and the court stated that the applicable rules allowed for similar names to be sufficient.\(^{286}\) The financing statement would not be revealed

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\(^{281}\) Zekan: The Name Game--Playing to Win Under § 9-402 of the Uniform Commer

\(^{282}\) 402(7) and the U.C.C. Revision Process, 52 GEO. WASH. L. REV. 408 (1984). For a discussion on curing defective filings, see generally Frisch, supra note 29.

\(^{283}\) Sounds, 42 Bankr. at 276.

\(^{284}\) Although there was no discussion of cross-referencing procedures in *Sounds*, the filing procedures of another county in the same district included cross-referencing under both names on the financing statement. See *In re Hinson & Hinson, Inc.*, 62 Bankr. 964, 965 (Bankr. W.D. Pa. 1986). Compare *Lines v. National Cash Register Co. (In re Green Mill Inn, Inc.*)*, 474 F.2d 14 (9th Cir. 1973) (holding that a financing statement that incorrectly named the debtor was sufficient to perfect a security interest where the financing statement had been cross-referenced to allow actual notice to creditors) with *Van Dusen Acceptance Corp. v. Gough (In re Thomas)*, 466 F.2d 51 (9th Cir. 1972) (holding that a financing statement which misstated debtor's name was fatally defective where a hypothetical creditor would not have discovered the filing by examining the notice index under the debtor's legal name). *But see Dietrich-Post Co. v. Alaska Nat'l Bank of the North (In re McCauley's Reprographics, Inc.)*, 638 F.2d 117 (9th Cir. 1981) (holding the financing statement fatally defective, despite the availability of actual notice, because the financing statement did not properly identify the debtor as a corporation instead of as a partnership).


\(^{287}\) 84 Bankr. 533 (Bankr. S.D. Ill. 1988).

\(^{288}\) Id. at 534.
through a search because of the indexing method used in Illinois.\textsuperscript{287} According to the Affidavits issued by the Office of the Secretary of State of Illinois, upon which the court heavily relied in \textit{Pierson}, searches in corporate debtor and individual debtor names were mutually exclusive because the filing system segregated individual and corporate filings.\textsuperscript{288} The \textit{Pierson} Court did not compare the names to one another in the abstract, but evaluated the name used on the financing statement in the context of the filing and search system. Failure to discover the financing statement through a routine search of the corporate debtor's name necessarily led to the conclusions that the discrepancy between the names was seriously misleading and that the secured party failed to fulfill the requirements of notice filing.\textsuperscript{289} The fact that corporate capacity appeared next to the signature and that the corporate address was listed did not cure the defect of misidentifying the debtor. Identification by reference to the signature or mailing address presumes that one searching the records would have had the opportunity to examine the financing statement.\textsuperscript{290} Since the financing statement was not found in \textit{Pierson}, nothing on the face of the financing statement could put the searcher on notice of anything.\textsuperscript{291}

\textsuperscript{287} See infra note 288 and accompanying text (detailing the Illinois indexing method). Although the result in \textit{Pierson} would appear to be precisely the same situation facing the court in General Motors Acceptance Corp. v. Haley, 329 Mass. 559, 109 N.E.2d 143 (1952), which was so vehemently rejected in U.C.C. § 9-402 official comment 9 (1989), one has only to refer to the filing system to recognize that the outcome in \textit{Pierson} was justified. For a more detailed discussion of \textit{Haley}, see supra notes 47-52 and accompanying text.

\textsuperscript{288} \textit{Pierson}, 84 Bankr. at 534 (noting that an affidavit of an employee of the Illinois Secretary of State's Office stated that "[t]he UCC-financing statements filed in the name of the individual Debtor will not appear on the corporate Debtor's search . . . UCC-financing statements filed in the name of the individual Debtor will not be revealed on a UCC-search of a corporate Debtor, even if the only difference from the individual Debtor is an "Inc." after the Debtor's name."). Even in an integrated system a standard search could dictate the same result. A search for a corporate debtor under the letter "T" would not reveal the filing made under the letter "P." For a description of a similar system in Florida, see Self, supra note 19.

\textsuperscript{289} \textit{Pierson}, 84 Bankr. at 536.

\textsuperscript{290} Id.

\textsuperscript{291} \textit{Contra In re Nara Non-Food Distrib. Inc.}, 66 Misc. 2d 779, 322 N.Y.S.2d 194 (Sup. Ct. 1970), aff'd, 36 A.D.2d 796, 320 N.Y.S.2d 1014 (1971); \textit{In re Excel Stores, Inc.}, 341 F.2d 961 (2d Cir. 1965); but see P.A.G. Garden Prairie, Inc. v. Central Wisconsin AG Supply, Inc. (\textit{In re Central Wisconsin AG Supply, Inc.}), 36 B.R. 908 (W.D. Wis. 1983) (holding that the omission of "Inc." from the name on the financing statement did not defeat perfection). The \textit{Central Wisconsin} Court observed that the debtor's name was a "decidedly uncommon business name" and that any creditor with a "modicum of concern" for his own welfare would investigate whether the filing in question referred to the debtor under review. \textit{Central Wisconsin}, 36 B.R. at 913. The filing system in Wyoming is fully integrated and totally alphabetical, which would tend to minimize the risk of non-discovery by omission of a
The analytical approach of the *Pierson* Court is instructive. The court first applied the Illinois statute and Official Comments to determine the requirements of the Code and to establish the defect in the financing statement. Upon concluding that a defect existed, the court then considered whether the financing statement could be saved through application of § 9-402(8). According to *Pierson*, substantial compliance with § 9-402(1) requires the financing statement to "provide enough information to alert an interested party of a possible prior security interest in that collateral." Resolution of this issue necessarily required a discussion of the Illinois administrative system to determine whether the financing statement could functionally provide notice of a potential security interest in the debtor's assets. This, of course, mandates discovery of the financing statement through the course of a routine search conducted in the legal name of the debtor.

Even the *Pierson* Court could not escape the circular reasoning of Section 9-402. The significance of the error hinged upon the "findability" of the financing statement in the context of the indexing system actually used in the jurisdiction. The focus was not so much on the similarity between the name used and the debtor's legal name, but on the effect of the dissimilarity. If the error did not interfere with the search or retrieval of the financing statement it would constitute a minor error that was not seriously misleading. If the error had destroyed findability, the error was not minor and was seriously misleading. Unless the financing statement is actually discoverable, further analysis is precluded. If the financing statement cannot be found, there is no reason for a reasonably prudent creditor to investigate further. But if the defective financing statement survives the first tier of the court's analysis, discoverability may proceed to the second tier regarding the quality and extent of the defect in the debtor's name.

Resolution of the substantial compliance question necessitates
discussion of the effect of the error within the context of the administrative system. The degree of error depends upon the search results; the search results dictate whether the financing statement substantially complies. First, the financing statement must actually be discoverable; only then may due consideration be given to the extent of the error. This analysis is in sharp contrast to those which simply compare, in isolation, the name used with the legal name without investigation of the consequences of a search within the system in operation.

5. Name Similarity: Benefits to Listing.—Secured parties have benefitted from listing the trade name as well as the debtor's legal name on the financing statement, as illustrated by Lieberman Music Co. v. Hagen. In Lieberman, Fargo National Bank and Lieberman Music Co. both filed financing statements listing the debtor as "Vernon Hagen, d/b/a Wilder Than Ever." At the time of Fargo's filing, the debtor was an individual transacting business as a sole proprietor under a trade name, and the filing was therefore effective to perfect Fargo's security interest. However, before Lieberman filed its financing statement, Hagen had incorporated his business. The new corporate name, "Wilder Than Ever, Inc." added only a corporate suffix to the former trade name. The court applied Section 9-402(7), since Fargo's financing statement was correct when filed.

Awarding paramount priority to Fargo, the court explained that Fargo's financing statement did not become seriously misleading because "a search under the debtor's true name would reveal the filing and . . . the financing statement, once found, would reveal the correct identity of the debtor." The court further explained that Lieberman knew the trade name and that Fargo's filing under this name did not conceal the existence of its security interest. In other

296. Id. at 839.
297. Id. at 838-39. The court did not discuss whether Lieberman, having identified the debtor incorrectly as an individual instead of as a corporation, was thereby precluded from attaining perfected status.
298. The bank subsequently perfected its security interest by filing financing statements which listed the corporation as the debtor. Id. at 839.
299. This was not a defective trade name filing case, which ordinarily leads to a discussion of the substantial compliance provision. Rather, the filing was correct when made, but the fact that the trade name was listed enabled the initial filing to remain effective and not become seriously misleading.
301. Id. at 840-41.
words, a search under the corporate name would reveal the financing statement that had been cross-indexed under the trade name, and having discovered the filing, a searcher would be led to discover the metamorphosis of the debtor, and hence, its true identity.302 Thus, the fact that the secured party had listed the trade name, though optional, served to protect the perfected status of the interest even though the debtor changed its structure from sole proprietorship to corporate status.

Filing procedures did make a difference in the determination that the financing statement was not seriously misleading,303 even though following incorporation the secured party did not file any amendment or new financing statement. A search in the name of the corporate debtor revealed the financing statement because the original financing statement had been cross-indexed under the trade name as well as the individual’s name. The Lieberman Court then applied the tests articulated in Dietrich-Post Co. v. Alaska National Bank of the North (In re McCauley’s Reprographics, Inc.):304 Would a search under the debtor’s true name reveal the filing, and once found, would the financing statement reveal the correct identity of the debtor. The financing statement thus found would indicate a sole proprietorship doing business under a trade name. The debtor’s true name and corporate identity could then be revealed through further inquiry.

6. *Result-Dictated Decisions.*—Some courts tend to favor one class of claimant over another and orient their analysis to bring about results reflecting that preference. The flaw in such a result-dictated approach305 is that the analysis is skewed to determine, from post hoc events, the legal significance of an earlier transaction — the filing of the financing statement. The legal sufficiency of a financing statement should be determined as of the time the earlier transaction occurred. Where secured creditors are favored over trust-

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302. Although not explicitly part of the opinion, it is a necessary inference that the financing statement in the name of the individual debtor had been cross-indexed under the trade name, because only by a reference under the trade name would a searcher have been able to locate the financing statement when searching under the corporate debtor’s name. A search under the corporate name “Wilder Than Ever, Inc.” would not have led to the filing if indexed only under the debtor’s name “Hagen.”

303. Lieberman, 394 N.W.2d at 840-41.

304. 638 F.2d 117 (9th Cir. 1981).

305. To some degree all decisions are result-oriented. A result-dictated decision is one in which the analysis is contrived to produce a particular result as opposed to an analysis in which the result is unknown in advance.

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ees in bankruptcy, the result dictated approach makes the filing of bankruptcy a critical factor in determining legal sufficiency of the financing statement, since it is at that point in time that a trustee’s claim is fixed and represents a challenge to the secured party.\textsuperscript{306} Courts may justify preferential treatment of secured parties on the theory that the secured party has given value and the trustee has not, or that the trustee was not misled, or that no one was misled by the error in the debtor’s name.\textsuperscript{307} However, if a financing statement cannot be found, it is possible that an unsecured creditor, whom the trustee represents, may have relied on its absence to extend unsecured credit, or may have expected equal treatment with all other creditors. A post hoc decision permitting a previously undisclosed claim to take priority in the debtor’s assets over a trustee’s claim would defeat an expectation of equality that an unsecured creditor may have had.

In \textit{Stafford v. Admiral Credit Corp.},\textsuperscript{308} decided under the former Uniform Trust Receipts Act,\textsuperscript{309} the court held that a trustee could not use defects in the filing to circumvent an earlier creditor’s lien, especially where there was “no showing that anyone was actually harmed or misled” to any extent by the defect.\textsuperscript{310} The court did not want to create a windfall to non-injured persons, the trustee, at the expense of the earlier creditor and, therefore, upheld the validity of the defective instrument.\textsuperscript{311} But creditors who rely on the record may be misled by the result, or the absence of a filing, whether they are themselves secured or unsecured.

Occasionally, decisions favor a particular claimant, impose a test of actual harm and retrospectively burden the subsequent creditor with expanded search obligations. A remarkable statement by the Oklahoma Court of Appeals in \textit{Peoples National Bank v. Uhlenhake}\textsuperscript{312} illustrates this point: “As to any other party, Boecking’s security interest might not be perfected. As to Bank, however,
equity demands a different result.”\textsuperscript{313} Whereas the financing statement might have been insufficient with respect to other creditors, it was held sufficient vis-a-vis the bank. The court held that, due to the bank’s knowledge of the debtor’s trade name, the bank was estopped from asserting that a financing statement filed in the trade name was improper.\textsuperscript{314}

The court, however, viewed the knowledge of Peoples National Bank, a subsequent creditor, as a critical factor in determining whether an earlier creditor’s financing statement, which was filed in the debtor’s trade name, would take priority. This analysis made the legal effectiveness of a financing statement depend upon events that occurred subsequent to filing. This also suggests that the test for measuring the gravity of an error is dependent upon actual results—did the financing statement actually mislead a subsequent creditor. This analysis would create an anomaly in situations where the subsequent creditor is a trustee in bankruptcy, who is a hypothetical lien creditor without knowledge.\textsuperscript{315} In conflicts with the trustee, it is not necessary to show that anyone was actually misled. The test applied in \textit{Uhlenhake} could support a contrary result. The \textit{Uhlenhake} Court held that because the bank had knowledge of the trade name, it should have searched that trade name and discovered the claim of the earlier creditor, Boecking Machinery, Inc. This is contrary to commercial practice. Although the bank had knowledge of the trade name, it reasonably expected that a creditor would only file in its actual name.\textsuperscript{316} The fact that the bank declined to search in the trade name and, rather, searched the records under the name it reasonably expected was required, suggests that the bank was misled by the trade name filing.

Had the \textit{Uhlenhake} Court utilized a more standard approach by first evaluating the existence of each party’s respective security inter-

\textsuperscript{313} \textit{Id.} at 77. \textit{Uhlenhake} involved a suit initiated by Peoples National Bank to collect money due on promissory notes signed by Uhlenhake as Chairman of the Board of Kurb Services, Inc. and to foreclose on some collateral securing the notes. Approximately five months before the bank entered into this arrangement and filed its financing statement Kurb Services, Inc., the defendant L.E. Uhlenhake, d/b/a Bud’s Construction Co., entered into an installment sales security agreement with the creditor Boecking Machinery, Inc., who was granted a security interest in the same collateral. Boecking’s financing statement was filed in the debtor’s trade name. When the debtor Uhlenhake defaulted in payments to Boecking and Kurb Services, Inc. defaulted in payments to the bank, this action arose to determine the priority between the security interests of the bank and Boecking Machinery, Inc. \textit{Id.} at 76-77.

\textsuperscript{314} \textit{Id.}


\textsuperscript{316} \textit{Uhlenhake}, 712 P.2d at 77.
est, and then addressing the priority issue, it would have arrived at the same result, but through a more defensible analysis. The debtor listed on the bank’s financing statement, Kurb Services, Inc., did not actually have rights in the collateral because the Bank’s expectation that the individual, Uhlenhake, was donating the equipment to his corporation Kurb Services, Inc. was not fulfilled. Upon proof that the bank’s security interest did not attach, Boecking could assert that it’s security interest was the first to attach in the collateral and, therefore, could establish priority pursuant to Section 9-312(5)(b).

Instead of pursuing this analysis, the Oklahoma Court of Appeals addressed perfection first instead of attachment and considered it unnecessary to address the nature of the bank’s security interest if Boecking’s security interest was perfected. A necessary ingredient to perfection is attachment, and this status should not have been taken for granted. The court, by applying a standard analysis of the creation, perfection, and priority of potentially conflicting security interests, would have reached the same result without unnecessarily expanding search obligations or inserting actual knowledge into the test for seriously misleading error.

7. The Third Category: The Second Tier Test, Seriously Misleading Errors, and Modern Approaches.—In re Terry Pierson, Inc. and In re Waters illustrate modern approaches in resolving variant name filings. Rejecting the name comparison approach, the Waters analysis included consideration of “the operation of the U.C.C. indexing system [in the relevant state and county], including the size of the index and the distinctiveness of the names involved.” Suggesting that the file box method, whereby a searcher “rifles” through the drawer full of cards, is nearly obsolete, the Waters Court recognized the demands for greater precision in the computer system. In view of the technological advances made over

317. See id. (noting that although the trial court determined that the Bank’s security interest did not attach because Kurb Services, Inc. lacked an ownership interest in the collateral, the court of appeals would only address the priority issue); see also U.C.C. § 9-203 (1989) (setting forth the requirements necessary for a security interest to “attach”).

318. U.C.C. § 9-312(5)(b) (1989) (providing that “[s]o long as conflicting security interests [in the same collateral] are unperfected, the first to attach has priority.”).


322. Id. at 960 (stating also that “[t]he resolution of the ‘seriously misleading’ question requires more than just the comparison of two names.”).

323. Id.
previous systems, the "identical name" standard is becoming a necessity. "A clear trend . . . is to require greater precision in listing the name of the debtor on a financing statement. That trend likely results from the increased reliance upon computers in filing and indexing financing statements." In Waters, three brothers operated a farm as a partnership. When the lender filed a security agreement as a financing statement, it named each of the three individual partners, but not the partnership, as the debtor. The court expressed strong doubts that a computer search in the partnership name would reveal the filing against the brothers and their wives; it concluded, however, that even if a search did generate the documents, the financing statement was seriously misleading because a prudent creditor would be justified in concluding that only personal assets had been pledged. The identification of the debtor was, therefore, a more influential criterion than the name similarity. Where the name of the debtor was listed on another security agreement filed as a financing statement as "Waters Bros." instead of "Waters Brothers Partnership," the court held that no one could be misled by the omission of the word "Partnership." Abbreviations, therefore, appear acceptable, at least where they are in standard form.

Many cases have cited Siljeg v. National Bank of Commerce (Henry House Packing Co.) for the principle that: "The issue to be determined is not the true name of the entity, but whether the filing was misleading. Filing under an assumed trade name is effective unless it is misleading." This implies that a name other than the legal name would satisfy the requirements of U.C.C. § 9-402. But the opinion of the circuit court in the context of the facts of Henry House does not necessarily support such a sweeping generalization.

The Washington enactment of the Uniform Commercial Code took effect on July 1, 1967. In anticipation of the new Code law, documentation of the credit transaction was prepared in June,

324. Id. at 961.
325. Id. at 951, 956.
326. Id. at 952 (stating that a UCC-1 financing statement filed on Nov. 14, 1980 listed the debtors as: Waters, George & Teresa; Waters, Lyle & Lisa Baum; Waters, Glen & Lori).
327. Id. at 961.
328. Id.
329. 509 F.2d 1009 (9th Cir. 1975).
330. Id. at 1012.
331. Id. at 1010; WASH. REV. CODE ANN. § 62A.10-101 (1966).
The debtor, Empire Packing Co., was merged into Henry House Packing Co., Inc. on June 26, 1967. The surviving corporation was Empire, but the name was to be changed to Henry House Packing Co., Inc. as soon as possible. In anticipation of the merger and name change, the National Bank of Commerce of Seattle filed a financing statement in the name of Henry House Packing Co., Inc. on June 15, and on June 30 entered into security agreements with the surviving corporation, under the new name, Henry House. The Secretary of State of Washington certified that the name was changed on June 26, 1967, although the necessary articles of amendment had not been filed with the state. While the security agreements were executed by the debtor after the merger, the financing statements were filed prior to the merger; the trustee challenged the financing statements as having been executed by a company that did not survive the merger and as being "technically in the wrong name." The trustee argued that, despite issuance of the State certification of the name change and despite the fact that the Secretary of State's records reflected the name change from Empire to Henry House, a filing under the name Henry House was "technically wrong" because the technical name remained Empire until articles of amendment were submitted to the Secretary of State. The district court held that the true name of the surviving corporation was Henry House, and awarded judgment to the bank.

According to the circuit court, the problem with using the "true" name test to determine whether the bank had perfected its security interest was that both perfection and priority would "turn on a mistake of the Secretary of State" instead of on the effectiveness of the financing statement itself. The error of the Secretary of State was the subject of another legal proceeding, in which a court order was sought to authorize the Secretary of State to correct its records. The state court prohibited back-dating, and ordered the correction and full record of the error and correction to be main-

332. Siljeg, 509 F.2d at 1010.
333. Id.
334. Id.
335. Id.
336. Id.
337. Id. at 1011.
338. Id.
339. Id. (the district court case is unreported).
340. Id. at 1011-12.
tained. The state court declined, however, to evaluate the effect of the error on the rights and priorities of the various claimants, leaving the matter explicitly for determination by the district court and the referee in bankruptcy.\footnote{342} The circuit court concluded that the district court had applied “the wrong legal test” because it “never found whether there was substantial compliance with the requirements of Section 9-402."\footnote{343} The proper legal standard to apply was whether the financing statement substantially complied with requirements of Section 9-402, and whether the error, if any, was seriously misleading.\footnote{344} If the issue were whether the debtor’s true name was used, the determination would depend upon whether the Secretary of State had made an error by issuing a certificate without having received the proper documentation. The error of the secured party was not the use of the name “Henry House Packing Company, Inc.,” but the failure to submit amended articles to the Office of the Secretary of State evidencing corporate action to change the name.\footnote{345} The surviving corporation carried on business as Henry House Packing Co., Inc.\footnote{346} The Henry House Court focused on commercial realities and found that all parties, including subsequent searchers, would regard the post-merger corporation to be “Henry House,” and the articles technically validating the debtor’s name were finally filed in November, five months later. The circuit court considered it likely that only that one name was used and “it may well be that a filing under that name was not seriously misleading.”\footnote{347} The court’s rejection of the “true name” test did not reject the true name of the debtor as a legal requirement, it rejected the use of a technicality to defeat an otherwise valid filing in the name actually regarded by all as the debtor’s true legal name.

III. WOMEN DEBTORS

Occasionally, perceptions of women affect the transaction or the

\footnote{342. Id. at 903, 468 P.2d at 438.}
\footnote{343. Siljeg v. National Bank of Commerce (Henry House Packing Co.), 509 F.2d 1009, 1013 (9th Cir. 1975).}
\footnote{344. See id.}
\footnote{345. Failure to use the anticipated name could itself have been determined to be seriously misleading, as was the case in Burnett v. H.O.U. Corp. (In re Kalamazoo), 503 F.2d 1218 (6th Cir. 1974) (holding that a secured creditor who knew that the debtor was contemplating changing its name and nevertheless proceeds to extend credit without providing notice of the name change, misled and deceived other potential creditors).}
\footnote{346. Siljeg, 509 F.2d at 1013.}
\footnote{347. Id.}
decision. In *Borg Warner Acceptance Corp. v. Secretary of State*, the First National Bank of Hillsboro correctly listed the debtors under their legal names, Paul Eugene Talley and Twila J. Talley, and also listed the trade name, misspelled, as *Empira Manufacturing Co.*, instead of *Empire Manufacturing Co.* In response to several search requests by the subsequent secured party, Borg Warner, over a span of six years, the Secretary of State's Office failed to produce any financing statement against the debtors. Each request properly identified the wife and business trade name, but incorrectly stated the name of the husband. In response to a request that correctly stated the name of the husband, however, the Secretary's office did disclose the Hillsboro financing statement. The fact that disclosure was made only when the name of the husband was listed correctly suggests that only the husband's name mattered to the filing clerk. If the financing statement had been properly indexed and searched under the wife's name as well as the husband's, the disclosure would have been made. The court held that the Twila filing should have been found, and that the state was negligent in failing to disclose the financing statements on record.

In *Citizens State Bank v. Davison (In re Davison)*, the secured party neglected to obtain the signature of the debtor who had an ownership interest in the collateral, believing that the signature of the husband alone was sufficient. Although the Missouri statute requires that the debtor sign the financing statement, which would therefore require the signature of the wife, the court held that the husband's signature satisfied the requirement if the husband acted as an agent for the wife.

349. *Id.* at 600, 731 P.2d at 303.
350. *See id.* at 600-01, 731 P.2d at 303-04.
351. *Id.*
352. *Id.* at 601-02, 731 P.2d at 304.
353. The filing supervisor in charge of U.C.C. filings testified that the financing statement should have been cross-indexed under the individual debtors, and that in looking for Twila Talley the clerk should have discovered the Hillsboro financing statement. *Id.* at 603, 731 P.2d at 305. If the wife is a debtor, therefore, a separate financing statement should be filed, unless the mandatory practice of the Secretary's office is to cross-index against both names. *See also* Walker v. Tennessee State Bank (*In re Williams*), 112 Bankr. 913 (Bankr. E.D. Tenn. 1990).
354. *Borg Warner*, 240 Kan. at 604-05, 731 P.2d at 305 (holding that because of the searcher's reliance on the state's certificates, the negligence of the employees of the Secretary of State proximately caused Borg Warner's damages).
355. 75 Bankr. 738, 739 (W.D. Mo. 1985).
356. *Id.* at 741-42.
In Barton v. ITT Diversified Credit Corp. (In re Skinner), the listing of the wife's name was mere surplusage but, as the second name listed, did not interfere with the notice function. In Walker v. Tennessee State Bank (In re Williams), the debtor, Anne Marie Williams, operated her business as a sole proprietorship. Nevertheless, the secured party listed the name of the husband first on the financing statement, followed by the wife's name and then the trade name. A search in the debtor's name was unsuccessful because, in accordance with procedure, the filing clerk filed only under the first name listed which was the husband's name. The court nevertheless held that the financing statement satisfied the Code's filing requirements, thereby excusing the secured party's error in preparing the financing statement. The court determined that the filing clerk should have rejected the financing statement or filed under all of the names listed under the financing statement. The court could have legitimately relied on Code requirements to discourage the practice of naming the husband first, at least where the husband was not even a debtor. Intent on saving the secured party's financing statement, however, the court may have overstepped judicial boundaries by imposing additional administrative procedures on the filing officer.

IV. Conclusions

Much of the difficulty in interpreting Section 9-402(8) stems from the tautological nature of its provisions. With respect to the identification of the debtor on the financing statement, substantial compliance depends in part upon the classification and gravity of the error. Even though a financing statement may facially appear to comply with requirements, the informational content may defeat the underlying objectives of the requirements. Failure to meet the objectives calls into question whether there has in fact been substantial compliance. In this circular structure it has been difficult to establish a straightforward test.

The test for substantial compliance with Code requirements set

359. Id. at 914 (noting that the names were not listed alphabetically, but as follows: "Williams, J. Malone, Williams, Ann Marie, DBA Jabo's Pharmacy #2").
360. Id. at 916-17.
361. Id.
362. U.C.C. § 9-402(8) may be linearly applied to the other requirements in a two stage process because a defect in any of the other functions may result in lack of notice as to particular collateral or other information, but there is not a failure of notice altogether.
forth in Section 9-402(8) appears to invite an evaluation of the error and of the financing statement within the context of its causal effect. If the effect of the error is a tendency to seriously mislead, the financing statement is not effective. Reconciliation of these two standards is possible if the Section 9-402(8) test is bifurcated into two stages or tiers. In the first tier, a determination must be made whether the financing statement has substantially complied with Code requirements. This decision is guided by comparing the information on the financing statement with the information required under § 9-402(1). If the financing statement does not substantially comply with the Code requirements of Section 9-402(1), there can be no consideration of the gravity or consequence of any alleged defects in the financing statement. If the financing statement does substantially comply because the information required has been supplied, then the analysis progresses to the second tier to determine the gravity and consequences of the alleged defect. An evaluation is made only in those cases where substantial compliance has been achieved.

This two-tier, functional approach to applying the requirements of Section 9-402 is becoming increasingly consistent with a strict construction of the name of the debtor requirement. Now more than ever, inaccuracies in stating the debtor’s name, or in selecting a name other than the debtor’s legal name, jeopardize the ability of a searching party to locate the filing. Absent discovery of the financing statement, notice of the security interest that may exist in the collateral is impossible. Therefore, a functional approach to the requirements of Section 9-402(1) with respect to its key feature—the name of the debtor—demands a literal, or strict reading in order to resolve the tautology. Section 9-402(8), as a redemptive provision, attempted to prevent hypertechnicalities from interfering with the efficient operation of the notice system; instead, it has compounded the problems of interpreting the legal requirements. If a financing statement can achieve its objective of providing notice to a subsequent searcher of the existence of a security interest in the debtor’s collateral, then trivial defects in form should not be used to defeat the earlier creditor’s superior status. But if a facially trivial defect defeats the objective, then a financing statement should not be said.

363. Non-compliance with the requirements for other information on the UCC-1 form does not jeopardize discovery of the financing statement, and since the purpose of notice is fulfilled, a more liberal, or lenient, application of Section 9-402(8) in those cases may be appropriate.
To substantially comply with requirements.

To render a financing statement in substantial compliance with requirements, even though the underlying purpose would be frustrated, would elevate form over substance. That would be contrary to the spirit of the Code and in direct conflict with the purpose of Section 9-402(8). Since the present Code does not explicitly require the exclusive use of the debtor's legal name as the identifier on the financing statement, the two-tier analysis should be engaged.

If the legal name were required under § 9-402(1), one could legitimately argue that there is no substantial compliance, unless the legal name of the debtor was provided, and therefore basic Code requirements have not been met. If there is not substantial compliance, the remaining tests of Section 9-402(8) need not even be addressed; a discussion of the gravity and effect of the error is rendered moot by the decision of no substantial compliance.

The name of the debtor on the financing statement demands special attention because of its unique function. Errors in the general contents of a financing statement may be rectified through a searcher's intervention, who may discover the true state of affairs through further inquiry. But an error in the name of the debtor may preclude discovery of the financing statement altogether because the debtor's name is the key to filing and retrieval of the financing statement. Without discovery of the financing statement there is no awareness of a prior interest or of any error, and further inquiry is, in any event, not possible. The searcher is foreclosed from the opportunity to rectify any error in the debtor's name if the error precluded discovery of the financing statement in the first place. Tolerance for error in the debtor's name should be limited to situations in which the error does not interfere with the discoverability of the financing statement during the course of a routine search of the records.

The modern approach to Section 9-402(8) rejects ad hoc decision making in favor of a mature legal analysis of the complex mosaic of law and fact attending debtor name issues. Analysis of the variety of approaches confirms the wisdom of applying a single unified approach to all debtor name issues, as suggested below. The standard of review in Section 9-402(8) calls for a two-tier analysis to determine, initially, whether the financing statement substantially complies with the requirements of Section 9-402; and secondly, whether any error in the name of the debtor is minor and not seriously misleading. The substantial compliance test is satisfied with an objective review of the financing statement against the statutory re-
quirements. If the financing statement is not disqualified after the initial stage of the analysis, the gravity of any error in the debtor’s name should be assessed in the second stage by reference to the effectiveness in achieving its essential purpose; providing notice. The analysis must depart from the past practice of presuming discovery of the financing statement. Instead, the analysis should include an evaluation of the probability or actuality of discovery within the context of the system in operation (manual or electronic), the administrative practices in filing and searching, and office procedures. The burden of proving that the error is minor and not seriously misleading should rest upon the secured party relying upon the filing, as provided in Section 9-402(8). The approach most compatible with preserving the reliability of the notice filing system and with providing the maximum fairness to all participants in the system is one that reviews the facts from the perspective of the subsequent searching creditor. This modern approach for interpreting Section 9-402(8) with respect to debtor name issues is mature enough to reach consensus on the law and flexible enough to accommodate all of the relevant facts.

The judiciary plays a pivotal role in modernizing commercial law through its interpretation of key provisions such as Section 9-402 of the Uniform Commercial Code. In addition, legislators have the power to reduce litigation through appropriate revisions of the Uniform Commercial Code of their respective states and to inform participants of their respective obligations without having to resort to hindsight analysis. Administrators may also contribute through the broad authorities granted to the Secretaries of State to implement the intent of Section 9-402.

The following recommendations are offered to streamline analysis, minimize the frequency of future debtor name errors, and clarify legal responsibilities. They are offered in the hope of improving the reliability and efficiency of the system, and of increasing the probability of a win-win situation for all.

V. Recommendations

Essentially five avenues of reform can be pursued to prevent the further erosion of the notice filing system of the Uniform Commercial Code. The five specific recommendations that follow are summarized in general terms below.

1. Legislative reform of Section 9-402(1), (3), (7), of the Official Comments to Section 9-402(8), and of Sections 9-402(4), (7)
and 9-105(1)(j) will more permanently reinforce the integrity of the notice filing system and provide a more uniform basis for statutory provisions.

2. Revisions to the Official Comments will explain the purpose to the reforms and assist interested parties in becoming informed of their respective legal obligations under the Uniform Commercial Code.

3. Administrative measures should be taken to prevent problems from arising in the first instance, and to implement the legislative reforms. Even in the absence of legislative reform, certain administrative measures are authorized by the existing U.C.C. and in some states are already supplemented by further powers granted under Administrative Procedures Acts.

4. Judicial adoption of a uniform approach to the problems arising under Section 9-402 should be encouraged. A two-tier analysis would be most consistent with the principles articulated in the Code and is specifically described in Recommendation Four herein.364

5. Finally, in Recommendation Five, some suggestions are offered for coping with Section 9-402 problems in the current uncertain judicial climate pending legislative reform.

The fact that some courts have developed rules to cope with the interpretation of the requirements of Section 9-402 does not obviate the need for statutory reform. Such rules have not been adopted unanimously, nor even by a clear majority of courts facing the issue of variant name filings. Such rules do not give adequate guidelines with respect to “similar” names, nor do they even suggest whether different approaches might be appropriate in light of manual or electronic filing and retrieval systems. Finally, to the extent such rules have been adopted by some courts they are subject to review and reconsideration by decisions which reflect positions contrary to these rules.365 Until these rules have been formalized by statute, they are subject to continuing attack and inconsistent application.

A. Recommendation One: Statutory Reform

The Official Text of the Uniform Commercial Code should be

364. See infra pp. 444-45.

365. For example, due to the Ninth Circuit's decision in Slijeg v. National Bank of Commerce (Henry House Packing Co.), 509 F.2d 1009 (9th Cir. 1975), the bankruptcy court in In re Wilhoit was urged to reconsider its decision regarding trade name filings as seriously misleading and invalid. Carter v. Greene County Bank (In re Wilhoit), 6 Bankr. 574, 575 (Bankr. E.D. Tenn. 1980).
revised to read along the following lines:

Section 9-402(1): A financing statement need not set forth the entire agreement of the parties, and is sufficient if it contains the following required information. The legal name of the debtor and the legal name of the secured party shall be provided in the spaces designated therein on the financing statement. A financing statement shall also include the signature of the debtor, an address of the secured party from which information concerning the security interest may be obtained, a mailing address of the debtor, and a statement describing the items or indicating the types of collateral. [No changes to the remaining portion of Section 9-402(1) are recommended at this time.]

The proposed revision would replace the first sentence of Section 9-402(1) of the 1989 Official Text of the Uniform Commercial Code, which currently reads:

Section 9-402(1): A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. \(^{366}\)

Conforming changes will be necessary to other provisions of Article 9 for the sake of clarification, consistency, and effective implementation of the amendments to Section 9-402(1). Included among the conforming amendments are the following (proposed revisions are italicized):

Section 9-402(3): A form substantially as follows is sufficient to comply with subsection (1):

Legal Name of debtor (or assignor) . . . .
Address . . . .
Federal Identification Number (Social Security or Tax Id) of debtor
Trade Name of debtor (or assignor)[optional] . . . .
Legal Name of secured party (or assignee) . . . .
Address
[No changes would be made to the remaining portion of Section 9-402(3) by the proposed revision.]

Section 9-402(7): A financing statement sufficiently shows the le-

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THE NAME GAME

gal name of the debtor if it gives the individual, partnership or corporate name of the debtor as it appears on the official documents (showing birth, registration or certificate of incorporation, respectively, and as officially modified or amended), whether or not it adds other trade names or names of partners. [Possible changes to the remaining portion of Section 9-402(7) are beyond the scope of this Article.]

A new subsection, Section 9-105(1)(j), would be added to define the term “Legal name,” and the subsections following the definition would be relettered:

Section 9-105(1)(j): “Legal name” means the official name (appellation) of an individual, partnership, or corporation as stated on an official document such as the birth certificate, passport, registration, or certificate of incorporation, respectively, and as modified, supplemented or amended of record with the appropriate judicial or other governmental authorities.

Corresponding changes should be made to Sections 9-403(4) and 9-403(7) with respect to the filing officer’s duties to index the statements according to the legal name of the debtor, and with respect to fixture filings, under the legal name of the secured party.

B. Recommendation Two: Revisions to Official Comments

The Official Comments to Section 9-402 should be supplemented with an explanation of the revisions (proposed revisions are italicized).

Official Comment 1 to § 9-402 should be revised as follows:

1. Subsection (1) sets out the simple formal requisites of a financing statement under this Article. These requirements are: (1) identification of the debtor by the legal name; (2) signature of the debtor; (3) addresses of both parties; (4) a description of the collateral by type or item. The identity of the debtor must be established by reference to the debtor’s legal name in order to provide systematic and effective notice of a potential security interest in the debtor’s assets and to simplify the filing and retrieval process in accomplishing that goal. [No changes would be made to the remaining portions of comment 1.]

Official Comment 7 to Section 9-402 should refer to the changes in Subsection (7) and to the new Section 9-105(1)(j). It should also explain that the controlling date for determining the legal name of the debtor should be the date of filing of the financing statement and any continuation statement. Suggested language to this effect is indi-
7. Subsection (7) undertakes to deal with some of the problems as to who is the debtor and what is the debtor's legal name. [The remaining portion of the first paragraph should remain unchanged but at the end of the first paragraph, add:] The "legal name" of the debtor is defined in Sections 9-105(1)(j) and 9-105(1)(d). With respect to a financing statement, the legal name is the legal name of the debtor in effect on the date of filing the financing statement, and if applicable, any continuation statement. [The remaining portion of comment 7 should remain unchanged.]

Official Comment 9 to Section 9-402 should be supplemented with an admonition that although subsection (8) was designed to "discourage the fanatical and impossibly refined reading of . . . statutory requirements" it should not be used to defeat notice. To that end, the following should be added to Official Comment 9:

9. [At the end of comment 9 add:] This provision should not, however, be used to defeat the accomplishment of notice. Errors which appear to be minor upon preparation of the financing statement but which in practice interfere with the systematic filing or retrieval of the financing statement during a routine search of the record are not minor errors and are seriously misleading. The use of a name other than the legal name of the debtor is an example of a seriously misleading error unless the secured party relying upon the defective filing can prove that during the entire period of its purported effectiveness the defective filing if filed in accordance with mandatory routine procedures in the respective filing office, would be produced in response to a routine request in the legal name of the debtor. The incorrect use of a corporate suffix is an example of an error that is not necessarily seriously misleading. Section 9-402(8) should generally be applied to save a defective financing statement only after a determination has been made that a routine search of the record would reveal such filed financing statement.

The Official Comment to the new Section 9-105(1)(j) with respect to the definition for "legal name" should simply cross-reference to Section 9-402 and the Official Comments thereto.

C. Recommendation Three: Administrative Measures

The primary obligations of the filing officers are set forth in Sections 9-403(4) and (7) of the Uniform Commercial Code, 1989 Official Text. Depending upon which Alternative Subsection (1) to
Section 9-401 has been adopted in the state, filings are usually made in the Office of the Secretary of State and may be made in the local, usually county, office. By statute, the filing officer must index the statements by name (as revised, the legal name) of the debtor. The form that the respective offices use for filing purposes is modeled after the form set forth in Section 9-402(3): "A form substantially as follows is sufficient to comply with subsection (1): . . . ." The form was previously described in relevant part in Recommendation One.\(^\text{367}\)

On the authority of proposed Section 9-402(3),\(^\text{368}\) administrative officers should revise the forms acceptable for filing by inserting the word "Legal" before the word "Name" on the forms. To the extent the particular state has given explicit authority to its administrative officers to devise the form and implement the purposes of Article 9, the administrative officers should further revise the form to include all the changes recommended herein with respect to Section 9-402(3)\(^\text{369}\) even before legislative enactment thereof. Revising the form in accordance with those recommendations will in itself provide notice that the legal name of the debtor is required and that the obligation to provide such information rests squarely with the secured party preparer. Setting forth a special line for the "trade name, if any, of the debtor" helps the preparer to recognize the distinction between the legal name and the trade name. Such assistance is beneficial until the practice of providing the legal name of the debtor has become firmly established.

At the annual national convention of state filing officers, discussion could be initiated with respect to divergent filing and retrieval methodologies with the objective of identifying uniform standards and conventions for searches to compensate for such variations. The standards are particularly important prior to legislative reform and under the conflicting judicial interpretations of Sections 9-402(1) and 9-402(8). For example, administrative corrections could be routinely made for search requests that may have erroneous corporate suffixes. Particularly where computer systems have been installed, a search for a name with one corporate suffix should automatically trigger a search for the same name with alternate suffixes.\(^\text{370}\) An-

\(^{367}\) See supra pp. 439-41.  
\(^{368}\) See id.  
\(^{369}\) See id.  
\(^{370}\) For example, a search under the name "The Shoe Store, Inc." should automatically trigger a search under the names "The Shoe Store, Incorporated," "The Shoe Store Company,
other type of administrative improvement would address the fact that different filing systems are employed in the different states which could have an impact on perceived name similarities. Ways to reduce the disparity of outcome could be discussed and implemented on an administrative level without compromising the filing officer's ministerial functions. At the very least procedures could be adopted for notifying the searcher of the manner in which searches are conducted in that office. This would be helpful to a searcher formulating multiple requests based on perceived name similarities, particularly where the search request is for a corporate name that appears to include an individual's name. Consensus could be obtained on standard abbreviations. The policy of expanding searches to correct secured party filers' errors could be discussed; expansive searches and filings in multiple names of the same debtor should generally be discouraged except for chronic and predictable variations such as corporate suffixes and standard abbreviations.

D. Recommendation Four: Judicial Methodology For Applying the Seriously Misleading Test

The sufficiency of a financing statement under Section 9-402(1) should be determined within the context of its notice function and the filing and search procedures employed by the state and county offices in which the financing statement is filed. The capacity of the financing statement to prevent a fraud on subsequent creditors should be evaluated from a review of the financing statement itself, after discovery in the files, not prima facie, prior to such discovery. The function and procedures are objective criteria consistent with a systematic approach; the latter circumstances are fairly subjective and contrary to systematic or predictable results.

While perfect accuracy is not required by virtue of Section 9-402(8), it is clear that not all errors are fatal. 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." Errors that do not cause subsequent creditors to be misled regarding the existence of a prior secured claim in the debtor's property should not defeat the validity of the earlier secured party's claim. Consistent with these

Inc.," and "The Shoe Store Co., Inc.," etc., without specific requests by the searcher.
371. For a discussion of the significance of filing procedures, see supra notes 4-19 and accompanying text.
goals it is imperative that Section 9-402(8) not be prematurely applied to save defective financing statements that contain errors that appear to be, but are not, minor.

Therefore, in determining whether a financing statement substantially complies with Code requirements, the courts should invoke a two-tier process of analysis. It should be determined whether the financing statement would be revealed at the time of the transaction with the searching creditor by a routine search in the legal name of the debtor in that jurisdiction. Relevant criteria include the legal name of the debtor, the name provided on the financing statement as the name of the debtor, and whether the financing statement that was filed would be revealed by a search in the actual, legal name of the debtor.

If the financing statement would be discovered, and if it contains errors, the second tier of Section 9-402(8) should then be applied to determine whether such errors are minor and not seriously misleading, given the fact that the financing statement has accomplished its fundamental task of providing notice that a security interest may exist in the debtor’s property. If a financing statement would not be discovered in the course of a routine search, the financing statement would fail in its essential purpose and give rise to the conclusive presumption, under the second tier of the analysis applying Section 9-402(8), that the errors contained therein are not minor and are seriously misleading.

This approach is distinguishable from that in which Section 9-402(8) is applied as a first step in the analysis to inspect the financing statement for substantial compliance from the preparer’s viewpoint. Such a prima facie approach focuses on the financing statement alone and outside the context of the notice filing system and is vulnerable to subjective perceptions. Ironically, the fact that a financing statement may technically comply with the requirements of the statute as presently stated and be saved by Section 9-402(8) even though such compliance may actually prevent notice, elevates form over substance in direct conflict with articulated goals of the U.C.C. The savings provision of Section 9-402(8) should therefore not be applied until after the threshold question of effective notice is resolved. Because a routinely discoverable name on the financing statement is the key to the entire notice system, subjective tests should be discarded in favor of the objective standards of the two-tier analysis.
E. Recommendation Five: Transactional Concerns

Lawyers representing the secured party at the transactional stage should complete the financing statement by inserting the legal name of the debtor in the space designated on the financing statement. The legal name should be verified by reference to appropriate official documents, such as a current Certificate of Incorporation, and confirmed by inspection of the debtor's business records. Such documents are, or should be, routinely obtained in any event to verify the good standing of the business person within the state. The confirmation represents an insignificant burden, if any, on the secured party. Since no challenges to the use of the legal name of the debtor have been sustained by the courts, this procedure should be observed to maximize the client's protected status.

Under the diverse range of judicial opinions with respect to secured party and subsequent creditor obligations, lawyers representing the subsequent creditor or searcher should take extra measures to protect their clients' interests. It should be remembered that a secured party at the transactional stage is also a potential subsequent creditor or searcher, and therefore these measures should also be observed by the secured party filers. Searches should be conducted in the legal name of the debtor, and the search request and results should be carefully documented in writing. Until legislation is enacted or judicial consensus is achieved, a search should also be conducted in the trade name or names known to the searcher and in the legal name(s) the debtor has used within the previous five years. All search requests and results should be adequately documented. If the risk of nonpayment and the size of the debtor so warrant, the attorney should investigate whether the relevant jurisdiction has applied a name similarity or physical or electronic proximity test to validate defective financing statements, whether searches are conducted manually or electronically, and what filing procedures are implied, in order to formulate alternate search requests in a less hazardous fashion.

The savings provision of Section 9-402(8) is a valuable protective device for complying creditors, but must be applied consistently with the goal of providing effective notice and protection to deserving subsequent creditors as well. To the extent that all creditors are potential subsequent creditors, all creditors are burdened unnecessarily. Judicial acceptance of the coherent systematic approach and two-tier test proposed in this Article minimizes the burdens, maximizes the benefits, and restores the balance of protections intended in Section 9-402.