

Limitation of Liability for UCC Searches: Can UCC Insurance Provide an Alternative?

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Introduction

It has long been a common practice for UCC search companies to insert express limitations (or even denials) of liability in their invoices resulting from mistakes in, or use of, the information supplied to customers. In a recent Washington State Supreme Court decision, *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*,¹ the court upheld an express limitation of liability for damages to \$25 contained in the defendant UCC search company's invoice. The court ruled that the limitation, which would prevent the plaintiff from recovering the losses it allegedly incurred as the result of the search company's failure to disclose a prior filing by another creditor, was valid and enforceable.

Background

Between 1993 and 1996 Puget Sound Financial L.L.C. (then known as Factors of Puget Sound ("Factors")), which was in the business of purchasing accounts receivable from companies and loaning money to other businesses, routinely contacted Unisearch, Inc. ("Unisearch") by telephone to place orders for UCC searches and reports in the State of Washington under particular names. The purpose of these searches was to identify existing liens on a potential applicant's assets. Each and every search report delivered to Factors contained the following statement:

The responsibility for maintaining public records rests with the filing officer, and Unisearch, Inc. will accept no liability beyond the exercise of reasonable care.

Unisearch charged \$25 for each search. Each invoice delivered by Unisearch along with its report for individual searches contained the statement "Liability limited to amount of fee." The search that was the subject of the current action by Factors was the 48th transaction between the parties.

In 1996, Factors contacted Unisearch regarding a search for "The Benefit Group, Inc." Unisearch produced and delivered to Factors a search report stating that no UCC filings were found under that particular name. As in the past, Unisearch charged Factors \$25 for the search. After receiving the "clean" report, Factors loaned The Benefit Group \$100,000, which loan was secured by the corporation's existing and future accounts receivable and other business assets. A year later, The Benefit Group defaulted on the loan. When Factors attempted to exercise its legal remedies as a result of the default, it discovered that the Travelers Insurance Company ("Travelers") had a valid prior lien

against the collateral. Travelers' lien had been filed under the name, "The Benefits Group, Inc.," and Unisearch had not disclosed this filing because of the plural spelling of the borrower's name. (Unisearch argued that its searches were based on the exact term that was the subject of the search request, while Factors asserted that Unisearch would routinely search for variations in spelling and that Unisearch failed to use reasonable care to determine the variation in this case).

Factors then filed a lawsuit against Unisearch, alleging negligence and breach of contract. The trial court determined that there was a triable issue of fact as to whether Unisearch had exercised reasonable care in conducting its search. Unisearch claimed that even if it were found liable its liability should be limited to \$25, as provided in its invoice to Factors. The trial court denied Factors' motion for summary judgment on liability and held that even if Unisearch were ultimately liable to Factors, the measure of damages would be limited to \$25. The Court of Appeals overturned the trial court's ruling and remanded the case for trial on the issues of both liability and damages. The appellate court reasoned that a question of fact had arisen as to whether Factors unequivocally agreed to or bargained for the limitation-of-liability clause, and as to whether the invoices containing the waiver of liability had created a "course of dealing" between the parties. Unisearch subsequently sought review of the appellate court's reversal of the trial court's ruling.

The Washington Supreme Court's Decision

The Washington Supreme Court was "asked to determine whether limitations on consequential damages presented in regular invoices for the purchase of commercial services can be enforced against a business purchaser."² The court, in ruling that the limitation language contained in the search reports and invoices was part of the parties' contract, considered the relevance of "trade usage" and "course of dealing" (as such terms are defined in the Restatement (Second) of Contracts) in interpreting and enforcing the contract. In this connection the court cited numerous cases from other jurisdictions, which were brought to its attention by Unisearch, upholding liability exclusions in search-company invoices as evidence of trade usage. A search-industry expert, who testified on behalf of Unisearch, also confirmed that it was standard practice in the industry for UCC search companies to contractually limit their liability for damages to the amount of the fee paid for the service. In addition, the court noted that the National Public Records Research Association, the trade group representing UCC search companies, had filed an *amicus* brief with the court that confirmed this standard practice, which brief stated that the limitation was necessary due to "customers' need for searches to be completed as quickly as possible."³

The court, relying on this unrebutted evidence and the fact that the previous 47 invoices sent by Unisearch to Factors, as well as the invoice that was the subject of the instant litigation, all contained the identical language limiting liability, found that a course of dealing had clearly been established by a "common basis of understanding." Furthermore, based on existing case law in the Ninth Circuit, the court stated that,

“Unisearch’s agreement with Factors could be interpreted as a ‘layered’ contract, which incorporates the search reports and sales invoices.”⁴

The court, having found that the liability limitation was included in the parties’ contract, then addressed the enforceability of the liability limitation, i.e., whether the limitation was “unconscionable” as a matter of law. The court noted that generally the legal presumption is against warranty and liability disclaimers and that the party seeking to include the disclaimer has the burden of proving its legality. However, the court noted that in connection with commercial transactions, applicable case law shifted the presumption to the party seeking to invalidate the liability limitation by presuming that the limitation was *prima facie* “conscionable.” The court cited a prior Washington Supreme Court case, *Schroeder v. Fageol Motors, Inc.*,⁵ for the proposition that a “totality of the circumstances” test, considering such factors as “conspicuousness” and “negotiations,” was required to determine the validity of liability limitations in commercial transactions. According to the court, the factors to be addressed in assessing the “totality of the circumstances” (in cases where there was “insufficient evidence of unfair surprise”) included: “(1) the conspicuousness of the clause in the agreement; (2) the presence of absence of negotiation regarding the clause; (3) the custom and usage of the trade; and (4) any policy developed between the parties during the course of dealing.”⁶ The court also noted that a section of Washington’s UCC statute,⁷ which the court had previously applied to service contracts (and which the court determined it would apply by analogy to the present case), states that; “Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable.”

The court ruled, as a threshold matter, that the factual circumstances of the case clearly demonstrated that there had been no unfair surprise. The court noted that all 48 reports and invoices delivered by Unisearch in connection with its services on behalf of Factors contained the disclaimer language, and that Factors’ president admitted that he had examined each of the invoices. The court then ruled that the liability-limitation clause was not unconscionable, and was therefore enforceable, because Unisearch had a reasonable opportunity to examine the terms of the parties’ contract. The court next held that the clause passed the “conspicuousness” test because the invoice consisted of a single sheet of paper with the liability clause printed on the front in the same font size as the other print and was not “hidden in a ‘maze of fine print.’”⁸ The court acknowledged that the limitation-of-liability language had not been specifically negotiated or bargained for by the parties, but stated that, “While absence of negotiations may weigh in Factors’ favor, Factors had a reasonable opportunity to understand the terms of the clause, which remained unchanged throughout the course of dealing.”⁹ Finally, the court reiterated that the evidence, which was unchallenged by Factors, had clearly established a trade usage and course of dealing with respect to the validity and enforceability of the limitation-of-liability provision in a commercial setting.

Exposure to Loss for Incorrect Filings

UCC search companies are understandably reluctant to expose themselves to the possibility of consequential damages if search errors occur or certain filings are not disclosed. Given the quick turnaround demanded by their customers, and the large and continuous volume of requests processed by the companies, they do not have the time or inclination to negotiate the nature and scope of liability restrictions with each individual customer. They therefore limit their liability, on a generally uniform basis, to an amount not exceeding the fee charged for the individual search. UCC search companies do not wish to, and are not in business to, become insurers of customer losses based on claims for consequential damages – nor do they charge premiums or charges sufficient to cover such risk, which would be economically inefficient for both the search companies and their customers.

Furthermore, UCC search companies (and their customers) lack recourse against the state or state agencies for filing or misindexing errors with respect to UCC filing statements (which may nonetheless create valid but undiscoverable prior liens) because of the sovereign immunity doctrine.¹⁰ Although the Eleventh Amendment expressly bars only lawsuits in federal court against States by citizens of other States, the Supreme Court has extended the scope of the Amendment to bar suits against the State by its own citizens where such suits seek damages to be paid out of the state treasury.¹¹ The Eleventh Amendment sovereign-immunity doctrine also has been interpreted to protect non-consenting states from suits in *state* as well as federal courts, and has been extended to administrative claims against non-consenting states filed with executive branch agencies.¹²

Under former UCC Article 9, which was in effect when the reporting error occurred in this case, the test for whether a filing against “The Benefit Group, Inc.” (instead of the correct name, “The Benefits Group, Inc.”) would be effective was whether the incorrect variation of the name was “seriously misleading.”¹³ In 2001, revised Article 9 (“Revised Article 9”) of the UCC was enacted into law in every state.¹⁴ Revised Article 9 has significantly expanded the scope of property and transactions covered by Article 9, and has simplified and clarified the rules for creation, perfection, priority, and enforcement of a security interest.¹⁵ Under § 506(a) of Revised Article 9, a financing statement is not rendered ineffective by minor errors or omissions in the debtor’s name (or collateral) unless they make the financing statement “seriously misleading.” Although this standard is similar to the standard under former Article 9, the revision specifies that a name error is seriously misleading unless a search under the correct name using the filing office’s search logic would disclose the defective financing statement.¹⁶ Under § 9-705 of Revised Article 9, an effective financing statement filed before July 1, 2001 continues to be effective until it lapses or until June 30, 2006, whichever occurs first. Thus, a “seriously misleading” filing (effective before July 1, 2001) remains effective until the earlier of June 30, 2006 or the date that it lapses by its terms. However, current search logic, which uses the stricter standard, will not find such “seriously misleading” but nonetheless effective filings. This poses a problem with respect to filings under former Article 9 and tax liens that remain effective under the former Article 9 standard, which

are not yet subject to the Revised Article 9 standard, and it remains necessary to search for such seriously misleading filings. In addition, some courts are not applying the former Article 9 standard to financing statements entered into and effective before July 1, 2001, i.e., they are incorrectly applying the harsher Revised Article 9 standard.¹⁷

Under former Article 9, human judgment was relevant because the courts determined whether an error was seriously misleading by asking whether a hypothetical “reasonably diligent searcher” could discover the erroneous filing.¹⁸ While the old manual search systems could tolerate certain variations in names, the computerized search logic now available and used by the filing offices results in a precise standard that has little (if any) tolerance for variations. The focus is now solely on the degree of tolerance built into the computerized search logic utilized by the applicable filing office. The search logic could be very liberal, very strict, or somewhere in between. In 2001, the International Association of Corporate Administrators promulgated Model Administrative Rules (“MARS”), which created a standard rules for search logic that tend toward the “strict” end of the spectrum.¹⁹ The majority of states have now adopted some version of MARS, although many states have modified the rules in some respect (which has resulted in a great deal of inconsistency; furthermore, some states have not adopted any rule on search logic at all). In general, when a debtor’s name has been modified by the applicable search logic, the search will produce a financing statement only if the names “exactly match.”²⁰ If there is no match, the security interest will be “seriously misleading,” and therefore unperfected and susceptible to a “strong-arm” attack by a bankruptcy trustee or debtor-in-possession (see bankruptcy discussion below).

Although the MARS search logic ignores punctuation, accents, capitalization, spaces, and other “noise words,” as well as words or abbreviations indicating the nature of the organization at the end of the name (e.g., “Corp.,” “Co.,” “Ltd.,” and “Attorneys at Law”), it does not treat common variations, minor misspellings, or typographical errors as equivalent to the correct name.²¹ Under § 506(c) of Revised Article 9, an error in the debtor’s name is fatal if a search under the correct name, using the filing office’s standard search logic, would not disclose the financing statement. As the result of this stricter standard under Revised Article 9 and the MARS search logic, there is an appreciably greater risk that failure of perfection will result due to an incorrect spelling of the debtor’s name on the financing statement.

Under § 9-516(d) of Revised Article 9 (as was the case under § 9-403(1) of former Article 9), an improperly rejected filing statement is nonetheless deemed to have been correctly filed and therefore effective.²² As noted above, there is no recourse against the State (or any state agency) for misindexed or misfiled financing statements against a debtor that are undiscoverable but nonetheless may be valid. Similarly, there is no way of ascertaining for certain from a search report that a termination of a financing statement was, in fact, properly authorized by the secured creditor.

Bankruptcy Concerns

For the second straight year, bankruptcy filings increased to an all-time record level. A record total of 1.58 million cases were filed in the year ended December 31, 2002.²³ While the number of business bankruptcy filings declined slightly in 2002, the business filings that occurred are much larger and have more significant implications for the economy. The goal of every bankruptcy trustee is to obtain and preserve cash and assets, from all available sources, for the benefit of the estate and its general creditors and to pay the expenses of administering the estate. The trustee therefore will pay a great deal of attention to the sufficiency and validity of any security interest claimed against the debtor's collateral, and will challenge the perfection and lien position of such interest wherever possible.

For a lender that is relying on the protection provided by its security interest in the debtor's collateral, a successful challenge to the perfection or priority of such interest could have devastating "all or nothing" consequences if its interest is reclassified as an unsecured claim. Since most security interests are perfected by filing a financing statement, the standards for measuring compliance with the filing requirements will be critical in determining whether a security interest can be avoided. Section 544 of the Bankruptcy Code gives the DIP, or the bankruptcy trustee, the status of a creditor as of the date of the bankruptcy petition. Section 544(a) incorporates state law into the bankruptcy process and enables the trustee to exercise the rights of creditors under state law. This is the "strong arm" provision of § 544, which enables the trustee or DIP to void any transfer of an interest of the debtor in property that is avoidable under applicable state law. Section 544(b) vests a bankruptcy trustee with the rights of a hypothetical lien creditor whose lien was perfected at the time of the filing of the bankruptcy petition. If another creditor who claims a lien against the applicable property has not properly perfected its lien as of the filing of the bankruptcy petition, the trustee or DIP can void that creditor's lien.²⁴ That creditor then becomes merely a general creditor of the bankruptcy estate. The purpose of § 544 is to arm the trustee with sufficient powers to acquire and evaluate all of the property of the estate. The existence of this power, and the willingness and incentive of the trustee or DIP to wield it, make it extremely important for secured lenders to ascertain that financing statements evidencing their security interests in borrowers' collateral are properly completed and filed to avoid subsequent perfection or priority challenges.

Pursuant to § 1141(a) of the Bankruptcy Code, the provisions of a confirmed bankruptcy plan bind the debtor and all existing creditors, whether or not the claim or interest of any such party is impaired under the plan or any such party has accepted the plan.²⁵ A confirmed plan therefore controls, even if a different result would occur under state law – including the UCC as adopted in each state. For example, in a case of first impression, *General Electric Capital Corp. v. Dial Business Forms, Inc.*,²⁶ the Eighth Circuit Court of Appeals affirmed the ruling of the Eighth Circuit Court of Appeals Bankruptcy Appellate Panel (BAP),²⁷ which held that the priority of a confirmed Chapter 11 plan trumped any contrary result that would have occurred under Missouri's version of former Article 9. (Former Article 9 applied in this case because the bankruptcy court that originally tried the case issued its decision before Revised Article 9 was enacted in Missouri). The confirmed Chapter 11 plan provided that the lien of an unsecured creditor

class created pursuant to the plan (and perfected by filing a financing statement pursuant to applicable state law) against the debtor's assets was expressly subordinated to the claim of an existing secured creditor that had a prior perfected financing statement against the assets. The bankruptcy court had ruled that the junior creditor's claim was not elevated to the status of a senior claim upon the lapsing of the senior lienholder's financing statement because of its failure to file a continuation statement within five years after the original filing – even though that would have been the result under Missouri's UCC statute (the result would be the same under Revised Article 9). This was so, the bankruptcy court ruled, because the Missouri UCC permits "subordination by agreement," which occurred in this case because the subordinated creditors expressly agreed to such subordination in the approved bankruptcy plan. The BAP affirmed the bankruptcy court's decision, for the reasons stated by the bankruptcy court. However, the BAP acknowledged that the subordination provision in the confirmed plan was binding only on pre-confirmation creditors and not on subsequent creditors, thereby obviating, in the majority's opinion, the concern raised in Judge Schermer's dissent that a "hidden lien" would be created, i.e., a senior lienholder still would be required to properly and timely file a continuation statement to preserve the perfection and priority of its existing security interest against future creditors. The Eighth Circuit noted in its opinion that "[o]nce confirmed, a Chapter 11 plan 'acts like a contract that binds the parties that participate in the plan,' and stated that "the effect of plan confirmation is to replace the prior obligations of the Chapter 11 debtor with the obligations provided in the plan." *Id.* at *7. The court reasoned that the agreement of the parties to the bankruptcy proceedings, as among themselves, with respect to the relative priorities of their security interests was binding on the parties and defined their relative positions. The Eighth Circuit found that these relative priorities were fixed permanently for the life of the competing liens and that this result was clearly intended by the bankruptcy court and was a "plausible interpretation" of the confirmed plan, which was entitled to deference by the Eighth Circuit. The Eighth Circuit acknowledged that its ruling affects only those creditors who "agreed to their relative priorities in the Plan," and does not affect post-bankruptcy creditors. *Id.* at 13. As a result of this decision, a new due-diligence requirement for lawyers seeking to perfect UCC security interests for third-party lenders will be a careful check for any pending bankruptcy proceedings filed by or against the debtor, including proposed disclosure statements and approved reorganization plans that specifically refer to (and adjust) the relative priority of secured claims. In addition, lawyers representing subordinated secured creditors in a debtor's bankruptcy proceeding must now be careful to modify (or at least attempt to modify) bankruptcy reorganization plans by which they are bound, to specifically state that their interests are subordinated only so long as, and to the extent that, the security interests of the prior lienholder(s) are properly perfected under applicable state law. (However, the Eighth Circuit stated in its opinion that, "As a matter of law, a particular creditor's intent is irrelevant, because a Chapter 11 plan may be confirmed over the objections of one or more creditors, who are then every bit as bound as if they had voted to approve the plan." *Id.* at *10.)²⁸

Would UCC Insurance Make a Difference?

Although a lender making a loan secured by personal property collateral would have no recourse against either the search company or the State based on the factual circumstances described in the *Puget Sound* decision, UCC insurance is now available that would provide both defense coverage and payment on a claim for damages under similar circumstances. A few of the large land-title insurance companies now offer this product. These national insurers are experienced, stable and well capitalized, and are regulated by each of the state insurance departments in which they do business. They are therefore able to spread their exposure among a large pool of customers and charge relatively low premiums for the risk assumed (especially in comparison to the fees that would have to be charged by UCC search companies or individual states to assume such risk). Without such coverage – as clearly illustrated by the *Puget Sound* case – lenders would either have to self-insure such risks or else have their law firms assume them, neither of which is cost effective or results in the extent of coverage provided by UCC insurance.

UCC insurance provides indemnity insurance for the attachment, priority, and perfection of the lender's security interest and transfers the risk of failing to properly create, perfect, or attain the desired priority of, the lender's security interest to the insurer. For a single premium, the lender who purchases a UCC insurance policy (and its counsel) obtains, in addition to an insurance policy that provides full legal-defense costs, the benefit of systems and procedures specifically designed to assure compliance with the Uniform Commercial Code (including legal and procedural changes thereto under Revised Article 9). Knowledgeable and experienced personnel provide a "second set of eyes" and engage in a dialog with both the lender and the lender's counsel. They provide assistance and advice during every step of the transaction, from ordering the policy to filing the required documentation in the proper location(s). The policy benefits include – at no additional cost – record searches (with respect to a single search on a single debtor), document preparation, filing, follow-up, and tracking (including timely notice of expiration dates) services, thereby providing peace of mind to lenders and their counsel.

In those circumstances where the filing of a UCC-1 financing statement would be required to perfect the lender's interest, the insurer would provide insurance that the filing was accomplished in the proper jurisdiction and maintained the priority insured in the policy -- and perhaps most important, provide at the insurer's cost a defense against any challenge (whether or not valid or justified) against the attachment, perfection, or priority of the lender's security interest.

As soon as there was a valid claim under the UCC insurance policy, the insurer would be obligated to pay. The fact that the lender might also have a claim against its attorney would be irrelevant and the insured would not be obligated to first pursue any rights it had against the attorney. But the insurer normally would, under its right of subrogation under the policy, have the right to pursue a claim against the negligent attorney in an attempt to recoup its loss. However, the insurer often can be persuaded to waive, by endorsement, any right of subrogation against the lender's attorney for indemnification for negligent acts by the attorney.

Conclusion

There is no doubt that that Factors was surprised and shocked to learn that even though the standard UCC search report produced by Unisearch, the search company it had used for dozens of previous searches, failed to show the existence of a prior lien, the search company's liability would be limited to the \$25 search fee. It undoubtedly also was surprised to learn that it had no recourse to Unisearch or to any other party (including the State). There have been other recent court decisions, in addition to *Puget Sound*, that demonstrate the risk to lenders of relying on third parties, including their attorneys, to properly draft and file documents (or perform searches) to assure the proper attachment, perfection and/or priority of the lenders' security interest in personal property collateral.²⁹ Fortunately for such lenders, UCC insurance is now available from some of the major title insurance companies that, for a relatively small premium, provides both liability coverage and defense costs in connection with many of these types of risks – not to mention peace of mind.

Endnotes

¹ 146 Wn.2d 428 (2002).

² *Id.* at 431.

³ *Id.* at 435.

⁴ *Id.* at 437.

⁵ 86 Wn. 2d 256, 260 (1975).

⁶ *Puget Sound*, *supra* note 1, at 439 (citing *Schroeder*, *supra* note 5, 86 Wn. 2d at 259-61).

⁷ RCW 62A.2-719(3).

⁸ *Puget Sound*, *supra* note 1, at 442 (citation omitted).

⁹ *Id.* at 443.

¹⁰ *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 72-73 (1996) (holding that Eleventh Amendment, absent waiver of sovereign immunity either by United States Congress pursuant to valid power or by state itself, precludes suit against state instrumentality in federal court, and stating that, “even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States”).

¹¹ *See Hans v. Louisiana*, 134 U.S. 1, 15 (1890); *Sacred Heart Hospital of Norristown v. Pennsylvania (In re Sacred Heart Hospital of Norristown)*, 133 F.3d 237, 241 (3d Cir. 1998); *Quern v. Jordan*, 440 U.S. 332, 337 ((1979); *In re Hechinger Inv. Co., Inc.*, 254 B.R. 306, 309 (Bankr. D. Del. 2000).

¹² *See Alden v. Maine*, 527 U.S. 706, 754 (1999) (“States retain immunity in their own courts”); *Magnolia Venture Capital*, 51 F.3d at 443 (“a state may waive its common law sovereignty without waiving its Eleventh Amendment immunity under federal law (citations omitted)”; *Nelson v. LaCrosse County Dist. Atty. (In re Nelson)*, 301 F.3d 820, 828 (7th Cir. 2002) (“The [Eleventh Amendment] has been interpreted to protect non-consenting states from suit in state as well as federal court (citation omitted)”) (emphasis in text); *Federal Maritime Com’m v. South Carolina State Sports Auth.*, 535 U.S. 743, 122 S. Ct. 1864, 1874 (2002) (extending Eleventh Amendment protection to administrative claims against non-consenting states filed with executive-branch agencies, reasoning that federal agencies share “strong similarities” with federal courts); *Nelson*, *supra*, 301 F.3d at 828 (“[t]he Eleventh Amendment extends to state agencies and departments and . . . to state employees acting in their official capacities”); *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 429 (1997) (“It has long been settled that the reference to actions ‘against one of the United States’ [in the Eleventh Amendment] encompasses not only actions in which a state is actually named as the defendant, but also certain actions against state agencies and state instrumentalities”).

¹³ *See* § 9-402(8) of former Article 9.

¹⁴ Revised Article 9 also was enacted into law in the District of Columbia. Only Puerto Rico has not adopted Revised Article 9.

¹⁵ *See* Steven O. Weise, *An Overview of Revised UCC Article 9*, THE NEW ARTICLE 9, UNIFORM COMMERCIAL CODE (SECOND EDITION), Section of Business Law, American Bar Association (2000), at p.1.

¹⁶ *See* Revised Article 9 § 506(b) and (c).

¹⁷ *See, e.g., In re Grabowski*, 277 B.R. 388, 391 (Bankr. S.D. Ill. 2002) (dealing with incorrect legal description and finding that “exceedingly general” standard under Revised Article 9 was sufficient); *Nazar v. Bucklin Nat’l Bank (In re Erwin)*; 2003 Bankr. LEXIS 692 (Bankr. D. Kansas, June 27, 2003), at *22 (holding that use of debtor’s nickname was sufficient under Revised Article 9, but not mentioning standard under former Article 9).

¹⁸ *See, e.g., Knudson v. Dakota Bank and Trust Co. (In re Knudson)*, 929 F.2d 1280, 1283 (8th Cir. 1991) (holding that under former Article 9, financing statement was not seriously

misleading if third-party searcher searching under debtor's correct name would be "reasonably likely" to find financing statement).

¹⁹ These rules ("Model Rules") appear at www.iaca.org/sts/.

²⁰ See Model Rule § 503.8.

²¹ See Model Rules §§503.2, 503.3, 503.5, and 503.6.

²² However, unlike former Article 9, § 9-516(d) of Revised Article 9 provides that an improperly rejected filing statement is not effective against a later secured creditor that obtains a security interest for value in reasonable reliance on the absence of the financing statement from the records.

²³ Data compiled by the Administrative Office of the U.S. Courts show that total bankruptcy filings for the calendar year 2002 increased by 5.7 percent over the previous year (which itself was a record year for bankruptcy filings), setting a record of 1,577,651 (compared with 1,492,129 in 2001). (The previous record year was 1998, with approximately 1,440,000 total filings). However, the total number of business bankruptcy filings in 2002 actually fell by 1,559 cases, from 40,099 in 2001 to 38,540 in 2002. Chapter 11 filings fell by 1.3 percent to 11,270 in calendar year 2002, from the 11,424 Chapter 11 filings in 2001.

²⁴ See 11 U.S.C. § 544(b)(1) (2003), which states:

Except as provided in paragraph 2 [applying to a transfer of a charitable contribution], the trustee may avoid any transfer of an interest in the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 ["Allowance of claims or interests"] of this title or that is not allowable only under section 502(e) [dealing with disallowed, contingent, and subrogated claims] of this title.

²⁵ Section 1141(a) states, in pertinent part:

[T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.
11 U.S.C. § 1141(a) (2003).

²⁶ (*In re Dial Business Forms, Inc.*),

²⁷ *Gen. Elec. Capital Corp. v. Dial Business Forms, Inc. (In re Dial Business Forms, Inc.)*, 283 B.R. 537 (B.A.P. 8th Cir. 2002) (Judge Schermer, dissenting).

²⁸ See also *Astroglass Boat Co., Inc. v. Eldridge (In re Astroglass Boat Co., Inc)*, 32 B.R. 538, 542 (Bankr. M.D. Tenn. 1983) (holding that bankruptcy plan and order of confirmation fix rights of the parties); *Gen. Elec. Credit Corp. v. Nardulli & Sons, Inc.*, 836 F.2d 184, 192 (3d Cir. 1988) (holding that secured creditor granted priority in Chapter 11 plan need not file continuation statement to maintain priority against bankruptcy trustee, because such requirement would "serve no useful purpose").

²⁹ See, e.g., *Lory v. Parsoff*, 745 N.Y.S.2d 218 (2002) (holding that, plaintiff, a former client of defendant and his law firm, was entitled to summary judgment against defendant and his firm because of their failure to file UCC-1 financing statement that would have perfected plaintiff's security interest in assets of electronics company sold by plaintiff, which subsequently filed for bankruptcy); *Shelby County State Bank v. Van Diest Supply Company*, 303 F.3d 832 (7th Cir. 2002) (ruling that creditor's security agreement was ambiguous as to whether it covered after-acquired inventory from other sellers, and was properly construed to limit collateral to that creditor's products by bankruptcy court).