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Filing Nationwide Perfectly or Get with the Trend

Michael I. Spak
Chicago-Kent College of Law

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FILING NATIONWIDE PERFECTLY OR GET WITH THE TREND

MICHAEL I. SPAK¹

I.	INTRODUCTION	11
A.	<i>Creation of a Security Interest-Attachment</i>	13
B.	<i>Perfection</i>	14
C.	<i>Filing Systems</i>	14
1.	Central Filing.....	14
2.	Dual Filing.....	15
3.	Local Filing	15
II.	ILLINOIS DUAL FILING SYSTEM	15
A.	<i>Central Filing System in Illinois</i>	15
B.	<i>Local Filing System in Illinois</i>	16
III.	PROBLEMS OF CURRENT FILING SYSTEM.....	17
A.	<i>Paper Based System</i>	20
B.	<i>9-401 Filing-Where Within State to File</i>	22
C.	<i>9-103 Filing-Which State to File in</i>	28
D.	<i>9-401(3) Filing – Having to Re-File</i>	31
IV.	SOLUTION – A SINGLE, UNIFORM, CENTRAL FILING IN EVERY STATE CONNECTED ON A NATIONAL SYSTEM.....	36
V.	CONCLUSION.....	38

I. INTRODUCTION

Society today is certainly heavily dependent and reliant upon computers for information and many routine administrative tasks. This dependence is amply demonstrated by all of the fears of the year 2000 and what will happen to the computer records upon which much information has been stored in databases. Most modern businesses, corporations, and individuals use computers. Computers are used for storing information, word processing, and now with the Internet, people can use them to find information about almost anything within a matter of minutes. People can look up corporations, schools, television shows, rock bands, and even shop on the Internet from the comfort of their own homes.

It is rare to find companies, schools, etc. that aren't using modern technology. If they are not, these institutions are unable to satisfactorily compete with others in providing information necessary for their operations. The Uniform Commercial Code ("U.C.C.") and its filing system, which has independent and varied offices all over the United States, is a system which has not taken advantage of the modern technology available, and thus has failed to keep pace with the rest of society's

¹Professor of Law at Chicago-Kent College of Law. He wishes to thank Michael Ralph, a student at Chicago-Kent College of Law, and Jennifer Ornburn, a student at Oklahoma City University School of Law, for their help with this article.

institutions. It is the author's view that all of the present filing systems should be brought into the 21st century by merging them into a single, unified, central, national U.C.C. filing system.

Article 9 of the U.C.C. deals with secured transactions, which are security interests in personal property. It sets forth the procedure for creating and administering security interests, as well as specifying the rights of the security interest holders, as compared to unsecured creditors, and other secured creditors, except where Federal law preempts Article 9. Article 9 only applies to consensual security interests in personal property and fixtures;² excluding, by its terms statutory, non-consensual security interests, such as landlord liens, and mechanics liens.³ Section 9-104 sets out transactions that are excluded from Article 9.

A security interest is an interest in personal property or fixtures which secures payment or performance of an obligation.⁴ In addition, some leases are included as security interests.⁵ There are different types of "collateral" which is the property subject to a security interest, which include accounts and chattel paper which have been sold.⁶ The collateral need not be in the secured party's possession, but also includes any property which the debtor continues to possess which the secured party can obtain upon debtor's default. The different types of collateral are: (1) accounts;⁷ (2) chattel paper;⁸ (3) documents;⁹ (4) instruments, negotiable and non-negotiable;¹⁰ (5) general intangibles;¹¹ (6) consumer goods;¹² (7) equipment;¹³ (8) farm products;¹⁴

²U.C.C. § 9-102(2)(1997).

³*See id.*

⁴*See id.* U.C.C. § 1-201(37).

⁵*Id.*

⁶*Id.* U.C.C. § 9-105(1)(c).

⁷'Accounts' are any "rights to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance." U.C.C. § 9-106.

⁸'Chattel Paper' is a "writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper." U.C.C. § 9-105(b).

⁹'Documents' are "documents of title as defined in the general definitions of Article 1 (Section 1-201), and a receipt of the kind described in subsection (2) of Section 7-201." U.C.C. § 9-105(f).

¹⁰'Instruments' mean a "negotiable instrument (defined in Section 3-104), or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment. The term does not include investment property." U.C.C. § 9-105(i).

¹¹'General Intangibles' are any "personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money." U.C.C. § 9-106.

(9) inventory;¹⁵ and (10) proceeds.¹⁶ The secured party is the lender, seller, or other person in whose favor there is a security interest.¹⁷

In a secured transaction, the secured party makes a loan to the debtor, and to secure the loan, the secured party takes a security interest in the collateral. In the instance that the debtor defaults, the secured party has the ability to recover the collateral securing the loan. A common example of a secured transaction would occur when a supplier of the debtor sells the debtor some equipment on credit. In return, the debtor not only promises to pay for the equipment, but in addition, furnishes a security interest in the equipment. If the debtor defaults, the secured lender could foreclose on the equipment, and apply the proceeds to the loan balance. Even the mere threat of foreclosure may get the debtor's attention, and perhaps coerce the debtor into paying the loan obligations.

Before enactment of the Code, the main form of secured transaction involved the debtor pledging the collateral to the secured party. In that type of transaction, the debtor would not have the use of the collateral. The use of a security agreement allows the debtor to retain possession of the collateral, receive the loan, and to secure the lender.

A. *Creation of a Security Interest-Attachment*

To create a security interest, three things must occur. A security interest can be enforced against the debtor upon attachment. To be an enforceable security interest, (1) there must be a written security agreement, which contains a description of the collateral and is signed by the debtor, or the collateral must be pledged to the secured party by an agreement; (2) value has been given; and (3) the debtor has rights in the collateral.¹⁸ Value includes any form of consideration or obligation of pre-existing debt; usually by advancing money or credit, or by legally binding himself to advance

¹²'Consumer goods' are goods that are "used or bought for use primarily for personal, family or household purposes." U.C.C. § 9-109(1).

¹³'Equipment' is goods that are "used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods." U.C.C. § 9-109(2).

¹⁴'Farm Products' are goods "if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory. U.C.C. § 9-109(3).

¹⁵'Inventory' are goods "if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment." U.C.C. § 9-109(4).

¹⁶'Proceeds' are "whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." U.C.C. § 9-306(1).

¹⁷§ 9-105(1)(m).

¹⁸See U.C.C. § 9-203.

money or credit.¹⁹ Value can be given from a secured party by legally binding himself to extend credit or money, taking a security interest to satisfy a pre-existing claim, or in return for any consideration which could support a contract.

B. Perfection

“A security interest is perfected when it has attached and when all of the steps for perfection have been taken.”²⁰ Perfection is a term of art created by Grant Gilmore, the main drafter of Article 9 of the U.C.C.²¹ Perfection allows the secured party to assert his rights against other third parties, as an attached security interest only helps give priority as to the debtor and not other third parties usually. To gain priority over third persons, the secured party must generally perfect the security interest. Security interests can be perfected automatically; temporarily, usually for 21 days; or depending on the collateral as long as the secured party maintains possession of the collateral. The most frequent way of perfecting a security interest is by filing a financing statement.²² The main purpose of perfecting a security interest is to provide notice to other potential creditors and lenders.

Part 4 of Article 9 explains how the filing system works. Filing a financing statement and tendering a filing fee, or acceptance by the filing officer constitutes a filing.²³ U.C.C. § 9-402 lists the requirements for a financing statement. Section 9-401 tells the secured party where to file to perfect their security interest. There are three alternatives for states to choose from for the filing system it desires for its jurisdiction, because it varies from state to state.²⁴ States also have more leeway in controlling their systems, as Article 9 is only a general guideline.

C. Filing Systems

For each state three possibilities exist for filing systems. The possibilities include: central filing, dual filing, and local filing. Because of the three possibilities and the freedom for the states to choose a system, they can all differ. This can lead to confusing and different results depending upon the jurisdiction. The pros and cons of each are discussed below.

1. Central Filing

In a central filing system, one central office is responsible for all secured transactions in that state. Hawaii is an example of a state with a central filing system. Hawaii's statute states that the proper place to file in order to perfect a security interest is with the Registrar of Conveyances, Bureau of Conveyances.²⁵

¹⁹Michael I. Spak, *A Modern Proposal: "Suggested Perfection"-For The 21st Century*, 63 UMKC L. Rev. 79, 81 (1994).

²⁰See U.C.C. § 9-303.

²¹Spak, *supra* note 19, at 81.

²²See U.C.C. § 9-302(1).

²³See *id.* § 9-403(1).

²⁴See *id.* § 9-401.

²⁵HAW. REV. STAT. § 490:9-401 (1997).

2. Dual Filing

A dual filing system is where some transactions are recorded in the central office, while other transactions are recorded locally. To determine which office to file or where to look up the financing statement, the person will check based on the type of collateral, on the location of the debtor or debtor's business, and sometimes on the judgment of the secured party. Illinois is an example of a state with a dual filing system. The majority of jurisdictions use a dual filing system for recording secured transactions.²⁶

3. Local filing

A local filing system is where transactions are all recorded in the local county offices. To determine which office to file or look up the financing statement, the person will check based on the county of the debtor or the debtor's business. Georgia was an example of a state with local filing, but realizing the error of local filing changed the state's filing system in 1994.²⁷

II. ILLINOIS DUAL FILING SYSTEM

Since dual filing is the filing system used in a majority of states, Illinois' system will be explained to demonstrate how a dual filing system works. Illinois has a dual filing system, which handles two separate filing systems within the state.²⁸ The first system is the central filing system located in the Secretary of State's Office in Springfield, Illinois' capital.²⁹ The central system is chiefly responsible for the business-type collateral.³⁰ The second system includes the local filing system located in each county at the Recorder of Deeds Office.³¹ The local filing office for Cook County is a Division of the Recorder of the Deeds Office in Chicago, for example.³² The main types of collateral handled by the local system are personal property, consumer goods, and now more frequently, beneficiary interests and trusts.³³

A. Central Filing System in Illinois

The central filing office primarily handles the business-type of collateral, including: equipment, inventory, documents, accounts, chattel paper, and general intangibles.³⁴ Instruments are not collateral handled by the central filing office. On

²⁶Spak, *supra* note 19, at 82.

²⁷See *Trust Co. Bank v. Georgia Superior Court Clerks' Cooperative Authority*, 456 S.E.2d 571 (Ga. 1995).

²⁸Spak, *supra* note 19, at 82.

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³Spak, *supra* note 19, at 82.

³⁴*Id.*

average, 400 U.C.C.-1 and 100 U.C.C.-3 filings are submitted each day.³⁵ The recent filings are stored in a computer database while the paper documents are kept and stored.³⁶ To obtain a collateral description, the actual financing statement must be removed from storage.³⁷

B. Local Filing System in Illinois

In the local filing offices, the creditor files a "financing statement" in the county of the debtor's residence or place of business.³⁸ The written financing statement signed by the debtor with a description of collateral, is presented to the Recorder of Deeds Office.³⁹ In Illinois, the financing statement is typically written on a standardized form called the U.C.C.-1. If parties do not use the standard form, they then pay an extra charge.⁴⁰ In Cook County, the cost of filing is \$7.00 for a U.C.C.-1 and \$11.00 for a non-standard form.⁴¹ In addition, there are supplemental charges for additional debtors of \$4.00 per debtor, and \$2.00 per each additional page.⁴² The financing statements are effective for five years,⁴³ assuming neither the debtor nor the collateral is moved.⁴⁴ To keep the security interest perfected after the five years, the secured party must file a continuation statement.⁴⁵ In Cook County, the standard form is the U.C.C.-3 form, which costs the same as the U.C.C.-1 financing statement.⁴⁶ These forms are submitted to the Recorder of Deeds Office either by mail or in person.⁴⁷

Since 1991, the staff has entered the information of the financing statements into computers to maintain them.⁴⁸ In addition, the actual forms are stored and filed according to the debtor's name.⁴⁹ Each office is independent and only keeps track of the filings submitted to that particular office.⁵⁰ All local filings since 1991 can be

³⁵*See Id.* at note 32. This information was provided by Illinois' Central Office. Survey Response of Tom Dilello, Administrator, U.C.C. Division, Department of Business Services, Secretary of State's Office, Springfield, Ill. (Jan. 5, 1994).

³⁶*See Id.*

³⁷*See Id.*

³⁸Spak, *supra* note 19, at 82.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³Spak, *supra* note 19, at 82.

⁴⁴*See* U.C.C. § 9-401(3), Alternative Subsection (3).

⁴⁵Spak, *supra* note 19, at 82.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰Spak, *supra* note 19, at 82.

accessed by computer in Cook County.⁵¹ To find the financing statement, one runs a query search of the database through the debtor's name.⁵² If the financing statement is pre-1991, the searcher must have the original paper filing retrieved from storage.⁵³

III. PROBLEMS OF CURRENT FILING SYSTEM

Filing searches are slow, inaccurate, and inefficient. People search to find all previous security agreements entered into by the debtor. Currently the searches are limited to the jurisdiction where the people search, and a change to a national system would allow people to search in one location to determine if there are filings throughout all jurisdictions without having to conduct a search in each jurisdiction.

Creditors usually do not lend money without some form of collateral, because if the debtor defaults, they have no recourse if the debtor has no money to satisfy the creditors judgment. So creditors take collateral or a security interest in collateral for lending money to debtors.

If creditors are to take a security interest in collateral of the debtor, it is very important that the secured party searches to determine whether other financing statements exist which would have interests senior to them on the collateral. Other filings on the same collateral represent a competing interest. Generally, the first in time to file has the senior interest.⁵⁴ If the secured creditor is over-secured, in that the security interest they have taken is greater than the amount of money they loaned the debtor, other parties can loan the debtor money and still be able to satisfy a judgment from the collateral after the first secured party has been paid their interest.

A party interested in lending money to a debtor typically asks the U.C.C. office to search through its records for financing statements on collateral, or for specific collateral.⁵⁵ If previous filings of financing statements exist, the creditor then knows that the collateral may be worthless, in that the value of the collateral is already secured to other creditors, and no money would be left over for this creditor to satisfy the loan. If no filings exist, the party then believes it has priority and can loan without worries if it needs to satisfy its judgment from the collateral.

Although, sometimes the searching office can make mistakes. The searcher could have put in the wrong name, or it could have been filed incorrectly so it does not show up from a search. It would show nothing, leading the creditor to believe it has priority, but in reality the collateral already could be spoken for. Also, there is a time lag between the filing of financial statements and the financing statement actually appearing in the records.⁵⁶ Since the financing statement needs to be "indexed" according to the debtor's name so that it can be stored and retrieved if necessary,⁵⁷ the searcher could be mistaken because when the search runs and there are no statements on record, but a statement could have been filed some time before and

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴See U.C.C. § 9-312.

⁵⁵Spak, *supra* note 19, at 86.

⁵⁶*Id.*

⁵⁷*Id.*

just not be recorded yet. According to a survey by the American Bar Association Task Force to the Permanent Editorial Board of the U.C.C., a large majority of the filing offices stated a search would typically uncover a recently filed financing statement within three days of the filing.⁵⁸ However, other filing offices take exceedingly longer.⁵⁹ For example, a search in Michigan may not discover a financing statement until almost one month after it has been filed.⁶⁰ Illinois' Central Filing Office stated a search usually reveals the financing statement of the previous day.⁶¹ However, a private search firm stated on several occasions searches will not show a financing statement for several days after the filing.⁶²

It is imperative to secured creditors to know whether other security agreements and financing statements exist before lending to debtors. Also, time can be a factor. Since a secured creditor cannot always be 100% positive the search is correct or timely, it causes substantial delays in the process of creating and perfecting security interests.

Filings are indexed according to the debtor's name, so a U.C.C. search officer is expected to review the index for an exact name match.⁶³ This search method is not always accurate and can cause problems. Common names and corporate names increase the possibility that a filing search will return an incorrect debtor or financing statement.⁶⁴ There can be many people with a name like Jackson or Davis, which can show up several times on search reports, thus leaving the creditor to figure out, or possibly guess, which Jackson or Davis is the correct party. Many financing statements are filed under a trade or corporate name, especially for commercial or business type collateral.⁶⁵ In these instances, the possible creditor must pay for separate searches of each possible name. For instance, the corporation Tom Jones, Inc. could do business under the name Tom's Tasty Tortillas. To run a search, the possible creditor needs to determine how to phrase the search. It might not even know the actual name of the corporation, but may only know the trade name. It might look under Tom Jones, Inc. which could be confused by the searching officer with a corporation called Tom Jones, Chtd., etc. Or it might search under Tom's Tasty Tortillas, and if the searcher or the creditor makes a mistake, it could come up with the wrong and a completely different party. The searches can become very expensive and time consuming, especially when the initial search fails to disclose the intended debtor or financing statement.⁶⁶

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰Spak, *supra* note 19, at 86.

⁶¹*See Id.* at 46. Survey Response of Blair Wagner, Vice President, Chattel Mortgage Report, Inc. (Jan. 27, 1994). Mr. Wagner is a vice president of a large private search firm that deals with U.C.C. transactions on a regular basis.

⁶²Survey Response of Blair Wagner, *supra* note 61.

⁶³Spak, *supra* note 19, at 87.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

Currently, the accuracy of the search depends on two subjective factors: the discretion and judgment of the official performing the search and the knowledge and familiarity of the searching party with the U.C.C. office in that area.⁶⁷ Similar names or common spelling variations are not automatically included in the search parameters.⁶⁸ When an exact match is not found, the likelihood of the intended party being discovered depends on the judgment and possibly the work ethic of the particular officer performing the search.⁶⁹ For instance, a debtor with the name of Jack David Williams could be filed under many different variations. It could appear in full or with initials, as Jack D. Williams or J.D. Williams. Misspellings are common occurrences on financing statements.⁷⁰ A typical search would not necessarily indicate all these possibilities.⁷¹ Thus, the accuracy of a search is partially determined by the individual state employee's decision on which alternative and variation to use in the search.⁷²

On the other side, the knowledge of the prospective creditor also determines the chances of a successful search.⁷³ A prospective creditor wanting information on a particular debtor or secured transaction either submits a search request to the office directly or uses a search firm.⁷⁴ Unless the creditor handles many secured transactions in that area, searchers are generally unfamiliar with the specific search methods used by that particular filing office.⁷⁵ This lack of knowledge by the prospective creditor makes it more likely that the creditor will not include additional information or the possible variations, thereby decreasing the chances of finding the intended debtor, transaction, or financing statement.⁷⁶

For the above stated reasons, many secured parties use the services of search firms to conduct their U.C.C. searches.⁷⁷ Search firms regularly deal with the U.C.C. offices and have expertise in performing many searches.⁷⁸ Search firms are more likely to succeed than regular creditors, who usually lack the experience and knowledge to include the names and information that will find the intended data.⁷⁹ Creditors without the experience and knowledge often use the search firms because

⁶⁷*Id.*

⁶⁸Spak, *supra* note 19, at 87.

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.*

⁷³Spak, *supra* note 19, at 87.

⁷⁴*Id.*

⁷⁵*Id.* at 88.

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸Spak, *supra* note 19, at 88.

⁷⁹*Id.*

of their efficiency and ability to search.⁸⁰ Since this knowledge is important to prospective creditors, they are willing to pay for the job to be done properly.⁸¹

The search firms are able to do jobs more efficiently, accurately, and quickly because their employees can go to the U.C.C. office and provide the necessary information about the debtor, which the typical creditor may not be able to do.⁸² Although the search firms are very efficient, it is not without a price.⁸³ Often, the cost to the prospective creditor of using the search firm can be from five to ten times the cost of the actual search.⁸⁴ In addition, since many creditors are unsure where the financing statement was filed, multiple searches must be made, further increasing the cost.⁸⁵

Other problems exist besides the problems discussed above. Other problems to be discussed are the problems of: the paper based system, where within the state to file, which state to file in, and lastly the problem of having to re-file.

A. Paper Based System

The filing system created by Article 9 of the U.C.C. is inefficient and archaic compared to the technology available to companies, schools, and the government. In 1962, when Grant Gilmore drafted the secured transactions system, computers and electronic information systems were not used.⁸⁶ All public records and information were paper documents, which were stored in warehouses or storage units.⁸⁷ The papers were the only evidence that a filing or secured transaction occurred, so if the papers were lost, destroyed, or ruined, the information contained was lost as well.⁸⁸

Since that time, there has been a computer revolution which has transformed society and brought many technological advances. These changes have altered the way business is done and how records and information are stored, used, and sent. Computers allowed data to be recorded, stored, calculated, indexed, copied, and retrieved at incredible rates and accuracy. The computer stores the information electronically, which eliminates the need and use of paper records.⁸⁹ Most major businesses, banks, law enforcement, law firms, schools, etc., have highly automated and integrated computer networks which record and analyze data.⁹⁰ Millions of

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

⁸³Spak, *supra* note 19, at 88.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 83.

⁸⁷*Id.*

⁸⁸Spak, *supra* note 19, at 83.

⁸⁹*Id.*

⁹⁰*Id.*

banking transactions are recorded daily and are instantly accessible from remote terminals.⁹¹

Currently, the U.C.C. is not with the trend, as it still primarily relies on the paper finance statement for its filing systems.⁹² Although, many jurisdictions have recently adopted some form of computer system to assist in filing, indexing, and searching with financing statements and filings,⁹³ these improvements have not been uniform, and the jurisdictions which have made technological improvements have been incomplete and unable to perform these tasks.⁹⁴ For instance, Cook County's Filing Office computer database can only access filings after 1991. To obtain earlier filings, the officer must manually retrieve the actual financing statement from storage.⁹⁵ Therefore, remote access by other U.C.C. offices is not possible for filings prior to 1991.⁹⁶ This level of computerization is insufficient and needs to be corrected. Recent computer and electronic advancements could increase the efficiency and cure the existing filing defects.⁹⁷ As the costs of technology decrease rapidly; automation, computerization, and efficiency become a better alternative.⁹⁸

Computer system databases could store and record all filings. An advantage of the database is that when conducting a search, one does not need to search the paper documents. People would not need to waste time to locate the boxes in the warehouses, and then locate the document within the box and file. Using a network and telephone connection with a modem, people could search the databases from almost anywhere, including homes and even while commuting on the train. Also, the databases could be linked together to include all counties within the state. Taking it one step further, a national system could be created which would allow people to search any county in the United States from wherever they are. For example, before lending money, a person located in Chicago could run a search for U.C.C.-1 statements on a company's inventory, by checking all throughout Illinois for U.C.C.-1 statements. Now, if a national system linked all the states together, this person could also check Indiana and Wisconsin to make sure the inventory is not cross-collateralized and that this person would not be junior to another person's security interest.

Searching a database does not require a person to be a computer expert, one only needs to know simple data entry and how to learn the system. Private parties could access the databases with filing information and financial statements by using modems and on-line services; or these databases could even be placed on the

⁹¹*Id.*

⁹²*Id.*

⁹³Spak, *supra* note 19, at 83.

⁹⁴*Id.* at 84.

⁹⁵*See id.* Interview with Daryll Phillips, U.C.C. Supervisor, Recorder of Deeds Office of Cook County, in Chicago, Ill. (Dec. 22, 1993).

⁹⁶*Id.* at 84.

⁹⁷*Id.*

⁹⁸Spak, *supra* note 19, at 84.

Internet. These steps could cut out the need to deal with government employees and reduce costs of searching.

Another advance in technology allows information to be stored on a CD-Rom disk.⁹⁹ CD-Rom disks are capable of storing very large amounts of information, and the common disk can hold several years of filings for a county, state, or the United States.¹⁰⁰ These disks can be sold to private companies each year.¹⁰¹ Companies can order updates each month to insure they have up to date information to rely upon. Westlaw now runs a similar operation, where instead of getting on-line, law firms and companies can run legal searches on CD-Rom to access the same information. Westlaw sends monthly updated disks to their subscribers. Although searchers do have the month lag time, it would be safer to supplement their search by looking on-line to determine whether their search reveals all possible financial statements and information. Also, large search firms would likely be the only parties to buy the CD-Rom indexes.¹⁰²

In addition, the advance of scanners would allow the databases to include previous filings of the U.C.C. offices. Scanners have optical character readers, which scan documents and transfer the document onto the database electronically.¹⁰³ This allows prior and later filings and financing statements to be scanned into the database directly, without the need for government employees to manually enter the information into the computer databases.¹⁰⁴

The technological advances made in the past couple decades allow the existing filing system to be changed and reformed. A single uniform filing system could be set up for each state, and then each state could be connected to provide a single national uniform filing system. A single national uniform filing system could combine all the U.C.C. recordings and filings of each state to a single database for the United States. Local offices within the states would remain as branches where people could file financing statements and other filings which would then be transmitted to the national database immediately. The actual financing statements and filings could then be filed and stored in the main office as backup records. There is no need to completely overhaul the system and eliminate the paper documents. The original documents may be necessary in the case of a dispute involving a filing-related issue, or an error in the transmittal of the financing statement to the database.

B. 9-401 Filing-Where Within State To File

Another problem for prospective creditors is deciding where to file the financing statements and security agreements within the state. U.C.C. § 9-401 explains the process of determining the proper place to file a security interest. To add to the chaos and difficulty of searching in different states, as mentioned before, there are

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³Spak, *supra* note 19, at 85.

¹⁰⁴*Id.*

three alternatives for the state to choose from. This means different states have different places for secured parties to file for a certain type of collateral.

Almost every individual county in the United States has a separate U.C.C. filing office.¹⁰⁵ Throughout the country, more than 4,200 different U.C.C. offices exist, with each having its own specific procedures, rules, and requirements for conducting business.¹⁰⁶ For example, Illinois requires dual filing at both the state and local levels for most types of collateral. Georgia, in contrast, until January 1, 1995, did not have a statewide system; instead the transactions were to be filed at the county level.¹⁰⁷

Search procedures and form requirements vary significantly from state to state and county to county.¹⁰⁸ For instance, a standard form in one U.C.C. office may not be adequate for filing in another office. In addition, many states have specific statutes which create separate filing systems for certain goods, such as boats and automobiles.¹⁰⁹ With all the possible places to file, parties are often confused with where to file or where to conduct a search.¹¹⁰ The current U.C.C. system creates the “where to file?” dilemma.¹¹¹ A secured party must decide whether to file locally, centrally, or out of state.¹¹² A secured party decides where to file depending on the type of collateral and the debtor’s residence or main work place.¹¹³ U.C.C. officials report that the decision whether to file locally, centrally, or in another jurisdiction remains the major source of confusion among consumers.¹¹⁴ Filing in an improper office is not effective and the party does not have a “perfected” security interest.¹¹⁵ Many publications give a general suggestion to “file everywhere possible.”¹¹⁶ Many private search firms tell their clients to file in both the state and local offices, instead of taking a chance on filing improperly.¹¹⁷ Making extra filings increases the cost for the secured transactions and secured parties, which they must consider.¹¹⁸

¹⁰⁵*Id.* at 89.

¹⁰⁶*Id.* Lynn M. LoPucki, *Computerization of the Article 9 Filing System: Thoughts on Building the Electronic Highway*, 55 LAW & CONTEMP. PROBS. 5, 18-20 (1992).

¹⁰⁷*See* Trust Co. Bank v. Georgia Superior Court Clerks’ Cooperative Authority, 26 U.C.C. Rep. Serv. 2d 932, 932(Ga. 1995).

¹⁰⁸Spak, *supra* note 19, at 89.

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.*

¹¹³Spak, *supra* note 19, at 90.

¹¹⁴*Id.* Interview with Fred Moody, Director of Customer Service of Recorder of Deeds, Cook County, Ill., in Chicago, Ill. (Dec. 20, 1993).

¹¹⁵*Id.*

¹¹⁶*See* LoPucki, *supra* note 106, at 16.

¹¹⁷Spak, *supra* note 19, at 90.

¹¹⁸*Id.*

Multiple filing offices add to the frustration of searching because of the lack of consistency and uniformity among the U.C.C. offices.¹¹⁹

The confusion of where to file also affects where to request a search.¹²⁰ A diligent creditor must conduct a search of all U.C.C. offices that could possibly contain the suspected financing statement.¹²¹ In today's mobile business world where companies can transact business in any state easily and have locations all throughout the United States, a creditor can have even more problems determining where to search. If a debtor moves to another state, a creditor will need to search the filing records of both the state where the debtor was last and the state where the debtor moved, at both the state and county levels. The cost of a search can vary from office to office, but obviously the more offices the creditor must search, the more it will cost the creditor.¹²² These additional costs may deter parties from entering into security agreements, and force them into going pot luck hoping for the best.¹²³

The diverse filing system is not an effective or cost-efficient manner for conducting U.C.C. searches.¹²⁴ Separate local and state offices do not reflect the national economy that is more prevalent today than when Grant Gilmore drafted Article 9 of the U.C.C..¹²⁵ When he drafted this article, businesses were more localized and less dependent on interstate and international trade.¹²⁶ Recently, markets have become more nationalized and globalized.¹²⁷ Supporters of the local division argue a local office can cope with the needs and concerns of the people in its jurisdiction.¹²⁸ Out-of-state lenders are unfairly burdened by U.C.C. diversity because they must adapt each financing statement to comply with the various requirements of each U.C.C. office.¹²⁹ Most secured parties, however, tend to be larger companies which need to create secured transactions nationally, as well as locally.¹³⁰

A survey of some cases dealing with U.C.C. § 9-401 will demonstrate the problems. In *In re Ware*, the Debtors executed a promissory note in favor of Community First Bank, N.A. ("Creditor") for \$15,342.60.¹³¹ To secure the note, the Debtors gave the Creditor a security interest in some tools, equipment, and

¹¹⁹*See id.*

¹²⁰*Id.*

¹²¹*Id.*

¹²²Spak, *supra* note 19, at 90.

¹²³*See id.*

¹²⁴*Id.*

¹²⁵*Id.* at 91.

¹²⁶*Id.*

¹²⁷Spak, *supra* note 19, at 91.

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹59 B.R. 549, 550 (Bankr. N.D. Ohio 1986).

vehicles.¹³² The creditor filed a financing statement in the County Recorder's Office, but did not file it with the Secretary of the State.¹³³ The debtor then defaulted on the note and the Creditor began a foreclosure action in state court and obtained a judgment.¹³⁴ The Creditor succeeded in repossessing some items of collateral, but the Debtor continued to possess some items.¹³⁵

After the Creditor obtained the foreclosure judgment, the Debtors filed a voluntary chapter 7 Petition in the Bankruptcy Court.¹³⁶ The Creditors motioned to repossess the remainder of the collateral.¹³⁷ The Debtors opposed the motion claiming that the Creditor was not properly perfected.¹³⁸ The Debtor argued the remaining items of collateral are tools that the Husband-Debtor used in his trade, meaning the tools were not considered consumer items for perfection purposes; and therefore, the Creditor needed to file a financing statement in both the county and the Secretary of the State's Office.¹³⁹ Because the Creditor only filed in the county, the Debtor claimed the Creditor was un-perfected in relation to the remaining collateral.¹⁴⁰

The Bankruptcy Court reviewed Ohio's comparable 9-401 section which stated that consumer goods need only be filed in the county of debtor's residence, and in all other cases, the creditor need file in both the county of the debtor's residence and the Secretary of State's office.¹⁴¹ The issue was whether at the time of the loan, was the remaining collateral considered consumer goods, or business goods of the Debtor.¹⁴² The court reviewed the evidence to determine at the time of the loan whether the Debtor used the collateral chiefly for his business, or for his personal use.¹⁴³ Upon review, the court determined some collateral appeared to be used chiefly in business, and some appeared to be used mainly for personal use.¹⁴⁴ The court held the collateral which was used for business was not properly perfected by the Creditor, and therefore, the Creditor was allowed to retain the collateral; and the collateral where the main use was personal, was properly perfected by the Creditor and the Debtor needed to allow the Creditor to repossess.¹⁴⁵

¹³²*See id.*

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*In re Ware*, 59 B.R. at 550.

¹³⁷*See id.*

¹³⁸*Id.* at 550-51.

¹³⁹*Id.* at 551.

¹⁴⁰*Id.*

¹⁴¹*In re Ware*, 59 B.R. at 551-52.

¹⁴²*See id.* at 552.

¹⁴³*See id.* at 580.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

In a national system where upon filing with a chosen place, such as the Secretary of State's office, the filing would be filed nationally and all systems would show the filing in their searches. Because all states and counties would have access to the same information, the filing could be condensed to just one place, whether it be the county U.C.C. office or the Secretary of State's office. The different uses of the same collateral would not alter where one files. Therefore the creditor would be protected and there would be no room for error by filing in the wrong place, because wherever it would be filed within the state, it would show up in all computer systems. If there was one place where everyone filed within a state, the type of collateral would not matter because it would not alter where one files. All that would show is the debtor and the financing statement and security agreement filed for the collateral, therefore creditors could lend to the debtor without worries that the debtor will argue it is a different form of collateral. In addition, once the creditor filed they could be sure the debtor could not make the same argument.

In *Lawhon Farm Supply, Inc. v Hayes*, Lawhon ("Creditor"), advanced farm products such as seed, chemicals, and fertilizer to the farmer Good ("Debtor").¹⁴⁶ In exchange, the Debtor executed a promissory note payable to the Creditor.¹⁴⁷ In addition, the Debtor executed an alleged enforceable security interest in crops to be grown on his farm, in a county separate from where the Debtor resided.¹⁴⁸ The Creditor filed a financing statement and security agreement with the circuit clerk in the county where the debtor resided and a central farm filing with the Secretary of State.¹⁴⁹

At a subsequent date, the Debtor sold the crop in which Debtor had executed a security interest to a third party.¹⁵⁰ Before the sale, Creditor informed the Debtor that the crops were subject to its lien and that Creditor should be made co-payee.¹⁵¹ Debtor sold the crop to the third party, who paid by a check which did not also name the Creditor, and the Debtor cashed the check without paying the Creditor.¹⁵² The Creditor then brought the suit against the purchaser claiming the purchaser negligently destroyed the Creditor's security interest by not naming the Creditor as co-payee on the check, despite purchasers knowledge of the security interest.¹⁵³ The court held that according to Arkansas's 9-401 section of the U.C.C., the Creditor's security interest was un-perfected because the Creditor did not file the financing statement where the debtor resided, in addition to where the crops were grown.¹⁵⁴

¹⁴⁶See *Lawhon Farm Supply, Inc. v. Hayes*, 870 S.W.2d 729, 729 (Ark. 1994).

¹⁴⁷*Id.*

¹⁴⁸*See id.*

¹⁴⁹*Id.*

¹⁵⁰*Id.*

¹⁵¹*Lawhon Farm Supply, Inc.*, 870 S.W.2d at 729.

¹⁵²*Id.*

¹⁵³*See id.* at 730.

¹⁵⁴*See id.*

Similarly, in this case as in the previous case, *In re Ware*,¹⁵⁵ the determination of the security interest turned upon the type of collateral. In the instant case, the creditor needed to file in two counties to have a perfected security interest. In a national system in which all systems are connected together, there would be no need to incur the expense and hassle of filing in two counties, because the creditor would just need to file in the chosen office and it would be recorded and available in all counties throughout the state.

In *In re Hot Shots Burgers & Fries, Inc.*, the Debtor was a closely-held corporation owned by three wives, whose husbands operated the corporation.¹⁵⁶ The Debtor filed for bankruptcy under chapter 11, but converted to chapter 7.¹⁵⁷ The trustee was attempting to sell the building owned by the three husband individuals, who purchased the building from Wheelers, Inc., (“Creditor”).¹⁵⁸ The individuals conveyed a security interest in the proceeds of the building to the Creditor.¹⁵⁹ The trustee wanted to determine how to distribute the proceedings correctly and filed a complaint.¹⁶⁰ Because the building was modular, it was considered personal property; in addition the court decided the owners of the building were not parties to the action and ordered the trustee to join the individual husbands.¹⁶¹ Each of the three husbands had individual chapter 7 proceedings pending when the adversary proceeding against them was commenced.¹⁶²

The trustees of the three individuals objected to the Creditor’s security interest because the Creditor failed to properly perfect its security interest by filing the financing statement in the wrong place.¹⁶³ Under Arkansas’ U.C.C. § 9-401 section, the proper place to file is determined by the debtor’s place of business, or if the debtor does not have a place of business, the debtor’s residence.¹⁶⁴ First a court must determine that the individuals are considered the “debtor” under the definition for the purposes of U.C.C. Article 9.¹⁶⁵ The proper place to file is the Secretary of States’ office and the office of the circuit clerk of the county of the individuals’ place of business, or if no place of business exists, the county where the debtors reside.¹⁶⁶ The individual debtors conducted the corporation’s business in one county, but there

¹⁵⁵1 U.C.C. Rep. Serv. 2d at 576, 59 B.R. at 549.

¹⁵⁶*See In re Hot Shots Burgers & Fries, Inc., Rice v. FASFAX Corp.*, 183 B.R. 848 (Bankr. E.D. Ark. 1995).

¹⁵⁷*See id.*

¹⁵⁸*See id.* at 849.

¹⁵⁹*Id.*

¹⁶⁰*Id.*

¹⁶¹*See Rice*, 183 B.R. at 849.

¹⁶²*Id.*

¹⁶³*See id.*

¹⁶⁴*Id.*

¹⁶⁵*See id.*

¹⁶⁶*See Rice*, 183 B.R. at 849.

was no specific place of business for the individuals.¹⁶⁷ The financing statement needed to be filed where the debtors resided, which was a different county from where they conducted the corporation's business and where the Creditor filed the financing statement.¹⁶⁸ Therefore, the security interest was unperfected and the Creditor was only an unsecured creditor in the chapter 7 bankruptcy case.¹⁶⁹

As in the previous cases, if a national filing system existed, when the creditor filed the security agreement and financing statement, it would be available throughout the state, and the need to file in two places, or a proper county would be unnecessary.

C. 9-103 Filing-Which State To File In

Potential creditors also face possible roadblocks in deciding in which state to file the financing statements and security agreements. U.C.C. § 9-103 discusses which is the proper state to file in. Section 9-103 is a rather complicated statute to comprehend and has led to many unperfected security interests where the creditor filed in the proper state and was perfected. Today, technological advances have allowed business to become more national in nature, and to expand from local commerce. Instead of needing to rely on mail which would take a couple of days, people can communicate immediately by telephone, electronic mail, and facsimile machines which allow documents to be transmitted over telephone lines immediately to anywhere where another facsimile machine exists. It is much more common now for businesses to be operating in many different states and for lending to occur outside of the counties and state where they sit.

Perfection of security interests in multiple state transactions is governed by § 9-103, which explains that, depending on the collateral, the creditor needs to file in a specific state.¹⁷⁰ Generally, for collateral which is tangible, such as documents, chattel paper, ordinary goods, etc., the creditor would look to the laws of the state where the collateral is.¹⁷¹ Creditors would expect any agreements to be in the state where the collateral exists. With regard to intangible collateral, such as accounts, general intangibles, mobile goods, etc., the creditor is to look at the laws of the state where the debtor resides or has a place of business.¹⁷² Creditors would expect to look for financing statements regarding this type of collateral where the debtor exists, because generally this type of collateral would be with the debtor. A survey of some cases dealing with § 9-103 will demonstrate the problems that occur in multiple state secured transactions.

In *In re Scott*, Scott ("Debtor") executed a security agreement, granting the bank a security interest in a boat.¹⁷³ A week or two later, the bank filed a financing

¹⁶⁷*See id.*

¹⁶⁸*Id.*

¹⁶⁹*See id.*

¹⁷⁰*See* U.C.C. § 9-103.

¹⁷¹*See* U.C.C. § 9-103(1) & (4).

¹⁷²*See* U.C.C. § 9-103(3).

¹⁷³*See In re Scott*, 52 B.R. 821, 823 (Bankr. W.D.Ky. 1985).

statement with the county clerk in an Indiana county where the Debtor resided.¹⁷⁴ About a year later, the Debtor sold the boat to Bass (“Purchaser”).¹⁷⁵ The bank did not receive actual or constructive notice of the proposed sale of the boat to the Purchaser.¹⁷⁶ Debtor and Purchaser checked the County Clerk’s office in a county in Kentucky where the Debtor had his principal place of business and found no security interest recorded by the bank.¹⁷⁷

The Court had to decide whether Kentucky or Indiana law applied to the perfection of the Bank’s security interest.¹⁷⁸ The Purchaser argued the Bank filed in the wrong place because the Debtor intended the boat to be used for business, and because the Debtor did not live in Kentucky, the Bank needed to file in the county where the Debtor’s principal office is located; and because the Bank did not file in Kentucky, it was therefore un-perfected.¹⁷⁹ Because the Debtor resided in Indiana and the boat was licensed and stored in Indiana, Indiana’s law governed the perfection of the Bank’s security interest.¹⁸⁰ The Bank followed Indiana’s law governing the perfection of security interests by filing a financing statement in the county where the debtor lives, so the Bank was perfected.¹⁸¹

If a national filing system were adopted, this suit would never have occurred. When Scott and the Purchaser searched the U.C.C. data banks and searched under Scott, the financing statement would have come up filed in the Indiana county, and the Purchaser would have worked out with Debtor terminating the security interest so it would have the senior interest in the boat. With this system, there would be no reason to apply the choice of law in § 9-103 of the U.C.C., because instead of having to determine which states’ filing laws govern and then look to the law of that state to determine where the financing statement would be filed, or where to file; all the creditors would need to do is either file a financing statement or search for previous financing statements and security agreements to determine whether any person or entity anywhere has an interest in the Debtor’s collateral.

In *In re J.A. Thompson & Son, Inc.*, J.A. Thompson & Co. (“Lessee”) leased from Shepherd Machinery Co. (“Lessor”) machinery for a one year term, which was automatically renewed until the lease was terminated by Lessee sending written notice to Lessor of termination, or if Lessee defaulted under the agreement.¹⁸² When the lease was executed, Lessee conducted operations and maintained offices in California and Hawaii.¹⁸³ Lessor did not file financing statements for the equipment in Hawaii or California, but one year before the lease was executed, Lessor had filed

¹⁷⁴*See id.*

¹⁷⁵*See id.*

¹⁷⁶*See id.*

¹⁷⁷*See id.*

¹⁷⁸*See Scott*, 52 B.R. at 823.

¹⁷⁹*See id.*

¹⁸⁰*See id.* at 823-24.

¹⁸¹*See id.* at 824.

¹⁸²*In re J.A. Thompson & Son, Inc.*, 665 F.2d 941, 943 (9th Cir. 1982).

¹⁸³*See id.*

a financing statement in California, which identified Lessee as debtor and covered after acquired property.¹⁸⁴ Lessee had financial problems and filed a bankruptcy petition under Chapter XI of the Bankruptcy Act.¹⁸⁵ Lessor removed the equipment from the Lessee's work sites, and the Lessee's receiver filed a complaint responding to Lessor's proof of claim which it had filed in the bankruptcy case.¹⁸⁶

Upon review of the security interest claimed by the Lessor, the bankruptcy court held Lessor held an un-perfected security interest because Lessor had needed to file in Hawaii under California's § 9-103.¹⁸⁷ Upon appeal by the Lessor, the district court overruled the bankruptcy court and the issue was argued to the Ninth Circuit Court of Appeals.¹⁸⁸ The issue relating to perfection revolved around the choice of law provisions for § 9-103, which stated California law dictates whether a security interest is valid and perfected if the debtor's "chief place of business" is in California and that if it is not the chief place of business, the law of that state dictates whether the security interest is valid and perfected.¹⁸⁹

The main dispute centered around which state was the chief place of business of Lessee.¹⁹⁰ Lessee's receiver claimed the chief place of business was Hawaii, while the Lessor claimed it was California.¹⁹¹ Both parties agreed if it was Hawaii, then the Lessor was unperfected; if it was California, then the Lessor was perfected.¹⁹² The bankruptcy determined the chief place of business by first looking at the business volume, and second, reviewing where those creditors would view the chief place of business to be.¹⁹³ The district court instead looked at the principal place of management of the debtor's multi-state business and where all creditors would expect the chief place of business to be based on all credit information.¹⁹⁴ The Official Comments following § 9-103 demonstrated the drafters intended a two-step inquiry for determining the chief place of business; first, focusing on where the debtor controls the main part of business operations, and second, where the creditors would expect the chief place of business to be.¹⁹⁵ The Official Comments were later revised and cleared up the confusion for determining how to interpret the place of management.¹⁹⁶ The comment stated the debtor is deemed located at its place of

¹⁸⁴*See id.*

¹⁸⁵*See id.* at 944.

¹⁸⁶*See id.*

¹⁸⁷*J.A. Thompson*, 665 F.2d at 944.

¹⁸⁸*See id.* at 945.

¹⁸⁹*See id.* at 947.

¹⁹⁰*See id.*

¹⁹¹*See id.*

¹⁹²*J.A. Thompson*, 665 F.2d at 947.

¹⁹³*See id.* at 949.

¹⁹⁴*See id.*

¹⁹⁵*See id.*

¹⁹⁶*See id.* at 950.

business if one exists, if more than one place exists at its chief executive office, and if neither exists then at debtor's residence.¹⁹⁷ Reviewing the record and affirming the district court, it was held that Lessor's security interest was valid and perfected because California would be where the chief place of business was because that was where the headquarters for Lessee existed.¹⁹⁸

With a national filing system, there would be no need to determine where the chief place of business is located, and which states law governs. An interested party would just need to search for the debtor in order to find all creditors financing statements and security agreements filed withing the United States. It could then look and determine whether there is a prior security interest for the collateral and would not be uncertain if it was searching in the right office and it would not need to search in multiple offices. A prospective creditor also could file its financing statement for collateral and be assured that creditors would be able to find it everywhere and the debtor could not attempt to borrow more money than the value of the collateral from other creditors in other states.

D. 9-401(3) Filing - Having To Re-File

An additional problem for prospective creditors and debtors is U.C.C. § 9-401(3). Alternative U.C.C. § 9-401(3) requires that when a filing which is proper in a county continues to be effective four months after the debtor moves its residence, place of business, or location of the collateral to another county for whichever governed the original filing.¹⁹⁹ After the four months, the secured party's security interest is terminated, unless the secured party files what is called a U.C.C.-3-Re-Filing statement in the new county.²⁰⁰ If the party re-files within the four-month-period, its prior interest continues as of the date of the previous filing for determining priority among competing security interests.²⁰¹ If the party fails to re-file within the four-month-period, the security interest is terminated and the party needs to file a new financing statement to perfect its security interest.²⁰² Once it files after the prior security interest has terminated, the priority is determined for the new filing for the collateral and it does not relate back to the previous filing. So if other creditors had interests in the collateral after the first filing, these creditors jump in priority over the original creditor.²⁰³

This law has lead to much litigation as many debtors either do not tell their creditors within four months, or at all; or the creditor forgets or fails to re-file in the new county and loses its perfected interest. A survey of some cases will demonstrate the obstacles of this U.C.C. section.

In *In re Nardulli & Sons Co., Inc.*, Nardulli & Sons Co., Inc. ("Debtor") entered into a security agreement and promissory note with General Electric Credit Corp.

¹⁹⁷See *J.A. Thompson*, 665 F.2d at 950.

¹⁹⁸See *id.* at 951.

¹⁹⁹See U.C.C. Alternative § 9-401(3) (1997).

²⁰⁰See *id.*

²⁰¹See *id.*

²⁰²See *id.*

²⁰³See *id.*

("Creditor") in which G.E. loaned the Debtor money.²⁰⁴ In exchange, Debtor granted Creditor a security interest in five pieces of construction equipment.²⁰⁵ The creditor filed financing statements with the Secretary of Commonwealth of Pennsylvania and with the county office to perfect its security interest in the five pieces of equipment.²⁰⁶ Approximately five years later, the Creditor filed continuation statements with the Secretary of the Commonwealth office to maintain its security agreement.²⁰⁷ According to a stipulation between the parties, approved by the Bankruptcy Court, the Creditors security interests were affirmed and it authorized the Debtor to grant the Creditor a security interest in another piece of equipment.²⁰⁸ The Creditor then perfected its security interest by filing a financing statement in the same offices.²⁰⁹

The Debtor's bankruptcy plan did not provide for the Creditor to retain its security interests in the six pieces of construction equipment, despite the fact the plan provided a payment schedule for the Creditor.²¹⁰ The Creditor filed a complaint to reclaim the property, for adequate protection, and/or relief from the automatic stay of the six pieces of equipment.²¹¹ The Trustee argued that the Creditor did not have a security interest in the equipment because the confirmed plan did not grant a retention of the security interest, and because after confirmation of the plan, the Creditor did not maintain its perfected security interest.²¹²

The Creditor filed an affidavit from the Debtor, which the Debtor did not dispute.²¹³ The affidavit stated that Debtor maintained a place of business until October, 1983, when it closed that office.²¹⁴ In addition, Debtor also maintained another place of business in another county until June of 1984.²¹⁵ Also, Debtor opened a place of business in another county in March of 1982, which it closed in January of 1986.²¹⁶ This place of business was the only place Debtor had from June, 1984 to January, 1986.²¹⁷ The affidavit also stated in March of 1984, that Debtor moved two pieces of equipment to Indiana, where they stayed.²¹⁸ Early in March of

²⁰⁴See *In Re Nardulli & Sons Co., Inc.*, 66 B.R. 871, 873 (Bankr. W.D. Pa. 1986).

²⁰⁵See *id.* at 873.

²⁰⁶See *id.*

²⁰⁷See *id.*

²⁰⁸See *id.*

²⁰⁹See *Nardulli*, 66 B.R. at 873.

²¹⁰See *id.*

²¹¹See *id.* at 872.

²¹²See *id.*

²¹³See *id.* at 873.

²¹⁴See *Nardulli*, 66 B.R. at 873.

²¹⁵See *id.*

²¹⁶See *id.*

²¹⁷See *id.*

²¹⁸See *id.* at 874.

1983, Debtor moved two other pieces to Butler county, where the third place of business existed.²¹⁹

The Court held that the security interest no longer existed because the confirmed plan did not provide for the retention of the security interest for the Creditor.²²⁰ Debtor could have alternatively argued the plan's failure to provide for retention of the security interest was a mistake or oversight.²²¹ If it was interpreted this way, then the Creditor must comply with the perfection requirements under the U.C.C. after the confirmation of the plan.²²²

The Court stated the Creditor should have filed a continuing financing statement, or a new financing statement, in order to prevent violation of the automatic stay upon confirmation of the plan.²²³ Had the plan provided for the Creditor to retain its security interests, under state law, the "termination" of the bankruptcy case would have occurred on December 29, 1983, allowing the Creditor to remain perfected for sixty days after.²²⁴ This allowed the Creditor to comply with the requirements for filing to remain perfected.²²⁵ Creditor could have remained perfected by filing either a new financing statement or a continuing financing statement during those sixty days in Butler county, the only place where Debtor was operating at the time.²²⁶ Because the Debtor moved its place of business to another county, Creditor should have filed in Butler county, however Creditor filed in the county of the Debtor's original place of business.²²⁷ The secured creditor is required to keep tabs on its debtors to stay perfected, and make sure it knows where the debtor is located and if it has moved any collateral which the creditor has an interest in.²²⁸

For the equipment that moved to Butler county, creditor had four months under 9-401 to maintain its perfection.²²⁹ The Creditor could have filed afterwards and be perfected, but it would lose its prior position of priority.²³⁰ To maintain its perfection, the creditor needed to send a copy of the financing statement, signed by the secured party, within the four month period.²³¹ The Creditor lost its interest by not filing a continuation statement or financing statement in Butler county within the

²¹⁹See *Nardulli*, 66 B.R. at 874.

²²⁰See *id.*

²²¹See *id.* at 875.

²²²See *id.*

²²³See *id.* at 876.

²²⁴See *Nardulli*, 66 B.R. at 876.

²²⁵See *id.*

²²⁶See *id.*

²²⁷See *id.*

²²⁸See *id.*

²²⁹See *Nardulli*, 66 B.R. at 876.

²³⁰See *id.* at 877.

²³¹See *id.* at 876-77.

four month period, and therefore became un-perfected under the Uniform Commercial Code.²³²

In a national filing system, re-filing for perfection after the debtor moves would be unnecessary because the prospective creditors would search the debtor and find the previous filings from the creditor in the state where it originally secured the collateral. It would not need to run separate searches and it could search the national database using the corporation's name and its FEIN number (Federal Employment Identification Number) or Social Security number to make sure it had the proper debtor and all financing statements would show up. The U.C.C. could still require new filings when the debtor moves, but priority would need not be lost because with a national system linked together, the prospective creditors would have notice of the debtor's secured transactions.

In *Matter of Hammons*, Hammons and Bell ("Debtors") as partners operated a business in a Mississippi county.²³³ Debtors executed a security agreement with a financial corporation ("Creditor") so debtors could obtain new inventory.²³⁴ Creditor, subsequent to the security agreement, filed a financing statement with the Secretary of State and the local county where the partnership operated its business.²³⁵

A few months later Debtors closed their business and relocated it to another county in Mississippi, while changing the partnership's name.²³⁶ Debtors executed a security agreement with Borg-Warner ("Creditor Two"), which granted them a security interest in the partnership's present and after-acquired inventory.²³⁷ Creditor Two conducted a search under the Debtor's partnership's new name and no filings were found in the new county or with the Secretary of State.²³⁸ After conducting the search and finding no prior filings, Creditor 2 filed a financing statement with the county U.C.C. office and the Secretary of State.²³⁹

The original creditor delivered merchandise to Debtors in the new county at its new business.²⁴⁰ Therefore, the creditor had actual knowledge that the partnership changed its name and relocated to another county.²⁴¹ Despite the knowledge, the creditor did not re-file in the new county or in the Secretary of State's office.²⁴²

Debtor's partnership filed for bankruptcy a few years later.²⁴³ The first issue the court determined was whether the partnership in the new county was a new entity or

²³²*See id.* at 877.

²³³*Matter of Hammons*, 614 F.2d 399 (5th Cir. 1980).

²³⁴*See id.* at 401.

²³⁵*See id.*

²³⁶*See id.*

²³⁷*See id.*

²³⁸*See Hammons*, 614 F.2d at 401.

²³⁹*See id.*

²⁴⁰*See id.* at 402.

²⁴¹*See id.*

²⁴²*See id.*

²⁴³*See Hammons*, 614 F.2d at 402.

the same entity.²⁴⁴ The court held it to be the same entity so the creditor would need to have re-filed its financing statement within the four months to relate back to its prior financing statement and to maintain its senior position to Creditor Two.²⁴⁵ The problem in the instant case was that the creditor did not send the debtor any property until the debtor had moved, so the security interest was held to not have arisen until the delivery.²⁴⁶ Because the creditor did not file in the new county, it was held to have an un-perfected interest.²⁴⁷

In *Matter of Howard's Appliance Corp.*, an appliance corporation ("Debtor") had its sole place of business in a New York county from 1973 to 1984.²⁴⁸ Debtor opened a second store in a different New York county in 1984, and in 1985, Debtor opened a third store in the same county.²⁴⁹ In March of 1986, the Debtor sold the original store, although the store continued to operate with the same name.²⁵⁰

In March of 1984, Debtor entered into a security agreement with Sanyo ("Creditor"), in which the Creditor received a security interest in all of the goods debtor possessed or acquired afterwards, which were manufactured, sold, or acquired from the Creditor or having the Creditor's name as well as the proceeds from these goods.²⁵¹ The security agreement also contained a clause which agreed the collateral would be held at the debtor's place of business, at the original location, and that no other places of business existed.²⁵² Creditor filed a financing statement with the offices of the original county clerk and the Secretary of State of New York in March 1984.²⁵³ Creditor never filed financing statements with the later county or the Secretary of State of New Jersey.²⁵⁴

Debtor stored all of its inventory at its original store and a public warehouse in that county up until 1984.²⁵⁵ Debtor then began to store all inventory at the original, or the second store, until 1986.²⁵⁶ In early 1986, the Debtor started storing some inventory in a public warehouse in New Jersey.²⁵⁷ The president of the Debtor stated he never physically went into New Jersey, no goods were sold from New Jersey, and that it was just a place for storing inventory. The Debtor would call for the inventory

²⁴⁴*See id.*

²⁴⁵*See id.* at 403.

²⁴⁶*See id.* at 405.

²⁴⁷*See id.*

²⁴⁸*See Matter of Howard's Appliance Corp.*, 69 B.R. 1015 (Bankr. E.D. N.Y. 1987).

²⁴⁹*See id.* at 1016.

²⁵⁰*See id.*

²⁵¹*See id.* at 1016-17.

²⁵²*See id.*

²⁵³*See Howard's Appliance Corp.*, 69 B.R. at 1017.

²⁵⁴*See id.*

²⁵⁵*See id.*

²⁵⁶*See id.*

²⁵⁷*See id.*

when necessary and the warehouse would ship it to the stores.²⁵⁸ Debtor never notified the Creditor in writing that its goods would be stored in New Jersey.²⁵⁹ The Creditor did not have knowledge until the time the Debtor filed for bankruptcy.²⁶⁰

In August of 1986, Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code.²⁶¹ The Creditor moved for relief from the automatic stay to allow it to foreclose on some of the debtor's inventory, in which it argued it had a security interest.²⁶² The Creditor argued its security interest was perfected in all of the collateral located in New York State and in New Jersey.²⁶³

The court determined the Creditor properly filed and perfected its security interest in the collateral.²⁶⁴ The Debtor argued that the Creditor needed to file a new financing statement in the second county when Debtor sold its original store and moved its operations to its second and third stores, which both resided in the same county and differed from the original store.²⁶⁵ The court said the Debtor forgot about § 9-401(3) which stated that a filing made in the proper place within the state continues to be valid even if the debtor moves its residence or place of business, or changes the location of the collateral, or its use.²⁶⁶ The court stated this subsection only applies when dealing with local filing.²⁶⁷

Therefore, if the situation involved filing which is not local, the creditor would need to file a new financing statement or re-file within four months to retain its perfection. If a national system existed which linked all the states and counties, the above problem would not have arisen in that there would be no reason for the creditor to have to file again to retain perfection, because in the system, the debtor's name would have financing statements for the collateral that all could find.

IV. SOLUTION - A SINGLE, UNIFORM, CENTRAL FILING IN EVERY STATE CONNECTED ON A NATIONAL SYSTEM

A single uniform U.C.C. filing system would cure most of the filing-related difficulties that arise from the paper-based filing system.²⁶⁸ Using today's computer databases, all of the counties of a state could be centralized into a single state database.²⁶⁹ Then all of the states could be centralized into a single national system which could be searched.

²⁵⁸See *Howard's Appliance Corp.*, 69 B.R. at 1017.

²⁵⁹See *id.*

²⁶⁰See *id.*

²⁶¹See *id.*

²⁶²See *id.*

²⁶³See *Howard's Appliance Corp.*, 69 B.R. at 1017-18.

²⁶⁴See *id.* at 1018.

²⁶⁵See *id.*

²⁶⁶See *id.*

²⁶⁷See *id.*

²⁶⁸*Spak, supra* note 19, at 91.

²⁶⁹See *id.*

The networks could be set up different ways. One way the system could be set up is by placing it on the Internet, in addition to the U.C.C. offices. Allowing people to log on to the web site using their modems and download the information they need, as if the debtor has any security agreements or financing statements regarding certain collateral, or if any exist for the debtor at all. Because the system could be searched from anywhere for anywhere, searchers could be more certain that with one national search, any filings will be retrieved and additional searches will be unnecessary. To make sure the searcher has the correct debtor, searchers can use the debtor's social security number of an individual or the debtor's FEIN number. In addition, people could download the U.C.C.-1 financing statement and U.C.C.-3 continuation statement forms to either print out and send to the filing office, or more likely to electronically fill out the form and send it to the filing office through the web site. As soon as the form is filed it would be transmitted to the national office, allowing any searcher to find it a few minutes after the filing.

Another way for the system to be set up would be for the central national system to keep control over the network. In this central system, each county office could continue to operate for people that wish to file in the paper form, and each county office could have computer stations to allow individuals to search the national system at the county U.C.C. office. At these county offices, people could fill out electronic forms, which would automatically be transmitted to the national system immediately. This eliminates the delay problem of the paper based system. Also, because it would not matter where the financing statement is filed, the problem of determining which state's law governs which state to file and where within the state to file would cease to exist as well. One could file an Illinois financing statement for a Wisconsin debtor while on vacation in Colorado by either system; either logging onto the Internet or network, or by going to a county U.C.C. office. In addition, using the standardized electronic forms leaves less room for error for the prospective secured creditors, making for a more efficient and accurate system.

There would be no reason to abandon the paper based system completely. It could be used to supplement the electronic system. If people still wanted to file paper documents because they were more comfortable with them, they could still file wherever they wish, since the system would be national. The U.C.C. officers could then use electronic scanners and scan the paper document into the computer database so it would appear in the system immediately as well.²⁷⁰ Prospective creditors could file electronically and by paper to make certain the filing is accurate and no mistakes occur.

The county offices could store the paper documents for backup purposes.²⁷¹ But from the computer system, the documents could be printed from the system automatically. If a court wants the official paper document though, it could be accessed from the U.C.C. offices. Even if people file in another county or state from where the debtor's residence, business, or main business if more than one exist; the U.C.C. office where the filing is filed, can send the paper filing to the proper county where the debtor resides, or where the business or chief place of business is located. A better system for storing the paper documents would be to store them in the state

²⁷⁰*See id.*

²⁷¹*See id.*

of the debtor, because with the ability to print and download the documents from the computer system, the paper documents would not often be necessary.

By computerizing the filing system, which reduces the need to maintain the burdensome paper retrieval systems, the cost to secured parties would decrease.²⁷² Secured parties would not need to make extra filings and extra searches, because filing in one location would be effective everywhere, and the search in one location will retrieve all filings for the debtor in the nation. In addition, filing would cost less because people would not need to go to the filing office to file or search if they could do these tasks on their own personal computers at home or at work. This would also save time for the parties involved, and time is money.

Obviously, for all of this to take place the Uniform Commercial Code would need to be redrafted. Section 9-401 would need be amended to provide for the single, unified, central, national U.C.C. filing system.²⁷³

This type of system is possible. In March of 1999, the United States Bankruptcy Court, Northern District of Illinois, Eastern Division started a system called ECM, Electronic Case Management. It is based on the same premises as discussed above. Starting with January 1998 forward, the Bankruptcy Case Documents have been scanned and put on computer databases which can be searched at the Bankruptcy Court in the Records Office at the Dierksen Building in downtown Chicago. The ECM contains: cover sheets, court dockets, claim registers, creditor listings, and pleadings, to list a few. The documents can be viewed by computer and printed immediately. If the searcher needs the actual paper document, the documents are still stored in the records office until the documents are sent to the Federal Records Archive. This occurs when the documents need to be moved for more current documents, some years down the road.

V. CONCLUSION

The current U.C.C. filing offices are behind the times and do not have the necessary structure to fit in with today's technological world.²⁷⁴ Even though this technology is available and ready to help correct the current U.C.C. filing system, a change like this may be met with much resistance, and if done, would probably be a delayed process.²⁷⁵ The people who work closely with the filing offices agree that changes would improve the filing system, but are not ready to adopt such a change.²⁷⁶ U.C.C. officials are conditioned to the current system, and do not appear to be in any hurry to change the system.²⁷⁷ In addition, the costs for changing the system and computerizing the system exceed the funds that are usually allocated to the U.C.C. offices.²⁷⁸ Many offices state they have plans to implement computer

²⁷²*See id.*

²⁷³Spak, *supra* note 19, at 91.

²⁷⁴*See id.* at 92.

²⁷⁵*See id.*

²⁷⁶*See id.*

²⁷⁷*See id.*

²⁷⁸Spak, *supra* note 19, at 91.

upgrades, but the offices do not have the necessary funds.²⁷⁹ The uniformity and improvements to the U.C.C. system will not occur without the U.C.C. being redrafted.²⁸⁰ Having to draft a new code, or redraft certain sections will also take time, and the commission may not want to redraft it, as the U.C.C. Drafting Committee met last year and revised Article 9 of the U.C.C. Changing the system would benefit everyone involved; the prospective creditors, debtors, secured creditors, and most importantly the court system.²⁸¹ These changes would bring secured transactions up to date with technology just in time for the turn of the century.

²⁷⁹*Id.* Peter A. Alces & Robert M. Lloyd, Report of the Uniform Commercial Code Article 9 Filing System Task Force to the Permanent Editorial Board's Article 9 Study Committee (Permanent Editorial Board for the Uniform Commercial Code, 1991). The report is an internal work product of an advisory committee to the Article 9 study committee of the Permanent Editorial Board for the Uniform Commercial Code. This study does not necessarily reflect the position of the Study Committee, the Permanent Editorial Board, or its sponsors (the American Bar Association, the American Law Institute and the National Conference of Commissioners on the Uniform State Laws).

²⁸⁰Spak, *supra* note 19, at 91.

²⁸¹*See id.*