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**Perfecting and Maintaining Perfection in Article 9 Security
Interests Under the 2010 Amendments:
New Sections 9-503 and 9-316**

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MARGIT LIVINGSTON: Good morning. I am Professor Margit Livingston of DePaul University College of Law, and I want to welcome you. We are very fortunate to have all of you here and have a great line-up of speakers for the day. This is the annual symposium of the DePaul Business and Commercial Law Journal, and it will be published in one of the issues of the Journal. The transcript will be published later on this year.

The Journal is about ten years old now. It was started in 2002 by a merger between the Commercial Law Journal of the Commercial Law League of America and the DePaul Business Law Journal. We have been very fortunate for the past ten years to have the ongoing support of the Commercial Law League of America as well, of course, as DePaul University. And I want to thank in particular my dean, Gregory Mark, who has given his strong support to the Journal. A couple of facts about the Journal: We have a circulation of nearly 2,000 subscribers worldwide. We have subscribers all over the world including Australia, Brazil, Canada, Ghana, Singapore, South Korea, and many others. We are also quite highly ranked among corporate and commercial law journals—sixth among corporate law journals and seventh among commercial law journals.

We are very proud of the work that the students have done in publishing the Journal over the years. I would like to thank the current editorial board of the Journal, so as I call your names, would you please stand: Amit Bindra, who is executive editor; Paul Rice, executive editor; Kara Blasquez, lead articles editor; Kristin Carl, notes and comments editor who also ran our fundraiser last night, which was a great success; Benjamin Clark, managing business editor; and Justin Whitesides, editor-in-chief; and of course, the incomparable Abraham Feng Zhou, our symposium editor who has done an incredible job pulling everything together to ensure that we have a wonderful program today.

It is also my privilege to introduce the speakers on our first panel. We have Professor Steven Harris from Chicago-Kent College of Law. Professor Harris originally started teaching at the University of Illinois College of Law and then came to Chicago-Kent as a nationally and internationally known expert in commercial and bankruptcy law. He has published widely in many top-tier scholarly journals, including *Cornell Law Review*, *Minnesota Law Review*, *Virginia Law Review*, and others. He is also the co-author of a casebook on security interests in personal property, and he has recently served as reporter to the drafting committee for revised UCC Article 9. He had a clerkship and also practiced law in Chicago for several years before going into teaching full-time.

Also I would like to introduce Jason Kilborn, who is a professor at John Marshall Law School. Professor Kilborn clerked for Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit and was a bankruptcy associate with a couple of large firms on the East Coast. He has focused his work on the comparison of bankruptcy and insolvency in the U.S. with similar systems in Europe and elsewhere in the world. He has written numerous articles and a book on comparative bankruptcy for individuals, including an analysis of Islamic law. He chaired a drafting group for a federal bank project on the treatment of insolvency of individuals and has advised several national governments on their development of personal insolvency laws.

We are very, very pleased to have both of these distinguished speakers here today. Professor Harris is going to start us off with some additional welcoming remarks.

STEVEN HARRIS: Thank you, and welcome. I suspect that I have been asked to greet you at the outset because I spent the better part of my adult life trying to make Article 9 a better product. Or at least it seems that way. I got involved with Article 9 revision in 1990 when a study committee was set up to determine whether Article 9 might need to be revised. The study committee recommended that a drafting committee be formed. The drafting committee started work in the early 1990s and finished in the late 1990s and the project never seemed to end. The promise was to submit the final text by December 31, 1998, which I did. And on the morning of January 1st, 1999, I got a phone call at home telling me, "Well, now we're going to have another period for reviewing comments, so gear up." Ultimately, this decade-long project resulted in revised Article 9, which took effect in 2001. Things did not settle down until recently.

There was another study committee put together in 2008 to consider whether additional amendments were needed, and it resulted in some

proposed amendments, which are now being shopped to legislatures. These are referred to generally as the 2010 amendments. There are not 2,010 of them; fortunately, there are many fewer. But we will have a chance during our panel to discuss two of the most important amendments that are in the legislative pipeline. What else will we talk about today? One of the things that revised Article 9 did in 2001 was to expand slightly the scope of Article 9 by providing for security interests in deposit accounts and in commercial tort claims. And the first panel this afternoon will talk about those types of collateral—deposit accounts, commercial tort claims—as well as security interests in intellectual property collateral.

One of the stranger things we did during the drafting in the 1990s was to begin by looking at the enforcement provisions. Rather than starting at the beginning of Article 9 and drafting the early provisions and then ultimately working our way to the end, we started at the end of the statute and spent a lot of time with enforcement provisions. They were particularly controversial with regard to enforcement against consumer goods or consumer debtors. The panel in the later half of the afternoon will take a look at whether these have worked and look at some recent developments in default and enforcement of security interests. Our panel, as I said, is focused largely on the two main changes and on the various sub-changes in the 2010 amendments. And with that, I will welcome you once again and turn it back over to Maggie [Livingston].

MARGIT LIVINGSTON: All right. We are going to start out with a little review of some of the basics of Article 9 and lead into the 2010 amendments as they pertain to the debtor's name on the financing statement. If we talk about what we need to have on a financing statement, which is filed in the public record to give notice to the world of possible security interests, the three basic pieces of information that have to go on a filed financing statement are the debtor's name, the secured party's name or the name of its representative, and an indication of collateral. The gateway to the filing system is the debtor's name because both filing and searching are done by means of the debtor's name, so the debtor's name has to be right.¹ Section 9-503(a) of the UCC specifies what name of a debtor is sufficient on a financing statement.² For a registered organization, the code says we need to use the debtor's name as indicated on the public record of the debtor's

1. For a more complete discussion of the debtor name issue under current Article 9, see Margit Livingston, *A Rose by Any Other Name Would Smell as Sweet (Or Would It?): Filing and Searching in the Article 9 Public Records*, 2007 B.Y.U. L. REV. 111 (2007).

2. U.C.C. § 9-503(a) (2001).

jurisdiction of organization which shows the debtor to have been organized.³ This is perhaps a little bit awkwardly phrased, but it ends up being revised in the 2010 amendment, and we are going to talk about that. For a decedent's estate you should use the name of the decedent and indicate that the debtor is an estate. For a trust or a trustee, use the name specified for the trust in its organic documents and indicate that the debtor is a trust or trustee. This is the current state of the law, the current version of Article 9 that states have in effect.

Section 9-503(a)(4) says for an individual or a nonregistered organization, you should use the debtor's name, so there is not much more to that.⁴ If the debtor does not have a name, then you should use the name of the partners, members, associates, or other persons comprising the debtor.⁵ If you have a general partnership, for example, that has not formally adopted a name, you as the secured party should put the names of the partners on the financing statement.

The Code says specifically that a financing statement using only the debtor's trade name is insufficient.⁶ Article 9 has always disliked trade names. They are considered to be too uncertain. They are too changeable. A debtor might have more than one trade name as opposed to the official legal name, so the Code tells us to avoid trade names on the financing statement.⁷

What is the standard for sufficiency of a financing statement? Well, we are all human and we all make mistakes so, inevitably, errors creep in when we are filing our financing statements. UCC § 9-506 gives us the substantial compliance standard for judging the sufficiency of a financing statement, and this is what the courts are supposed to apply when they are evaluating whether or not the secured party has made an effective filing.⁸ Section 9-506 says that a financing statement substantially satisfying the requirements of this part is effective even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.⁹ The seriously misleading standard is something that has been in Article 9 for a long time and was brought forward to the 2001 amendments. It is still with us, but in 2001 the drafters clarified under § 9-506(b) that essentially a debtor name error is a fatal error unless it is saved by subsection (c).¹⁰ The

3. *Id.* § 9-503(a).

4. *Id.* § 9-503(a)(4).

5. *Id.*

6. *Id.* § 9-503(c).

7. U.C.C. § 9-503(c).

8. *Id.* § 9-506.

9. *Id.*

10. *Id.* § 9-506(c).

drafters came out very forcefully in favor of almost complete accuracy in setting forth the debtor's name because of the importance of the debtor's name in locating the financing statement and maintaining a useful filing system—a filing system that can give us information that we want. But then § 9-506(c) gives us the single search safety net and says that if a search of the records of the filing office under the debtor's correct name using the filing office's standard search logic would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 9-503(a), the name provided does not make the financing statement seriously misleading.¹¹

There is a lot in there. Basically it says that if you search the public record under the debtor's correct name, whatever that is, and you are using the filing office's, that is the Secretary of State's, standard search logic, and doing the search under the debtor's correct name, do you get a hit on the financing statement with the incorrect name? Is the financing statement with the incorrect name uncovered, revealed, or disclosed when you are searching under the correct name in the official Secretary of State's database? This is a safe harbor for the filing secured party who has made a mistake. If you have made a small mistake in the debtor's name but a search under the debtor's correct name will uncover your filing with the wrong name, then your filing with the wrong name is still okay. It is legally sufficient because the thought is, "Well, the searcher can find you." The searcher searching under the correct name will find your financing statement with the wrong name.

The problem with a debtor's name on a financing statement involves two critical issues: First of all, if the debtor has multiple names, which name or names do you use? Individuals sometimes have more than one name. Businesses obviously can have more than one name, but perhaps only one legal name. Secondly, if you choose the wrong name or spell the right name incorrectly, will your financing statement still stand up under the single search safety net? Getting the correct name on the financing statement and then spelling that name accurately are issues that filing secured parties have to be concerned about. So what do we get out of this? Under the current law for registered organizations you should use the official publicly registered name. If you have an Illinois corporation as your debtor, the corporation was formed under the laws of Illinois, and was duly registered as a corporation with the State of Illinois, you should use the official name that the corporation has adopted. For nonregistered organiza-

11. *Id.*

tions, such as general partnerships, you should generally use the name adopted on the formation agreement for the partnership and any amendments thereto. If the partnership has changed its name over time, obviously you want to look at the most recent amendments to the partnership agreement to try to find out what the current name is. Then you have the question for individual persons or natural persons who are debtors. Do you use a person's legal name or something else? The Code really does not specify what should be used for an individual person. The 2010 amendments to Article 9 address that issue.

Let's take an example illustrating the single search safety net. What is the ability of the secured party who filed a financing statement with the wrong name to have that financing statement stand up? For example, the debtor's name is "McAfee Tires, Inc.," and secured party number one files a financing statement listing the debtor as "McAfee Tires Company." Later creditor X searches under "McAfee Tires, Inc.," which is the debtor's legal name, in the official Secretary of State database using the standard search logic. Most likely, that search will uncover the first secured party's filing because "Inc.," "Corp.," "Company," etc., are generally treated as noise words.

That is not always the case. In a Virginia case, the first secured party had filed under the name "Tyringham Holdings" when the debtor's name was "Tyringham Holdings, Inc."¹² The Virginia filing system did not treat "Inc." as a noise word, so when a later creditor was searching under the name "Tyringham Holdings, Inc.," which was the legal name, that search did not uncover the filing "Tyringham Holdings." Even though the spelling of "Tyringham Holdings" by the original filing creditor was completely correct, the omission of "Inc." was an error. If the first secured party in my hypothetical listed the debtor as "MacAfee Tires, Inc.," or "McAfee Tire, Inc.," without the "s" on "Tires," the filing would probably not be revealed. So again, there is just very slight room for errors in most Secretary of State's filing systems.

What is confusing too is that some states offer searchers a standardized search as well as a non-standardized search. For example, in Kentucky, you can go into the Secretary of State's database and do a standardized search for your debtor in looking for financing statements or do a non-standardized search. If you do a standardized search, you will get a much narrower group of hits than if you do the non-standardized search. If you want to just do the minimum as a

12. *In re Tyringham Holdings, Inc.*, 354 B.R. 363 (Bankr. E.D. Va. 2006).

searcher, you could plug in the debtor's name, hit standardized search, and see what you get. Then you are done, in a sense, because you have done the single search. But if you really want to know whether there are filings out there against your debtor, you also will do a non-standardized search because that will produce a greater range of hits and reduce the likelihood of missing something that could affect the outcome of your search. It is kind of a little bit peculiar that the state offers two choices. In Wisconsin, on the other hand, if you go into the Secretary of State's database, you are prompted as a searcher with the phrase "starts with." If you are searching, for example, for a corporate debtor under my "McAfee Tires, Inc." example, Wisconsin prompts the searcher—"starts with"—and you would say "McAfee." That, of course, would uncover "McAfee Tire, Inc." or "McAfee Tires Company" because you are starting with just the word McAfee, and that type of search is going to produce a greater number of hits.

The standard search logic of Secretary of States offices has tended to be quite rigid. In many states, you are only going to pick up almost exact matches.

Another question has arisen: What if the secured party's financing statement is not on the first page of the search results? For example, consider a searcher who searches under the debtor's correct legal name and gets a page of results on the computer. But our first secured party has filed under a slightly erroneous version of the debtor's name. As a result, the financing statement is on the page before the first page of results or on the page after. So the question is: Does a searcher who gets a single page of search results then have to click "previous" to look at the previous page or have to click "next" to look at the next page? There is a case out of the bankruptcy court in the Middle District of Florida, *Summit Staffing*, where the court said the searcher must use reasonable diligence in examining search results.¹³ The old standard for searchers before the 2001 amendments was the reasonable diligent search standard by court decision. The Florida Bankruptcy Court in 2003 inserted a reasonable diligence search standard back into the mix by saying, use the single search standard to do your search but then once you get that page of results you should at least look a little bit behind that first page and a little bit ahead of that first page. Then there was a subsequent case, *John's Bean Farm*,¹⁴ a few years later where the court pushed back from *Summit Staffing* and said that reasonable diligence means no more

13. *In re Summit Staffing Polk Cnty., Inc.*, 305 B.R. 347 (Bankr. M.D. Fla. 2003).

14. *In re John's Bean Farm of Homestead, Inc.*, 378 B.R. 385 (Bankr. S.D. Fla. 2007).

than one page before and one page after the initial search results page because we don't want searchers to have keep going back, back, back, you know, ten, twenty pages backward and then go forward in the same way. We want to limit the amount of work that searchers have to do in trying to find financing statements.

The 2010 amendments to Article 9 specifically focus on the debtor's name on a financing statement. Several amendments to Article 9 have been promulgated, including amendments to § 9-503 involving the debtor's name. The suggested effective date for the states is July 1, 2013. The amendments address the problem of the name of an individual debtor who may have different names on his or her driver's license, tax return, passport, bank statement, birth certificate, etc. Here is my hypothetical individual debtor: "Margaret Taylor Watson," and these are all of her names: on her IRS form 1040, she uses "Margaret Taylor Watson"; on her passport she uses "M. Taylor Watson"; on her business cards she uses "M. T. Watson"; on her driver's license she uses "Margaret T. Watson"; her friends know her as "Peggy Watson"; her family knows her as "Meg Watson"; her employee ID says "Peggy T. Watson"; her personal stationery for inviting people to parties says "Margaret Taylor-Watson"; her bank statement says "Margaret Watson"; her birth certificate says "Margaret Taylor"; and at the country club she is known as "Muffy Watson." These are all of her possible names. Which one should the secured party put on the financing statement? The 2010 amendments to Article 9 present the states with two alternatives for individual debtor names, which I will discuss in a moment.

Obviously Article 9 is not self-executing. It has to be adopted by individual states. Sometimes, of course, states make their own non-uniform amendments in the adoption process.

Here are the two alternatives. Alternative A under § 9-503(a)(4) is the "only-if" rule, and it says that basically the filing secured party should use the name of the debtor on the unexpired driver's license issued by this state, meaning the state of filing. The debtor's location controls the place of filing. A natural person debtor is located in his or her state of residence. Thus, if you have a debtor who is a resident of Illinois, you would be filing in Illinois, and you should look to that debtor's unexpired Illinois driver's license and take the name on that license to put on the financing statement. If the debtor does not have a current, unexpired driver's license from this state, then the fallback is to use the debtor's individual name or the surname and first personal name of the debtor. For example, my debtor "Margaret Taylor Watson," has the name on her unexpired driver's license of "Margaret

T. Watson,” so that’s the name that you would put on the financing statement. If she did not have a driver’s license, then presumably “Margaret Watson,” her first personal name and her surname, would be sufficient.

The second alternative presented to the states under § 9-503(a)(4) is the safe harbor rule. The states are supposed to choose whether they are going to adopt Alternative A or Alternative B. In the safe harbor rule, there are three choices for secured parties. They can pick the debtor’s individual name, the surname and first personal name of the debtor, or the debtor’s name on his/her unexpired driver’s license from the state of filing. For my debtor, you could use “Margaret Taylor Watson,” which is her individual name, you could use “Margaret Watson,” which is her first personal name and surname, or you can use “Margaret T. Watson,” which is the name on her unexpired driver’s license. The current single search requirement for searchers would conceivably become a “triple search” requirement because you would be, as a searcher, considering the possibility that one of these three choices could be on the financing statement. You do not know which one the filer might have chosen, so you have to search under all three possibilities.

Ten jurisdictions have adopted the 2010 amendments. Of those, only two have adopted Alternative B, the safe harbor rule. Legislation is pending in twenty-three other jurisdictions, and only four of those adopted Alternative B, so Alternative A seems to be the wave of the future—the “only-if” alternative. Alternative A is appealing because it provides a single source for the debtor’s name for both filers and searchers. If you are using the name off the debtor’s unexpired driver’s license, the filer knows what that is and presumably the searcher knows what that is, unless there has been some sort of name change.

A couple of observations: The National Conference of Commissioners on Uniform State Laws, which is one of the promulgators of Article 9, cautions that states adopting alternative A, the “only-if” rule, should in particular consider whether the state’s driver’s license database is compatible with its UCC database as to characters, field length, and the like. In other words, is the driver’s license name displayed in a particular way so that it will not fit on to the UCC Article 9 form? And the states should be cognizant of the need to harmonize the way names are displayed on those two different documents. If the state issues a non-driver’s license state identification card and an individual cannot hold both a driver’s and a non-driver’s ID, then the non-driver’s ID will be treated the same as a driver’s license for the pur-

poses of either Alternative A or Alternative B. Obviously, some people do not drive, and they do not have a driver's license. But you can get a state-issued ID card for non-drivers, and if that is the case, then the filing secured party should be using the name from that.

The 2010 amendments also modify the definition of registered organization to clarify that an organization is a registered organization if it is formed or organized under the law of the state by the filing of a public record with that state. In other words, registered organizations are organizations created when there is an act of public filing. The amendments also clarify that statutory business trusts, such as a Massachusetts business trust, will be considered registered organizations for purposes of Article 9. The 2010 amendments also clarify that the name of the registered organization debtor is the name reflected on the public organic record of the registered organization. In most cases, the public organic record of an organization is the publicly available record filed with the state to form or organize the registered organization. It is essentially the organization's birth certificate that is filed with the Secretary of State to create a corporation or a limited liability company or something like that. Whatever document you file with the state to form or organize the organization, the name on that document should be used on the financing statement.

For estates, the 2010 amendments set forth requirements for the name of the debtor when the collateral is administered by a personal representative. The amendments state the filer should use the name of the decedent, and in a separate part of the financing statement indicate that the collateral is being administered by a personal representative. For the decedent's name, you should use the name provided on the court order appointing the personal representative. If there is more than one name on that court order, then the first name of the debtor on the appointment order is sufficient. Finally, in situations where the collateral is held in trust, if you have a registered organization trust—a trust that is officially registered under the laws of the state—you should use the name on the public organic record of the trust. For other trusts that are not registered organizations, you should use the name of the trust itself or, if the trust has no name, the name of the settlor or testator. If using the trust's name, indicate in a separate part of the financing state that the collateral is held in trust. If using the settlor's or testator's name, you should provide additional information sufficient to distinguish that trust from other trusts with the same settlor or testator.

That is all I have on the debtor's name and the 2010 amendments. We'll take questions between each segment of our presentations. If

you have any questions on this material, any of us will be happy to try to answer.

AUDIENCE MEMBER: I just ran into a situation on the debtor's name. It was like ABC incorporation, a debtor incorporation. It was in Illinois, a state with noise words. When I did the standardized version, it did not come up, but the second lender was a tenant who was also claiming a lien so we found it in another way, but not through the state or from some other form. If the debtor is incorporated and does not show up through the state search, but you find it another way, that is not good enough. According to what you are saying, the bank lien has problems. Is that correct?

MARGIT LIVINGSTON: Yes, the official comments to § 9-503 as it currently exists, and I do not think these have changed, say that a search in a nonofficial database is not a search and a search in the Secretary of State's office using something other than the standard search logic is not a search. So to judge whether you have complied with the single search safety net and therefore have a sufficient financing statement, you have to search in the official filing office using the standard search logic. Any other search does not count as a search that uncovered your financing statement. A lot of states will give you a certified search. If you are a searcher, you can ask the Secretary of State, "I would like to have you search using this name and then give me a certified search result." If the first secured party's financing statement with the error does not show up on the certified search results, then the first filer does not have an adequate financing statement. That is kind of the interesting thing about the filing system now. People can find things in lots of different ways using non-standardized searches or using searches in LEXIS,[®] which has UCC filings. You can find stuff, but unless it can be found using a single search in the official database with the standard search logic, then the financing statement is not adequate.

JASON KILBORN: Professor Livingston made an important point that I often have overlooked when we met earlier. She pointed out that the noise word comment that you made is not one that one can really predict. Every individual state is responsible for establishing its own search logic so "corporation" or "incorporated" or whatever may well be a noise word disregarded by the search logic from one state but might not be a noise word in another state. Something as simple as "comma Inc.," whether the period follows "Inc." or not cannot be a noise element in at least some states' standard search logic. For example, Kansas and Arizona have infamously demanding search logics and words that may well not be noise.

STEVEN HARRIS: Unfortunately, the trend among the filing offices is to make their search logic increasingly rigid. Maybe the one counterexample is the *Tyringham Holdings* case which Maggie [Livingston] talked about, in which the secured party filed but left off the “, Inc.” at the end of the debtor’s name. The search logic did not pick up the financing statement, and the court held the filing was ineffective.¹⁵ Virginia changed the search logic afterwards so that future filers who leave off “Inc.” will be protected. But the general trend seems to be moving in the opposite direction, and this is largely because it appears that filing offices misunderstand the use of the filing system and why people might want to find more rather than less.

This goes in part also to your question. There are two issues here. One issue is: Does what is essentially a misspelling result in failure to perfect? That answer is given by the rules in § 9-506: If you have a misspelling, the financing statement is ineffective to perfect unless a search under the correct name would disclose the erroneous financing statement. To prevent that, of course, a filer in a deal of any magnitude would conduct its own search after filing to see whether, in fact, its financing statement is going to be shown. But the other question is, even if the filing is no good and the security interest is unperfected, does the searcher care? After all, the searcher can achieve priority by making its own filing. But presumably the lender who made the ineffective filing thought its filing was good. The searcher would do well to deal with this lender before closing the transaction rather than after the debtor defaults. Also, presumably the searcher has asked the debtor for information about competing security interests. If the debtor did not disclose the transaction evidenced by the erroneous financing statement, why not? Is there a deal out there and is there a person out there who has filed what you conclude is an ineffective financing statement but who may cause trouble later claiming that the financing statement is ineffective? So this information is useful, even the stuff that used to be called “below the line”; that is, it is not revealed by the standard search logic but it’s disclosed anyway. That information can have some use because potential secured parties may want to discover what is out there even if it might not have legal effect.

MARGIT LIVINGSTON: And often there is not a second secured party. Often it is the trustee in bankruptcy who is trying to deny the effectiveness of the financing statement so that the security interest will disappear and you can bring the collateral back into the debtor’s

15. *In re Tyringham Holdings, Inc.*, 354 B.R. 363 (Bankr. E.D. Va. 2006).

estate for bankruptcy purposes. Often the so-called second party, this hypothetical searcher, does not really exist and it is just the trustee sort of measuring the sufficiency of the financing statement according to the statutory standard. And in many cases, we do not know that anybody actually looked for or tried to find it. They do searches in anticipation of litigation to try and establish whether or not it could be found. Any questions?

AUDIENCE MEMBER: I have a question. I mean, how do you find a surname? I worked for legal aid and many Hispanics use their mother's name and father's name and I could never quite figure out the order and nobody could ever really explain it to me. So therefore, what is it, just the last name they would use on their driver's license or something or what is the surname?

MARGIT LIVINGSTON: That is a good question.

AUDIENCE MEMBER: Maybe they do not have a driver's license.

STEVEN HARRIS: This was something that was discussed at the drafting committee. What is a surname? The answer is that you have to figure it out. Names from Spanish-speaking countries are not all uniform in the way they are constructed. It is typically the matronymic and the patronymic, but when in doubt, as a filer there is nothing to prevent you from using one name in the name box for the first debtor and separately using a different name for the same individual in the box for the second debtor. If you think there is a third possibility, you get the addendum form and you add a third debtor name, all of which refer to the same debtor. As a practical matter, that is a way to make sure that you are perfected.

When you are searching, you have the same problem. You have to search under all these variations because it is not always clear, and it may not always be clear under the new amendments. It may not always be clear what the surname is on the driver's license because the driver's licenses in many states do not indicate what field they are filling in. They just put the name in. Some states put what we would call last name first. For example, my license would say "Harris Steven." In other states, my license would say "Steven Harris." You need to figure out for filing purposes, even under the driver's license name, what is the surname, and you need to make sure it gets in the surname box. But once again, you are always free to include additional names of the debtor if there's any real doubt.

MARGIT LIVINGSTON: I think that is true with some Asian names, too, that the order – well, Abe [Feng Zhou], you can probably

speak to that, but the order is different from the traditional Western order of a given name, then a surname.

ABRAHAM FENG ZHOU: Most of the Asian countries, China, Korea, and Japan, normally the conventional surname comes first followed by given name. The problem, especially with Chinese names, is we often have two middle names too, and some of them choose to use one middle name. Some of them choose to hyphenate both of them, and that is a problem.

MARGIT LIVINGSTON: There are a lot of different possibilities, different combinations.

ABRAHAM FENG ZHOU: Yeah.

MARGIT LIVINGSTON: Any questions? Okay. We are going to hand things off to Steven [Harris].

STEVEN HARRIS: Thanks. I have a couple of things to bring to the table after that excellent presentation, one of which concerns these cases that seem to suggest that if you get a response from the filing office, you do not have to pay attention to it or you are assumed to be of limited attention span. To the extent that these cases might suggest that a financing statement that is disclosed by a search using the standard search logic is somehow ineffective because it is found on the third page of a report rather than the first page of the report, that strikes me as lawless. If you plug in the debtor's correct name, the filing office uses its standard search logic, and the search discloses the financing statement, that financing statement has a name that is sufficient.

JASON KILBORN: Can I interject on that?

STEVEN HARRIS: Sure.

JASON KILBORN: Both of those cases I think were from Florida and Ken Kettering has a really great piece¹⁶ out right now that reveals I think quite compellingly that Florida does not have a standard search logic because it does not retrieve a series of hits like we would get from Google. It retrieves the entire database with a bookmark where your search would be in the entire index, and this previous page versus next page business is about should the searcher be required to page back and page forward within the index? And I think Ken makes quite a good point that the notion that § 9-506 cannot ever apply to protect the filer in Florida is just erroneous because Florida is apparently one of the very, very small handful of places without a

16. Kenneth C. Kettering, *Standard Search Logic Under Article 9 and the Florida Debacle*, U MIAMI L. REV. (forthcoming), available at <http://ssrn.com/abstract=1981415>.

standard search logic. And it strikes me as that is a pretty compelling point. Do you think that is not right?

STEVEN HARRIS: Yes. I would agree that there is no standard search logic if the entire database is provided in response to a search request. As a practical matter such a system does not work with the statutory “not seriously misleading” test. I see a nod in the back [from Steven Weise]. The idea behind the test is that the name on a financing statement is sufficient if a search would pick it up because the searcher would receive just as much information as he would if the name were correct. But if the response to a search is, “okay, here are all the financing statements we’ve got, you go figure it out,” that is not consistent with the idea that lies behind § 9-506(c). As we all know, or should know, the UCC is supposed to be construed in accordance with its underlying purposes and policies, one of which is to clarify, simplify, and modernize commercial law. You are certainly not simplifying commercial law by saying that the search result that counts for § 9-506(c) purposes is everything in the database. And this is not just me talking. This is the legislature of every state that has enacted the UCC commanding its judiciary. The Uniform Commercial Code “must be liberally construed and applied to promote its underlying purposes and policies.”¹⁷ The plain meaning of § 1-103 is that courts are obligated to construe “standard search logic” in a way that promotes the underlying policies of the UCC.

AUDIENCE MEMBER: I have a comment. I did not look at the latest amendments and then I was teaching a commercial law class we have. When I looked at Article 9 again, I really thought that it was much more complicated than the good old one that was good enough for me and Grandpa. [Karl] Llewellyn actually had this idea that somebody should be able to just read – you know, a businessman, should look, be able to read the UCC, and understand it. I had a knockdown fight with Jason [Kilborn]. He knocked me down. But he said that, you know, that is crazy. It never happened. And I said, “Well, yeah, but it is getting to be more like the Internal Revenue Code, and I think this is a step backyard.” So anyway, that is my comment. Now, Jason [Kilborn], you said it is just impossible. You cannot do it, something like that.

JASON KILBORN: I was probably more ambiguous than that. I do not like to be nailed down. It is tough. It is a good point, though. Is it too complicated now?

17. U.C.C. § 1-103(a) (2002).

STEVEN HARRIS: Chuck Mooney and I have a piece in a symposium issue of the Chicago-Kent Law Review where we opine on that.¹⁸ There was a tension in the drafting room between on the one hand making the statute simple and clear, and on the other solving every problem anyone had ever encountered or imagined. People write opinion letters, they come up with oddball cases, and they want some comfort as to what the rule is. Well, to the extent that you start adding up all these details for different types of collateral and different situations, the more rules you put in. The statute might appear to give more comfort by being more specific and more definite, but, as you suggest, it becomes so cumbersome that it creates uncertainty.

All I can tell you is that there were a number of provisions that if I had had my druthers would not be in there. We pay judges to resolve legal issues. But we did have at the table a lot of practicing lawyers both on the committee—and it was open meetings—people came in, people wrote in, and people called and said, “We have this problem. We have that problem. What is the answer?” And there was great pressure to add to the statute. There was a great pressure from the Uniform Law Commissioners’ style committee to use this kind of bureaucratic style, which takes a lot of the nice flavor out of the Article 9 that some of us grew up with and makes it read much more like regulations. But this style may also result from the fact that a lot of finance lawyers now are used to dealing with regulations. Article 9 in particular has become in that sense much more like the other law that lawyers are dealing with.

MARGIT LIVINGSTON: Steve [Harris], you mentioned that you thought maybe the states did not understand what § 9-506 seems all about and the single search and all that. They are not quite getting the purpose of it, or—

STEVEN HARRIS: Not quite. It is not that the states do not get the purpose of § 9-506. The purpose of § 9-506 is to save financing statements that a person would find if the person had conducted a search under the debtor’s correct name. My concern is that the utility of § 9-506 is completely lost if a search logic that yields every financing statement in the database qualifies as the filing office’s “standard search logic.” Suppose your debtor is “McAfee Tires.” You file under “Harris Construction.” A search under “McAfee Tires” returns everything in the Florida database, including the filing under “Harris Construction.” If the search logic qualifies as “standard search logic,”

18. Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 CHI-KENT L. REV. 1357, 1388–98 (1999).

then the filing against “Harris Construction” is good for “McAfee Tires,” and that cannot be right. It cannot be right, and if it cannot be right, then it is not, because § 1-103 tells us that. If it is completely wrong for commercial transactions, then you are misreading the statute. You have to construe the UCC liberally, if you are still allowed to say that word.

MARGIT LIVINGSTON: So now we are getting to a fuller meaning of not giving too much information but giving practically no information at all.

STEVEN HARRIS: It all depends on the standard search logic, and each state has its own standard search logic. Some of them I think are too rigid, like the old Virginia one. But the Wisconsin one is more loosey-goosey if, in fact, the standard search logic is to put in “McAfee Tires” and you not only get “McAfee Tires” but you also get “McAfee Productions,” and “McAfee Construction,” and “McAfee Manufacturing,” and “McAfee John T.,” right?

MARGIT LIVINGSTON: Right.

STEVEN HARRIS: But that is a problem with the search logic. There was an effort made to unify the search logic. There is a trade organization of filing officers, the International Association of Commercial Administrators, or IACA, and the drafting committee worked with them to put together a uniform search logic. Indeed, there was a model search logic that was promulgated by that organization,¹⁹ but it has no enforcement powers. IACA cannot compel states to adopt their model search logic. Then you have Secretaries of States who say, “In order to change our search logic, it costs us X thousands of dollars, and we do not have it.” So this is a practical problem at the state level with the search logic.

MARGIT LIVINGSTON: And do you accept that it would be unduly expensive to change the search logic given the advances in computer technology?

STEVEN HARRIS: I can’t really opine on that without having more information.

MARGIT LIVINGSTON: What do you make of Kentucky where you can do a standardized search and a non-standardized search?

STEVEN HARRIS: This is nothing that Article 9 in its revised form created. This was something that filing officers, in an effort to be helpful, created before the advent of on-line searching. They said,

19. The most recent version of IACA’s model search logic can be found in its Model Administrative Rules. http://www.iaca.org/downloads/2010Conference/STS/v14-2010_Model_Administrative_Rules.pdf.

“Look, we searched and we found these which match, and we found these others which you might be interested in.” I do not have a problem with that. In fact, that is what the standard search logic in § 9-506 was designed to recognize. It was designed to pick up that practice. Section 9-506 is most useful if you have a filing office that designates the financing statements that its standard search logic picks up and then allows you to get more information if you want it. I think that is terrific.

MARGIT LIVINGSTON: Do you find descriptions of standard search logic to be very helpful? I mean, just a listing of noise words and then we omit all spaces . . . we omit all punctuation marks?

STEVEN HARRIS: I do not think that the typical lawyer has to worry about the standard search logic even to the extent it is presently available. If you are a filer, get the debtor’s name right. If you are not sure which is the right name, you add additional names as additional debtors. You don’t have to worry about § 9-506 if you file using the debtor’s correct name. If you are a searcher or a bankruptcy trustee, you are going to go into the filing office and say, “Give me a response to this search.” It is conceivable to me that if you had multiple billions at stake, someone might go behind the actual search that was conducted to say, “You did not conduct your search according to the standard search logic that you promulgated,” but I think that is pretty far out there.

MARGIT LIVINGSTON: Okay.

STEVEN HARRIS: I have just one or two more things to watch out for. One is with regard to Massachusetts business trusts. The 2010 amendments have made clear that Massachusetts business trusts are registered organizations and as a consequence, you file under the registered organization name, which is the name that is submitted to the Secretary of State or Commonwealth. A number of intelligent and informed people think this is a change from current law, that a Massachusetts business trust under current law may well not be a registered organization. That is just a caveat. The second point is regarding collateral that is held in trust. What we have been talking about is debtor names. What name do you put on the financing statement? As Maggie [Livingston] pointed out, under the 2010 amendments, you need to figure out whether your trust is a registered organization. But it may be that the trust is not the debtor. In common law trusts the debtor typically is the trustee. The trustee is holding the property. The trustee has the legal title to the property. The trustee is the one who is creating the security interest in the trust assets. For 2010 amendment purposes the name does not turn on who the debtor is. The name

turns on whether the trust is a registered organization. It does not turn on whether the debtor is the trust or the trustee.

There are, of course, other provisions in Article 9 that turn on who the debtor is, and perhaps the most important in this context is: What is the location of the debtor? For that you need to figure out, is my debtor the trust or is my debtor the trustee, or in a really nasty case the trustees? To determine a debtor's location for purposes of filing, you need to look to trust law and the nature of the trust. As I mentioned, in common law trusts the trustee is typically the debtor. Massachusetts business trusts are common law trusts, and so the trustees are the debtors. You file against a Massachusetts business trust wherever the trustees are located under § 9-307. That is the where-to-file issue. The name issue is a separate issue, which is determined by the fact that, even though the trust is not the debtor, it is a registered organization. You file in the location of the trustees, but provide the trust's name as it appears in the trust's public organic record.

MARGIT LIVINGSTON: Steven [Harris], as one of the reporters for Article 9, what do you think about the way this very important statute is drafted, created, finalized, and then sort of presented to the states? Most states pretty much accept it as it is? Is this a funny way to make a statute or a good way?

STEVEN HARRIS: It strikes me as a very sensible way to make a statute that is to some extent quite technical and for which uniformity is very important. The UCC is the child of two organizations. One is a private organization, the American Law Institute, with about 4,000 elected members, including judges, law professors, and practicing lawyers. The other organization is the National Conference of Commissioners on Uniform State Laws, now known as the Uniform Law Commission, which is quasi-governmental. Each state appoints its own commissioners in the manner in which it chooses to appoint them.

MARGIT LIVINGSTON: Does each state have the same number?

STEVEN HARRIS: No. Each state can pick its own number because each state gets one vote, so it does not matter how many commissioners it has.

MARGIT LIVINGSTON: So it is not by size of state.

STEVEN HARRIS: Right. It is not by size of state. These organizations, before they embark upon a UCC drafting project, convene a study committee, which considers the issues. Then they move, if necessary, to a drafting committee. The UCC drafting committees meet typically three times a year, two and a half days—they meet all day Friday, all day Saturday, and half of Sunday. They are open to the

public, and in our revised Article 9 drafting committee meetings, there were sometimes sixty, seventy people at the table with a drafting committee of fewer than fifteen. Particularly with the revision, again, in the 1990s, we had lawyers who contributed a great deal but who were not on the drafting committee. They spent a lot of time reviewing the drafts. There was one firm in Chicago that undertook to take the draft of what would become revised Article 9 and work some of their past transactions through the draft to see whether, in fact, the revised version would give them the outcome that they expected. We had all sorts of trade organizations that weighed in on various topics on which they have expertise. We had representatives from consumer organizations—National Consumer Law Center, Consumers Union, Legal Aid Society—as well as representatives of consumer finance companies to weigh in on the consumer provisions. Ultimately, I think this was a very good way to deal with these issues both from a practical sense of getting an Article 9 that works for these kinds of transactions as well as getting an Article 9 that would be enactable. This is one of the important things for the Uniform Law Commissioners, that their work not go for naught and you get enactment. Fortunately we had 100 percent enactment, almost all of it by the uniform effective date of July 1, 2001. For the amendments we will see. We have twenty, twenty-five in the pipeline out of fifty. Fifty-three if you include the District of Columbia, the U.S. Virgin Islands, and Puerto Rico, all of which have the Uniform Commercial Code. We are well on our way to what we hope will be a 2013 uniform effective date on these amendments.

JASON KILBORN: Was the enactability point the driving force behind this quite self-awarely nonuniform statute now? You have this “Alt. A” and “Alt. B.” Is that why you guys did that?

STEVEN HARRIS: The individual debtor name issue is the reason why we had these two years of drafting. All of the rest of the issues were issues that people I think could live with. But there began to be a movement among some states to enact non-uniform amendments of § 9-503. Some of these simply did not work. One was drafted so badly that any name you picked would work. So the sponsors had a choice of saying, “Okay, you can mess it up and live with the consequences” or “We can come in and try and give you something that will work.” You had an organized bank lobby, the American Bankers Association, which was pushing very hard for what became Alternative A. You had others who were not as sanguine as the bankers were about the desirability of saying, as Alternative A does, if you use the

driver's license name, that works, and you should not have to search under anything else or use anything else.

As Jason [Kilborn] will explain shortly, some of the Alternative A provisions become difficult for filers when there are name changes. If you have something that is unforgiving like Alternative A, then you have to get the debtor's name exactly right. We have seen problems with search logics that are unforgiving. So even though it sounds very nice—all I have to do is file in the driver's license name—you still have to solve the problem with Hispanic names and figuring out which is the surname. You still have problems with name changes and so on. There were others who said, "Let's give filers a choice when there's more than one plausible name. Many people are going to search widely anyway." If you have your "Margaret Taylor Watson" person, many people are going to do more than one search anyway to find out what is out there. These folks favored Alternative B. Then there were some who said, "Why are we getting into this? It is a problem where we can never nail it down completely, and if you cannot nail it down completely, let's just live with 'individual name of the debtor.'"

MARGIT LIVINGSTON: Jason [Kilborn], do you want to speak to your name change issues?

JASON KILBORN: Yes. Thank you very much for having me and for coming. I am going to talk a bit about two kind of changes that are implicated by the 2010 amendments, changes to the debtor's name first and then changes to the debtor's location or at least a change in the governing law. As we will see at the very end, this may well not involve a physical movement of the debtor or any collateral but simply a change in law.

The first issue I am going to deal with briefly is the notion that Alternative A seems to provide a nice, clear, bright line rule for the name that ought to be the financing statement, and that is a pretty bright line source of information but it is not as stable as we might expect or indeed like. The driver's license, potentially I think, opens up a much broader field of application for the name change rule in Section 9-507. I will conclude by suggesting that maybe that is not a big deal but we, particularly those of you who file, at least need to be aware of this problem. I like the fact that § 9-507, the name change rule, has been amended now to make it quite clear that rather than a name change being an action, as it reads now when the debtor so changes its name, the name change is now an event. If the name becomes insufficient, it is not an action anymore. It is just something that might happen.

At least three events, three ways, might make a name change happen whether or not the debtor actually does something to make that happen or not. First, a driver's license expiration under Alternative A is at least potentially an automatic name change. A new comment to Section 9-507, for example, acknowledges that. We rely on a driver's license having been issued that has not expired and so expiration, the comment points out, may well be a name change. If you have a name like mine, "Jason Jeremy Kilborn," you know my driver's license name is pretty much the same as my name on my birth certificate, so even if the driver's license no longer is the governing source of information about my name, and you have to revert to the birth certificate, for people like me that kind of event, expiration of a driver's license, may well not be a name change because my name is pretty much the same everywhere.

But if you have someone like, for example, "Benny Miller" whose name according to everyone including his grandmother is "Benny Miller" and his birth certificate is the only document that anyone can identify that says his name is "Ben Miller," if his driver's license expires, his name, probably at least in the Central District of Illinois Bankruptcy Court, has now just changed to "Ben Miller." So expiration of a driver's license may well be a name change event. My father, incidentally, has the exact opposite issue. My father, "Dan Kilborn," everyone knows him as "Dan." His birth certificate actually says "Danny Kilborn." My grandparents called him "Danny." If his driver's license, that says "Dan Kilborn" on it, expires, his name has now just changed from "Dan" to "Danny." It may well be that given the single search safe harbor that Professor Livingston described earlier, a search on "Dan" is likely in most systems to come up with "Danny." So even though apparently in Illinois a search on a "Benny" did not come up with "Ben," the opposite problem might not be as big of a deal.

Note also very briefly that moving from one state to another is an automatic name change as well because it is essentially an automatic driver's license expiration. If someone moves from Indiana to Illinois, for example, the name on their Indiana driver's license is now no longer an effective source of information because the place of the debtor's residence governs the choice of law. In Illinois, § 9-503, if we choose Alternative A, we will say that a driver's license issued by this state that is unexpired, determines the driver's licensee's name. If this state, Illinois, has not issued a new driver's license yet, the old Indiana driver's license is completely unhelpful. It is effective only after this

four-month transition after a change in location, which we will describe in just a moment.

So all kinds of shenanigans can occur with expiration. A similar name change event might well be the renewal of a driver's license. A renewal might correct an old clerical error in a driver's license, the comments to § 9-503 point out, because the comment says quite explicitly the name on a driver's license is the name that you have to use, even if it is obviously erroneous. The comments I think quite entertainingly offer an example: An Illinois debtor whose middle name is actually spelled "Alan," rather than "Allan" on his driver's license. Those kinds of mistakes are not as uncommon as we might like to think. For example, my significant other's first name is in Arabic. She spells her name "Sawsan." And you cannot imagine the variety of alternatives that people come up with for calling her something different. "Susan" is obviously the most common because people at least can relate to that, but "Swanson" is not at all an uncommon alternative. She has all kinds of official documents with four, five different iterations of subsets of her name. If she applies once for a driver's license, the first time, and they put "Swanson" on there, she is going to live with it. But when she goes to renew, if someone is paying attention and they fix her name, that has now been a name change simply because they have changed her driver's license. By the way, notice that if the debtor actually goes through a legal process to change his or her name and gets it actually done, that person's name ironically has not changed for Article 9 until that person renews their driver's license. So an actual name change is not really a name change now under § 9-507 until a driver's license renewal confirms that. So we have got this weird situation now that we have to be aware of if Alternative A comes down the pike. It is going to cause at least potential for significant confusion.

One last point that might reveal and make a name change is a new issuance of a driver's license, particularly after a state move. Thanks to the Seattle lawyer Richard Goldfarb, he pointed out an issue that I was not aware of. Apparently this Real ID Act²⁰ is making its way down the pike, and goodness only knows whether the states will reject it. Many states have actually passed legislation that says, they are not going to comply with the Real ID thing. The effective date of this thing has been pushed back and back. It is now January 2013, but if it goes into effect in 2013, along with the 2010 amendments, the Real ID Act would require that when you apply for a driver's license, the state

20. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005).

has to accept from you at least four documents. One is a photo ID, or some other ID with your full legal name and birth date on it, such as a driver's license or marriage certificate. Second is documentation of your birth date, such as a birth certificate. Third, a document of legal status or Social Security number, such as a Social Security card or maybe a passport; and fourth, a document showing your principal residential address, like your mortgage or a utility bill. All four of these documents could easily have a very different name on them. That "Margaret Taylor" could have four completely different names on these four different documents, and we just have no way of knowing which one the clerk and the driver's license office is going to choose.

Goldfarb describes a situation where his mother moved to Florida and no one had ever called her "Ruthe" with an "E" on it since she changed her name way, way, way back. Florida just happened to pick the one document that said "Ruthe" with an "E" on it, and all of a sudden her name changed. So the new issuance of a driver's license under the Real ID Act may well force people to go back to a name they have never used before because it is on one of these random documents.

Is this a big deal? I think, first of all, we have to realize that the effect of this name change problem probably will be limited because of the seriously misleading safe harbor, which was described earlier. If my dad's name changes from "Dan" to "Danny," chances are a search using, for example, Illinois's standard search logic will find a financing statement under "Dan" if you search on "Danny." Maybe, maybe not, but my sense is that will be at least mildly a part of the saving grace for a number of these name changes. In any event, let's of course remember that the effect of a name change is not as aggressive as, for example, a location change. If the debtor's name changes in a way that makes an old financing statement seriously misleading, that affects only perfection for future collateral. If that same debtor acquires something four months after the name change, only then is that old financing statement no good. That old, now-with-the-wrong-name-on-it financing statement is still good until its expiration to perfect an interest in collateral acquired before four months after the name change. The scope of application of this potential problem is limited really to collateral that might turn over.

We are really talking about business collateral here, such as inventory, and what kind of an individual has inventory? If individuals are doing business like my dad, for example, they are probably doing business under a registered organization. "Lake Plumbing & Heating" is my dad's business, and he does not do business under "Dan Kilborn."

He has a small business, and most of these small businesses will be registered organizations for which I think the name rules are likely to cause less trouble.

As Professor Harris pointed out during our conversation earlier, though, the people whom this is apparently going to really effect are farmers, who may well be taking loans, with inventory, equipment that turns over, and they may well end up using their own first names because that is the only name they have. They have not incorporated their farming operation. Of course, remember that the most important piece of consumer loan collateral is a car, and cars are not subject to these name rules at all. You note your lien on the face of the certificate of title in every state but Louisiana, as far as I can tell, and so you know that name change issue is not going to affect perfection in cars.

STEVEN HARRIS: Purchase-money security interest in consumer goods.

JASON KILBORN: Well, maybe in PMSIs in consumer goods. Those are automatically perfected and I do not have to worry about the name change there at all. My sense is this is going to affect a relatively narrow range of sole proprietors using collateral for business purposes that turns over, but probably relatively limited effect, luckily for us. But let's keep our eyes out for at least those few cases where we will have an effect. Professor Livingston already did mention one other little point I wanted to raise about the name of a registered organization. It is now quite clearly the name on the certificate of incorporation, not as a couple of people have thought apparently before, the name that comes up on an informal search of the business filing's database. I am surprised that anyone was confused at the fact that that could have been the right name for a registered organization.

Something that I must admit I had overlooked, and I want to at least point out here, is a clarification of the comments now that an LLP, a limited liability partnership, is not a registered organization. This is one of the very few, if maybe the only, limited liability entities that the comments now confirm is not a registered organization because the definitions now for this public organic record now state quite explicitly that the public organic record creates the entity. It is only an organic record that creates an entity, such as the filing of articles of organization or articles of incorporation for an LLC or corporation. That filing creates the entity. For a limited liability partnership, those things are formed under the ordinary partnership rules. They get limited liability by filing a registration to become an LLP but those organizations are formed without a filing.

The other really significant changes that are affected by the 2010 amendments are changes not only on the debtor's name but a change in the debtor's location. The relatively basic first rule for a change in the governing law after the debtor changes location is § 9-316(a)(2). Debtor begins in Illinois, has some collateral perfected via Illinois UCC-1, and then moves to Indiana. Under the old rule, § 9-316(a)(2), that old Illinois UCC-1 was effective for four months after that move to maintain perfection in the collateral acquired in Illinois. But, as I think a number of people have missed, it does not perfect collateral acquired in Indiana in the new jurisdiction during that four-month grace period, quite unlike the name change rule, and I think this caught a number of people off guard. The new rule adds § 9-316(h) to include a grace period after a change of location and therefore a change of jurisdiction. The old UCC-1 financing statement in Illinois is now still effective to give us a grace period of perfection even in the stuff that the debtor acquires now after the move to Indiana. You know, it is only four months. One wonders again how much of a big deal this would have been in any event as well, but one imagines that, you know, financiers will at least breathe a bit easier, particularly if the debtor declares bankruptcy within that first four months following a move.

This same rule applies in the context of a new debtor who finds him, or herself, in a new jurisdiction, maybe not by means of a physical move but maybe just by the application of different law. We have Illinois corporation "Old Debtor," who then at some point in time reincorporates, maybe in advance of a public offering or something, as "New Debtor" in Delaware. No assets, no people, no physical anything that you can identify associated with Illinois corporation has moved out of Illinois, but because now it is a Delaware corporation, that old debtor has essentially become this new debtor. The old debtor has not moved. It is a new debtor because as the law defines it, the new debtor has become obligated on the old debtor's security agreement and other obligations. A similar rule applies for a new debtor like this in a new jurisdiction as applies for the old debtor who actually does move physically to a new jurisdiction. The old rule again, slightly different, was the law provides one-year grace effectiveness of the old Illinois financing statement to perfect collateral of the old Illinois debtor that was acquired up to the point of the reincorporation in Delaware, and the change in governing law. But again, there is no grace period for the period after the incorporation, once that debtor is a Delaware corporation, no grace period at all for collateral acquired after the incorporation in Delaware. Now, once

again § 9-316(i) adds a rule that is quite like the location change rule that says if a new debtor is governed by a new jurisdiction's laws, we have not only the one-year grace period for effectiveness of the old Illinois financing statement but also now a four-month grace period for effectiveness of the Illinois financing statement for collateral acquired after the Illinois corporation has become a Delaware corporation. Notice, however, we now have two different expiration periods, two different graces: Four months for stuff acquired after reincorporation in Delaware, and one year for stuff acquired before reincorporation in Delaware.

To make things more complicated, that very same rule applies in the context not of a reincorporation of a single debtor but of a merger. That same rule applies in very much the same way as the old rule if we have, for example, D1, an Illinois corporation, and D2, a corporation from anywhere—it does not matter where it is—merge as a new Delaware corporation, new D, same idea. Now we have got three sources of property to deal with. D1's property that it owned prior to the merger in Illinois is still perfected for one year after the date of the merger and the effective change in governing law, but that old Illinois financing statement had no effectiveness to perfect an interest in D2's property transferred to the new combined debtor and no effectiveness to perfect an interest in the new debtor's property acquired after the merger. Now, once again, the new rule § 9-316(i) provides a four-month grace in both of those latter two categories. Not only do we have one-year continued effectiveness for the stuff D1 owned before the merger, but we also have four months of grace effectiveness of the Illinois financing statement, not mentioning the new debtor, for D2's stuff transferred to the new combined debtor and stuff that the new debtor acquires after the merger as a Delaware company. Once again, I wonder how much of an impact these things will actually have in real practice but they provide a pretty significant new grace period for post change in governing jurisdiction rules. So questions or comments I would be happy to take them.

AUDIENCE MEMBER: So it sounds like when I order the organizational documents, I need to ultimately date the organization documents or create an icon. Now, my question was really your eyeball is now looking at organizational documents rather than simply joining –

JASON KILBORN: Yes. You have to understand that conceivably these problems create big problems for searchers. I have to understand not only is my filing a filing that I might find under the correct debtor's name but might there be a filing out there somewhere in some other state that has continued effectiveness in some portion of

the collateral belonging to my debtor or maybe a predecessor of my debtor that for either a year after that effective move of jurisdiction or four months may well still be effective. These rules make searchers' jobs quite a bit more complicated, at least for a relatively small period of time.

STEVEN HARRIS: Let's not forget that the current set of rules already imposes much of that burden on a searcher. This is the trade-off that Article 9 has repeatedly dealt with, between on the one hand, wanting to make it easy to file once and stay perfected, and on the other hand wanting to make it easy to search.

If you have a debtor that changes its name, or a debtor that relocates, or collateral that is transferred, you can have an easier rule that says once the underlying facts change, then the financing statement of the original secured party is no good. You can have that rule: The minute the debtor changes its name, the financing statement is no good, because it becomes seriously misleading. The minute the debtor relocates, the financing statement is no good, because it is now filed in the wrong place. You can do that, and then people who file would say, "This is a crazy world. We need some time to adjust to these changes." And if you give the filer some time to adjust, this means that someone who comes along after the event—after the name change, after the relocation, after the merger—has to figure out some of the things that happened before.

Now, because a lot of this deals with after-acquired property, somebody who searches is going to wonder, "Where does this property come from and what other security interests are there?" And the searchers are probably going to search anyway. The issue that was raised from the audience is an issue that was discussed at some length at the drafting committee. One nice thing about security interests: When you are dealing with searchers and filers, you do not have one group of secured parties that are searchers and one group of secured parties that are filers. Searchers and filers are essentially the same entities, and if they can agree that this is a sensible balance, then I think we can have some comfort that, as a practical matter, the rule is not going to increase the search burden. Any increase is likely to be more theoretical than real. But yes, you do need to worry about where your collateral has been and where your debtor has been.

AUDIENCE MEMBER: But in many ways, is this not a trend back to old Article 9? I mean, that is from, you know, us old lawyers. That is the feeling you get. It is almost like, "Okay. Well, this did not really work so we are going to go back to the old." I mean, I know it is not exactly the same but there is a feeling of that.

STEVEN HARRIS: On the four-month?

AUDIENCE MEMBER: It is a much more severe change.

STEVEN HARRIS: Old Article 9 was a mess when it came to these situations. It was not clear what happened with re-incorporations; were they treated as name changes or were they treated as changes in identity? The case law was terribly confused. What to do with these change problems was a major issue going into the 1990s, and it may have been the only issue on which the study committee disagreed among themselves as to what was the right balance. So it is one of these problems that you do your best to solve. Why four months rather than three months, or six months? The idea is to provide some protection for the filer. And that means the searcher has got to go back and look. And yes, now if you are potentially in the position of a post-name-change or post-relocation secured party, you may have a little more work to do. The flip side is if you are a filer, you have much better protection in bankruptcy. Part of the question is, how often is it that someone with existing financing is going to go to a new financier during the grace period?

JASON KILBORN: Well, there is an important point to make on this score as well, and this is one of the relatively few instances in Article 9 where you have to distinguish between continued perfection and priority because § 9-326 now has what appears to be a clarified rule for priority of a later-in-time filer against, for example, a new debtor. Even if old financier's security interest is still effective in D1's stuff, § 9-326 might reorder the priorities at least in relatively few instances. That is something I actually am continuing to struggle with, like exactly how would that operate? That might take a bit of the burden off of searchers, but I do think it is important to point out that there is sort of a political economy observation to be made here that Article 9 really does favor filers. What Article 9 fundamentally is about is encouraging the extension of secured credit because we believe that the extension of secured credit enhances economic production and societal welfare. Agree or disagree, the people who are going to be doing that primarily are filers, and so we want to really protect and encourage filers. It is a quite clear position that has been taken, and I think the new Article 9 just kind of advances even that political economy position. Disagree?

AUDIENCE MEMBER: No. I think it is a good point. I had not thought of it that way before. Maybe that is an underlying assumption. What do you think?

STEVEN HARRIS: It is curious because there may be more people who file without searching. Right? Purchase-money secured par-

ties in equipment, for example, file without searching. But there may be, in fact, more searchers than filers because there are searchers who search and never wind up filing. Regardless, I think you are right that there is a sense that if you are going to do the deal and you are going to put your money out and you are going to try and lock your place in line, you ought to have an easy way to file. Once you have done that you should be secure; your position is not going to be undermined. Some of that security comes at the cost of doing the searches at the outset to determine whether anybody else may be out there.

JASON KILBORN: I also think it is important to point out that protecting these kinds of filers against what I think is sort of roundly regarded as the pernicious effects of a trustee in bankruptcy sort of stealing rights from people, my sense is that that is kind of a flavor that runs through here as well. This sort of further protection of an old filing that now has continued existence, I think again is designed basically to sort of push the trustee in bankruptcy further and further away from being able to undermine legitimately contractually created rights. This may well be inadvertently impacting some later searchers and filers as well, but it is really kind of judicial lien creditors, trustees in bankruptcy, who I think are going to be really hit by this. As far as I can see, most of the litigation over Article 9 seems to appear in bankruptcy court, so pushing the TIB out of the picture probably must be one of the primary driving forces behind these kinds of rules. Is that true?

STEVEN HARRIS: I think it is fair to say that part of the concern is for the unperfected status as it affects your security interests in bankruptcy, but I would not say this was an inadvertent effect on searchers. It was an advertent effect; that is, people said, "When we file, we would like more protection," and one response was "Yes, but what are the costs to searchers?" That was explored, and the conclusion was that there may be a cost to searchers, but the number of cases in which the situation will, as a practical matter, arise and require additional due diligence beyond that which people are doing anyway will be small. It was just a judgment made about the practical effects. And my impression is that had it come out otherwise—had people said, "You are imposing a ridiculously huge search burden in order to protect the filing"—the amendment would not have gone forward.

MARGIT LIVINGSTON: Jason [Kilborn], did the lapse of perfection rules change at all under the new amendments?

JASON KILBORN: Not as far as I can tell. Of course the lapse of perfection rule for a location change is devastating. If you do not act within the four months after this change of location, you are deemed

retroactively unperfected at least as against purchasers for value, other contract creditors, though again only prospectively for lien creditors and the trustee. Now, those rules, as far as I can tell, have not changed at all.

MARGIT LIVINGSTON: That is different in the pure change context, right?

JASON KILBORN: Yeah, very, very different. The effect of a name change is again only prospective and quite limited, beginning after the point four months after the name change. The effect of a location change, of a jurisdiction change, either for the debtor actually moving or becoming a new debtor, is again devastating, retroactive back to the beginning of time as if your original filing had never been made at all.

MARGIT LIVINGSTON: And why did the drafters choose those different results for a name change?

STEVEN HARRIS: These different results, again, trace back to original Article 9. I think the notion was that if you are dealing with someone who has a piece of collateral and changes the name, what kind of burden of monitoring do you want to impose? There is indeed a longer period involved with transfer of the collateral, based on the notion that if all you are doing is lending and the checks keep coming in, why would you go and hunt down where the collateral is? In fact, it was raised at the drafting committee that under this one-year rule, where the collateral is transferred, your security interests remain perfected for a year, assuming your filing does not lapse. So if I am a debtor in Illinois, there is a filing against me, and then I sell my collateral to Jason who is located in Iowa, the Illinois filing is good for a year. There was a similar rule under old Article 9, and some people asked the drafting committee: "Why should that period of time be so long?" And again, the drafting committee considered whether people are lending on what is likely to be used equipment that is sitting around for a year, or if it is inventory, how long is it going to be sitting? The thought was that there was not a great burden on someone who might be entering the picture after the relocation with regard to these things that had come from elsewhere. It is all just trying to make a balance between protecting people who have filed and protecting those who want information before they enter into the picture. In determining whether to change the law, we asked whether people could live with it and are happy with it. If yes, we did not monkey with it. But, if it was presenting problems, we tried to solve them while balancing the concerns of the competing creditors.

I agree there was a sense that the lien creditor or the bankruptcy trustee is a fortuity and that if we are going to allow a bankruptcy trustee or a lien creditor to prevail, there ought to be a good reason. But it is not all one-sided. For example, the debtor name rules are much more favorable to trustees than they were under old Article 9. If you get the debtor's name wrong under current law, the filing is no good. Some cases under old Article 9 said that if you get it wrong, filing is good nevertheless because searchers should have figured out that a filer may have used the wrong name and searched under that different name. Revised Article 9 has gotten rid of all that, which means that you get a case like *Tyringham Holdings*,²¹ which probably would have come out the other way under old Article 9.

MARGIT LIVINGSTON: As someone involved in the drafting process, Steve, how do you feel about the problematic points that come up over time? Do you look upon that as a failure of your drafting process or just an inevitable part of the whole thing?

STEVEN HARRIS: Well, you know, nothing is perfect. I mean, not even a perfected security interest is perfect. It still loses to some competitors. I think that, based on the last ten years of results in the case law, things worked out pretty well. There is only one real firestorm that I am aware of. The *Commercial Money Center* case involved a tangential issue that may arise when a lessor of equipment uses the lease rental stream as collateral without assigning the other rights under the lease.²² The secured party faced a problem that it could have prevented by filing, which a cautious secured party would have done, and the issue is more an intellectual issue than a practical issue, I think. Of the other items that were on the issues list for the new drafting committee, which met from 2008 to 2010, the individual name of the debtor was the largest issue. Everything else really I think was relatively small potatoes, things that people could have lived with and were prepared to live with. As you see, even with the 2010 amendments on the debtor's name we are dealing with an issue that in many ways is insoluble. Ultimately, what is a name? There is some recent Illinois legislation that changes the common law of names in Illinois.²³ Under the law in Illinois, your name is what your name is and if you change your name, you change your name. Right?

MARGIT LIVINGSTON: Right.

STEVEN HARRIS: As long as you are not defrauding anybody, you are free to change your name. Well, not anymore. "Common law

21. *In re Tyringham Holdings, Inc.*, 354 B.R. 363 (Bankr. E.D. Va. 2006).

22. *In re Commercial Money Ctr., Inc.*, 350 B.R. 465 (B.A.P. 9th Cir. 2006).

23. 735 ILL. COMP. STAT. 5/21-101 (2010).

name changes adopted in this State on or after July 1, 2010 are invalid. All name changes shall be made pursuant to marriage or other legal proceedings.”²⁴ Article 9 is a filing system that is drafted against what used to be thought of as the common law—and now I guess it is the common and statutory law—of names. There is only so much that one can do to create a uniform law when your background rules are non-uniform. Ultimately, I think a lot of people spent a lot of time, worked very hard, and I think ultimately the outcome has been pretty successful as legislation of this length and complexity goes.

JASON KILBORN: Do you have any sense of which direction Illinois will go, Alternative A, or Alternative B, or reject the whole kit and kaboodle? I cannot imagine they will do that.

STEVEN HARRIS: The banking lobby is working hard for Alternative A, but throughout the country, and as we have seen it is about three and a half to one of adoptions and introductions for A compared to B.

MARGIT LIVINGSTON: And in your own mind, is Alternative A the preferable choice?

STEVEN HARRIS: No. In my own mind, Alternative A is not the preferable choice. In my mind, Alternative B is the preferable choice.

MARGIT LIVINGSTON: Because?

STEVEN HARRIS: Because it is more forgiving. It gives you a better shot at being perfected, and I think people very frequently are going to search broadly anyway when there are questions about what an individual debtor’s name is. Under either alternative we will still have issues if there is no relevant driver’s license. What is the debtor’s name? There was reference earlier to legal name. A case recently decided in the Central District in the Bankruptcy Court suggests that the legal name—and, by the way, Article 9 does not require that the debtor’s “legal name” be used—is the birth certificate name unless it is changed.²⁵ If you now have an Illinois rule that says you cannot change your name unless you go to court or get married, you have got real problems because people when they get credit do not produce birth certificates. There is no reason why they should have to. If you have a rule that says the individual name is the name on the birth certificate, you are really impeding commerce. Well, we tried.

24. *Id.*

25. *Miller v. State Bank of Arthur (In re Miller)*, 2012 Bankr. LEXIS 70 (Bankr. C.D. Ill. Jan. 6, 2012), rev’d, No. 12-CV-02052, 2012 WL 3589426 (C.D. Ill. Aug. 17, 2012). For a critique of this case, see Harry C. Sigman, *Individual Debtor Names Revisited Yet Again*, 44 UCC L.J., no. 3, July, 2012.

MARGIT LIVINGSTON: Well, I want to thank our speakers. We are going to adjourn at this point, and I think lunch is available outside in the foyer. We will reconvene at noon for our luncheon speakers. Thank you very much.