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Debtors' Name or Identity Changes: Distributing Benefits and Burdens Under Article 9

By Claude Michael Stern*

"Well, but do you not see, Cratylus, that he who follows names in their search of things, and analyzes their meaning, is in great danger of being deceived?"

Of the many celebrated features of Article 9 of the Uniform Commercial Code (Code), certainly one of the most curious is the significance attached to the document known as the financing statement. Through the filing of the financing statement, the Code attempts to assign specific rights and liabilities to the parties concerned with a secured transaction. Even more curious than the general import of the financing statement is the attention that Article 9 gives to the formal aspects of the financing statement. This Note focuses on the problems associated with one of those formal requirements: the need for the financing statement to identify and be filed under the debtor's name. In particular, the Note addresses, under both the 1962 Code and the 1972 Code, the resolution of the problems arising from a change of the debtor's name or identity after the financing statement has been filed by a secured creditor to perfect a security interest in the debtor's

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2. The rules governing the filing, form, and effect of the financing statement are contained in Part 4 of Article 9 of the Uniform Commercial Code. The financing statement is most popularly called the UCC-1 form; an example of its proper format is given in U.C.C. § 9-402(3) of the 1962, 1972, and 1978 versions.

3. Section 9-105(1)(d) of the 1962 Code defines a debtor as "the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires. . . " U.C.C. § 9-105(1)(d) (1962 version). The definition was changed by the 1972 amendments which deleted the phrase "contract rights." See U.C.C. § 9-105(1)(d) (1972 version).

4. The terms "secured party" and "secured creditor" are used interchangeably throughout this Note. "Secured party" is defined by the 1962 Code as being "a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by
property.

To appreciate the problems caused by a "postperfection" name or identity change by the debtor, the filing of the financing statement must be viewed from the perspectives of both existing and prospective secured creditors. From the secured creditor's point of view, the filing of the financing statement with the Secretary of State or other appropriate agency is extremely important, as this is the method by which creditors perfect their security interests in certain kinds of collateral. By perfecting the security interest, a creditor becomes a member of the class of creditors whose claims to the collateral or its proceeds are superior to those of unperfected secured creditors, should the debtor default on credit payments or declare bankruptcy. For the members a trustee or other person, the representative is the secured party. U.C.C. § 9-105(1)(m) (1962 version). Again, the 1972 amendments changed the definition by deleting the phrase "contract rights." See U.C.C. § 9-105(1)(m) (1972 version).

5. The rules governing the perfection of security interests are contained in Part 3 of Article 9 of the Uniform Commercial Code. For a general discussion of perfection and associated concepts, see R. Henson, Secured Transactions 56-116 (2d ed. 1979) [hereinafter cited as Henson].

6. The term "security interest" is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-210(37) (1962 version); U.C.C. § 1-210(37) (1972 version).

7. In this Note, the terms "existing secured creditor" and "secured creditor" are used to refer to the party to the secured transaction who entered into a security agreement with the debtor and filed a financing statement to perfect the security interest in the debtor's property. The term "prospective secured creditor" is used to refer to a person or organization that wishes to enter into a security agreement with the debtor and therefore must search the financing statements filed with the Secretary of State to find any prior encumbrances on the debtor's property.

8. "Collateral" is defined in § 9-105(1)(c) of the 1962 Code as being "the property subject to a security interest, and includes accounts, contract rights and chattel paper which have been sold." U.C.C. § 9-105(1)(c) (1962 version). The phrase "contract rights" has been deleted from the 1972 version of Article 9. See U.C.C. § 9-105(1)(c) (1972 version).

9. "Proceeds" are defined in the 1962 Code as including "whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of." U.C.C. § 9-306(1) (1962 version).

10. "Default" is not specifically defined in the Code, but rather is defined by the agreement between the secured party and the debtor. U.C.C. § 9-501(1) (1978 version). "The primary event of default will be a failure to make required payments to the secured party in accordance with the schedule agreed upon . . . . Beyond this point, the events of default vary depending on the kinds of collateral, whether the transaction is purchase money or not, the debtor's business (if the debtor is not a consumer) and so on." Henson, supra note 5, at 350.

11. "It is often said that the acid test of a security interest is in the debtor's bankruptcy." Henson, supra note 5, at 258. In bankruptcy, the rights of a "perfected" secured creditor are not necessarily superior to those of other "perfected" or "unperfected" creditors. For a discussion of bankruptcy and Article 9, see Henson, supra note 5, at 258-91. Although Article 9 never explicitly states that an unperfected security interest is subordinate to the rights of secured parties with perfected security interests, such is the apparent effect of §§ 9-301(1)(a) and 9-312 of the Code. U.C.C. §§ 9-301(1)(a), 9-312 (1962 version).
of this class, priority of claims generally is determined by priority in time of filing or perfecting of the security interest.\textsuperscript{12}

Since a secured party's ability to recover from the debtor hinges on perfecting a security interest, the responsibility for properly filing a financing statement rests on the secured party. Section 9-402 of the 1962 Code, which specifies the formal requisites of the financing statement, does not on its face require a statement of the debtor's identity at the time of filing.\textsuperscript{13} The courts, however, have implied such a requirement from the Code provision requiring that the financing statement be filed under the debtor's name.\textsuperscript{14} Indeed, the failure of a secured creditor to identify the debtor adequately in the financing statement is sufficient grounds for finding a security interest unperfected, despite compliance with all other filing requirements.\textsuperscript{15}

The heavy sanction imposed on a secured party for improper identification of the debtor in the financing statement is justifiable in view of the function of the financing statement: to give public notice of a potential security interest in the debtor's property.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{12}See U.C.C. § 9-312 (1978 version) for the method the Code uses to determine priority among secured parties in different financing situations.
\item \textsuperscript{13}Section 9-402 of the 1962 Code formally required the financing statement to contain (1) the signatures and addresses of both parties to the secured transaction and (2) a description of the collateral by type or item. U.C.C. § 9-402(1) (1962 version).
\item \textsuperscript{14}Several courts have implied the name of the debtor to be a formal requirement of the financing statement. This implied requirement is based on § 9-403(4) which requires an indexing of the financing statement by the name of the debtor, U.C.C. § 9-403(4) (1962 version), and the practical consideration that prospective secured creditors would search under the debtor's name. See, e.g., In re Merrill, 9 U.C.C. Rep. Serv. 757 (D. Neb. 1971) (in bankruptcy); In re Levins, 7 U.C.C. Rep. Serv. 1076 (E.D.N.Y. 1970) (in bankruptcy). See also Coca-Cola Bottling Plants, Inc. v. Tabenken (In re Brawn), 7 U.C.C. Rep. Serv. 565 (D. Me. 1970) (in bankruptcy), where the court points out that "[a]lthough the language of § 9-402(1) does not specifically require that the name of the debtor appear on the financing statements, § 9-402(3) does contain such a requirement and the form of financing statement [sic] there recited must be substantially followed in order to comply with subsection (1)." Id. at 568 (footnotes omitted).
\item \textsuperscript{15}Section 9-402(5) of the 1962 Code states that "[a] financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." U.C.C. § 9-402(5) (1962 version). This section was applied by the courts when considering whether the financing statement's failure to identify the debtor was so "seriously misleading" to prospective secured creditors that the previous security interest should be held unperfected. For a discussion of the cases dealing with this problem, see Note, The Effect of Errors and Changes in the Debtor's Name on Article Nine Security Interests, 1975 Duke L.J. 148 [hereinafter cited as Errors and Changes in the Debtor's Name].
\item \textsuperscript{16}The purpose of the Code's notice filing system is to indicate "merely that the secured party who has filed may have a security interest in the collateral described." U.C.C. § 9-402, Comment 2 (1962 version). One need not have a security interest in the debtor's property to file, as it is possible to file before entering into a security agreement. U.C.C. § 9-303, Comment 1 (1962 version). For a general discussion of the Code's notice filing system,
plates that prospective secured parties will search for existing encumbrances on the debtor's property. The notice filing system is, in turn, a convenient means by which prior security interests can be discovered by an interested party. The notice filing system therefore simultaneously imposes a burden on the secured party to identify the debtor properly in the financing statement at the time of the filing and a burden on prospective secured creditors to investigate the past commercial transactions of the debtor before extending credit. Consequently, both the existing and prospective secured parties receive distinct benefits from the filing of the financing statement.

Problems arise, however, when a financing statement that was originally effective loses its notice value because of the debtor's change of name or identity after the original filing. In such a case, the secured party has complied with the requirement of identifying the debtor in the financing statement at the time of the filing. Nevertheless, prospective secured creditors may find a search of the financing statements under the debtor's new name or identity unproductive, particularly when the new and original names or identities are significantly different. The resulting lack of effective notice from the financing statement


17. See notes 72-78 & accompanying text infra for a discussion of the investigative responsibilities of prospective secured creditors.

18. As the financing statement indicates only the possibility of an encumbrance on the debtor's property, it is necessary for prospective creditors to conduct their own investigation as to, e.g., the value of the outstanding encumbrances, the debtor's possession of possibly encumbered property, and the duration of the outstanding encumbrances.

19. The gravity of the secured creditor's failure to properly identify the debtor in the financing statement is best demonstrated by those cases that consider the inadequacy of the financing statement's identification of the debtor as grounds for terminating the perfected status of a prior perfected security interest. These cases, which have been popularly called the *ab initio* cases, all involve financing statements that were alleged to be seriously misleading to prospective secured creditors and, therefore, were held to be ineffective as of the time they were filed. For a fuller discussion of these cases, see *Errors and Changes in the Debtor's Name,* supra note 15, at 150-56. See also W. Davenport & D. Murray, *Secured Transactions* 127-31 (1978) [hereinafter cited as *Davenport & Murray*]; Henson, *supra* note 5, at 66-70. The gravity of the prospective secured creditor's failure to conduct a thorough investigation of the debtor is best illustrated by considering the potential consequences to the prospective secured creditor for a failure to discover the existence of a prior perfected interest in the collateral.

20. Where the old and new names are substantially similar, the courts have not been willing to void the previously perfected security interest. See Corwin v. RCA Corp. (*In re Kittyhawk Television Corp.*), 516 F.2d 24 (6th Cir. 1975) (in bankruptcy), rev'd 383 F. Supp. 691 (S.D. Ohio 1974) (Kittyhawk Broadcasting Corporation changed to Kittyhawk Television Corporation); Borg-Warner Acceptance Corp. v. Bank of Marin, 36 Cal. App. 3d 286, 111 Cal. Rptr. 361 (1973) (Loch Lomand Boat Shop and Loch Lomand Yacht Sales changed to Loch Lomand Yacht Sales, Inc.); Fliegel v. Associates Capital Co. of Del., Inc., 272 Or. 434, 537 P.2d 1144 (1975) (Clint's Appliance Sales and Services changed to Clint's Appli-
draws into question its effectiveness and hence the perfected status of the existing security interest.

The 1962 Code does not contain a provision dealing explicitly with a debtor's postperfection name or identity change. Consequently, one might expect that such a change would not affect the rights or liabilities of the parties concerned with a secured transaction. The issue, however, has not been resolved so neatly. Courts dealing with this issue under the 1962 Code were faced with the argument that the financing statement, although identifying the debtor when originally filed, failed to identify the debtor sufficiently after its name or identity change and consequently the secured creditor's interest was unperfected. The majority of courts considering this or similar arguments under the 1962 Code were not persuaded and left the secured creditor's interest intact. Analysis of these decisions, however, reveals general uncertainty as to the proper rationale for resolving the problem. The source of this confusion is the failure of the Code to articulate the precise burdens the notice filing system was intended to impose on both existing and prospective secured creditors.

A belated response to the problems caused by debtors' postperfection name or identity changes was embodied in the 1972 amendments to Article 9. Subsection 9-402(7), although a potentially promising cure, has been referred to in commercial cases only infrequently, most often only in dicta. This Note, by considering the various problems associated with each kind of name or identity change effected by debtors, first examines the uncertainty over the filing and investigative bur-

ance, Inc.). Similarly, minor errors in the original financial statement which do not impede the prospective secured creditor from receiving notice of a prior security interest are not considered seriously misleading. See Errors and Changes in the Debtor's Name, supra note 15, at 151-56.

21. Although this would be the essential thrust of a proponent's argument, the form of the argument varies. See notes 89-108 & accompanying text infra.


dens of existing and prospective secured creditors under the 1962 Code. After discussing the shortcomings of the 1962 Code, the Note analyzes subsection 9-402(7) which, although marred by latent ambiguities, generally succeeds in defining the burdens imposed on the parties involved in a secured transaction.

The 1962 Code

Lacking specific direction from the 1962 Code, courts adopted an ad hoc approach to cases involving a debtor's postperfection name or identity change. Although the majority of courts reached the same conclusion, i.e., that the change did not affect the perfected security interest, there existed little uniformity in the rationales underlying these decisions. Many courts decided in favor of the secured party because the 1962 Code imposed no obligation to refile after the debtor's name change. Several courts reached the same result through analogy to certain Code provisions and the policies they promote. Still others, attempting to distinguish these inconsistent rationales and supply a new test, concluded that the time at which the secured party acquired knowledge of the debtor's change was determinative of the issue.

This last approach received the greatest attention by the courts and was the most popular among commentators. Under this approach, if the secured party knew at the time of filing of the debtor's intention to change in the future, but filed under the then current name, the financ-


28. See cases cited note 27 supra.
ing statement would be held ineffective. Consequently, the secured party's perfected interest would be deemed unperfected at the time of the name or identity change. If, however, knowledge was acquired after the filing, or was never acquired, the original filing would be held effective and the security interest perfected. The reason most commonly advanced for penalizing the secured party who acquired knowledge of the debtor's intended name or identity change before filing was that the secured party had received a "secret lien," thereby precluding prospective secured parties from acquiring notice of the original security interest. Because the acquisition of a secret lien impairs the effectiveness of the Code's filing system and demonstrates commercial bad faith, the courts reasoned that the secured party benefiting from the


32. The purpose of the notice filing system adopted by the Code is "to give notice to the public, and to future creditors, that the assets of a debtor are encumbered. The evil to be protected against is a secret lien against the assets of a debtor which might cause innocent parties to extend credit to such debtor without knowledge of the prior lien. To allow one creditor to have a secret lien would be a fraud on all other creditors." In re Veiths, Inc., 9 U.C.C. REP. SERV. 943, 947 (E.D. Wis. 1971) (in bankruptcy).

33. The Court of Appeals for the Sixth Circuit in Burnett v. H.O.U. Corp. (In re Kalamazoo Steel Process, Inc.), 503 F.2d 1218 (6th Cir. 1974) (in bankruptcy), that "[w]hen a secured party has knowledge at the time the security agreement is executed that the debtor intends to change its name, and the new name is known to him, the secured party must act in good faith to insure" accurateness of the financing statement. Id. at 1222. Relying on the Code's definition of good faith as "honesty in fact in the conduct or transaction concerned," U.C.C. § 1-201(14) (1962 version), the court noted that "a realization that another is unaware of something or does not understand it may be considered as not conforming to the good faith standard of the Code." 503 F.2d at 1222 (citing King, Policy Decisions and Security Agreements under the Uniform Commercial Code, 9 WAYNE L. REV. 556, 561 (1963)) (footnote omitted). Similar reasoning was applied in King v. Williams (In re Conger Printing Co.), 18 U.C.C. REP. SERV. 224 (D. Or. 1975) (in bankruptcy), where, as in Kalamazoo, the security interest of a creditor who had known of the debtor's intended name change when the security agreement was entered into was held to be unperfected as a
knowledge should not have perfected status. Interestingly, this same rationale was not applied to secured parties who had received knowledge after the original filing. Apparently, the secured party's failure to refile after learning of the change was not sufficiently deceptive to constitute commercial bad faith.

Although this approach for determining whether a debtor's change affects a creditor's interest under the 1962 Code may be desirable for its ease of application, it suffers from two shortcomings. First, the approach in some respects is too broad, as it conceivably could be applied when the secured creditor's knowledge of the debtor's change should be irrelevant to the prospective secured creditor's investigative responsibilities. Second, the approach fails to resolve problems of statutory construction indigenous to certain kinds of changes by the debtor. Consequently, application of the approach to all name or identity change cases may result in either unjustifiable consequences for the secured creditor or continued confusion over the impact of related Code provisions.

Notably, none of the courts or commentators considering the problems associated with the debtor's name or identity change distinguished the cases on the basis of the kinds and forms of the change; instead, cases involving corporate name changes are relied on as authority for cases concerned with the name change of a proprietorship, which in turn are treated like cases involving intercorporate transfers, corporate mergers, and consolidations. By considering and analyzing the cases in terms of the kinds of changes involved, however, the distinct problems of each form of change and the precise inadequacies of the 1962 Code can be identified.

result of the operation of the good faith requirement imposed by the Code, U.C.C. § 1-203 (1962 version), and the requirement under Article 9 of filing a financing statement which identifies the debtor. 18 U.C.C. REP. SERV. at 228.

34. See, e.g., Burnett v. H.O.U. Corp. (In re Kalamazoo Steel Process, Inc.), 503 F.2d 1218 (6th Cir. 1974) (in bankruptcy), where the Court of Appeals for the Sixth Circuit restricted the application of the good faith standard to creditors who had knowledge of the debtor's intended change at the time of contracting or filing by stating that “[w]e do not have a case now before us requiring a determination of the responsibilities of a secured party where he learns of a name change at a later time.” Id. at 1222. Conversely, in Corwin v. RCA Corp. (In re Kittyhawk Television Corp.), 516 F.2d 24 (6th Cir. 1975) (in bankruptcy), the same court refused to impose a duty to refile on a secured party who discovered the debtor's change after it had occurred. Id. at 27-28. Accord, Fedders Financial Corp. v. Borg Warner Acceptance Corp. (In re Hammons), 438 F. Supp. 1143, 1155 (S.D. Miss. 1977) (in bankruptcy); Continental Oil Co. v. Citizens Trust & Sav. Bank, 397 Mich. 203, 208-09, 244 N.W.2d 243, 244-45 (1976), aff'g 57 Mich. App. 1, 225 N.W.2d 209 (1974).

35. See notes 42-43 & accompanying text infra.

36. See notes 81-108 & accompanying text infra.

37. See, e.g., Davenport & Murray, supra note 19, § 4.03(d).

Sole Proprietorship Name Changes

Part of the problem caused by the debtor's postperfection identity change can be attributed to the 1962 Code's failure to specify the proper name under which a secured party must file to perfect a security interest in the debtor's property. As a result of this uncertainty, secured parties often have filed under an incorrect designation of the debtor's name, while prospective secured parties have been forced to search under more than one possible name of the debtor.

Faced with the Code's silence, courts fashioned a duty on the part of a secured party interested in perfecting a security interest in the property of a sole proprietorship to file under the name of the individual proprietor or the name of the proprietorship when the latter resembled or contained the name of the proprietor. This duty was created in light of the ease with which the debtor could change the name of the proprietorship, thereby undermining the effectiveness of the filed financing statement indexed solely under the proprietorship name. Hence, just as existing secured parties were expected to file under the name of the individual proprietor, prospective secured parties were expected, in conformity with reasonable commercial practice, to search under the individual proprietor's name when attempting to discover encumbrances on the proprietorship property.

In theory, then, even a drastic change in the name of a proprietorship should not prevent the original financing statement from supply-
ing sufficient notice of a prior security interest to prospective secured parties of the proprietorship. Although only one case appears to have addressed the effect of a proprietorship name change under the 1962 Code,\textsuperscript{44} the holding of the case conforms to the conclusion reached above, \textit{i.e.}, the debtor's name change was insufficient grounds either to find the security interest unperfected or to establish a duty for the secured party to file a new or amended financing statement.

This analysis establishes one instance in which the existing secured party's knowledge of the debtor's change does not put that party in a more advantageous position than a prospective secured party. In this instance, the secured party's knowledge and failure to refile do not impede the prospective secured party from discovering the existence of the perfected security interest. As a result, the knowledge of the secured party, whenever acquired, should not alter the filing obligations of the secured party or the investigative obligations of the prospective secured party. This does not imply, however, that secured creditors may never gain a secret lien in the property of a sole proprietorship by virtue of a change. To the contrary, as will be seen in analyzing those cases involving the incorporation of sole proprietorships,\textsuperscript{45} a real danger of creating a secret lien exists.

Corporate and Partnership Name Changes

The cases involving corporate or partnership name changes present a new difficulty. In large part this results from the requirement that a financing statement filed to perfect a security interest in either corporate or partnership assets identify the debtor by the corporate\textsuperscript{46} or partnership\textsuperscript{47} name, respectively. Consequently, a significant\textsuperscript{48} change of name by either of these two business enterprises renders a filed financing statement ineffective for notifying prospective secured parties of prior encumbrances. Prospective secured parties of either of these enterprises thus have a greater investigative liability than do prospective

\textsuperscript{44} \textit{In re} McCoy, 330 F. Supp. 533 (D. Kan. 1971) (in bankruptcy) (debtor named Carl Lee McCoy changed trade name from McCoy Furniture and Appliance to McCoy's Discount Furniture Warehouse). Notably, in this case the debtor's former and subsequent trade names were similar, thereby rendering the change arguably non-misleading to prospective secured creditors. Nonetheless, given the requirement of filing under the individual debtor's name, the similarity of the former and successor names appears wholly irrelevant.

\textsuperscript{45} See notes 81-108 & accompanying text infra.

\textsuperscript{46} See \textit{Davenport} & Murray, \textit{supra} note 19, at 131; \textit{Henson}, \textit{supra} note 5, at 66.

\textsuperscript{47} See \textit{Davenport} & Murray, \textit{supra} note 19, at 131.

\textsuperscript{48} The requirement of "significance" derives from § 9-402(5), discussed at note 15 \textit{supra}, which renders ineffective only those financing statements which, \textit{inter alia}, fail to give prospective secured creditors of the debtor adequate notice. If the name change is insignificant, thereby continuing the original financing statement's notice value, the change would not be seriously misleading. U.C.C. § 9-402(5) (1962 version).
secured parties of a sole proprietorship. Because the corporate and partnership name changes present essentially the same problems, the following discussion is applicable to both. The following analysis, for the sake of simplicity, is phrased in terms of the more commonly litigated49 corporate name change.

The relevant corporate name change cases here are those made by an amendment to the corporate articles,50 charter,51 or certificate of incorporation.52 Because a significant corporate name change prevents the filed financing statement from notifying prospective secured parties of outstanding security interests in the debtor's property, there is little chance that a prospective secured creditor will be able to claim a superior right in the debtor's property.53 As most courts have refused to alter the perfected status of the prior security interest, the secured creditor effectively is immune from superior claims.

The secured creditor's immunity might be attacked, however, through reliance on both the Code requirement that a financing statement not be seriously misleading to prospective secured creditors54 and the secured creditor's ultimate responsibility for filing the financing

49. The only known partnership name change case is Fedders Financial Corp. v. Borg Warner Acceptance Corp. (In re Hammons), 438 F. Supp. 1143 (S.D. Miss. 1977) (in bankruptcy). The corporate and partnership name change cases differ primarily with respect to the availability of public records by which the original names of the debtor could be verified. In the case of a corporation, the original name of the corporation must be contained in the articles or certificate of incorporation, as prescribed by statute. It is also a common statutory requirement that any corporate name change be contained in the articles or certificate. See 18 AM. JUR. 2d Corporations § 145 (1965); 6 AM. JUR. LEGAL FORMS 2d § 74:100 (1972). In the case of partnerships, the requirements for initial public registration of the partnership's name and reregistration upon a subsequent name change are not so clear.


These formal name change cases should be distinguished from those involving transfer of the collateral, discussed at text accompanying notes 81-108 infra.

53. This is a consequence of the Code's "first to file or perfect" rule. Prospective secured creditors intending to finance the debtor in exchange for a purchase money security interest in the debtor's collateral had a particular problem as § 9-312(3) of the 1962 Code required secured creditors with perfected security interests in the debtor's inventory to receive notice of the intended refinancing. For a case involving this problem, see Fedders Financial Corp. v. Borg Warner Acceptance Corp. (In re Hammons), 438 F. Supp. 1143 (S.D. Miss. 1977) (in bankruptcy), discussed at note 78 infra.

statement.\textsuperscript{55} Under this reasoning, the court in \textit{In re A-I Imperial Moving & Storage Co.},\textsuperscript{56} held that the corporate debtor's name change "invalidated" the secured creditor's perfected security interest for the period during which prospective secured creditors could have been misled by the financing statement. The court viewed this result as particularly appropriate in light of the ease with which the secured creditor could have examined the corporate articles recorded with the Secretary of State and presumably refiled upon discovery of the debtor's change.\textsuperscript{57}

The unusual result achieved in \textit{A-I Imperial Moving} is difficult to justify, particularly in light of that secured creditor's ignorance of the debtor's name change. The court's holding implicitly imposed on the secured creditor, first, a duty to maintain knowledge of the debtor's identity after perfection, and second, a duty to refile if the debtor effects a seriously misleading name change. The former duty, constant monitoring of the debtor, might be justified on the ground that the secured creditor has a closer relationship and hence closer contact with the debtor than the prospective secured party.\textsuperscript{58} Consequently, the burden and expense of monitoring the identity of the debtor, presumably by resort to public records and like sources of information, arguably should be on the secured creditor. Considering, however, both the substantial expense imposed on the existing secured creditor and the need for prospective secured creditors to conduct only a single search of the

\textsuperscript{55} See notes 12-15 & accompanying text supra.

\textsuperscript{56} 350 F. Supp. 1188 (S.D. Fla. 1972) (in bankruptcy).

\textsuperscript{57} \textit{Id.} at 1189. The facts in \textit{A-I Imperial Moving} provide a good example of the extreme case in which a debtor conceivably could change its name for the sole purpose of acquiring refinancing on previously encumbered property. Initially, the corporate debtor changed its name from "A-I Imperial Moving and Storage, Co., Inc.," under which a financing statement had been filed, to "6105 Corporation." Nine months later, the corporation changed its name back to its original designation. Both name changes were unknown to the secured party. In the subsequent bankruptcy proceedings, the court held that the original name change rendered the financing statement seriously misleading under § 9-402(5) and that therefore the security interest was no longer perfected. On appeal, the district court used a more technical approach to achieve a similar result. The court concluded that the initial name change "invalidated" the financing statement for the period the corporation operated under the name "6105 Corporation," since it was during this period that prospective secured creditors would be most seriously misled. The second name change, however, had the effect of breathing life into the previously invalidated financing statement, since the second name change cured the problem created by the first name change. Hence, for the period of time following the second name change, the originally perfected security interest, which had been "invalidated," became "reperfected." 350 F. Supp. at 1189.

The court's holding is important despite the fact that the security interest ultimately was held perfected. Presumably, had the debtor given a second creditor a security interest in its property during the "ineffective" period of the financing statement, the second secured creditor would have had a claim superior to that of the original secured creditor.

\textsuperscript{58} This point was suggested in Levenberg, \textit{Comments on Certain Proposed Amendments to Article 9 of the Uniform Commercial Code}, 56 MINN. L. REV. 117, 129 (1972).
same public records, the district court in *A-I Imperial Moving* imposed an undue burden on secured creditors.

The second requirement implicitly imposed in *A-I Imperial Moving*, a duty to refile if the secured creditor becomes aware of the debtor's name change, appears easier to justify. In such a case, the secured party should be aware that the filed financing statement no longer serves notice of the perfected security interest. In *Continental Oil Co. v. Citizens Trust & Savings Bank*, one of the few cases addressing this issue, the Michigan Supreme Court concluded that, despite the secured creditor's acquired knowledge, the name change did not affect the perfected status of the secured interest. Justices Williams and Kavanaugh dissented, arguing that the creditor's failure to attempt to file a new financing statement once knowledge of the debtor's change was acquired constituted a breach of the good faith requirement imposed by the Code. In reaching its conclusion, the dissent relied on *Burnett v. H.O.U. Corp. (In re Kalamazoo Steel Process, Inc.)*. In *Kalamazoo*, the corporate-debtor's name change was held to terminate the secured creditor's perfected security interest because the secured creditor knew of the debtor's anticipated change at the time of the original filing. Although the secured creditor in *Continental Oil* learned of the debtor's change after the original filing, the dissent insisted that there was no reason why the policy of preventing secret liens manifest in [section 9-402]... and the good faith obligation set out in [section 1-203]... should not require the same result [as that reached in *Kalamazoo*] where the secured party has actual knowledge of a subsequent change in the debtor's name, and where that name change is "seriously misleading."

In essence, the dissent in *Continental Oil* implied that when the

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59. The cost to search the financing statements or amendments to the articles of incorporation on hand with the office of the Secretary of State varies among the different jurisdictions. In California, a search of the financing statements costs either $3.00 or $4.00, while a search of the articles of incorporation costs $4.00. See CAL. COM. CODE § 9403(5) (West Supp. 1979). Since the debtor conceivably could change its name an unlimited number of times, the corresponding cost to the secured creditor to thoroughly search for the present identity of the debtor could be substantial. On the other hand, prospective secured creditors would have to conduct the same search only once, i.e., when considering extending credit to the debtor. The burden would be even greater in the case of partnerships, where a public record may not be available. In this latter case the prospective secured creditor would only have to request the debtor's personal records at the beginning of negotiations; it thus would seem more reasonable to impose the burden on the prospective secured creditor.

60. 397 Mich. 203, 244 N.W.2d 243 (1976).
61. Id. at 209-10, 244 N.W.2d at 245.
62. Id. at 210-17, 244 N.W.2d at 245-48.
63. 503 F.2d 1218 (6th Cir. 1974) (in bankruptcy). See note 33 supra for a discussion of the *Kalamazoo* rationale.
64. 397 Mich. at 220, 244 N.W.2d at 250.
secured creditor knows of the debtor's name change, regardless of when this knowledge is acquired, the secured creditor's responsibility to refile is invariably greater than the prospective secured creditor's obligation to learn of the perfected security interest through sources other than the financing statement.\(^\text{65}\) Certainly the danger of creating a secret lien in favor of the secured creditor is the same whether the secured creditor knows of the debtor's change before or after it has occurred: in both cases the financing statement does not sufficiently alert prospective secured creditors to the existing encumbrance on the corporate property.\(^\text{66}\) Assuming this is the case, however, one must still consider whether the prospective secured creditor's investigative responsibilities are limited to a search of the financing statements. The conclusion reached by the Continental Oil dissent certainly suggests that it is so limited.

In In re Pasco Sales Co.,\(^\text{67}\) on the other hand, this conclusion was explicitly rejected. The court instead held, in accord with the Continental Oil majority, that the secured creditor's perfected security interest remains unaffected "regardless of whether the secured party had knowledge of the change of name."\(^\text{68}\) In placing the greater responsibility on the prospective secured creditor, the court in Pasco emphasized that the Code's notice filing system was never intended to be the sole source of information to be relied on by the prospective secured party, but rather "'a starting point for investigation which will result in fair warning concerning the transaction contemplated.'"\(^\text{69}\) Hence, the court in Pasco concluded that even though the corporate name change may have eliminated the notice value of the financing statement, imposing a duty for the prospective creditor "[t]o inquire of any change of name, especially where the filed certification of incorporation has been

\(^{65}\) The dissent noted that "a contrary conclusion would disrupt the simple and workable filing system envisioned by the drafters of the Code, and create unnecessary uncertainty and delay in the contracting of security agreement[s] to secure the loans which are often so vital to success in the business world." \textit{Id.} at 215-16, 244 N.W.2d at 248.

\(^{66}\) The dissent in Continental Oil reached its conclusion only after recognizing that "there would be no great burden [on the secured creditor] in moving to refile or amend its financing statement . . . ." \textit{Id.} at 217, 244 N.W.2d at 248. This is not entirely true, as under the 1962 Code the debtor's signature was required on all financing statements. Hence, a debtor's refusal to sign a new financing statement would prevent its being filed. The dissent answered this by requiring only that the secured creditor make a good faith "attempt" to refile; should the debtor refuse to sign the new financing statement, the secured creditor's burden would be fulfilled. This problem has been eliminated by the 1972 amendments, which require only the creditor's signature on a financing statement if "it is filed to perfect a security interest in . . . collateral acquired after a change of name, identity or corporate structure of the debtor." U.C.C. § 9-402(2) (1972 version).


\(^{68}\) 77 Misc. 2d at 726, 354 N.Y.S.2d at 404.

\(^{69}\) \textit{Id.} at 727, 354 N.Y.S.2d at 405.
amended to effect such a change, imposes no greater burden than is already contemplated under the Code."  

As the Pasco decision indicates, the Code contains several provisions which suggest that the prospective secured creditor's investigative burden involves more than a mere search of recorded financing statements. The court referred to section 9-401(3), which states that the financing statement remains effective despite the debtor's change of residence, place of business, or use of the collateral.71 Because these changes conceivably could mislead prospective secured creditors, the section logically implies that "[i]t was not intended . . . that interested parties be completely absolved from any inquiry as to the past history of the debtor."72 Similarly, section 9-20873 provides a device by which a debtor may force a secured creditor to disclose information needed by a prospective secured party. This provision, not referred to in the Pasco opinion, is further evidence that the Code does not contemplate that a prospective secured creditor will rely solely on information derived from the financing statement.74

Two additional practical considerations support the conclusion reached in Pasco. First, because the financing statement contains little more than a designation of the type of collateral secured, a prudent prospective creditor interested in securing presently encumbered tangible property should be convinced of the debtor's possession of the collateral.75 This assurance cannot be acquired by a mere review of the financing statement, but rather may require physical inspection of the collateral. Moreover, once the prospective secured party has located the collateral, title to the property still must be investigated before the prospective secured creditor is guaranteed priority in the event of a conflict in security interests. To the extent that reasonable commercial practice demands this type of investigation, the filed financing statement is not intended as an exclusive source of information for a prospective secured creditor concerned about prior perfected security interests. Second, the Code requires the prospective secured creditor to

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70. Id. (emphasis added).
72. 77 Misc. 2d at 727, 354 N.Y.S.2d at 405.
74. Arguably, the operation of both §§ 9-401(3) and 9-208 assumes that the prospective secured party, at a minimum, has received from a reading of the financing statement some notice of the name of the debtor or of the existence of a perfected security interest. In the corporate name change cases, not even this minimum notice was available. Indeed, the efficacy of the notice filing system in general is highly suspect if the financing statement is not acknowledged as the ultimate means of receiving notice of a perfected security interest.
75. For a discussion of suggested steps in investigating a prospective debtor, see Davenport & Murray, supra note 19, § 4.03(c).
make sure that non-Code, statutorily created liens\(^{76}\) do not encumber the collateral, as these statutory liens may be superior to any security interest created by filing under the Code.\(^{77}\) Again, the existence of such statutory liens would not be discovered through searching the financing statements.

Despite the persuasiveness of the arguments presented in *Pasco* and the Code provisions impliedly favoring a greater duty on the part of the prospective secured creditor, the 1962 Code provides no conclusive resolution to the problem posed by corporate name changes. Even assuming that the prospective secured creditor should conduct a thorough investigation of the debtor's history before extending credit to the debtor,\(^{78}\) it is difficult to dismiss the argument presented by the dissent in *Continental Oil* that a secured creditor who knows of the debtor's change and takes no remedial action is not acting in good faith.\(^{79}\) Unfortunately, because the 1962 Code failed to provide an adequate solution to the corporate name change problem, the courts had no uniform means of determining the existing and prospective secured creditor's burdens under the Code. Absent adoption of the 1972 amendments to Article 9,\(^{80}\) the distribution of those burdens remains a difficult problem.

### Incorporation and Intercorporate Transfer Cases

The third category of cases involves, at least superficially, more than a mere name change by the debtor. These cases involve either incorporations of proprietorships or partnerships,\(^{81}\) transfers of encum-
bered property between sibling corporations, corporate mergers, or corporate sales. All are more "identity" than "name" changes. Each of these changes has two significant features. First, the change renders the filed financing statement an ineffective means of notifying prospective secured creditors of the successor enterprise of existing perfected security interests. Second, the entity change entails a transfer of the prior enterprise's assets to the successor enterprise. The problems posed by the first feature of these identity changes are identical to the problems discussed in the section dealing with corporate name change cases. Thus, the discussion in this section focuses on the problems posed by the second feature, namely, the transfer of assets between initial and successor enterprises.

The transfer of encumbered assets occurring in these cases implicates Code sections which were neither referred to nor relevant in the conventional name change cases. The primary additional section, 9-306(2), provides that a security interest continues to exist in collateral "notwithstanding sale, exchange or other disposition" thereof by the


85. "Identity transfer" is used in this Note to refer to a disposition of the collateral to a successor enterprise which is owned and controlled by the original debtor entity. "Third party transfer" refers to a disposition to an independent third party.

86. See notes 46-79 & accompanying text supra.

87. The transfers which took place in the various cases were often in different forms. In the incorporation cases, the transfer of the encumbered assets to the newly formed corporation was made either in consideration for the corporation's assumption of the obligation, see, e.g., Ryan v. Rolland, 434 F.2d 353 (10th Cir. 1970) (in bankruptcy); Bank of Va.-Central v. Taurus Constr. Co., 30 N.C. App. 220, 226 S.E.2d 685, cert. denied, 290 N.C. 659, 228 S.E.2d 450 (1976); or in exchange for corporate shares, see, e.g., In re Veiths, 9 U.C.C. REP. SERV. 943 (E.D. Wis. 1971) (in bankruptcy). In the merger cases, the transfer of assets either was made in consideration for the newly formed corporate shares, see, e.g., Inter Mountain Ass'n of Credit Men v. Villagers, Inc., 527 P.2d 664 (Utah 1974); or merely as a bookkeeping device, see, e.g., First Security Bank of Utah v. Zions First Nat'l Bank, 537 P.2d 1024 (Utah 1975).

88. See note 94 infra.

89. Section 9-306(2) of the 1962 Code provides: "Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor." U.C.C. § 9-306(2) (1962 version).

90. The terms "disposition" and "exchange" are not defined in the Code. "Sale" is
debtor unless his action was authorized by the secured party in the security agreement or otherwise. . . ."91 The courts' reference to this section is surprising in these cases, since this section has been applied more frequently in cases in which the collateral had been sold or exchanged by the debtor to a third party.92 Nevertheless, trustees in bankruptcy and prospective secured creditors of the successor enterprise have urged section 9-306(2) as a means of terminating the perfected security interest in collateral transferred in an identity change on the ground that the secured creditor knew of the identity change and therefore had authorized the transfer.

By the very nature of this argument, section 9-306(2) was relied on only in those cases in which the secured creditor's knowledge of the change, and hence an authorization, could be established. In cases where no such proof existed, the section obviously was of no assistance to the prospective secured creditor. Although resort to section 9-306(2) had the apparent advantage of grounding the claims of the prospective secured creditor in the precise language of the Code, virtually all courts considering the argument refused to terminate the secured creditors' perfected security interest.93 Instead, the courts consistently held that there had been no authorization within the meaning of section 9-306(2).94

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92. For a list of cases in which § 9-306(2) was considered in a context other than an "entity" or "identity" change, see Corwin v. RCA Corp. (In re Kittyhawk Television Corp.), 383 F. Supp. 691 (S.D. Ohio 1974) (in bankruptcy).
93. The exceptional cases were King v. Williams (In re Conger Printing Co.), 18 U.C.C REP. SERV. 224 (D. Or. 1975) (in bankruptcy), and In re Veiths, Inc., 9 U.C.C. REP. SERV. 943 (E.D. Wis. 1971) (in bankruptcy). In Veiths, the court indicated that the authorization demanded by § 9-306(2) was satisfied by a finding that the individual debtor's incorporation was made with the secured party's "knowledge or consent." In turn, the creditor's knowledge and consent was established by the creditor's receipt of, inter alia, (1) a new promissory note after the debtor's incorporation and (2) a corporate resolution which stated that the new corporation had authority to borrow funds from the creditor. But cf. Corwin v. RCA Corp. (In re Kittyhawk Television Corp.), 516 F.2d 24 (6th Cir. 1975) (in bankruptcy), rev'd 383 F. Supp. 691 (S.D. Ohio 1974) (court held that § 9-306(2) was inapplicable to an intercorporate transfer, despite secured creditor's consent to debtor's incorporation and subsequent receipt of new promissory notes signed by successor enterprise). Interestingly, § 9-402(7) of the 1972 amendments to Article 9 provides that "[a]n financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer." U.C.C. § 9-402(7) (1972 version) (emphasis added).
94. The secured creditor's consent before or after the transfer was held not to be an authorization where the security agreement contained a clause which provided that the obligation of the original debtor was binding on the debtor's assigns or "successors." Fliegel v. Associates Capital of Del., Inc., 272 Or. 434, 537 P.2d 1144 (1975); Inter Mountain Ass'n of Credit Men v. Villager, Inc., 527 P.2d 664 (Utah 1974). Cf. King v. Williams (In re Conger Printing Co.), 18 U.C.C. REP. SERV. 224 (D. Or. 1975) (in bankruptcy) (secured creditor's
In Corwin v. RCA Corp. (In re Kittyhawk Television Corp.), the Sixth Circuit Court of Appeals went beyond this position, concluding instead that section 9-306(2) essentially is inapplicable to identity change cases. In Kittyhawk, the original debtor entity, Kittyhawk Broadcasting Corporation, transferred its encumbered assets to a successor corporation named Kittyhawk Television Corporation. RCA, the secured creditor of the transferor corporation, was notified immediately of the transfer. Both the original and successor corporations had the same shareholders, management, and directors. The district court, reasoning that the transfer of assets took place between "two entities which the law regards as separate," held that section 9-306(2) demanded the termination of RCA's perfected security interest in the transferred assets.

On appeal, the Sixth Circuit court reversed. Refusing to apply section 9-306(2), the court held that the transfer of assets, although ostensibly a "disposition" within the meaning of section 9-306(2), substantively was "no more than a change of name by the debtor insofar as the filing requirements of the Uniform Commercial Code are concerned." After noting that the initial and successor entities were identical and the ease with which a corporate name change would have accomplished the same commercial objective as the transfer, the court concluded that the transfer was equivalent to a non-misleading name change by the debtor corporation. Accordingly, the transfer

knowledge of and consent to debtor's incorporation before transfer held not to be authorization of the transfer under § 9-306(2), although such consent without refiling constituted bad faith under the Code). In cases where no authorization was alleged, the courts pointed out that, although the debtor has the right to transfer the encumbered assets, U.C.C. § 9-311 (1962 version), the transfer must be authorized under § 9-306(2) for the creditor's security interest to terminate in the collateral. Ryan v. Rolland, 434 F.2d 353 (10th Cir. 1970) (in bankruptcy); American Heritage Bank & Trust Co. v. O. & E., Inc., 576 P.2d 566 (Colo. App. 1978); Bank of Va.-Central v. Taurus Constr. Co., 30 N.C. App. 220, 226 S.E.2d 605, cert. denied, 290 N.C. 659, 228 S.E.2d 450 (1976).


96. Identity of ownership and control of both the prior and successor enterprises was an earmark of virtually all the cases within this third category. This identity between the debtor-transferor and the transferee enterprise was a significant factor in the courts' refusal to apply § 9-306(2).

97. 383 F. Supp. at 693.

98. 516 F.2d at 26.

99. The court noted that because of the "complete identity of ownership and control of the two corporations, the assumption of liabilities and transfer of assets could hardly be treated as the kind of sale, exchange or disposition contemplated . . . by [§ 9-306(2)]." 516 F.2d at 26.

100. The purpose of the transfer in Kittyhawk was to separate the original corporation's radio and television operations. The court insisted that the same separation could have been achieved by renaming the original entity, issuing new stock, and transferring the unencumbered property to a subsequently formed new corporation. 516 F.2d at 26-27.
was held not to affect RCA's perfected security interest in the corporate assets.101

The strength of the conclusion reached in *Kittyhawk* is that it enforces the principle of fairness. The effect of the identity change was fundamentally the same as that resulting from a conventional corporate name change. The court therefore concluded that the prospective secured parties of the successor enterprise should not have available to them a weapon, in the form of section 9-306(2), which prospective secured parties of newly named corporations could not wield.

The difficulty with the court's conclusion, however, is that it was based on the identity of the initial and successor debtor enterprises (the transferor and the transferee) and not on the purposes for which section 9-306(2) originally was intended. Indeed, examination of the cases considering section 9-306(2) amply demonstrates that the section was not intended, and generally has not been used, to cure what are essentially insufficiencies in the financing statement.102 Analysis of this section shows that its purpose is not to protect prospective secured parties of the transferee but rather to afford protection to the transferor's secured creditor and to the transferee of the collateral in a sale of inventory. Section 9-306(2) first insures that innocent transferee-purchasers of the debtor-transferor's inventory will not be subject to claims of those secured creditors having a perfected security interest in the inventory who previously authorized the disposition of the inventory.103 Section 9-306(2) also operates to give the secured creditor a perfected security interest in the proceeds resulting from the sale or exchange of the debtor's inventory, collateral which the secured creditor knew would be sold.104 Any resulting protection of the transferee's prospective secured creditors is incidental to the protection intended for the innocent inventory purchaser and secured creditor. Indeed, as most identity transfers do not result in the original debtor entity having

101. *Id.* at 29.


103. "Accordingly, after sale of inventory, the secured party must rely exclusively on a security interest in proceeds, since his interest will not continue in the collateral after sale under § 9-306(2)." Davenport & Murray, *supra* note 19, at 79. It logically follows that "except in the case of inventory transactions, most secured parties explicitly prohibit their debtors from selling collateral until the underlying obligation is satisfied." Levenberg, *Comments on Certain Proposed Amendments to Article 9 of the Uniform Commercial Code*, 56 Minn. L. Rev. 117, 127 (1972). The objective of § 9-306(2) is not to protect the purchaser's prospective secured creditors from secret liens but "to protect the buying public in cases in which the secured party finances inventory which is sold to the public by the debtor in the regular course of the debtor's business." McFadden v. Mercantile-Safe Deposit & Trust Co., 260 Md. 601, 624, 273 A.2d 198, 209 (1971) (emphasis added).

104. This is evidenced by the title to § 9-306 of the 1962 Code: *Proceeds; Rights of the Secured Party on Disposition of Collateral*. U.C.C. § 9-306 (1962 version).
“proceeds” from the disposition,\textsuperscript{105} resort to section 9-306(2) appears dubious. Hence, although the identity and inventory transfer cases may produce similar consequences regarding the financing statement, analysis of the policies behind section 9-306(2) suggests that application of the section to the identity transfer cases does not promote these policies.\textsuperscript{106}

Despite these policy considerations, there is no truly conclusive means of establishing that section 9-306(2) is not appropriately applied in identity transfer cases brought under the 1962 Code.\textsuperscript{107} Moreover, given the various potential forms of transfers, it may be difficult to distinguish between dispositions of collateral to independent third parties and to successor enterprises of the debtor.\textsuperscript{108} Applying the \textit{Kittyhawk

\textsuperscript{105} Difficulties arise regarding the “formal” transfer in which no tangible proceeds are received for the assets which are the subject of the transfer. \textit{See}, e.g., Ryan v. Rolland, 434 F.2d 353 (10th Cir. 1970) (in bankruptcy) (debtor transferred encumbered assets in exchange for corporation's assumption of liability); First Security Bank of Utah v. Zions First Nat'l Bank, 537 F.2d 1024 (Utah 1975) (debtor transferred assets to sister corporation for bookkeeping purposes only).

\textsuperscript{106} \textit{But see} Corwin v. RCA Corp. (\textit{In re Kittyhawk Television Corp.}), 383 F. Supp. 691 (S.D. Ohio 1974) (in bankruptcy), \textit{rev'd}, 516 F.2d 24 (6th Cir. 1975), where the district court rejected any material distinction between an identity transfer and third party transfer and emphasized the authorization of the disposition as being determinative of the section's applicability. In applying § 9-306(2), the court summarized the purposes and objective of § 9-306(2), apparently ignoring the inapplicability of the “purchaser’s” interest: “This is an area of competing interests among three types of interested parties. The secured creditor wishes protection from the sale of collateral by the debtor which he did not authorize. The purchaser wishes protection from the secured creditor in sales of collateral which were authorized. Creditors wish protection from secret liens on the property of the bankrupt. The court is of the opinion that § 9-306(2) protects each interest by its exact terms. If the debtor is not authorized to sell the collateral, then the secured creditor continues to have a security interest in the collateral and any proceeds received by the debtor. If the secured creditor authorizes the sale of the collateral, then the security interest continues only in the proceeds. But should the secured creditor wish to continue the security interest in the collateral in the hands of the purchaser, a new security agreement and financing statement must be prepared and filed. This is a new security interest which does not arise from the operation of § 9-306(2) and therefore must comply with the usual filing requirements of Article Nine. Only in this manner can competing creditors be protected from secret liens. This too is an interest Article Nine seeks to protect.” 383 F. Supp. at 694-95 (emphasis added).

Similarly, in \textit{In re Veiths}, 9 U.C.C. REP. SERV. 943, 948 (E.D. Wis. 1971) (in bankruptcy), the court ignored the third party's interest and emphasized that the secured creditor's authorization of the transfer of the collateral, regardless of its form, was the factor which determined whether § 9-306(2) was to apply.

\textsuperscript{107} Commentators have stated that the cases considering the application of § 9-306(2) to the identity transfer cases “do not . . . supply a satisfactory rule for practice; their rationale is frequently narrow.” DAVENPORT & MURRAY, supra note 19, at 166 (footnote omitted).

\textsuperscript{108} \textit{See}, e.g., American Heritage Bank & Trust Co. v. O. & E.; Inc., 576 P.2d 566 (Colo. App. 1978), where the original debtor corporation was taken over by a junior lienor to whom the original debtor had defaulted. Subsequently, the lienor transferred the assets to a new corporation. This appears to be distinguishable from the typical incorporation case, or even
rationale consistently in such cases would be extremely difficult. As the
following discussion demonstrates, section 9-402(7) of the 1972 amend-
ments, although arguably unclear in some respects, may help resolve
the uncertainty under the 1962 Code by supplying needed guidelines
for the application of section 9-306(2).

Significantly, the previous grouping of cases is not intended as a
means of establishing an absolute duty on the secured party to refile in
the event he or she discovers a postperfection name or identity change
by the debtor, although refiling certainly would be helpful to prospec-
tive secured creditors. Nor does this approach attempt to impose on
the prospective secured creditor a duty to investigate the history or
background of an intended debtor more thoroughly, even when such
investigation likely would result in avoidance of the problem entirely.
Rather, by analyzing the cases under the 1962 Code in light of the types
of changes effected by the debtor, both the inadequacies of the 1962
Code and the essential problems posed by a debtor's postperfection
name or identity change become most apparent.

Section 9-402(7) of the 1972 Amendments

Section 9-402(7) of the 1972 amendments to Article 9 is an attempt
to balance the interests and burdens of existing and prospective secured
parties. The significance of section 9-402(7) is highlighted by consider-
ing its operation in the context of the various kinds of changes that may
be effectuated by the debtor.

Sole Proprietorship Name Changes

One improvement the new section offers over the 1962 Code is an
explicit direction to secured creditors regarding the name under which
the financing statement ought to be filed. The first sentence of the
three-sentence section provides that "[a] financing statement suffi-
ciently shows the name of the debtor if it gives the individual, partner-
ship or corporate name of the debtor, whether or not it adds other trade
names or names of partners." 109 This sentence essentially codifies the
rule of practice developed by the courts under the 1962 Code. 110 The
analysis provided in the prior section concerning proprietorship name
changes therefore is fully applicable to the 1972 Code. Consequently,
barring a change of name by the individual proprietor, 111 even a radi-

109. The problems caused by filing under the name of the partnership, as opposed to the
names of the individual partners, discussed in note 49 supra, have not been cured by the new
section.
110. See notes 39-45 & accompanying text supra.
111. See note 43 supra.
change in the business name of a sole proprietorship does not affect a perfected security interest in the proprietorship's property.112

Corporate and Partnership Name Changes

To resolve the problem caused by a significant change in either a partnership or corporate name, section 9-402(7) provides a mechanism which, to some extent, incorporates suggestions made in cases decided under the 1962 Code. According to the second sentence of section 9-402(7):

Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time.113

There are several important features of this provision. First, the provision does not demand refiling for all name changes, but only for those that render a filed financing statement seriously misleading.114 This suggests that the drafters of section 9-402(7) recognized the unfair consequences to the prospective secured creditor which could flow from the debtor's seriously misleading change. The imposition of this limitation on the effectiveness of the filed financing statement therefore militates against the position that the financing statement is only one of several sources of information for the prospective secured creditor.115

112. In Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank, 544 S.W.2d 947 (Tex. Civ. App. 1976), decided under the 1972 Code, the name change of a proprietorship's business name from "Lloyd E. Nations d/b/a Nations' David Brown Tractor Co." to "Nation's Tractor Co." was held to be not seriously misleading within the meaning of § 9-402(7). As a result, no new filing was required. In reaching its decision, the court indicated that the change of a proprietorship's business name cannot ever be seriously misleading to prospective secured creditors, in view of the requirement of filing under the individual proprietor's name.

Section 9-403(5) provides an additional improvement over the 1962 Code by allowing the secured creditor to file under more than one designation of the debtor's name. By permitting such filings, the section suggests to secured creditors the significance of the notice filing system.

114. Whether the change is seriously misleading is a question of fact. An example of a case where the debtor's incorporation tacitly was held to render the financing statement seriously misleading to prospective secured creditors under the 1972 Code is United States v. Ocean Electronics Corp. (In re Ocean Electronics Corp.), 451 F. Supp. 511 (S.D. Cal. 1978) (in bankruptcy), where the court held that the secured creditor "timely" filed an amendment to the filed financing statement after the debtor, Steven L. Millis, incorporated his business as "Photo Shoppe, Inc."
115. See notes 71-77 & accompanying text supra. Although § 9-402(7) underscores the significance of the financing statement as a source of notice to the prospective secured creditor, a comment to the section explicitly states that "any person searching the condition of the ownership of a debtor must make inquiry as to the debtor's source of title, and must search in
Second, section 9-402(7) renders an originally effective financing statement ineffective only with respect to collateral acquired more than four months after the seriously misleading change by the debtor. By balancing the interests of both existing and prospective secured parties, this feature makes the most significant change in the allocation of the risks involved. The new section effectively provides a four month grace period to a secured creditor who originally has complied with the Code’s filing requirements, despite the fact that prospective secured creditors may be misled by the filed financing statement during that four month period. Although this is a significant departure from the virtually absolute immunity enjoyed by secured creditors making an originally proper filing under the 1962 Code cases, the section does reward them by granting this four month grace period.

This benefit to existing secured creditors is limited, however, by the duty to refile under the debtor’s new name within the four month period after a seriously misleading change. As a result of this duty, all secured creditors who wish to maintain a perfected security interest in collateral acquired by the debtor more than four months after the debtor’s change must monitor the identity of the debtor at least once the name of a former owner if circumstances seem to require it.” U.C.C. § 9-402(7), Comment 8 (1972 version) (emphasis added).

116. This construction of § 9-402(7) finds support in the Official Comments, which provide that the “old financing statement, if legally still valid under the circumstances, would continue to protect collateral acquired before the change and, if still operative under the particular circumstances, would also protect collateral acquired within the four months.” U.C.C. § 9-402(7), Comment 7 (1972 version) (emphasis added). One commentator has suggested that the italicized phrases indicate that, if the secured creditor learns of the debtor’s change and fails to make a timely refiling, then the Code’s good faith requirement renders the financing statement legally invalid and inoperative, thereby divesting the secured party’s interest in all property, whenever acquired by the debtor. Errors and Changes in the Debtor’s Name, supra note 15, at 159-60. This interpretation, albeit creative, finds no support in the Code. The reference to the financing statement being “legally valid” or “operative” undoubtedly refers to the limitations on the financing statement imposed by §§ 9-403(2), 9-403(6), regarding the duration of the financing statement.

117. The metaphysical premise under which the new section operates is akin to that made by the courts deciding the name or identity change cases under the 1962 Code. Insofar as the first four months are concerned, according to both the new section and the cases under the 1962 Code, once the secured creditor has properly filed and therefore perfected the security interest in the collateral, the secured creditor’s security interest in the collateral is automatically immune from any change by the debtor, regardless of how seriously misleading the debtor’s change really is. This “once properly perfected, always perfected” assumption by the cases, limited to four months duration by § 9-402(7), helps to balance the burdens between the secured party and all prospective secured creditors; it clearly gives the secured creditor the benefit of an originally proper filing, while warning the secured creditor of the dangers resulting from a failure to make a timely refiling when the debtor effects a seriously misleading name or identity change.
DEBTOR NAME CHANGE

every four months. Failure to do so will result in the loss of the perfected security interest in any collateral acquired more than four months after the change. By creating this four month monitoring period, section 9-402(7) imposes a duty to know on the secured creditor, without the enormous expense of a continuous duty to know, as apparently required in *A-1 Imperial Moving*. Similarly, the four month period also benefits the prospective secured creditor, who need only search the financing statements under the debtor's name as it has existed for the preceding four months. This resulting shift in liability for the debtor's change of name is an important benefit to the prospective secured creditor.

In addition, the 1972 amendments explicitly authorize the secured creditor to refile in the event of a seriously misleading name change by the debtor. Although under the 1962 Code a financing statement required the signature of the debtor to be effective, section 9-402(2)(d) of the 1972 amendments authorize the secured creditor to file without the debtor's signature to perfect a security interest in collateral acquired after the debtor's name or identity change. Consequently, this section fairly allocates the burdens and responsibilities of existing and prospective secured creditors by decreasing the burden of refileing on the secured creditor, a mechanism particularly useful when the debtor is hostile or unavailable.

Incorporations and Intercorporate Transfers: Changes of Identity or Corporate Structure

*Taylorville: Construing 9-402(7)*

Under section 9-402(7), the debtor's incorporation or transfer of collateral to a successor enterprise should be characterized as a change of identity or corporate structure. To the extent that such a change causes a financing statement to be seriously misleading the previous discussion applies equally here. The significant contribution which section 9-402(7) advances to resolve the "transfer" problem is the last sentence of the section, which provides that "[a] filed financing statement remains effective with respect to collateral transferred by the debtor.

118. The four month period corresponds to that granted in U.C.C. § 9-103 (1972 version).
119. See notes 58-59 & accompanying text supra for a criticism of imposing a continuous duty to know on the secured creditor.
120. U.C.C. § 9-402(2) (1972 version).
121. The significance of this new section should not be overlooked. The fact that the dissent in *Continental Oil*, discussed at notes 61-67 & accompanying text supra, was willing to accept the secured creditor's attempt to refile a financing statement as sufficient to satisfy the good faith obligation indicates the practical problems which the secured creditor faces under the 1962 Code.
even though the secured party knows of or consents to the transfer."  

At first glance, the import of the last sentence of section 9-402(7) appears to derive directly from the second sentence. As noted, the second sentence operates to cut off the secured creditor's interest in any collateral acquired by the debtor more than four months after the seriously misleading identity change if the secured party fails to make a timely refiling. Accordingly, the last sentence appears to state merely what is evident from the second, *i.e.*, that no new financing statement need be filed with respect to the security interest in the specific property transferred by the debtor to the successor enterprise. As stated previously, this property would appear to fall within the four month grace period in which no new filing was required. Indeed, no financing statement need be refilled, as there is no threat to the survival of the secured creditor's security interest in this property.

Unfortunately, the only court to have construed and applied the second and third sentences of section 9-402(7) failed to adopt this interpretation. In *Houchen v. First National Bank of Pana (In re Taylorville Eisner Agency, Inc.)*, two individuals purchased a grocery store from its sole proprietor. To finance the purchase, the individuals received a loan from a bank, which in turn acquired a security interest in the store's "fixtures, equipment, inventory, and after-acquired property." On the same date that the security agreement was entered into, the debtors transferred the store's inventory, fixtures, and equipment to a newly formed corporation in exchange for the corporation's assumption of the debt to the bank. Four days later, the bank, presumably unaware of the incorporation, filed a financing statement listing the debtors in their individual capacities. More than two years later, after there had been a "continual change of merchandise and inventory," the corporation filed a voluntary petition in bankruptcy.

The bankruptcy court determined that, in view of the bank's failure to file a new financing statement within four months after the incorporation, section 9-402(7) required a finding that the bank did not have a perfected security interest in either inventory or proceeds present at

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124. *Id.* at 666.
125. The court failed to note that, under Illinois law, the debtor entity was more a partnership than an individual. *See* Ill. Ann. Stat. ch. 106½, §§ 6-7 (Smith-Hurd 1952 & Supp. 1979). Hence, under the first sentence of § 9-402(7), the bank was obligated to file under the partnership name, not the individual names of the partners. This deficiency with the financing statement should not be regarded as a mere technical failing; if indeed true, the filing failed to identify the debtor and in all likelihood was seriously misleading to prospective secured parties under § 9-402(8). The effect of this deficiency would be to prevent the bank's security interest in the named collateral from being perfected.
the time of bankruptcy. On appeal, the District Court for the Southern District of Illinois reversed. The court reasoned that the individual debtor's incorporation and concomitant transfer of the collateral was governed exclusively by the third sentence of section 9-402(7) which upholds financing statements despite knowledge of the transfer by the secured party, and not the second which invalidates filings for collateral acquired more than four months after the change of identity. The court reached its conclusion, despite the perfection of the security interest in question as to property acquired more than four months after the change, i.e., the inventory, by distinguishing between the meaning of the word "collateral" as used in the second and third sentences of section 9-402(7). According to the court, "collateral" as used in the second sentence "is defined as that collateral acquired by the debtor more than four months after the change,"\(^{127}\) whereas in the third sentence, collateral "must mean the property subject to the security interest as defined in UCC § 9-105(1)(c)."\(^{128}\) By adopting this potentially broader definition of collateral in the third sentence, the critical issue becomes what is the "collateral" which is subject to the security interest. In addressing this issue, the court reasoned that because the security agreement covered "acquired inventory," the inventory acquired by the corporate store, although more than four months after the change, was part of the collateral for which no new financing statement need be refiled under the third sentence of section 9-402(7).

The rationale employed by the court in *Taylorville* suffers from several weaknesses. Initially, there is little sense in contending that the actual inventory in the debtor's possession at the time of bankruptcy had ever been transferred by the original debtor entity at the time of incorporation; obviously, the inventory in the debtor's possession at bankruptcy was not that property transferred more than two years earlier. Consequently, the opinion in *Taylorville* is open to two interpretations.

The first construction of the opinion would restrict its import to security interests in inventory. By this reading, *Taylorville* implied that because inventory characteristically is turned over with a greater frequency than any other type of collateral, inventory, by its very nature, is never after acquired collateral within the meaning of the second sentence of section 9-402(7).\(^{129}\) Although perhaps an acceptable construct

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127. *Id.* at 669.

128. *Id.* Section 9-105(1)(c) provides that collateral "means the property subject to a security interest, and includes accounts and chattel paper which have been sold." U.C.C. § 9-105(1)(c) (1972 version).

129. The revolving characteristic of inventory has caused considerable confusion in other contexts as well. See, e.g., Henson *supra* note 5, at 204-10, where the author discusses the "Mississippi River" approach to determining the proceeds of inventory sales. In the context of a bankruptcy proceeding, the revolving feature of inventory has been the source
in other contexts, application of this principle to section 9-402(7) would have serious consequences. First, a large class of creditors secured by inventory, distinguishable only by the nature of their security, would become immune from the responsibilities imposed by the second sentence of section 9-402(7). Second, adoption of this interpretation necessitates making an unfounded distinction between those creditors secured by inventory of debtors effecting a change by way of a transfer of the collateral (immune from section 9-402(7)), and those creditors secured by inventory of debtors effecting a formal name change, with no concomitant transfer taking place (no immunity). Distinguishing between secured parties on the basis of either the nature of their security or the nature of the debtor's change is particularly inappropriate in view of the uniform treatment which the language of 9-402(7) accords all secured creditors. Section 9-402(7) appears to advance a four-month grace period applicable to all secured creditors and consequently gives all secured creditors, regardless of their security, a period of time within which no new filing is required to maintain the perfected security interest. Indeed, were these distinctions acceptable implic-}

of a historical controversy, *i.e.*, whether the debtor's sale and subsequent repurchase of inventory within four months of bankruptcy involves the transfer of a voidable preference under § 60 of the Bankruptcy Act of 1898. See *Henson*, *supra* note 5, at 269-90.

100. *Henson*, *supra* note 5, at 269-90. However, if the revolving nature of the collateral is the defining feature of the class, the class also should contain creditors secured by accounts receivable.

131. Arguably, the automatic four month grace period makes an unreasonable distinction between secured creditors having a security interest in revolving collateral and those having a security interest in nonrevolving collateral. The latter class of creditors appear less likely to suffer the loss of their security interest in the collateral, as the debtor presumably will have acquired it within four months of the change and is not likely to dispose of it. As a consequence, the section appears to discriminate against after acquired collateral secured creditors, particularly those with an interest in inventory or accounts receivable.

tions of 9-402(7), the import and effect of the section would be substantially emasculated.

The second possible interpretation of *Taylorville* requires an expansive reading of the court's conclusion that the secured creditor's security interest in the bankrupt's inventory remained perfected for the sole reason that the security interest originally had been perfected as to "after acquired inventory." This interpretation implies one of two positions, either of which is practicably untenable. First, the court may have implied that the mere use of an after acquired clause by the secured creditor may subject any type of collateral acquired more than four months after the incorporation to the secured creditor's claims. This position does no more than advance the unreasonable use of after acquired collateral clauses as a general means of avoiding all responsibility imposed by the second sentence of section 9-402(7) in the transfer context.\footnote{\textsuperscript{132}} The second potential inference to be drawn from an expansive reading of *Taylorville* is that the third sentence of section 9-402(7) mandates that no new filing is necessary to perfect a security interest with respect to "collateral" generically, when a transfer takes place.

Second, by increasing the potential liability of creditors secured by both presently owned and after acquired property, the Code has taken a step toward allocating responsibility among secured creditors in proportion to the potential benefits received under the financing agreement, i.e., the more extensive the creditor's security interest, the greater the creditor's liability. See Skilton, *Security Interest in After-Acquired Property Under the Uniform Commercial Code*, 1974 Wis. L. Rev. 925, where the author notes that, at a minimum, one should "pause for a moment's meditation upon possible dangers that may lurk in a clear case of overreaching, where there is no commercial reason for an extravagant assertion of a sweeping security interest, feeling that the taking of too much security may be a disadvantage . . . in fact to the debtor. . . ." *Id.* at 928 n.9.

Finally, although inventory most often will be the type of collateral which the debtor acquired more than four months after the change, it is not the only collateral with this feature. For example, as was illustrated in *Taylorville*, the secured creditor may have a security interest in after acquired equipment or fixtures. Failure to make a timely refiling by such a creditor will result in the loss of the security interest in the after acquired collateral. In addition, if the debtor were to receive the collateral and enter into the security agreement more than four months after the change \textit{and} the original financing statement were filed, the secured creditor's failure to refile would be fatal to the security interest in the collateral. Consequently, the section does have a wider application than just in the inventory context.\footnote{\textsuperscript{132}}

At least in the bankruptcy context, the use of the after acquired clause with respect to equipment to obviate the preference problem created by the debtor's receipt of new equipment within four months of bankruptcy has been highly questioned. See Henson, *supra* note 5, at 290-91.
The impact of this interpretation is obvious: at least with respect to identity changes involving a transfer of the collateral, no new filing would ever be required. As a result, section 9-402(7) would have no meaning in the transfer context. Thus, under any reading of *Taylorville*, application of the rule to any form of the debtor's change would run contrary to the purposes of the Code.

The *Taylorville* approach should be rejected in favor of the more common sense construction proposed at the beginning of this section. Since the clear function of the second sentence of section 9-402(7) is to demand that secured creditors monitor the identity of the debtor and refile if the debtor has altered its identity significantly, the second sentence should be held applicable to all forms of financing, regardless of the collateral's nature. The word "collateral" should be defined in both the second and last sentences of section 9-402(7) as the specific property involved which is received by the debtor more than four months after the change or transferred to the successor enterprise. Through such construction, the courts will effectuate the notice policies section 9-402(7) was intended to embody.

Reconciling 9-306(2) and 9-402(7)

A remaining problem with section 9-402(7) is the potential conflict between section 9-306(2), which mandates termination of the security interest in the collateral upon its authorized disposition, and section 9-402(7), which makes the secured party's knowledge of or consent to the transfer irrelevant to the survival of the security interest in the collateral. Absent clarification of this potential conflict, the confusion over the proper role of section 9-306(2) which existed under the 1962 Code conceivably could be exacerbated under the 1972 amendments. Two resolutions to this conflict already have been suggested. First, both section 9-306(2) and the last sentence of section 9-402(7) might be reconciled by drawing an essential distinction between the concepts of "authorization," referred to in 9-306(2), and "knowledge" or "consent," referred to in 9-402(7). Alternatively, section 9-306(2) might be read to apply to either identity or third party transfers which the secured creditor understands will discontinue the security interest in the transferred collateral. The last sentence of section 9-402(7), on the other hand, would apply to all transfers to which the secured party consented only because the security interest will continue in the collateral.

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133. See notes 89-107 & accompanying text supra.
135. "Justice Braucher of the Massachusetts Supreme Court in a letter submitted to the Bankruptcy Court states that § 9-306(2) deals with the situation in which the secured party..."
These suggested reconciliations, although initially appealing, may create more problems than they solve. Distinguishing the concept of "authorization" from "knowledge" may not be difficult, but to distinguish between the secured party's "consent to" and "authorization of" a transfer is a much more questionable practice. Similarly, distinguishing on the basis of the secured party's "understanding" of the transfer may present problems which the court will be unable to resolve and which the Code certainly did not intend.

The second, less complex means of resolving the conflict between 9-306(2) and 9-402(7) involves restricting section 9-306(2) to third party transfers while limiting section 9-402(7) to identity transfer cases. This alternative has several advantages. First, as section 9-402(7) would be inapplicable to third party transfers, there would be no change from the pre-amendment practice of not requiring a filing by the secured creditor upon an unauthorized transfer of the collateral by the debtor to a third party. Second, this approach avoids the difficulties associated with distinguishing between various mental states of the secured party, although it does assume there is a cognizable distinction has agreed that the security interest will no longer exist [in the disposed collateral], and Revised Section 9-402(7) [sic] deals with the situation where the secured party consents to the transfer on the understanding that the security interest will continue." Corwin v. RCA Corp. (In re Kittyhawk Television Corp.), 383 F. Supp. 691, 694 (S.D. Ohio 1974) (in bankruptcy), rev'd on other grounds, 516 F.2d 24 (6th Cir. 1975).

136. Certainly, one may know of something without authorizing it, as in the case when one knows of but objects to the transfer by the debtor.

137. For an interesting discussion of the means by which the courts should handle difficulties under § 9-402(7), name change problems under the 1962 Code, and the difficulties associated with establishing the secured creditor's state of mind, see Errors and Changes in the Debtor's Name, supra note 15, at 159-61.

138. In contrast to the view restricting the application of section 9-306(2) to third-party transfers, it has been suggested that "in a real case involving this conflict of provisions, subsection 9-306(2) would determine the relative rights of the competing parties, since unlike 9-402(7) it is explicitly designed to tell us when a security interest does or does not exist after transfer of collateral. Revised 9-402(7), on the other hand, is intended only to answer negatively the question whether a refiling in the name of the transferee is ever required after transfers of collateral by a debtor. The context of the last sentence of 9-402(7) shows that its focus is simply on the name under which a security interest, if existent, should be filed." Coogan, The New U.C.C. Article 9, 86 HARV. L. REV. 477, 527 (1973) (emphasis in original).

139. This approach is suggested in Davenport & Murray, supra note 19, where the authors point out that the comment to § 9-402(7) states "Subsection (7) also deals with a different problem, namely, whether a new filing is necessary where the collateral has been transferred from one debtor to another," id. at 167 (emphasis added), thereby indicating that the transfer contemplated was to take place between two debtors. Additionally, in Taylorville the court referred to the comment to the Illinois version of the Code which says in part: "The proper interpretation (of the third sentence) it is believed, therefore limits the 'transfer' in question to one by a debtor—e.g., an individual or partnership—to a successor enterprise—e.g., a corporation whose stock is owned by the individual or the partners of the debtor transferor." Houchen v. First Nat'l Bank of Pana (In re Taylorville Eisner Agency, Inc.), 445 F. Supp. 665, 669 (S.D. Ill. 1977) (in bankruptcy).
between a third party transfer and an identity transfer. A suggested method for differentiating between the two kinds of transfers is through a somewhat novel application of the test first mentioned in Kittvahawk, i.e., analyzing the degree to which the ownership and control of the former (transferor) and successor (transferee) enterprises are vested in one and the same entity. Where ownership and control of both the former and successor enterprises are in the same entity, the transfer should be deemed one involving an identity change. When, on the other hand, the former and successor enterprises are owned and controlled by substantively different entities, the transfer should be deemed one involving a third party. Although fact situations may arise that present difficult “borderline” cases, this means of reconciling section 9-402(7) and 9-306(2) nonetheless is preferable to those first suggested, as it requires discerning the objective differences between prior and successor enterprises, as opposed to the subjective differences between the secured party’s mental states.

Conclusion

The typical financial statement used by most institutional lenders to verify the credit-worthiness of potential debtors contains a section which requires the debtor to list previously encumbered assets, along with the names of secured creditors. Ideally, the debtor’s completion of this section should prevent the appearance of any of the problems discussed in this Note: the conscientious debtor would indicate the names of all secured creditors and the property in which these creditors had security interests and the prudent lender could thereby evaluate the reasonableness of extending credit to the debtor.

Of course, the fact that cases arise which involve creditors or others similarly situated battling over priority in collateral suggests that commercial practice differs from that which ideally could be expected. Perhaps this difference can be accounted for by the willingness of prospective secured creditors to ignore prior encumbrances on collateral and finance a debtor which is a going concern and obviously able to repay the lender under the terms of the security agreement. Or perhaps the difference is explained by the failure of many debtors to report prior encumbrances as forthrightly as prospective secured creditors.

140. See note 108 supra.
141. See notes 95-101 & accompanying text supra.
142. Notably, in United States v. Ocean Electronics Corp. (In re Ocean Electronics Corp.), 451 F. Supp. 511 (S.D. Cal. 1978) (in bankruptcy), the court used the last sentence of § 9-402(7) as support for the proposition that, upon an unauthorized disposition of the collateral by the debtor to a third party, no new filing is needed under § 9-306(2). This construction seems highly dubious, as it fails to reconcile the precise language of either of the sections.
would hope and the failure of prospective secured creditors to invest the necessary energy to conduct a thorough investigation into the history of the debtor.

Regardless of the explanation for the litigation discussed in this Note, the appearance of section 9-402(7) in the 1972 amendments to Article 9 provides a mechanism through which all the creditors involved in a secured transaction concerning the debtor's name or identity change are fairly apprised of the possible consequences of their actions. For the secured creditor, section 9-402(7) articulates the conditions under which the duty to monitor exists, when the duty to refile arises, and the limits of the original financing statement, information which was sorely needed for cases decided under the 1962 Code. For the prospective secured creditor, the section removes much of the responsibility of investigating the identity of the debtor imposed by courts interpreting the 1962 Code, while still providing adequate incentive for the prospective secured creditor to "know" with whom he or she is dealing. Although still in need of commercially reasonable judicial gloss, the section is an improvement over the judicial approaches to the problem posed by the debtor's postperfection name or identity change and may in time be adopted by those jurisdictions which still have not adopted the 1972 amendments to Article 9.\textsuperscript{143} Even failing universal adoption, the section presents a clear solution to a procedural area that for too long was uncertain.

\textsuperscript{143} The following jurisdictions have not adopted the 1972 amendments to Article 9: Alabama, Alaska, Delaware, District of Columbia, Idaho, Indiana, Kentucky, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, the Virgin Islands, Washington, and Wyoming.