Chapter 3
U.C.C. Article 9 and Insolvency Law

E. Bankruptcy Impact of the Article 9 Filing and Perfection Standards

1. Contents of Financing Statement
Revised Article 9 generally seeks to reduce the burdens and pitfalls for secured parties who perfect by filing in order to maximize the efficiencies and utility of the filing system as a means to provide public notice. Thus, a major purpose of revised Article 9 is to improve the filing system and to clarify and simplify the Article 9 filing requirements. The requirements for a financing statement at § 9-502 have been simplified, removing unneeded former requirements (like the debtor’s signature), although (as discussed in the paragraph below) the practical benefits of this change are muted by the new and rather more complex “safe harbor” rules at § 9-516 and the model form at § 9-521. The latter are intended to reduce uncertainty by providing rather detailed rules governing how U.C.C. filing offices accept financing statements. In this context, the U.C.C. goals of clarity, uniformity, and simplicity collided, and some simplicity was sacrificed in return for the clarity that accompanies specificity. Thus, the requirements for a financing statement are more complex than a review of § 9-502 may initially reveal.

One aim of the new safe harbor rules at § 9-516 is to encourage use of the uniform financing statement form at § 9-521, which contains all information necessary for nationwide filings. Properly executed, this form is not subject to arbitrary rejection by the filing office, pursuant to §§ 9-516 and 9-520. Nonetheless, § 9-502 effectively provides a lesser standard for determining the validity of a filing statement once it is on file. See §§ 9-502, 9-516, 9-520, 9-521. The resulting complexity is necessary to accomplish these multiple purposes.
This complexity, and the resulting pitfalls for secured parties, also cut against arguments that Article 9 secured parties are unduly favored. The outcome is a degree of increased risk of unperfection under Article 9 because of a failure to meet the more complicated requirements of §§ 9-516, 9-520, and 9-521, despite the apparent simplicity of § 9-502. See, e.g., Christopher S. Bose, *A Trap for the Unwary: Revised U.C.C. Article 9’s Deceptive Technical Guillotine for Financing Statements*, 55 CONSUMER FIN. L. Q. REP. 152 (2001). In addition, under revised §§ 9-503 and 9-506, Article 9 secured parties are subject to higher standards regarding accuracy of the debtor’s name. The goal of all of this was to simultaneously:

1. simplify and modernize the filing system by eliminating obsolete requirements at § 9-502;
2. provide an all-inclusive safe harbor and model form to suit national filings and prevent inappropriate rejections by the local filing office (§§ 9-516, 9-520, 9-521); and (3) resolve problems regarding debtor’s names (§§ 9-503 and 9-506—see below).

### 2. The “Seriously Misleading” Rule

The Article 9 “seriously misleading error” rule, carried forward from old § 9-402(8) to revised § 9-506(b), has been clarified to specify that an error in the debtor’s name (the key factor in terms of indexing financing statements in the Article 9 filing system) is seriously misleading. See also § 9-503. By negative implication, other errors are not. Section 9-506(c) provides a statutory test to determine whether an error in the debtor’s name is seriously misleading (based upon the capabilities of the filing office search logic and apparently inspired by a prior Texas nonuniform amendment). For background, see Jerald M. Pomerantz, *Trade Name Filings under U.C.C. Article 9: Anatomy of a Nonuniform Amendment*, 47 CONSUMER FIN. L. Q. REP. 34 (1994).

An error or unrecorded change in the secured party’s name (a common occurrence as loans are bought and sold and creditors merge) cannot mislead searching parties regarding the existence or perfection of the security interest and thus is not “seriously misleading” in a manner that would impair perfection. See § 9-506 and cmt. 2; §§ 9-503(d), (e). However, if the incorrect information in the filed financing statement is prejudicial to an innocent party, the latter will take free of claims based upon the filing. Id.; § 9-338. For example, notices that must be sent to the secured party of record may not be received by the proper party if the financing statement is inaccurate in this regard; the notice will nonetheless be deemed sent. Thus, searching parties who rely on the public record are entitled to rely upon the name of the secured party of record in giving required notices, and an error in that name may result in the secured party’s failure to receive important notices to that party’s loss or detriment. See, e.g., §§ 9-611(c), 9-608, 9-511; see also §§ 9-310(c), 9-512, 9-513, 9-514. Nonreliance parties (who do not rely on the public record), however, have no such claim; such errors will not be “seriously misleading” under the standard at § 9-506(b) and therefore will not affect perfection (e.g., as against lien creditors and other non-reliance parties, including the trustee in bankruptcy). Bankr. Code § 506(a).

However, an error in the debtor’s name under § 9-503 is deemed seriously misleading unless “saved” under Article 9 § 9-506, and this may facilitate a bankruptcy trustee’s ability to attack erroneous financing statements on such grounds. See §§ 9-503 and 9-506.
3. Choice of Law

The new choice-of-law and location of debtor rules at §§ 9-301–9-307 (see supra this Chapter at Part B.11) may have some effect on the trustee’s strong arm powers (discussed supra in Chapter Two) in that any improvement in the clarity of the rules governing the Article 9 filing system reduces the likelihood that secured parties will inadvertently fail to meet the applicable requirements. Thus, fewer Article 9 security interests may be avoidable under Code §§ 544–553 because of the secured party’s inadvertent failure to perfect in the proper location. The relatively small number of reported cases under old Article 9 in this regard suggests that the effects may be minimal, however. In any event, there is no bankruptcy policy favoring a legitimate secured party’s inadvertent loss of perfection.

4. Description of Collateral

Changes at Article 9 §§ 9-108 and 9-504 that clarify the requirements for a description of the collateral, reaffirming the long-standing policy in favor of using U.C.C.-defined categories (e.g., “accounts” or “general intangibles”) and authorizing super-generic descriptions (e.g., “all assets”) in the financing statement (but not the security agreement) also may affect bankruptcy cases by both clarifying the law and reducing the number of instances in which Article 9 perfection is inadvertently lost. However, §§ 9-108 and 9-504 provide significant exceptions and limitations on collateral descriptions, and reliance parties receive additional remedies if they justifiably rely on erroneous information in the public record. See §§ 9-502(a), 9-516(b), 9-338. Such remedies, however, are inherently unavailable to nonreliance parties (such as the trustee in bankruptcy) who do not rely on the public record. For example, the liberal requirement of “value” in §§ 9-338 and Article 1 § 1-204 qualifies nearly all Article 9 secured parties for protection under § 9-338, while excluding lien creditors (including the trustee in bankruptcy) from such protection. There remain ample bases for trustees to attack inappropriate security agreement collateral descriptions under § 9-108, but, as an inherent aspect of any public notice system, parties who rely on erroneous information in the public records obtain afforded additional protections regarding that record.

5. Perfection by Possession

As an alternative to perfection by filing, Article 9 perfection by possession via notice to a bailee now requires the bailee to acknowledge such perfection in an authenticated record (not required under old Article 9), making perfection by possession via a bailee somewhat more difficult and increasing the risk that secured parties will not realize they are unperfected because they lack such acknowledgment. See § 9-313(c). The one-year transition rule at §§ 9-703(b) and 9-705(a) means that security interests perfected by notice to a bailee (without an acknowledgment) under old Article 9 will become unperfected one year after the effective date of new Article 9 if an acknowledgment is not obtained beforehand.
6. Conclusion: Bankruptcy Impact of Revised Article 9

Overall, the revised Article 9 filing and perfection rules provide some benefits and some increased risks for secured and unsecured creditors, both in and outside of bankruptcy. A measure of complexity was added in revised Article 9 to provide added guidance, where needed, and to specifically address perceived ambiguities in old Article 9; to some extent this new complexity inherently favors those attacking security interests in bankruptcy. The overall result, however, is an evenhanded approach that improves the Article 9 filing system without disturbing the fundamental balance between secured credit and bankruptcy.

There will always be debate over the precise and optimal mix of rules governing perfection, priority, and public notice issues and their impact upon secured and unsecured creditors and other interested parties. The increased complexity in revised Article 9 inevitably arose from an effort to address and resolve such issues. The Code has evolved in much the same way; yet, these two elaborate statutes fit together remarkably well. The complexity of revised Article 9 creates inherent pitfalls for creditors by providing opportunities for competing parties and trustees in bankruptcy to frustrate creditor expectations. But such risks, it seems, are a price to be paid for greater certainty in the commercial law.