MEMORANDUM

TO: JOINT REVIEW COMMITTEE ON U.C.C. ARTICLE 9

FROM: JOHN T. McGARVEY

DATE: September 22, 2009

RE: CASE LAW ON SUFFICIENCY OF INDIVIDUAL NAMES

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Eleven published decisions have construed the issue of what satisfies the requirement of 9-503(4)(A) that a financing statement provide the "individual…name of the debtor;…"[1] The first case did not percolate up to reported status until June 27, 2003. The last decision on the issue was rendered December 13, 2007. Seven of the cases were decided during 2006 and the last two in 2007; a logical inference being that the courts have established a standard for the sufficiency for individual names and practitioners are not litigating matters that are now clearly covered by established precedent.

Several of the courts discuss their search for guidance on the sufficiency of an individual's name.[2] The courts fill what they perceive to be a gap in the guidance of 9-503 and its Official Comments on individual names by reference to 9-521 and the legend beside block 1 of the form for initial financing statements: "DEBTOR'S EXACT FULL LEGAL NAME."

Six of the cases involve agricultural credit, and in four cases the collateral is mechanics tools; indicia of the type and frequency of secured credit granted to individual debtors. Trustees challenge the secured party's perfection in six of the cases based on the form of name used by the secured party. Four of the decisions are priority disputes between secured parties. Nine of the decisions are consistent in requiring a debtor's full legal name (a term the courts do not formally define) for perfection of a security interest. Two decisions, one that has been firmly overruled, and the other, a Fifth Circuit decision that is a product of poor briefing by the losing party and lack of independent research by the court, allow perfection by filing under an individual debtor's nickname.

Following, in chronological order, is a synopsis of the pertinent parts and discussion of each of the eleven decisions.

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[1] *See* Exhibit A to July 9, 2009 letter of *Uniform Commercial Code Committee v. State Bar of California* to the Committee. Through exhaustive word and digest topic searches, updated on September 18, 2009, and conversations with several of you, I am confident the eleven decisions define the universe of cases that construe the issue of sufficiency of individual names.

[2] *E.g.,* "Although § 84-9-503 specifically sets parameters for listing a debtor's name in a financing statement when the debtor is an entity, does not provide any detail as to the name that must be provided for an individual debtor—it simply states that the "name of the debtor should be used." Clark v. Deere & Co. (*In re* Kinderknecht), 308 B.R. 71, 75 (B.A.P. 10th Cir. 2004).

Nazar v. Bucklin Nat'l Bank *(In re* Erwin*)*, 50 U.C.C. Rep. Serv. 2d 933, 2003 WL 21513158 (Bankr. D. Kan. 2003).

The first case to address the issue of individual names, and the first of six cases on nicknames, allowed a bank that filed under the name of "Mike Erwin" to prevail over a trustee attempting to avoid the bank's lien on the debtor Michael A. Erwin. The Court missed a controlling state administrative regulation that specified that the supplemental database search upon which the Court relied in finding the bank's financing statement should not be considered part of the standard search logic of the filing office. The Court noted that "revised Article 9 makes no attempt to resolve the many issues that can arise with respect to human names."

Clark v. Deere & Co. *(In re* Kinderknecht*)*, 308 B.R. 71, 53 U.C.C. Rep. Serv. 2d 167 (B.A.P. 10th Cir. 2004).

The bankruptcy appellate panel for the Tenth Circuit reversed the Bankruptcy Court for the District of Kansas, and found for a trustee, avoiding a purchase money security interest in two farm implements, where the secured party perfected under the name "Terry J. Kinderknecht" when the debtor's name was "Terrance Joseph Kinderknecht." The Court found "that a legal name is necessary to sufficiently provide the name of an individual debtor within the meaning of § 84-9-503(a) . . . ." The Court cited four basic reasons for its conclusion.

> First, mandating the debtor's legal name sets a clear test so as [to] simplify the drafting of financing statements. Second, setting a clear test simplifies the parameters of UCC searches. Persons searching UCC filing will know that they need the debtor's legal name to conduct a search, they will not be penalized if they do not know that a debtor has a nickname, and they will not have to guess any number of nicknames that could exist to conduct a search. Third, requiring the debtor's legal name will avoid litigation as to the commonality or appropriateness of a debtor's nickname, and as to whether a reasonable searcher would have or should have known to use the name. Finally, obtaining a debtor's legal name is not difficult or burdensome for the creditor taking a secured interest in a debtor's property. Indeed, knowing the individual's legal name will assure the accuracy of any search that creditor conducts prior to taking its secured interest in property.

pp. 75-76. The Court also noted the lack of statutory guidance on individual names. *See*, footnote 2. The only standard found by the Court, and subsequent courts, was the language on the official form for an initial financing statement at 9-521. Whether the drafters intended for this to be an explicit statement of the law, the Court found : "the language in the Financing Statement Form set forth in § 84-9-521 expressly states the preparer should include the 'DEBTOR'S EXACT FULL LEGAL NAME.'" p. 76. This case is cited as authority in six of the nine cases to follow.

Pankratz Implement Co. v Citizens Nat'l Bank, 130 P.3d 57 (Kansas 2006).

Until this decision of the Kansas Supreme Court, the bankruptcy courts and bankruptcy appellate panel that dealt with the issue of individual names of Kansas debtors had to predict how a Kansas state court would rule. Here the Kansas Supreme Court properly addressed and adopted the standard search logic requirement of 9-506. The decision was in a priority case between secured parties. Pankratz Implement Co., a PMSI creditor, filed on "Roger House" when the debtor's name was Ro*d*ger House. Finding that the filing with a single letter misspelling would not be disclosed when searching under the debtor's legal name using a standard search logic search in the filing office, the Court found in favor of a later filed secured party, Citizens National Bank. Although a misspelled name, as opposed to a nickname case, the Kansas Supreme Court followed the reasoning of the court in *Kinderknecht*.

> We believe the language used by the Legislature and the intent behind the adoption of the most recent amendments had the effect of shifting the responsibility of getting the name on the financing statement right to the filing party, thereby enabling the searching party to rely upon that name and eliminating the need for multiple searches using variations of the debtor's name. This would have the effect of providing more certainty in the commercial world and reducing litigation as was required prior to the amendments to determine whether an adequate search was made.

The Court notes that 9-503 "provides no specific rule or guidance concerning what constitutes a sufficient debtor 'name' and references a 'loud silence' on the issue. The term 'name,' name of debtor, debtor's name, or 'correct name' is not defined in Article 9. At the same time, the statute sets forth exact requirements for the name of registered organizations." The Kansas Secretary of State, in an amicus brief cited by the Court, argued for the "debtor's exact full legal name" and cited 9-521.

All Business Corporation v Choi, 634 S.E. 2d 400 (Ga. Ct. App. 2006)

The debtor's correct name was "Sang Woo Gu." The secured party filed under "Gu, Sang Woo." The secured party's filing was on July 17, 2001, (significant only because of its relation to the effective date of Revised Article 9). The Court does not detail the means by which the filing was inputted into Georgia's central database through a Circuit Court Clerk's office. The decision turns on the form in which the name was submitted to the filing system. The Court correctly applies the 9-506 search criteria but the perfection issue is one of many legal issues (including improperly naming an associated business entity) addressed by the case. The Court does not cite *Kinderknecht* or *Pankratz* as authority.

Corona Fruits & Veggies, Inc. v Frozsun Foods, Inc., 48 Cal. Rptr. 3d 868 (Cal. Ct. App. 2006).

The second of the non-Anglo name cases is frequently cited in discussions of Latin American naming customs (an argument made by appellant and addressed by the Court rejecting the "naming convention" for financing statements). However, the decision turns on Corona's actual knowledge of its debtor's legal name. The case was a priority dispute between Corona, the landowner where

fruit was grown, and Frozsun Foods which advanced money to the farmer that raised the fruit. Each filed a financing statement. Corona's employees admitted in testimony that they made a mistake in filing the company's financing statement. Although the debtor's lease of the land from Corona was under the name Armando Munoz Juarez, and the debtor provided Corona with a photo ID and green card with the name "Armando Munoz Juarez," and the debtor filed his tax returns using the last name of "Juarez," Corona filed its financing statement under "Armando Munoz."

Parks v Berry *(In re* Berry*)*, 61 U.C.C. Rep. Serv. 2d 95, 2006 WL 2795507 (Bankr. D. Kan. 2006).

This is another of the nickname cases where a trustee prevailed over the PMSI of Snap-On Credit LLC. Snap-On perfected under the name "Mike Barry, Jr." The debtor's actual name was Michael R. Barry, Jr. The case follows the decisions in *Kinderknecht* and *Pankratz* and requires the debtor's "full legal name" be used on a financing statement. However the Court noted that: "While this standard is easily stated, it is perhaps less easily enforced in the absence of a clear statutory declaration of what a legal name is." Referring to the language on the official form financing statement (9-521) regarding debtor's names, the Court said: "it sets a clear test so as to simplify the drafting of financing statements and UCC search parameters, and avoids litigation as to the appropriateness of a debtor's nickname and whether a reasonable searcher would have or should have know to use the name."

Morris v. Snap On Credit, L.L.C. *(In re* Stewart*)*, 2006 WL 319 3374 (Bkrtcy. D. Kan. 2006).

The decision holds, applying the standard search logic for the State of Kansas, that a full legal name requires, at a minimum, the first given name, the first initial of the second given name, and the surname. Because Snap On Credit perfected under the name of Richard Stewart (with no middle name or initial), when the debtor's name was Richard Morgan Stewart, IV, the financing statement was not disclosed by standard search logic search using the debtor's full name. The trustee avoided Snap-On's PMSI. The Court said a searcher must use the debtor's "correct legal name" and stated that would be the name "indicated on a birth certificate or a name otherwise maintained in the public records (e.g., social security card, driver's license)…." The Court also noted that the fuzzy logic of human searches has been replaced with the objective criteria of the standard search logic.

Genoa Nat'l Bank v. Sw. Implement, Inc. *(In re* Borden*)*, 353 B.R. 886 (Bankr. D. Neb. 2006).

Genoa National Bank, a subsequently filed all personal property secured party, defeated the priority of Southwest Implement Inc.'s PMSI in two pieces of farm equipment. Genoa filed its financing statement under the name "Michael R. Borden." Citing the *Kinderknecht* decision, the Bankruptcy Court found the financing statement of Southwest Implement filed under the name "Mike Borden" insufficient even though the debtor frequently signed legal documents as Mike Borden. For statutory authority the court looked to the official financing statement form and its reference to the debtor's exact full legal name. The Court also said that a searcher should not be required to search each possible name to ensure all possibility had been exhausted.

Morris v. Snap-On Credit, LLC *(In re* Jones*)*, 2006 WL 3590097 (Bkrtcy. B. Kan. 2006).

Snap-On Credit, a PMSI secured party, filed its financing statement listing the debtor's name as "Chris Jones." The debtor's full legal name is Christopher Gary Jones. Ruling in favor of the trustee who challenged Snap-On's perfection, the Court stated that it was constrained to follow the Kansas Supreme Court's construction of Article 9 in *Pankratz* and rejected Snap-On's argument grounded upon *In re Erwin.* The Court's legal analysis also looked to "the official UCC-1 form for a financing statement used by Defendant [that] requires the 'debtor's exact full legal name.'"

Peoples Bank v. Bryan Brothers Cattle Co., 504 F.3d 549 (5th Cir. 2007).

A sub-part of this multi faceted decision involved the priority of financing statements filed by two banks against cattle owned by their common customer Brooks L. Dickerson. The first to file, Cornerstone Bank, filed under the debtor's nickname of Louie Dickerson. People's Bank filed its financing statement using the name Brooks L. Dickerson. The Fifth Circuit found Cornerstone's financing statement, filed under the name Louie Dickerson, was not seriously misleading. Although the Fifth Circuit analyzed the proper statutes it came to the wrong conclusion: "The purpose of the filing system is to give notice to creditors and other interested parties that a security interest exists in the property of the debtor . . . . Perfect accuracy, however, is not required as long as the financing statement contains sufficient information to put any searcher on inquiry." p. 559. The Court further found that Peoples was on inquiry notice because Brooks L. Dickerson held himself out to the community as Louie Dickerson and frequently used his nickname in business affairs.

There is no discussion of 9-506 and a standard search logic search. The decision cites none of the post-revised Article 9 cases on individual names. Instead, the Court cites two of its own pre-revision cases on individual names. The absence of any discussion of the *Kinderknecht* case, or its progeny, prompted me to review the briefs filed for People's Bank. The briefs were as devoid of post-revision case law as was the Fifth Circuit's Opinion. The Court obviously did no independent research. Although the statutory citations are to revised Article 9, the legal analysis and precedent applied is all pre-revision and can be easily distinguished by practitioners and other courts.

Hopkins v. NMTC Inc. *(In re* Fuell), 61 U.C.C. Rep. Serv. 2d 722, 207 WL 4404643 (Bankr. D. Idaho 2007).

In the second of the misspelled name cases a PMSI creditor lost its priority to the trustee when it filed its financing statement under the name "Andrew Fuel" rather than the debtor's actual surname of Fuell. The case follows *Pankratz* and *Kinderknecht* and cites the ultimate authority, Professor White's treatise.