

# UCC INSURANCE:

## Cost-effective Alternative to Borrower's Counsel Legal Opinion

BY JAMES D. PRENDERGAST

When you are trying to figure out whether to go to outside counsel for a legal opinion or to recommend that your company obtain UCC insurance, you need to consider several factors: what constitutes UCC insurance, comparison of typical legal opinions and UCC insurance coverage, multijurisdictional issues under the UCC, and cases requiring UCC insurance.

### WHAT IS UCC INSURANCE?

First, you will need to consider what UCC insurance is. The purpose of this article is to discuss the utility of UCC insurance and of legal opinions provided to lenders or sellers offering take-back financing by counsel to the borrower or buyer/borrower. These opinions cover organization, execution, and delivery of the loan documents, the enforceability of those documents under relevant law, and the perfection or priority, if you can get it, of the security interest of the lender or take-back financier (hereinafter, collectively "lender") in the assets of the borrower that are provided to secure the repayment obligation of the borrower to the lender. After many years of doing transactional work, I have concluded that these opinions generally are not worth the cost, expense, and aggravation needed to obtain them. The alternative, however, is not to rely totally on the borrower's representations and warranties in the loan documents. A cost-effective alternative is UCC lien perfection and priority insurance that is now offered by all of the major land title companies ("UCC insurance"). This insurance not only guarantees the priority—not just perfection—of the security interest but also covers many additional risks that are not covered by a legal opinion, such as an indexing mistake at the central filing office or the accuracy of the debtor's name.

The subject of this UCC insurance is personal property, defined generally as being any thing that is not real property.

This coverage includes not only movable collateral, such as equipment or inventory, but also intellectual property, including patents, trademarks, and copyrightable matters (but not copyrighted matters that are excluded from the UCC), software and software embedded in goods, general intangibles, such as contract rights and payment intangibles, and investment property, such as common stock in corporations.

Also covered by UCC insurance is personal property, known as fixtures, that has become so affixed to the real property that an interest in the personal property arises under real property law. So unless you are dealing with dirt and things embedded in the dirt, such as a transaction involving a commercial building, your transaction probably involves personal property. Whether the personal property is collateralized is up to you, but if it is, UCC lien priority insurance should be a matter of great interest to a lender on or buyer of the assets.

As in-house counsel, whether you are in the legal department of a financial institution or a seller of assets, you must understand that relying on a legal opinion for the factual reality of a transaction is fundamentally misplaced and confuses a legal opinion with an insurance policy. Fortunately, an insurance policy now exists that can provide the assurance that a lender has previously—and perhaps mistakenly—sought from borrower's counsel.

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As is clear from the guidelines issued by the American Bar Association, Business Law Section Committee on Legal Opinions,<sup>1</sup> the principal purpose of a commercial law opinion in a business transaction, including a third-party remedies opinion, is to help the recipient of the opinion determine, as part of due diligence, whether to enter into the transaction on the business terms discussed by the parties or at all.<sup>2</sup> Because of this purpose, you should seek the requested legal opinion only when its benefits justify its cost. Further, if you are knowledgeable about opinion matters, such as enforceability, you should not request an opinion from outside counsel who is less knowledgeable than you are.

The types of transactions that may involve a commercial legal opinion, including a third-party remedies opinion, include secured credit transactions, the factoring of accounts receivable, and equipment leasing.<sup>3</sup> Additionally, real estate transactions on such things as hospitals, power plants, and hotels often involve significant personal property.

### **COMPARING A TYPICAL COMMERCIAL LAW OPINION AND UCC INSURANCE COVERAGE**

Second, you will need to consider how a typical commercial law opinion compares to UCC insurance coverage. The sidebar on pages 85–87 lists the elements of a typical legal opinion in commercial loan transactions and corresponding coverage under UCC insurance. In reviewing the list, it is important to remember that a legal opinion is not an insurance policy, but instead, it is a document designed to assist the recipient in performing due diligence for a transaction. UCC insurance, on the other hand, is traditional insurance, and the insurance provider is expected to make prudent actuarial calculations in shifting the risk of occurrence of a hazard from the insured to the carrier.

Because attorneys are committed to protecting their clients from risk, extensive discussions usually

take place over the scope of a legal opinion and the pages and pages of qualifications and exceptions that follow the body of the opinion as the lender's attorney attempts to get the buyer's attorney to guarantee that the transaction won't fail. With UCC insurance, however, a lender is dealing with an insurance company on matters of risk, so the lender's attorney no longer has to try to maneuver the borrower's attorney into acting as an insurance company on the deal. By matching expectations with results, UCC insurance gives the lender what the lender is really looking for.

Also, in the typical situation of a financing transaction in which the borrower and lender are in the same jurisdiction, the choice of law for the loan or acquisition documents is the law of the jurisdiction of counsel to the lender, so the cost and expense of a borrower's counsel commercial law opinion is rarely justified, given the acceptability, relatively low cost, and availability of UCC insurance.

Another example of the utility of UCC insurance is in cross-boarder transactions. Assume, for example, that a Canadian lender is making a loan to a Canadian borrower that is a subsidiary of a U.S. corporation with the loan obligation being guaranteed by the U.S. parent of the Canadian subsidiary. Also assume that the U.S. parent is securing the loan with its assets located in the United States but that the assets are not the reliance collateral. The Canadian lender could engage local U.S. counsel in, say, Kansas to give an opinion on the perfection of its lien in the collateral located in Kansas for the parent corporation or use UCC insurance to insure the priority of its lien in the assets. The UCC insurance would probably be much less costly than engaging local counsel for both the lender and the borrower to review loan documents and opine on the transaction.

### **Additional Benefits of UCC Insurance**

UCC insurance does much more than improve on a legal opinion of borrower's counsel for perfecting the priority of a lender's security interest. UCC insurance also provides more extensive coverage of attendant risks to perfecting the priority of a security interest under Revised Article 9 than the legal opinion of borrower's counsel. The UCC insurance company can cover these risks because that's what an insurance company does and what a law firm cannot do.

*(continued on page 88)*

## COMPARISON OF TYPICAL LEGAL OPINION AND UCC INSURANCE COVERAGE

TYPICAL LEGAL OPINION IN A COMMERCIAL LOAN TRANSACTION	OPINION PROVISIONS COVERED BY UCC INSURANCE
<p>Borrower is a corporation duly incorporated, validly existing, and in good standing under the laws of the State of _____.</p>	<p>UCC insurance insures against the failure of the security interest to attach, to be perfected, or to have priority as provided in the policy for any reason. Because of the scope of the policy coverage, this opinion paragraph is fully covered by the policy.</p>
<p>Borrower is qualified to do business in the states listed in the appropriate schedule attached hereto.</p>	<p>Because the underwriting process is directed to the enforceability of the security interest, no review of good standing in “other” jurisdictions is made or intended. If, however, the borrower is not doing business in any foreign jurisdictions, this opinion paragraph is unnecessary. If other jurisdictions are involved, borrower’s counsel usually does nothing more than review a list of the operative jurisdictions provided by an officer of the borrower, order good standing certificates, and match the certificates to the list. Borrower’s counsel would normally have no independent knowledge of where the borrower is doing business. The UCC insurance company could provide an endorsement of an effective good standing certificate for each state listed on the borrower’s certificate. Alternatively, lender’s counsel could review the list in lieu of an endorsement.</p>
<p>Borrower has the corporate power and authority to execute and deliver each loan document and perform its obligations thereunder, to own and operate its properties and assets, and to carry on its business.</p>	<p>UCC insurance addresses the question of the borrower’s power and authority to execute and deliver a grant of a security interest. UCC insurance would not directly cover the requisite power and authority to execute and deliver the other loan documents, although a reasonable assumption to such effect could be made.</p>
<p>The execution, delivery, and performance of the loan documents by borrower, the incurrence and repayment of the indebtedness, and the granting by borrower of security interests in collateral pursuant to the loan documents have been duly authorized by all necessary corporate actions on the part of borrower. Each loan document has been duly executed and delivered by borrower.</p>	<p>The grant of the security interest is clearly covered by UCC insurance. The balance of this opinion paragraph is not directly covered. The utility of the paragraph, in light of the availability of UCC insurance, turns on the possibility that the grant of the security interest would be duly authorized but the balance of the loan and security agreement would not be duly authorized. I would suggest that the chances of this situation occurring are extremely low.</p>
<p>The loan documents constitute the legal, valid, and binding obligations of borrower, enforceable against borrower in accordance with their respective terms.</p>	<p>As discussed above, the legality, validity, and binding nature of that portion of the loan documents constituting the grant of the security interest would be covered by UCC insurance, but that the balance would not. Again, the utility of this opinion would turn on the chance that the grant of the security interest were legal, valid, and binding but the balance of the loan documents were not.</p>

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TYPICAL LEGAL OPINION IN A COMMERCIAL LOAN TRANSACTION	OPINION PROVISIONS COVERED BY UCC INSURANCE
<p>The execution, delivery, and performance of the loan documents by borrower, the compliance with the terms and conditions thereof, and the consummation of the transactions contemplated thereby, do not and will not (1) conflict with, result in a breach of, or constitute a default under, any of the terms, conditions, or provisions of (a) any present statute, rule, or regulation applicable to borrower, (b) the articles of incorporation or bylaws of borrower, (c) to our knowledge, after due inquiry, any term of any agreement, contract, undertaking, indenture, or instrument by which borrower or the properties or assets of borrower are bound, or (d) any order, judgment, or decree of any domestic court or other agency of domestic government, known to us, after due inquiry, that is binding on borrower, or (2) result in the creation of any lien, mortgage, pledge, charge, security interest, or other encumbrance upon any of the properties or assets of borrower other than as granted to lender.</p>	<p>Except for item (1)(b), which covers the grant of the security interest, this opinion paragraph is not covered by UCC insurance. The importance of this paragraph turns on due diligence issues, the complexity of the borrower and related matters, and the willingness of borrower's counsel to offer an opinion on what are arguably factual matters. Extensive discussions often develop over this paragraph, with counsel relying on certificates of the borrower describing its material contracts and so on. The resulting opinion is often less useful than the borrower's schedules attached to the loan documents.</p>
<p>The loan agreement is effective to create attached and enforceable security interests in favor of the lender in the collateral covered thereby to the extent that borrower has rights therein.</p>	<p>This paragraph is fully covered by UCC insurance.</p>
<p>The financing statements are in appropriate form for filing in the jurisdictions listed in the appropriate schedule attached hereto. The offices in the jurisdictions indicated in the filing offices schedule attached hereto are the only offices in the relevant jurisdictions in which financing statements are required to be filed in order to perfect by filing the security interests granted to lender in the collateral consisting of personal property or fixtures located in such jurisdictions. Accordingly, to the extent that a security interest in the collateral consisting of personal property or fixtures may be perfected by the filing of a financing statement or fixture filing in such jurisdictions, the security interest of lender in such collateral is perfected upon the filing of the financing statements in the filing offices.</p>	<p>This paragraph on appropriate filing jurisdictions and the form of financing statements is fully covered by UCC insurance. UCC insurance goes far beyond the legal opinion to insure priority of the lender's lien position, however, and covers related matters, including protection against forgery and fraud, collateral description, priority in proceeds, priority over lien creditors, misindexing, and so on. Further, UCC insurance covers perfection of security interests by possession or control, in addition to perfection by filing.</p>
<p>There are no stamp, recording, or similar taxes required to be paid in connection with the execution, delivery, or filing of the financing statements to be filed with the filing offices, except for the standard filing fees collected by such filing offices.</p>	<p>This topic is not covered by UCC insurance, but in most cases, lender's counsel should be able to answer any questions regarding this issue without an opinion from borrower's counsel. This issue is significant only when foreign state law is involved, such as in cases in which the borrower is in a different state from that of the lender, and lender's counsel is not able to advise its client on this issue.</p>

## COMPARISON OF TYPICAL LEGAL OPINION AND UCC INSURANCE COVERAGE

<p style="text-align: center;"><b>TYPICAL LEGAL OPINION IN A COMMERCIAL LOAN TRANSACTION</b></p>	<p style="text-align: center;"><b>OPINION PROVISIONS COVERED BY UCC INSURANCE</b></p>
<p>The choice of the law of the State of _____ to govern the construction and interpretation of the loan documents is a valid and effective choice of law under the laws of the State of _____, and adherence to existing judicial precedents under the law of the State of _____ would require courts sitting in the State of _____ to abide by such choice of law. If a _____ court were to apply the substantive law of _____ to the loan documents, each of the loan documents would be legal, valid, and binding obligations of the parties thereto, enforceable in accordance with their terms, and the transactions contemplated thereby would not violate _____ usury laws.</p>	<p>This subject is not covered by UCC insurance except on the matter of priority perfection. Additionally, this paragraph is germane only in a multistate transaction.</p>
<p>No governmental consents, approvals, authorizations, registrations, declarations, or filings are required in connection with the extensions of credit under the loan documents or other consummation of the transactions contemplated by the loan documents, except for filings required for the perfection of lender's liens and security interests.</p>	<p>This topic is not covered by UCC insurance. Except in multistate transactions, however, lender's counsel is in a better position to answer these questions than borrower's counsel, and asking for this opinion from borrower's counsel in a single-jurisdiction transaction may not comport with the Special Report of the TriBar Opinion Committee—UCC Security Interest Opinions—Revised Article 9 (“TriBar Report”). The issue addressed by the TriBar Report is the balance between the cost and the utility of certain typically requested opinions in commercial transactions.</p>
<p>The making of all loans, advances, and extensions of credit to borrower pursuant to the loan agreement and the loan documents and the application of the proceeds of the advances thereunder do not violate Regulations T, U, or X of the Board of Governors of the Federal Reserve System.</p>	<p>This topic is not covered by UCC insurance but is usually not a major issue and is most often waived if borrower's counsel objects to providing the opinion. The purchase of margin securities (the subject of Regulations T, U, and X of the Board of Governors of the Federal Reserve System) is usually not an issue in a middle market commercial lending transaction. Further, lender's counsel, often more expert in commercial law than borrower's counsel, already knows the answer to this question. Again, asking for this opinion may not comport with the TriBar Report.</p>
<p>It will not be necessary in connection with the execution, delivery, recording, or enforcement of the provisions of the loan documents for lender to register or qualify to do business as a foreign corporation under the laws of the State of _____ or to comply with any laws of the State of _____ relating to banking, finance, or other lending activities.</p>	<p>The topic is not covered by UCC insurance, but again, this paragraph is important only in a multistate transaction.</p>

(continued from page 84)

Among the additional risks covered by UCC insurance that are not within the scope of a legal opinion are the following:

- Competing claims of lien creditors.
- Federal and state tax liens.
- Loss of priority due to filing office error, including incorrect indexing and loss of prior financing statements.
- Risk of loss due to invalidly filed termination statements.
- Priming filings in the gap, the filing of a senior lien in the time period between the search of the UCC central filing office records and the search to reflect the filing of the lender's financing statement.
- Matching the description of the covered collateral in the financing statement against the description of the collateral in the lien-granting document, such as the security agreement.
- Whether the security agreement is sufficient to create the security interest.
- Accuracy of the debtor's name if the debtor is a registered organization.<sup>4</sup>

#### **Situations Warranting a Commercial Law Opinion**

A commercial law opinion from borrower's counsel would be appropriate in the following situations:

- Opinion would assist the recipient in performing due diligence or discharging the recipient's legal obligations to others, such as in syndicated credits.
- Opinion would assist a regulated institution in satisfying regulatory obligations or statutory requirements.
- Borrower is a regulated entity, and borrower's counsel is, in fact, in the best position to give an opinion on relevant matters beyond the knowledge of the lender and its counsel.
- Transaction is multijurisdictional, the law of another jurisdiction is significant to the transaction, and counsel to the borrower is in the best position to give an opinion on relevant matters beyond the knowledge of the lender and its counsel.

#### **MULTIJURISDICTIONAL ISSUES UNDER THE UCC**

Third, you will need to consider any multijurisdictional issues under the UCC that could affect your

company's situation. Under Revised Article 9 of the UCC, the perfection of a security interest in the personal property of a debtor, as to which a security interest can be perfected by filing, is generally effected through the filing of a financing statement in the jurisdiction where the debtor is located. A debtor that is a registered organization is "located" in the state under whose laws the company is organized.

Given this Revised Article 9 framework, in a transaction, for example, in which the debtor is a Delaware corporation with its chief executive office in Los Angeles and its personal property located in Los Angeles, the perfection of a security interest in most of the assets of the debtor, including general intangibles, inventory, and equipment, would be through the filing of a financing statement with the Secretary of State of Delaware. Under former Article 9, a secured party would have had to file a financing statement in California, not Delaware. Although filing in Delaware may seem logical, counsel for the debtor is probably located in Los Angeles, where the debtor has its chief executive offices and warehouse operations. Unless the law firm is a national bankruptcy firm, the California lawyer probably does not have an office in Delaware, nor is he or she or any of his or her partners licensed to practice law in Delaware.

In the above hypothetical, if the lender, under former Article 9, wanted a UCC "perfection" and/or "priority" opinion from debtor's counsel, the debate might have been over the contents of the opinion and whether the lawyer would provide a "priority" opinion, but the debate would not have been over whether debtor's counsel could give the opinion in the first instance. Applicable commercial law would have been the commercial law of California, not Delaware. Under Revised Article 9, however, the California attorney would now be asked to provide an opinion as to perfection under Delaware law.<sup>5</sup>

Because many firms that do not practice law in Delaware have for years provided opinions under Delaware corporate law, the California lawyer should be able to provide some kind of opinion, particularly given the uniformity of the UCC and Revised Article 9 across the states. Keep in mind, however, ethical and liability concerns and the Rules of Professional Conduct.

The Special Report of the TriBar Opinion Committee—UCC Security Interest Opinions—Revised Article 9 ("TriBar Report"), is informative on how to

structure a UCC perfection opinion. The opinion needs to be on Revised Article 9, however, not the entire commercial law of Delaware, so the usefulness of the “perfection” opinion to the lender is in doubt.

The TriBar Report limits the scope of a security interest opinion to the UCC. As a result, a security interest opinion letter subject to the UCC scope limitation would not address the following items:

- Laws of jurisdictions other than the jurisdiction specified.
- Laws of the specified jurisdiction, except for Article 9 of its UCC.
- Collateral and transactions of a type not subject to Article 9 of the specified jurisdiction’s UCC.
- Under the specified jurisdiction’s UCC § 9-301, what law governs perfection of the security interest granted in the collateral covered by the opinion.

Pursuant to the scope limitation, the TriBar Report provides that an opinion giver may provide an opinion on the perfection of a security interest under the law of a state that is foreign to the opinion giver.<sup>6</sup> The TriBar Report notes, however, that such a perfection opinion should specify the limited extent of the opinion giver’s review of the law governing perfection. The opinion should specify that it is limited to a review of the text of the UCC as it appears in the official statutory compilation or a recognized reporting service, such as the *CCH Secured Transactions Guide*.

At issue in these situations is whether providing such an opinion is contrary to the rules of professional conduct in the opinion giver’s home jurisdiction. The TriBar Report does not set ethical guidelines, and the opinion giver needs to be familiar with the area of multijurisdictional practice of law.

Rule 5.5 of the Model Rules of Professional Conduct, titled “Unauthorized Practice of Law; Multijurisdictional Practice of Law,” identifies circumstances in which a lawyer who is admitted in a U.S. jurisdiction and not disbarred or suspended from practice in any jurisdiction may practice law on a temporary basis in another jurisdiction. The rule, which is comparable to state ethics rules, provides multijurisdictional practice standards relating to (1) legal services by a lawyer who is an employee of a client and (2) legal services that the lawyer is authorized by federal or other law to provide in a jurisdiction in which the lawyer is not licensed to practice law.

The safe harbors under Rule 5.5(c) include nonlitigation work that arises out of or is reasonably related

to the lawyer’s practice in a jurisdiction where the lawyer is admitted to practice.<sup>7</sup> Rule 5.5(c)(4) permits, on a temporary basis, transactional representation, counseling, and other nonlitigation work that arises out of or is reasonably related to the lawyer’s practice in a jurisdiction where the lawyer is admitted to practice. This provision addresses legal services provided by the lawyer *outside* the lawyer’s state of admission that are related to the lawyer’s practice in the home state.

An overarching concern of a California lawyer giving an opinion on Delaware law, even an opinion limited in scope as discussed above, however, is the issue of legal malpractice and the standard of care employed in judging the competence of the foreign law UCC perfection opinion. It may not be malpractice per se for a California lawyer to provide a UCC perfection opinion under Delaware law. Unless, however, the opinion recipient is willing to accept a competence limitation on the opinion, even assuming enforceability of such an informed consent limitation, the opinion giver becomes a guarantor of the correctness of the opinion. As stated by the court in a New York case, “When, as here, counsel is retained in a matter involving foreign law, it is counsel’s responsibility . . . to know, or learn, the law of the foreign jurisdiction.”<sup>8</sup>

## CASES REQUIRING UCC INSURANCE

Fourth, you will need to consider what courts have said on the question of whether problems that cannot be covered by the representations and warranties of the borrower or, for that matter, a commercial law opinion from borrower’s counsel actually occur and so require UCC insurance.

### Search Company Damage Limitation

In a Washington case,<sup>9</sup> respondent financial factors company filed a lawsuit against petitioner lien search company, alleging negligence and breach of contract. The question was whether limitations on consequential damages presented in regular invoices for the purchase of commercial services could be enforced against a business purchaser. In this case, the search company had failed to report on a filing against “The Benefits Group, Inc.,” in response to a search request under the name “The Benefit Group, Inc.” The search company was held liable for its negligence, but the

*From this point on . . .*

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#### **ON PAPER:**

- *The Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) ("ABA

Guidelines"), adopted by the American Bar Association's Section of Business Law.

- *Special Report of the TriBar Opinion Committee—UCC Security Interest Opinions—Revised Article 9*, 58 BUS. LAW. 1449 (2003) ("TriBar Report").

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Washington Supreme Court held that the liability limitation clauses were a part of the contract for services between the parties and therefore enforceable.

The importance of this case to our discussion is the near universality of such limitations in the contracts of search companies. Footnote 9 of the case sets forth evidence submitted by the search company on similar limitations of damages in the contracts of many search companies. An expert for the search company also testified, "It is standard practice in the UCC search industry to disclaim any liability resulting from the use of the information provided, and to provide a limitation of damages equal to the fee paid for the service."

The limit on damages is not difficult to understand or justify. Loss of priority of a security interest can result in the loss of a significant amount of money, and a search company does not want to face that degree of contingent liability for a \$50 search fee. Otherwise, the search company would be an insurance company, and the charge for the UCC search would be commensurate with the assumed risk. The search company is not, however, an insurance company, nor are the law firms reviewing the searches.

#### **Collateral Descriptions**

In a Seventh Circuit case,<sup>10</sup> the facts involved a dispute between two secured parties over the scope of a collateral description in a UCC-1 financing statement.

The Van Diest Supply Company had supplied materials to the debtor, Hemmings, while Shelby County State Bank had provided working capital financing to the debtor. The financing statement of Van Diest, which was filed prior to the blanket filing of Shelby, described the security interest as "[a]ll inventory, including but not limited to agricultural chemicals, fertilizers, and fertilizer materials sold to Debtor by Van Diest Supply Co. whether now owned or hereafter acquired, including all replacements, substitutions and additions thereto, and the accounts, notes, and any other proceeds therefrom."

Shelby argued that the collateral description limited the security interest solely to inventory sold by Van Diest to the debtor and that, therefore, Shelby was senior in all other inventory collateral of the debtor. Van Diest argued that the description covered all inventory as stated and that the balance of the collateral description was only descriptive and in further clarification.

In a statement that commercial lawyers may find remarkable, the Seventh Circuit wrote:

We do agree with the Bank's claim, however, that it would be bizarre as a commercial matter to claim a lien in everything, and then to describe in detail only a small portion of the whole. This is not to say that there is no use for descriptive clauses of inclusion, so as to

make clear the kind of entities that ought to be included. . . . But if all goods of any kind are to be included, why mention only a few? A court required to give “reasonable and effective meaning to all terms,” . . . must shy away from finding that a significant phrase (like the lengthy description of chemicals and fertilizers we have here) is nothing but surplusage.

Commercial lawyers have for years commenced a collateral description with the general collateral type and then continued with pages of specifics. One solution would be to limit the collateral description, if all of a particular collateral type is to be covered, with only stating the collateral type. Van Diest’s collateral description could have read simply “all inventory.”

The real importance of this case, however, is its effect on reviewers of filed financing statements and a rethinking of certain conclusions regarding the scope of the coverage of a senior security interest. Except for the Seventh Circuit, the collateral description of Van Diest would be held to be a blanket over all inventory.

Any potential secured creditor searching the filed UCC record needs to carefully consider this case because it stands generally for the proposition that a court can reach an unusual conclusion as to the scope of a collateral description.

### **Searching the Name of an Individual**

According to a recent bankruptcy case, the “reasonably diligent searcher” standard under former Article 9 of the UCC is alive and well under Revised Article 9 with respect to the names of individuals, perhaps despite the language of the statute.<sup>11</sup> In this case, the secured party had filed against the debtor in 1999 using the name Mike Erwin. The trustee in bankruptcy later ran a search under the name certified as the debtor’s legal name, Michael A. Erwin, and did not bring up the Mike Erwin filing. The trustee then argued that the creditor’s filing was ineffective.

The court could have drawn a distinction between the standards for searching under former Article 9 and Revised Article 9 because this filing was a former Article 9 filing, but the court did not do so. Rather, the court held that former § 9-503(a) does not require an individual’s full legal name on a financing statement. The court also held that a financing statement in which the name of the individual debtor complies with § 9-503(a) is not, as a matter of law, seriously misleading under § 9-506(b). Additionally, a

nickname may be a “correct name” and, using search logic standards, is not seriously misleading under § 9-506(c). Kansas search logic rules make it clear that some aspect of human judgment remains in requesting searches for financing statements made by individual debtors, so the reasonably diligent searcher rule survives the enactment of Revised Article 9, at least as to individual debtors. As a result, the trustee should have searched for “Erwin” or “Erwin, M.”

### **CONCLUSION**

Whether the issue is failure to file a financing statement, failure to correctly describe the covered collateral, a mistake in the requested search by a filing company, or the failure of a search to disclose a primary secured party, the holdings of the cases discussed above provide only two avenues of recovery: the self-insured lender or the lender who wants to sue its own lawyer in the middle of the bankruptcy proceeding. The opinions of debtor counsel do not address priority and, with the carve-outs and exceptions, are generally of limited utility. It is lender’s counsel who is, in fact, providing perfection and probably priority by permitting the client to proceed with the transaction.

The alternative is for the lender to require, in lieu of the perfection opinion, security interest priority insurance coverage from an insurance company. The result is true value for the money spent, real indemnity coverage for the failure of priority, and peace of mind.

Although no court has yet found the following to be true, common sense suggests such a conclusion: the utility of UCC insurance is so great that it amounts to malpractice for lender’s counsel not to use UCC insurance. Consider that today, after a number of years of acceptance, some experts argue that it is malpractice not to use land title insurance.<sup>12</sup>

The time is probably not too far off when a court will hold that a creditor who lost priority when a search company missed a filing is limited to damages against the search company to the amount of the fee paid but may recover against its attorney who failed to insure priority through available and cost-effective UCC insurance. The standard for malpractice will change over time, and protecting against risk with insurance will also change as more lenders become aware of the utility of UCC insurance and as more cases make their way through the court system. ■

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## NOTES

1. *Special Report of the TriBar Opinion Committee—UCC Security Interest Opinions—Revised Article 9*, 58 BUS. LAW. 1449 (2003) (“TriBar Report”); *The Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) (“ABA Guidelines”), adopted by the American Bar Association’s Section of Business Law.
  2. ABA Guidelines ¶ 1.1.
  3. It may be unclear in an equipment lease transaction whether the transaction is a true lease or a “financing transaction” subject to the requirements of Article 9 of the UCC. Often, to avoid an attack that a lessor is an unperfected secured creditor, the lessor will file a UCC-1 financing statement for informational purposes contending that the transaction is a “true lease.” If, however, the form of the transaction is challenged, the filing will perfect the security interest of the “lessor” in the leased goods.
  4. Under § 9-102 (70) of the UCC, a registered organization is “an organization organized solely under the law of a single State or of the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized.” Examples of a registered organization would be a corporation, a limited liability, or a limited partnership, as least under California law, but not a common law general partnership.
  5. We will assume for the balance of this article that no lawyer who is solvent would provide a UCC security interest “priority” opinion except perhaps in the area of consensual liens in certificated and uncertificated securities.
  6. TriBar Report, at 22.
  7. ABA Multijurisdictional Report, at 6.
  8. Hart, Carro, Spandock, Kaster & Cuiffo, 620 N.Y.S. 2d 847, 849 (2d Dep’t 1995).
  9. Puget Sound Financial, L.L.C., a Washington limited liability company, f/k/a Factors of Puget Sound, L.L.C., Respondent v. Unisearch, Inc., a Washington corporation, Petitioner, 146 Wn. 2d 428 (2002).
  10. Shelby County State Bank v. Van Diest Supply Company, 303 F.3d 832 (7th Cir. 2002).
  11. In Re Michael A. Erwin, 2003 WL 21513158 (Bankr. D. Kan. June 27, 2003); *see also*, In re Terrance Joseph Kinderknecht, no. 02-20733-7-JTF (Bankr. D. Kan. 2003).
  12. Robin Paul Malloy and Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner’s Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN’S L. REV., no. 2, at 407 (Spring 2000).
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