Bogus Filings—Some Legal and Policy Considerations

Norman M. Powell[*]

Abstract—There is no free lunch. The ease with which UCC Article 9 permits the filing of financing statements, while tremendously facilitative of legitimate transactions, is a factor in the occasional filing of "bogus" financing statements unrelated to any legitimate transaction. While bogus filings, like all unauthorized filings, have no legal effect, their practical implications can include real-world inconvenience and other harm to putative debtors. UCC Article 9 includes provisions that can be used to address bogus filings. A number of states have adopted additional provisions, whether by way of non-uniform amendment to their enactments of UCC Article 9 or elsewhere. Many involve the exercise of judgment by filing office personnel, and assume that a legitimate filing erroneously rejected or removed as bogus can be restored to effectiveness as fully as though no erroneous rejection or removal had occurred. It isn't that simple.

I. The Perceived Problem

Bogus UCC1 financing statement filings are those that serve no legitimate purpose under Article 9 of the Uniform Commercial Code.[1] They are generally tendered in furtherance of either of two objectives: harassment or fraud. Harassment filings, often made by prison inmates, typically name

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[*]Norman M. Powell is a partner in the Delaware law firm of Young Conaway Stargatt & Taylor, LLP, where his practice includes alternative entities, security interests, and third party legal opinions, and an adjunct professor at the Temple University James E. Beasley School of Law, where he teaches Secured Transactions. He can be reached via email at npowell@ycst.com

[1]Unless otherwise specified herein, references to Article 9 ("Article 9") of the Uniform Commercial Code (the "UCC") are to the official text thereof, promulgated in 1998 by the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) and the American Law Institute, which generally took effect on July 1, 2001, as amended through the 2010 amendments thereto, which generally took effect on July 1, 2013 (the "2010 Amendments").

public officials, bank and corporate employees, and others as debtors. They are thought to be made in retaliation for a perceived injustice wrought by the nominal debtor. Harassment filings can complicate and even prevent the named debtor's attempts to obtain legitimate secured financing. Such harassment filings often come as a surprise, can be difficult to explain, and are expensive and time-consuming to remove. Fraudulent filings, by contrast, often name substantially the same person as debtor and secured party and are thought to be made in furtherance of dubious ideologies.[2] While they do not harm third parties, a great many of them indicate the debtors they identify are "transmitting utilities"[3]—filings against which do not lapse after five years and thus need not be continued.[4] While some lament this permanent cluttering of the public record, the fee paid in connection with a fraudulent filing is no different than that paid in connection with a legitimate filing, and thus, one assumes, is a net source of revenue for the filing office. Nonetheless, some find both harassment filings and fraudulent filings intolerable and, as discussed herein, some jurisdictions have taken steps to lessen the likelihood that such filings will appear in their records.

Article 9 provides at least two possible responses to harassment filings. First, a debtor may file an information statement with respect to any financing statement indexed in the debtor's name which the debtor believes is inaccurate or was

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[2]For a fascinating overview of one such ideology, *see* JJ MacNab, What is a Sovereign Citizen? Forbes (2015), https://www.forbes.com/sites/jjmacnab/2012/02/13/what-is-a-sovereign-citizen/#6e298d4b6012 (last visited Mar. 17, 2017). Its author estimates there are some 300,000 adherents to this ideology in the United States.

[3]" 'Transmitting utility' means a person primarily engaged in the business of: (A) operating a railroad, subway, street railway, or trolley bus; (B) transmitting communications electrically, electromagnetically, or by light; (C) transmitting goods by pipeline or sewer; or (D) transmitting or producing and transmitting electricity, steam, gas, or water." U.C.C. § 9-102(a)(81).

[4]A financing statement naming a transmitting utility as debtor and so indicating remains effective until a termination statement is filed. U.C.C. § 9-515(f).

wrongfully filed.[5] An information statement does not affect the effectiveness of a filed record,[6] but of course a harassment filing has no legal effect.[7] Second, a debtor may demand that the secured party file a termination statement, commencing a 20-day period for compliance.[8] Perhaps understandably, many believe such demand to be futile in the context of harassment filings. Both responses, at best, offer incomplete relief. Neither can be utilized unless and until the purported debtor knows of the harassment filing. It seems reasonable to assume many will learn of such filings only at the proverbial 11th hour, as their efforts to obtain legitimate financing are thwarted by discovery of a harassment filing. And because all financing statements, even those for which termination statements have been filed, remain in the searchable record until at least one year after their effectiveness lapses,[9] as a practical matter, neither of these responses quite restores the purported debtor to his status *ex ante*. While purported debtors can seek judicial relief, including injunction against further harassment and (theoretical) entitlement to recover any loss resulting from inability to obtain, or increased costs of, alternative financing, and statutory damages,[10] doing so is both expensive and time-consuming, particularly in light of possible outcomes. It seems reasonable to assume that those proffering harassment filings, many of whom are incarcerated, may be influenced to a lesser degree than others by court orders to

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[5] *See* U.C.C. § 9-518(a). Prior to the effectiveness of the 2010 Amendments, such filing was denominated a "correction statement." Other than this nomenclatural change, the 2010 Amendments included no changes relevant to this discussion.

[6] U.C.C. § 9-518(e). Note that North Carolina has enacted a non-uniform provision whereby the filing of a correction statement can lead to the Secretary of State's cancelling a filed financing statement, whereupon it is void and of no effect. *See* N.C. Gen. Stat. Ann. § 25-9-518(b1).

[7] *See generally* U.C.C. §§ 9-509, 9-510(a).

[8] U.C.C. § 9-513.

[9] U.C.C. § 9-519(g).

[10] *See* U.C.C. § 9-625. Statutory damages are generally in the amount of $500. Some jurisdictions offer additional or enhanced judicial remedies, whether by non-uniform language in their versions of Article 9 or elsewhere.

refrain from conduct or to pay damages. Finally, none of these responses offers any solution to the issues generated by fraudulent filings.

While bogus filings are generally acknowledged to be a relatively small fraction of all filings, roughly half of the states have enacted non-uniform revisions to Article 9 or other legislation to combat them. The former fundamentally alter the workings of Article 9 by permitting filing offices to reject or remove filings deemed bogus.[11] They vary widely, and have given rise to renewed efforts by the Permanent Editorial Board for the Uniform Commercial Code (the "PEB")[12] to fashion a model legislative response that appropriately balances harm and relief. None of these responses is a panacea; each presents its own problems. Many commentators have long believed that any cure to the bogus filing scourge is worse than the disease itself. But in light of the number of jurisdictions having enacted widely varied legislative responses to bogus filings, it must now be asked whether the patchwork of homemade treatments is worse than more uniform enactment of a carefully considered response. This article discusses the key elements featured in may legislative responses to bogus filings ("Bogus Filing Fixes") and the salient legal and policy considerations they present, and concludes that wider enactment of the PEB's Bogus Filing Fix (the "PEB Fix"), which reflects a considered (but nonetheless imperfect) effort to minimize substantive harm to the Article 9 filing system and detriment to its legitimate users, is greatly preferable to continued enactment of ad-hoc Bogus Filing Fixes.

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[11]Article 9 clarifies that filing offices are not intended to exercise discretion. *See* U.C.C. § 9-520(a) ("A filing office . . . may refuse to accept a record for filing only for a reason set forth in Section 9-516(b)") and Official Comment 2 thereto ("Under this section, the filing office is not expected to make legal judgments and is not permitted to impose additional conditions or requirements."). To the extent that they invite, or even require, discretion, these responses represent a significant policy shift.

[12]The author is an American Bar Association Advisor to the PEB, and served on its Bogus Filing Task Force, led by Professor William H. Henning.

II. Key Elements of Perceived Solutions

While Bogus Filing Fixes vary considerably, it can be helpful to consider them as falling into two principal categories: those that permit rejection of a tendered filing, and those that permit removal of an accepted filing (of course, some Bogus Filing Fixes permit both rejection and removal). Some Bogus Filing Fixes are applicable to any purported debtor, while others offer protection (or relief) only to a specified group of purported debtors, such as public officials.

A. Grounds for Rejection

Generally, grounds for rejection range from suspicion of fraud or other improper purpose to such specific factors as naming the same individual as debtor and secured party, and indicating an individual debtor is a transmitting utility. As jurisdictions continue to encourage electronic submission of financing statements through differential pricing, and with a growing number of jurisdictions mandating electronic submission, the occasion for filing office personnel to exercise discretion is disappearing, suggesting such remedies may be exercised with decreasing frequency. Specific factors such as those mentioned above, of course, can be identified by properly programmed electronic filing systems, giving rise to automatic rejection without, or not subject to, human deliberation. At least 20 jurisdictions permit rejection based on suspicion of fraud or other improper purpose.[13] At least six permit rejection of a financing statement naming the

[13]These include Alabama (Ala. Admin. Code Rule 820-4-3.02(3)(b)), California (Cal. Gov't Code § 12181), Colorado (Colo. Rev. Stat. § 38-35-202(1)), Illinois (810 Ill. Comp. Stat. 5/9-516(b)(3.5)), Indiana (Ind. Code Ann. § 26-1-9.1-901(a)), Kentucky (Ky. Rev. Stat. Ann. § 355.9-516A), Maine (Me. Rev. Stat. Ann. tit. 5 § 90-F(1)), Michigan (Mich. Comp. Laws Ann. § 440.9520), Mississippi (Miss. Code Ann. § 75-9-501.1(b)), Missouri (Mo. Rev. Stat. § 400.9-516(b)(8)), Montana (Mont. Code Ann. § 30-9A-420(1)), New Jersey (N.J. Stat. Ann. 12A:9-516(b)(8)), North Carolina (N.C. Gen. Stat. Ann. § 25-9-516(b)(8)), North Dakota (N.D. Cent. Code § 35-35-03), Ohio (Ohio Rev. Code Ann. § 111.24), Oregon (Or. Rev. Stat. Ann. § 79.0516(2)(h)), South Carolina (S.C. Code Ann. § 36-9-516(b)(8)), Texas (Tex. Gov. Code § 405.022), Utah (Utah Code Ann. § 70A-9a-516(2)(h)), and Virginia (Va. Code Ann. § 8.9A-516(b)(8)).

same individual as debtor and secured party.[14] At least four permit rejection of a financing statement indicating an individual debtor is a transmitting utility.[15]

While rejection of financing statements naming the same individual as debtor and secured party would seem largely unobjectionable, there is at least one context in which such a filing may be legitimate. Consider a secured loan by an individual to an unnamed common law trust of which the same individual is the settlor.[16] Perhaps incrementally more likely, while still largely the stuff of law school hypotheticals, is the legitimate financing statement indicating an individual debtor is a transmitting utility.[17]

B. Protecting a Specified Class

Some jurisdictions have crafted responses applicable only to a select group thought to be at particular risk for bogus filings. Many harassment filings are made against elected officials and government employees, reflecting both their comparative notoriety and the vindictiveness of those who file them. It seems sound to suggest that this group of victims is uniquely effective in advocating for enactment of Bogus Filing Fixes. At least eight jurisdictions have enacted special provisions for the benefit of specified governmental officials

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[14]These include Alabama (Ala. Admin. Code Rule 820-4-3.02(3)(c)), Idaho (Idaho Code Ann. § 28-9-516A(b)), Missouri (Mo. Rev. Stat. § 400.9-516(b)(9)), Nebraska (Neb. Rev. Stat. U.C.C. § 9-516(b)(8)), North Dakota (N.D. Cent. Code § 35-35-03), and South Carolina (S.C. Code Ann. § 36-9-516(b)(9)).

[15]These include Idaho (Idaho Code Ann. § 28-9-516A(2)) (if the filing indicates that the debtor is a "transmitting utility," the filing officer may require reasonable proof from the secured party that the debtor is in fact a "transmitting utility"), Missouri (Mo. Rev. Stat. § 400.9-516(b)(9)), North Dakota (N.D. Cent. Code § 35-35-03), and West Virginia (W. Va. Code Ann. § 46-9-516(b)(3)(E)(i)).

[16]*See* Powell, Filings Against Trusts and Trustees Under the Proposed Revisions to Current Article 9—Thirteen Variations, 42 UCC L.J. 375 (2010).

[17]With the growing popularity of solar panels and the like, for perhaps the first time in history one can imagine an idle, affluent, entrepreneur "primarily engaged in the business of . . . transmitting or producing and transmitting electricity. . . ." *See* U.C.C. § 9-102(a)(81) for definition of "transmitting utility."

or employees.[18] While such special treatment of public officials and employees may strike some as appropriate, aggrieved bank and corporate employees (and others) may take a different view. Whatever the basis for such distinctions, the intentions behind them can only be realized with careful and precise definitions by which to determine who's within, and who's without, the specially protected class.

C. Removal of Previously Accepted Bogus Filings

More than a dozen jurisdictions permit removal of bogus filings from their records, whether following an administrative procedure[19] or a judicial procedure.[20] Grounds for removal tend to mirror those for rejection. In most jurisdictions, the procedure for removal begins with a request, whether a sworn affidavit or something less formal, from the putative debtor to the filing office. Of course, as a practical matter this procedure requires that putative debtors be aware of the bogus filings against them. Michigan squarely addresses this threshold logistic by requiring its Secretary of

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[18]These include California (Cal. Gov't Code § 6223), Florida (Fla. Stat. Ann. § 817.535(3)), Hawaii (Haw. Rev. Stat. § 507D-5(a)), Idaho (Idaho Code Ann. §§ 45-1704 & 1705(3)), Missouri (Mo. Rev. Stat. § 400.9-516(b)(9)), New York (N.Y. U.C.C. § 518(d)), Oregon (Or. Rev. Stat. Ann. § 205.445(4)), and Washington (Wash. Rev. Code § 60.70.030).

[19]These include Alabama (Ala. Code § 13A-9-12(e)), Hawaii (Haw. Rev. Stat. § 507D-4(b)), Illinois (810 Ill. Comp. Stat. 5/9-501.1), Kentucky (Ky. Rev. Stat. Ann. § 355.9-513A), Maine (Me. Rev. Stat. Ann. tit. 5 § 90-F(2)), Michigan (Mich. Comp. Laws Ann. § 440.9501a), Mississippi (Miss. Code Ann. § 75-9-5011(b)), Missouri (Mo. Rev. Stat. § 400.9-516(e)), Montana (Mont. Code Ann. § 30-9A-420(1)), Nevada (Nev. Rev. Stat. § 225.084), Oregon (Or. Rev. Stat. Ann. § 205.445(4)), Pennsylvania (13 Pa. Cons. Stat. Ann. § 9518(f)), South Carolina (S.C. Code Ann. § 36-9-518), Utah (Utah Code Ann. § 70A-9a-513.5), and Virginia (Va. Code Ann. § 8.9A-516(c)(3)(B)).

[20]These include Arizona (Ariz. Rev. Stat. § 47-9527(B)), Arkansas (Ark. Code Ann. § 5-37-215(d)), Colorado (Colo. Rev. Stat. § 38-35-204), Florida (Fla. Stat. Ann. § 817.535(8)(a)), Idaho (Idaho Code Ann. § 45-1703), Indiana (Ind. Code § 26-1-9.1-902(a)), Kansas (Kan. Stat. Ann. § 58-4301), Maine (Me. Rev. Stat. Ann. tit. 5 § 90-E), Michigan (Mich. Comp. Laws Ann. § 440.9501(7)), Minnesota (Minn. Stat. Ann. § 545.05), Missouri (Mo. Rev. Stat. § 428.120), New Hampshire (N.H. Rev. Stat. Ann. § 382-A:9-529(c)), New York (N.Y. U.C.C. § 9-518(d)), North Dakota (N.D. Cent. Code § 35-35-05), Texas (Tex. Bus. & Com. Code Ann. § 9.5185(d)), and Utah (Utah Code Ann. § 38-9a-201).

State to send a notice of filing to every individual debtor named on a financing statement filed in that office.[21]

III. Deciding What's Bogus

Having enacted Article 9, legislatures of course are at liberty to amend it in their jurisdictions so as to eliminate those financing statements meeting specified objective criteria from its filing protocols. Indeed, each jurisdiction is at liberty to vest filing office personnel (or others) with authority to reject or remove financing statements on a discretionary basis. But the introduction of discretion, wherever vested, is fraught, and it would seem axiomatic that in the fullness of time some number of legitimate financing statements will be wrongly deemed bogus and rejected or removed. Article 9 has never required, or even permitted, filing offices to exercise discretion in accepting or rejecting financing statements. In fact, the comprehensive revision that generally took effect on July 1, 2001, took pains to clearly disavow any such discretion.[22] The reasons for movement in that direction are just as compelling now as they were in 1998, when such text was approved. Simply put, whenever discretion is applied, there will be risk of both false positives and false negatives.

While the risk of refusing a legitimate filing seems minimal and outweighed by benefits in the case of a record the filing office can't read, a record for which the filing fee has not been paid, or a record lacking the debtor's name under which it is to be indexed, black and white quickly yield to many shades of gray as the criteria become more subtle or esoteric. Undoubtedly, readers can readily bring to mind the "pornographic bogus filing" which Potter Stewart

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[21] Mich. Comp. Laws Ann. § 440.9501(4).

[22] Under Article 9, a central filing office may lawfully reject a tendered UCC1 financing statement for only three reasons: (i) communication of the record by an unauthorized method or medium, (ii) nonpayment or underpayment of the filing fee, and (iii) failure to provide the debtor's name or, if an individual, to identify the debtor's last name. U.C.C. § 516(b).

would have known when he saw it.[23] But there will be others, whose characterization will be less clear. And, of course, the sensibilities and sensitivities of filing office personnel are likely to vary considerably. Much as we may agree in eschewing pornographic bogus filings, what of Mapplethorpian bogus filings?[24] More generally, by introducing filing office discretion, we cross the Rubicon,[25] and may come to regret having done so. In what other realms might filing offices be given discretion—whether they want it or not, and regardless of their ability to discharge it without causing unwarranted harm to legitimate users of the filing system?

IV. Legal Considerations

Many Bogus Filing Fixes are based on the implicit assumption that filing offices and their personnel will be remarkably accurate and consistent in their judgment as to which filings are bogus. Nonetheless, and commendably, most include a mechanism whereby a legitimate filing erroneously thought to be bogus can be restored to effectiveness. Such restoration, however, is not always complete, a former position not necessarily being available for returning to. Indeed, as we have known for dozens of centuries, "No man ever steps in the same river twice."[26]

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[23]". . . [F]aced with the task of trying to define what may be indefinable . . . I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . ." Jacobellis v. State of Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring).

[24]Robert Mapplethorpe, born in 1946 in Floral Park, Queens, was "one of the most important artists of the twentieth century." In the late 1970s, he grew "increasingly interested in documenting the New York S & M scene." Biography, The Robert Mapplethorpe Foundation-Biography, http://www.mapplethorpe.org/biography (last visited June 23, 2015).

[25]The Rubicon was a small stream separating Gaul from Italy. Julius Caesar led his troops across it in 49 A.D., leading to civil war. *See* Elizabeth Rawson, Caesar: civil war and dictatorship, *in* Elizabeth Rawson, J. A. Crook, and Andrew Lintott, eds, 9 The Cambridge Ancient History: The Last Age of the Roman Republic, 146-43 B.C. (2d ed. 1994).

[26]Charles Kahn, The Art and Thoughtful of Heraclitus: Fragments with Translation and Commentary 1-23 (1979).

A. The Due Process Issue

Two provisions of the United States Constitution have particular relevance to Bogus Filing Fixes. The Fifth Amendment provides in relevant part that, "No person shall be . . . deprived of . . . property, without due process of law."[27] The Fourteenth Amendment provides in relevant part "[N]or shall any state deprive any person of . . . property, without due process of law . . ."[28] In the context of Bogus Filing Fixes, these provisions prohibit federal and state governments from depriving secured parties of perfected security interests of a given priority, absent due process of law. Implicit in this framing is the assumption that a perfected security interest of a given priority is property, a proposition for which there is ample support.[29] Of course, it is conceivable that a secured party whose filing is erroneously thought to be bogus will in fact be restored to exactly the same posture as before implementation of a Bogus Filing Fix; but not all will fare so well. Our constitutionally suspect scenario plays out when a federal bankruptcy court proceeds on the basis of state law that deprives a legitimate secured party of a property interest without due process.

B. Preference and Strong Arm Issues

As a general matter, when an Article 9 debtor becomes a debtor in bankruptcy, the treatment of and potential recoveries by creditors vary considerably as a function of their perfected or unperfected status and the priority of their

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[27]U.S. Const. amend. V.

[28]U.S. Const. amend. XIV, § 1.

[29]*See, e.g.*, U.S. v. Security Indus. Bank, 459 U.S. 70, 76, 103 S. Ct. 407, 74 L. Ed. 2d 235, 9 Bankr. Ct. Dec. (CRR) 1071, 7 Collier Bankr. Cas. 2d (MB) 629, Bankr. L. Rep. (CCH) P 68875, 35 U.C.C. Rep. Serv. 1 (1982) ("The 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but . . . [there are] no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property."); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A.L.R. 1106 (1935) (finding that the government's taking of liens was compensable under the Fifth Amendment as a taking of property); Bailey v. U.S., 78 Fed. Cl. 239, 276 (2007) ("Without question, a mortgagee's lien is 'a compensable property interest within the meaning of the Fifth Amendment.' " (quoting Shelden v. U.S., 7 F.3d 1022, 1026, 136 A.L.R. Fed. 771 (Fed. Cir. 1993))).

interests in specified collateral. Thus, a Bogus Filing Fix that has the consequence of relegating a secured party to lesser priority, or relegating a secured party to unperfected status, inflicts upon such legitimate secured party a deprivation of property. In the absence of due process, such deprivation is unconstitutional. Despite being more straightforward, the arguments are more esoteric, if not obtuse, with respect to preference than to the strong arm clause. In each case, such argument reduces to the viscerally compelling and easily comprehended, "Hey, I would have recovered 100 cents on the dollar if it hadn't been for this Bogus Filing Fix. Now I'm looking at pennies—nickels if I'm lucky." For illustrative purposes, assume that on January 1 SP loans D $100,000 secured by a security interest in certain of D's personal property and perfected by filing. On February 1, pursuant to an applicable Bogus Filing Fix, the financing statement ceases to be effective. On May 1, pursuant to the same applicable Bogus Filing Fix, the filing is determined not to have been bogus after all, and is once again effective, retroactive to the original January 1 filing date.

1. The Preference Issue

Generally, the trustee in bankruptcy may avoid any transfer of an interest of the debtor within 90 days before the filing of a bankruptcy petition, provided certain conditions are met.[30] United States Bankruptcy Code (the "Bankruptcy Code") Section 547(e)(2) establishes the transfer date as the time the transfer takes effect between the transferor and the transferee, so long as it is perfected at or within 30 days after such time.[31] A transferee's rights are deemed "perfected" when "a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."[32] Continuing our hypothetical from above, assume that on June 15, D filed a voluntary bankruptcy petition. Under Bankruptcy Code Section 547(e)(1)(B), SP became perfected on May 1. Yet, under Bankruptcy Code Section 547(e)(2), the transfer from D to SP occurred on January 1. Perfection did not occur at or within 30 days of

[30] 11 U.S.C.A. § 547(b).

[31] 11 U.S.C.A. § 547(e)(2)(A).

[32] 11 U.S.C.A. § 547(e)(1)(B).

January 1. Thus, Bankruptcy Code Section 547(e)(2)(A) does not apply. Instead, under Bankruptcy Code Section 547(e)(2)(B), the transfer-D's January 1 grant of a security interest to SP—is deemed to have occurred at the time it was perfected, viz. May 1. As such, SP's security interest is avoidable as a preference because:

1. The transfer was made to or for the benefit of a creditor (i.e., from D to SP);
2. The transfer was made on account of an antecedent debt (the debt was created on January 1; the transfer occurred four months later, on May 1);
3. The transfer was made while the debtor was presumptively insolvent (a debtor is presumed to have been insolvent during the 90 days prior to its filing a bankruptcy petition);
4. The transfer was made within 90 days prior to the filing of the petition; and
5. Assuming for analytical purposes that the bankruptcy is a Chapter 7 case, SP would recover more with the collateral than without it.

Unless one of the exceptions in Bankruptcy Code Section 547(c) applies, the trustee can avoid the security interest. There are nine such exceptions, and it is quite conceivable that, in many commercial secured lending contexts, none will apply. Those nine exceptions include:

(c)(1) The transfer (May 1) was not a substantially contemporaneous exchange for new value (the loan closed January 1)—subsection (c)(1) doesn't apply;

(c)(2) The transfer was not an ordinary course payment of an ordinary course debt—subsection (c)(2) doesn't apply;

(c)(3) We assume the loan was not a purchase-money loan—subsection (c)(3) does not apply.

(c)(4) No "new value" was given to or for the benefit of the debtor at or after the transfer—subsection (c)(4) does not apply.

(c)(5) We assume the collateral was neither inventory nor receivables—subsection (c)(5) does not apply.

(c)(6) The transfer is not the fixing of a statutory lien to which Section 545 does not apply—subsection (c)(6) does not apply.

(c)(7) We assume the loan was not a domestic support obligation—subsection (c)(3) does not apply.
(c)(8) We assume D is not a consumer—subsection (c)(8) does not apply.
(c)(9) We assume the aggregate value of the collateral for this $100,000 secured loan is more than $6,225—Section (c)(9) does not apply.

Thus, it can be anticipated that some legitimate secured parties whose filings are erroneously rejected or removed will be disadvantaged, even if such rejection or removal is fully "cured" under the applicable Bogus Filing Fix, by reason of the preference issue detailed above.

2. The Strong Arm Issue

Bankruptcy Code Section 544(a)(1) provides,

> The trustee . . . may avoid any transfer of property of the debtor . . . that is voidable by a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists . . . .

In our hypothetical, we concluded above that SP's perfected security interest of a given priority constitutes property.[33] Let's assume that on April 1 D filed a voluntary petition in bankruptcy. To see if SP's security interest can be avoided by the bankruptcy trustee under the strong arm power, we look to state law.

Under the UCC, a secured party whose security interest is unperfected on the date of its debtor's bankruptcy petition is subordinate to the trustee as a lien creditor, unless an exception applies.[34] Although SP was perfected from January 1 until February 1, and was perfected again from May 1, with such perfection "retroactive" to the original January 1 filing

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[33] *See* In re Taylor, 599 F.3d 880, 884 (9th Cir. 2010) (holding that a transferred security interest was property and thus was a preferential transfer under bankruptcy law); In re McLaughlin, 183 B.R. 171, 174, 33 Collier Bankr. Cas. 2d (MB) 1011, 26 U.C.C. Rep. Serv. 2d 1110 (Bankr. W.D. Wis. 1995) ("Cases have widely held that giving a security interest in property constitutes transfer of property of the debtor").

[34] U.C.C. § 9-317(a)(2).

date, SP was not perfected on April 1. Thus, the trustee may avoid SP's security interest unless an exception to the general rule of Bankruptcy Code Section 544(a)(1) applies. Possible exceptions relevant to this analysis appear in Bankruptcy Code Section 546(b)(1):

> The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—
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> (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or
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> (B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

Both exceptions refer to an entity that acquires rights in the relevant property. The statutory language is susceptible to at least two constructions. First, Section 546(b) could be read as limiting Section 544 in cases where subsequent perfection would defeat a lien creditor (the type of creditor referred to in Section 544). Second, Section 546(b) could be read as limiting Section 544 only in cases where subsequent perfection would defeat a lien creditor (under Section 544), a bona fide purchaser (under Section 545), and a good faith purchaser (under Section 549). Article 9 Section 317 speaks only with respect to lien creditors. Under the former construction, SP benefits from a Section 546(b) exception to the strong arm power, while under the latter construction SP does not.

V. Highlights of the PEB Fix

Endeavoring to provide a least-objectionable Bogus Filing Fix, a subgroup of the Permanent Editorial Board (the "PEB Working Group") has drafted language for consideration by jurisdictions inclined to augment the official text of Article 9 to provide additional tools in the fight against bogus filings. Many of its characteristics are similar to those found in the ad hoc provisions discussed above, though affording greater due process protections and narrower tailoring of "remedy" to "problem" than many of them. It begins by empowering filing offices to refuse records they believe were communicated with intent to harass or defraud the putative

debtor, but exempts from this power records communicated by "trusted filers."

The PEB Working Group thought it unlikely that filing offices could reliably determine the true identity of the persons responsible for initiating bogus filings. While some might advocate for a safe harbor for filings tendered by service companies, financial institutions, or law firms, the PEB Working Group could not identify any mechanism by which filing offices could reliably and viably determine membership in such groups. Rather, it focused on the person tendering a given filing already being known to the filing office. That is to say, the PEB Working Group believes a safe harbor should be limited to registered users—those who have made themselves known to the filing office. Their identity would be established not by an easily falsified assertion of identity, but rather by their use of either (or both) a method of filing or method of payment not available to persons other than registered users. While it remains possible that a bogus filer could retain the services of a registered user to tender a bogus filing, it was thought that such instances would be *de minimus* and that another layer of review by an experienced party may serve as an additional barrier against a filer with unlawful intent.

A key element of the PEB Fix amendment is its introduction of an affidavit of wrongful filing, by which an aggrieved putative debtor asserts that the filing at issue was made without authorization and with the intent to harass or defraud the debtor. Upon receipt of an affidavit of wrongful filing, a filing office is to file a termination statement with a delayed effective date, allowing for administrative appeal in the interim. Having been notified of such filing, a secured party may request administrative review. Ultimately, a secured party may bring suit to reinstate a wrongfully terminated financing statement.

VI. Conclusion

Returning to the medical analogy (whether the cure is worse than the disease), there is room for concern that in the bogus filing realm, as in others, folks will consume any and all treatments available to them. In both the medical treatment and bogus filing realms, a given person's current discomfort from the malady looms larger than possible future

adverse consequences of the available treatment, and in both we can more easily visualize ourselves as benefitting in the present from treatment than suffering in the distant future from its consequences. Many of us consume antibiotics in pursuit of immediate relief, disregarding our incremental contribution to the accelerated decline in their future effectiveness. Manifesting a classic market failure, each actor will seek to optimize his own outcome without regard to the true social cost of his behavior. The same might be said of those who respond to the bogus filing scourge with unrestrained zeal.

A "first principle" guiding the drafting of Article 9 has been facilitating the creation of security interests—easily, inexpensively, and reliably.[35] To be sure, some advocated for other principles. But it seems fair to acknowledge the facilitative goals of the law as it currently exists. Given those goals, and the centrality of perfection of security interests to its realization, it is but a small step to posit that potential legal harm to legitimate secured parties should be carefully balanced against enhanced protections for certain putative (but not actual) debtors. Surely, public policy should balance benefits and burdens to individuals, on the one hand, and to the community at large, on the other.

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[35] *See* Harris and Mooney, Jr., A Property Based Theory of Security Interests: Taking Debtor's Choices Seriously, 80 Va. L. Rev. 2021 (1994).