

1995

Abolish the Article 9 Filing System

Peter A. Alces

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Alces, Peter A., "Abolish the Article 9 Filing System" (1995). *Minnesota Law Review*. 2078.
<https://scholarship.law.umn.edu/mlr/2078>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Abolish the Article 9 Filing System

Peter A. Alces*

Who breaks a butterfly upon a wheel?

—Alexander Pope¹

Because the filing system is the very basis of the personal property security law in our economy, failure of the filing system would undermine the complex, often subtle interaction of policies, interests, and equities vouchsafed by Article 9 of the Uniform Commercial Code. Succinctly, if the filing system fails, Article 9 fails.² Incongruities in the design and operation of the filing system produce results inimical to the object of secured credit and make it worthwhile to revisit the place of the filing system in the Article 9 scheme and the consequences of the system's deficiencies.³ If we expect too much of the filing system, or believe that we can accomplish too much through its reform, the object of Article 9 may be frustrated.

I start by trying to imagine the world of secured transactions without the Article 9 filing system. Let me make clear: I do not imagine a world without secured transactions;⁴ I do not imagine a world in which secured parties would have to publish

* Professor of Law, Marshall-Wythe School of Law, The College of William and Mary. I am indebted to Professor David Frisch for his insightful comments on an earlier draft of this Article.

1. ALEXANDER POPE, EPISTLE TO DOCTOR ARBUTHNOT (1734), reprinted in COMPLETE POETICAL WORKS OF ALEXANDER POPE 176, 180 (Henry W. Boynton ed., 1903).

2. See *Coca-Cola Bottling Plants, Inc. v. Tabenken (In re Brawn)*, 7 U.C.C. Rep. Serv. (Callaghan) 565, 575 (D. Me. 1970) ("It is most improbable that [Article 9's] sponsors anticipated the extent to which secured credit under the . . . Code would be jeopardized by the errors and omissions of secured parties in satisfying the simple requirements of a sufficient financing statement."), quoted in William C. Hillman, *What's in a Name: The U.C.C. Filing System in the Courts*, 44 OKLA. L. REV. 151, 159 n.65 (1991).

3. See James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823 (1993).

4. A number of articles have reviewed the economic arguments for and against secured credit in some depth. See, e.g., Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979); Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984); Alan Schwartz, *Security Interests in Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1 (1981).

in newspapers their memoranda claiming a collateral interest in a debtor's assets; I do not imagine a world without *Twyne's Case*.⁵ I just try to think of a commercial world without filing and then make the case for a filing system *ab initio*. That is, if there were no filing system, would someone have to invent it? What would the invention look like?

To answer that question, we must first decide what we want the filing system to do. Toward this end, this Article examines two different models of the filing system: the informational, bulletin board model and the claim-staking model. According to the bulletin board model, the filing system serves as a source of information for interested parties to learn about the finances of debtors. Most obviously, it allows prospective secured creditors to learn to what degree a debtor has encumbered her assets. According to the claim-staking model, the filing system is, above all else, a means for secured creditors to stake their claims to the debtor's assets. This Article criticizes the informational model and builds on the claim-staking model.

Claim-staking lies at the heart of the filing system's rationale, but claim-staking alone is insufficient. Creditors not only want to stake their claims; they also need to *know* the status of their claims, i.e., whether they have staked their claims in a way that a court will recognize. In short, creditors need to *verify* their claims.

Perversely, the present filing system makes it easy to stake a claim, but makes verification expensive and uncertain. The verifying creditor typically will hire an attorney who tells a paralegal to request financing statements from various filing offices. From the returned filing statements, the attorney theoretically can determine where her client would stand in the priority line provided she files in a correct manner. In essence, the present filing system creates huge expense for creditors by requiring them to obtain uncertain *opinions* on priority.

I propose we remove the need for attorney opinions on priority. State officials should dispositively determine priority among secured creditors. By enabling secured parties to obtain such

5. 3 Coke Rep. 80b, 76 Eng. Rep. 809 (Star Chamber 1601). The case involved a debtor's preferential, and fraudulent, transfer of assets just prior to the issuance of a writ of execution against the debtor. The debtor had remained in possession of the "transferred" property after the conveyance in form. That "ostensible ownership" problem informed the arguments in favor of extending the filing system offered by Douglas Baird and Thomas Jackson. See Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 179-96 (1983).

certain *determinations* of priority, this reform would eliminate uncertainty and thereby reduce cost.

Part I of this Article describes the failures of the current filing system and portends an even more bleak future: The problems with the current system may well be exacerbated rather than corrected by developing technologies and law revision initiatives.⁶ Part II then considers our ambitions for the system. The existence of the competing informational and claim-staking models demonstrates that there is not perfect agreement on our aspirations for Article 9 filing. It is necessary to discern some common interest before we can posit a system that will serve that interest. Part III begins with a vision of the filing system, a theory of filing. It then builds on this theory by developing my proposal that state filing offices determine priority. I conclude that by reformulating the role of the state filing office and the debtor in order to better provide for creditors' verification needs, relatively minor adjustments to the status quo would make the filing system more reliable and save billions of dollars.

I. THE FLAWS OF THE STATUS QUO

Because virtually all secured obligations are satisfied without the secured party's recourse to collateral, even if the current system were completely dysfunctional, even if no filing were properly indexed and no search revealed prior filings, loans secured by personal property collateral would still usually be satisfied.⁷ Also, it would be prohibitively difficult to determine the number of fatally deficient filings now littering the local and central filing offices of this country. In any event, after five years,

6. Although the introduction of more sophisticated technology in this area of the law could be a very good thing, see Lynn M. LoPucki, *Computerization of the Article 9 Filing System: Thoughts on Building the Electronic Highway*, LAW & CONTEMP. PROBS., Summer 1992, at 5, 6, if that increased technological sophistication is not coordinated among the filing venues, a net savings may not be realized. Although the cost savings effected by the proposal described in this Article would need to be compared with the revised filing system rather than just the status quo, proposed adjustments to the filing system may not in fact reduce attorneys' fees significantly. In any event, the drafters of the revision have not offered any data to establish a net reduction in attorneys' fees attributable to filing system compliance. The issue remains largely ignored.

7. That observation leaves aside, for the moment, the fact that many secured loans would not be made in the first place were it not for the *assumed* integrity of the current system.

the good as well as the bad filings generally go away⁸ (even though they may not be purged from the records).⁹

Because most debtors do not go into bankruptcy, there is no meddlesome trustee running a fine-tooth comb through the filing records. Thus, the secured party's failure to file in the right place or under the correct debtor's name matters no more than the tree's falling in the middle of a forest. It is necessary, though, to appreciate what can (and does) go wrong in order to understand what secured parties and their counsel must do to avoid frustration of their expectations.

In the last few years, the Article 9 filing system has been the subject of considerable study. An American Bar Association Task Force¹⁰ surveyed the filing practices of search services and state and local filing offices.¹¹ The Task Force also devoted some attention to the costs of the current system, as well as to emerging technological developments that might impact the evolution of the system. The work of the Task Force resulted in the development of several recommendations for reform of the filing system.¹²

The report of the American Bar Association's Task Force on the state of the filing system described the deficiencies of the system revealed in the Task Force's survey of filing practices

8. At least a filing ceases to matter after five years, unless a proper continuation statement is filed within the statutorily prescribed six-month period. See U.C.C. § 9-403(2) (1990).

9. But Harry Sigman, a member of the Article Study and Revision Committees as well as a member of the Article 9 Filing System Advisory Committee, has noted the filing officers' "urge to purge."

10. The members of the Task Force participating in the study discussed in this Article were Mary Atkinson, John D. Berchild, Michael J. Brandt, Barbara Brewer Clark, Marvin Gillock, Bruce Jacobi, Professor Robert M. Lloyd (Vice Chair of the Task Force), Professor Ann Lousin, Professor Alemante G. Selassie, Jan Whitehead Swift, and Professor Peter A. Alces (Chair). See Report of the Uniform Commercial Code Article 9 Filing System Task Force to the Permanent Editorial Board's Article 9 Study Committee (May 1, 1991) [hereinafter Filing System Task Force], in PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 9: REPORT app. at 13, 15 (1992).

11. The Task Force survey evolved from a questionnaire developed by Harry Sigman, a member of the Article 9 Study and Revision Committees. In 1991, the Task Force published the results in *Survey of the U.C.C. Article Nine Filing System* and issued a Task Force Report based on that study. See *id.* at 16.

12. In 1992, an Advisory Committee, chaired by Jan Whitehead Swift, prepared a report entitled *19 Recommendations for Reform of the Filing System* (on file with author). The Advisory Committee included representatives of constituent interests in the Article 9 filing system.

and review of the case law.¹³ The Task Force Report focused on the speed, accuracy, and cost of the system. A brief review of these findings supports the argument pursued in subsequent parts of this Article that we should carefully limit our ambitions for the filing system.

A. SPEED OF THE SYSTEM

Prudent secured creditors file financing statements against the debtor's property well before the creditor funds the loan that the collateral will secure.¹⁴ Besides providing the means to apprise all others with whom the debtor might negotiate of the creditor's interest in the debtor's property, such anticipatory filing provides the creditor the means, before disbursing the loan proceeds, to assure that its claim is first of record and will have Article 9 priority.¹⁵ The prudent creditor also obtains a certified search, in those jurisdictions where such a thing exists,¹⁶ although it is not clear that all interested parties have the same understanding of what the certification assures.¹⁷

13. See Filing System Task Force, *supra* note 10, at 18-19 (describing scope of Task Force study). For other, more comprehensive reviews of the case law, see Hillman, *supra* note 2, and Julianna J. Zekan, *The Name Game—Playing to Win Under § 9-402 of the Uniform Commercial Code*, 19 *HOFSTRA L. REV.* 365, 379, 433 (1990) (discussing judicial treatment of U.C.C. § 9-402).

14. There is, of course, no requirement that there be an obligation owed the debtor by the creditor in order for there to be a filing: "A financing statement may be filed before a security agreement is made or a security interest otherwise attaches." U.C.C. § 9-402(1). *But see id.* § 9-404(1) ("[W]henver there is no outstanding secured obligation . . . the secured party must on written demand by the debtor send the debtor . . . a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number.").

15. See *id.* § 9-402(1) & cmt. 2.

16. Filing System Task Force, *supra* note 10, at 93-108 (providing state-by-state data regarding availability of certified searches).

17. The ABA Filing System Task Force Questionnaire that supported the Task Force Survey asked respondents whether their state issued "certified" searches and, if so, what the label "certified" signified:

Although thirty-four states reported that certified searches are prepared, only ten states responded that a certified search verifies that all statements on file in the debtor's name are included in the search report. The significance of a certified search in other states is unclear, with two [states] responding that the only significance of a certified search is that it contains the official seal of the Secretary of State's office, several reporting that certified searches are admissible in court, and two states responding that a certified search indicates that it was conducted by appropriate personnel.

Filing System Task Force, *supra* note 10, at 30-31.

In the credit world, time is by definition money. Uncertainty that causes delay increases the cost of credit, and that cost is passed on to debtors (to the extent that the market will bear). At the margin, some debtors will be denied access to secured credit when the cost of credit increases.

So long, however, as a prospective secured party is able to file a financing statement and then receive a search report showing it to be first of record by the time the secured creditor is ready to fund the loan, the system works quickly enough. But if a secured party—ready, willing, and able to fund a loan—is delayed because a filing or search report is delayed, the system does not work quickly enough.¹⁸ This is not to say that all secured creditors will wait for the system if a search report does not come back by the time the secured creditor is ready to fund. But if the secured party proceeds with the financing without first obtaining the appropriate search report, and perhaps even if the secured party later proceeds without a subsequent report showing no intervening interests,¹⁹ the system is not working as designed—although it may be working despite itself.

Therefore, although the best filing system would be a system that could assure instantaneous filing and response, efforts to reduce delay should be considered successful if they reduce delay enough to stop frustrating the expectations of participants in the secured credit system. At present, however, there is no reason to believe that the delays in the current system have actually frustrated deals.²⁰ To the extent that delay has not mattered because secured creditors have proceeded without the

18. See *id.* at 20 (“[A]lthough a filed financing statement becomes effective when filed, it may be some time later before it is indexed so that a search would disclose it.”).

19. A party may want to proceed with financing without obtaining any search reports because of the costs such reports entail:

Although the charges made for searching and filing are minimal, the inefficiencies of the present system impose enormous hidden costs on both borrowers and lenders. Perhaps the most obvious of these is the cost of search firms. In many jurisdictions, the response time on a search request submitted to the central filing office is so long that lenders are forced to employ private search firms to make their searches. For large transactions, this cost is insignificant, but for small transactions it can become important. The result in some cases is that searches that should be made are, in fact, not. For example, some major commercial lenders when taking purchase money security interests fail to search after filing to make sure their financing statement is properly on file.

Peter A. Alces & Robert M. Lloyd, *An Agenda for Reform of the Article 9 Filing System*, 44 OKLA. L. REV. 99, 107 (1991).

20. Filing System Task Force, *supra* note 10, at 20.

assurances that they should require (and could expect were the system working better), the secured creditors' reliance on the system should be reexamined: Do secured creditors really need a faster system when they are willing to fund a loan without the assurances that a faster system would provide? If speed does not matter as much as we thought it did, what is it about the system that does matter? Posing the questions this way will help assure that we do not design more of a filing system than we need, at greater cost than is justified.²¹

Article 9 nowhere specifies what a search report must contain,²² beyond the general statement in optional section 9-407 that upon a secured party's request

the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein.²³

As a matter of course, secured parties contemplating substantial loans will obtain a search report containing copies of all filing statements at any filing office in which a financing statement might have been filed against the debtor.²⁴ Counsel for the secured party will then peruse what may be a stack of financing statements against the debtor's name or similar names to determine which financing statements trigger the need for a termination statement. When in any doubt (and even on occasion when there is no real reason for doubt) the secured party will cause a prior filing to be terminated.²⁵

Because counsel for the secured party will need to review each prior filing in order to opine as to her client's priority, she would be ill-advised to abdicate responsibility for review of prior filings to a filing officer or search service that generates a search report. So the filing system becomes a victim of its own comprehensiveness: The more information that search of the system will yield, the more attorney time required to review search re-

21. Cost here means both the cost of implementing the system as well as the costs imposed on secured creditors (and the secured credit system) for failing to comply with the requirements of the system.

22. Article 9 does describe the duties of a filing officer with regard to financing statements presented for filing. See U.C.C. § 9-403(4).

23. *Id.* § 9-407(2).

24. These reports are generally obtained through search services. See Alces & Lloyd, *supra* note 19, at 107 (noting that lenders often employ private search firms to overcome delays in central filing offices).

25. See U.C.C. § 9-404 (describing termination statement).

sults. In other words, the more that we ask of the system, the more we slow it down and increase the risk that secured parties will refuse to slow their dealmaking to discover whatever investigation of prior filings of record might reveal. Prudence, and malpractice carriers, however, will settle for nothing less than careful deliberation.

A number of possibilities exist for speeding up the system. For instance, the law or regulations could provide greater certainty about what a search report must contain. By clearly stating what documents an attorney can obtain through a search request, such reform would thereby determine the scope of the attorney's responsibility to review documents. The attorney would need to review only those documents pertinent to the priority determination.

The statute could be revised to remove ambiguity where ambiguity requires counsel to take expensive and too often unnecessary precautions. For example, section 9-402(8) provides that financing statements containing "minor errors" that are not "seriously misleading"²⁶ may be effective despite their errors. This provides the courts a means to do equity after the fact by manipulating their interpretation of "seriously misleading," but it also creates the type of uncertainty that a conscientious attorney will always resolve by assuming that a court will do that equity at the expense of her client, and so she will take whatever precautionary measures are available, at some cost.

Similarly, reform could speed the system by reducing the role of subjective inquiries in determining the validity of filings. For instance, section 9-401(2) provides that a deficient filing is nonetheless effective "against any person who has knowledge of the contents of such financing statement."²⁷ This provision injects uncertainty into the system that generates cost by increasing the burden on potential creditors, who may have to establish their lack of inquiry notice to survive the vicissitudes of a court's

26. *Id.* § 9-402(8) ("A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."). Section 9-402(7) is also applicable to financing statements that have errors:

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

Id. § 9-402(7).

27. *Id.* § 9-401(2).

post hoc "knowledge" calculus.²⁸ This is not to argue that the harsh edges of the notice filing system should not, in the interest of fairness and equity, be smoothed by inquiry notice concepts. It is only to point out the costs, for the whole system, that essentially subjective exceptions may generate. Although five thousand attorneys will each review fifty filings for each of five hundred transactions just to avoid the uncertainty of post hoc "knowledge" determinations and never discover anything that could remotely put them on inquiry, their time and fees are a drag on the secured credit system (and, most ironically, still may not provide their clients the assurance they want).²⁹

B. ACCURACY OF THE SYSTEM

Given the volume of paper generated by the filing system, and the varying degrees of competence and sophistication of those who feed the system, rely on the system, and maintain the system, it should come as no surprise that there are inaccuracies. Virtually every constituency with an interest in the system is in a position to undermine its efficacy by providing incomplete or inadequate information.

Secured creditors completing a financing statement may fail to identify properly the debtor, the collateral, and the address of the debtor. Either intentionally or unintentionally, they may even fail to provide sufficient information about themselves to enable third parties to learn more about their claimed collateral interest.³⁰ Although it is reasonable to conclude that the secured creditors responsible for such inaccuracies should suffer the consequences of their own carelessness, the benefits of that predisposition must be balanced against the costs imposed on

28. The UCC defines "knowledge" in subjective terms: "A person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it." *Id.* § 1-201(25). In a related context, regarding priority to chattel paper, a recent Permanent Editorial Board Commentary made clear that the UCC's "knowledge" standard does not impose a duty of inquiry on transferees of property encumbered by an outstanding collateral interest. PERMANENT EDITORIAL BOARD OF THE UCC, PEB COMMENTARY ON THE UNIFORM COMMERCIAL CODE: COMMENTARY No. 8 FINAL DRAFT 7-10 (1991) (addressing U.C.C. § 9-308).

29. An attorney can never know everything that his client has "knowledge" of and thus can only look for whatever might trigger U.C.C. § 9-401(2).

30. Secured parties may try to disguise the essence of their financing for a particular debtor. For example, to give third parties the impression that the debtor is a better credit risk than third parties reviewing the filings records may assume, finance company lenders participating with a bank in the provision of a line of credit may cause the financing statement to read "Bank of —, for itself and as Agent," rather than disclosing the name of the finance company even if the finance company is providing virtually all of the funding.

careful secured creditors who will go to greater expense than we might deem appropriate to avoid a post hoc conclusion that they have been careless.³¹ Arguably, the only beneficiaries of a conclusion that the secured party was careless are the unsecured creditors of the debtor—who realize a windfall when the putative security interest is avoided by the debtor's trustee in bankruptcy. If this is the case, penalizing careless secured creditors the benefits of penalizing careless secured creditors do not justify the systemic costs of requiring all conscientious secured parties to take extraordinary steps to preclude post hoc avoidance.

Filing office personnel, too, add to the problem of inaccuracies in the system. The ABA Survey and Task Force Report revealed that although most filing officers and search service professionals are generally satisfied with the accuracy of filing system searches, there are persistent problems with search accuracy that will likely occur so long as there is any human intervention in the system.³² The accuracy of filing system searches is determined by the skill and care of those who index submitted financing statements and those who perform the searches. Turnover among filing office professionals as well as inconsistencies in the filing and search procedures within filing offices undermine the filing system's accuracy. Because there is such intraoffice inconsistency, secured parties, their counsel, and search services may have good reason to be uncertain about how the system will respond to any given filing or search request.³³

31. This is similar to a point Professor Charles Mooney made in arguing that the filing system should not have been extended to apply to lease interests in personal property. "[A]n unperfected lessor may be exposed to greater costs arising out of loss of its residual value than that incurred by an unperfected secured party. . . . [T]he effects of nonperfection for lessors . . . would be more costly than for secured creditors because lessors rely more on the leased equipment." Charles W. Mooney, Jr., *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683, 711, 713 (1988).

32. See Filing System Task Force, *supra* note 10, at 8; see also Dwight W. Fawcett & Robert F. Hugi, *Hidden Liens: A Trap for the Unwary*, 106 BANKING L.J. 212, 215 (1989) ("[A]s many as 20 percent of the search reports contain an error of some kind.").

33. It should be only somewhat reassuring to secured creditors that there may not be a good faith duty on a creditor to refile a financing statement once the filing officer has accepted it but then revoked that acceptance and returned the financing statement to the secured party. The filing is effective upon the filing officer's receipt of it. U.C.C. § 9-403(1). A bankruptcy court has found that a secured creditor has no good faith duty to refile when that acceptance is revoked. *In re Flagstaff Foodservice Corp.*, 16 B.R. 132, 136 (Bankr. S.D.N.Y. 1981).

Interoffice inconsistencies worsen this problem. Within each state that has local as well as central filing, the secured party will confront potentially divergent practices among the local offices and between the local offices and the central office. Secured creditors who undertake transactions in several states will find little consistency among the different states' practices. While there may be no reason why Maryland should care how West Virginia maintains its filing system, the lack of consistency and coordination among the states imposes costs on secured transactions that are difficult to rationalize. It is not clear what states' rights interest is vindicated by maintaining disparate systems. Insofar as the personal property security law is state law, however, it seems unlikely that federalization of the filing system is imminent.

C. THE REAL COST OF UNCERTAINTY

The two preceding subsections have suggested some of the costs generated by delays and inaccuracies in the filing system. So long as there is room for uncertainty in the system, as a matter of the legal, practical, or technological status quo, there will be work for attorneys to do. In fact, however, many attorneys know very little about the operation of the filing system and rely on paralegals and search services to deal with filing offices. The search services or filing offices provide attorneys with search reports and the attorneys then spend the time (and client money) necessary to support an opinion regarding the priority of claims to the debtor's assets.

Shortly after the ABA Study was completed, the ABA Task Force briefly considered the role of attorneys in the filing system, particularly the attorneys' fees related to filing system issues in typical secured transactions. The percentage of attorneys' fees related to filing issues in secured transactions is determined by the nature of the debtor, the type of financing, and the amount of the secured loan. If a debtor has many subsidiaries, or has collateral in many locations, filings in more filing offices may be necessary to assure the secured party's priority. Similarly, all-assets financing, contemplating a security interest in various forms of collateral, generates more filing system costs than would a purchase money loan in a single piece of equipment. The amount of the financing also may have an impact on the filing costs incurred by secured creditors.³⁴

34. This would certainly be true in states that assess a tax on secured transactions as part of the filing process, such as Tennessee, where a recording

In her report to the ABA Task Force, Meredith Jackson, then an associate working with the commercial law group of Bingham, Dana & Gould, analyzed more than 100 legal bills generated by the firm in its representation of lenders over a five-year period.³⁵ Although the experience of other firms, with different groups of clients making different loans to different debtors, might differ from the Bingham, Dana, & Gould fee pattern,³⁶ there is no reason to believe that the firm's figures are significantly atypical.

Jackson divided the fee data into three categories: small loans (less than \$19 million), mid-size loans (\$20-\$74 million), and large loans (greater than \$75 million). She then "compared the UCC filing costs associated with original financings, workouts, and ongoing maintenance including amendments, etc., and costs for borrowers with two or less subsidiaries to those for borrowers with three or more subsidiaries."³⁷ Finally, she separated the data related to attorneys' fees for loans to leasing companies as presented in Table 1.³⁸

tax of \$0.115 per \$100 of indebtedness is collected. TENN. CODE ANN. § 67-4-409(b) (1994). The first \$2000, however, is exempt. *Id.*

35. Letter from Meredith S. Jackson, Bingham, Dana & Gould, to Professor Peter A. Alces, Marshall-Wythe School of Law, The College of William and Mary 1 (May 28, 1992) (on file with author).

36. *See id.* ("As I stated at the ABA Spring Conference, I do not have any basis to assert that these results are statistically significant, as I am unable to evaluate in what respect our firm's handling of these filings might differ from other firms' methods."). The particular clients served by a firm as prestigious as Bingham, Dana & Gould may be more likely to fund large loans to debtors with multiple subsidiaries in various jurisdictions—suggesting that the firm's filing system-related fees would be higher than would be the case for loans made to smaller debtors—but there is no reason that Bingham, Dana & Gould's legal fees related to the filing system would be a higher *percentage* of the total legal services bill than would be the case with smaller loans to smaller debtors.

The problem, of course, is that this important empirical work has not been completed, nor even taken beyond the work of the ABA Task Force. The attorneys' fees associated with the filing system are crucial to the cost-benefit calculus, and until those who would defend the filing system do empirical research that would controvert the data reported by Jackson, the case for the filing system is uncertain.

37. *Id.*

38. *Id.* at 3.

Table 1. UCC Filing Costs as Percentage of Transactional Costs

	Size of Loan (in millions)		
	Over \$75	\$20-\$74	Under \$19
Original Loan	2.8%	4.7%	3.9%
Maintenance	3.6%	4.9%	1.8%
Workout	5.4%	6.2%	4.8%
0-2 Subsidiaries	2.2%	3.1%	4.1%
3+ Subsidiaries	3.4%	5.1%	4.4%
Leasing Cos. Loans	6.4%	7.8%	15.4%
Average	3.6%	5.4%	4.2%

The figures in Table 1 are provocative, and become even more so when the percentages are translated into dollars. Jackson reported that a typical fee for representing a secured creditor is \$467,100, of which 5.52% (or more than \$25,000) is attributable to filing system cost. The lowest percentage was under 1% (\$40 of an \$11,000 bill) and the highest was 38% (\$6,935 of an \$18,250 bill).³⁹

Whether those figures reflect what secured creditors would have anticipated, and whether it is the province of Article 9 revision to make choices that will reduce attorneys' fees, it seems clear that the figures reflected in Jackson's report are relevant to legislative and regulatory reform of the filing system. The

39. Jackson reported the following figures for "Some Typical Transactions":

Transaction 1: \$45 million credit—working capital (revolving credit loan converting into term loan); six subsidiaries; collateral in 32 states; four-year billing period; total bill: \$467,100; UCC filings billing: \$25,770 (5.52% of total billings).

Transaction 2: \$75 million credit—acquisition finance (term loan) and working capital (revolving credit loan); 12 subsidiaries; collateral in 26 states; four-year billing period; total bill: \$637,250; UCC filings billing: \$26,700 (4.19% of total billings).

Transaction 3: \$110 million workout (senior and sub debt restructuring); five subsidiaries; collateral in 18 states; 15-month billing period; total bill: \$385,400; UCC filings billing: \$18,660 (4.84% of total billings).

Transaction 4: \$12 million workout (restructuring of secured debt as one of four senior secured parties); 14 subsidiaries; collateral in 37 states; 15-month billing period; total bill: \$242,750; UCC filings billing: \$16,810 (6.92% of total billings).

Transaction 5: \$4 million start-up company working capital financing; no subsidiaries; collateral in four states; 13-month billing period; total bill: \$9800; UCC filings billing: \$250 (2.6% of total billings). *Id.*

figures are particularly pertinent to reform because they compel us to ask what we are buying for nearly 5% in the form of attorneys' fees in some typical secured transactions (and more than 15% in other types of secured transactions), and whether we are paying too much for what we get in return.⁴⁰

The relationship between the legal costs generated by the filing system and the dollar size of a particular financing transaction is not fixed: There is no reason to believe that the dollars spent on attorney time for filing issues will increase as the amount of the loan increases. Although there may well be some relationship between the loan amount and the size of the debtor, i.e., the debtor's number of subsidiaries and the locations of its assets, the relationship between the *percentage* of the total legal fee attributable to the filing system and the amount of the loan need not be constant.⁴¹

40. Five percent might not be too much if the filing system provided real protection against the types of transactional risks that concern lenders, but it would be an exorbitant amount to pay if the protections are substantially less than they are designed to be due to incongruities in the system among the states and breakdown or substantial impairment of the system within particular states. The issue remains one of determining what protection the system needs to provide and what we should be willing to pay for that protection.

41. By contrast, a company that sells Article 9 filing system insurance is currently working with several states and would sell creditors insurance at a premium determined by reference to the amount of the secured loan:

Lien Priority Insurance performs all verifying, searching, analyzing search results, preparing financial statements (or comparable documentation), and filing in connection with every commercial loan transaction. This results in our consolidating and standardizing the capture and processing of data. *The coverage includes all costs of defense.* We work with lender, borrower, and their respective counsel to complete the underwriting and issue a policy within the time frame for closing.

The cost of coverage depends on the type of coverage that is selected. For all-inclusive coverage under the enclosed specimen—wherein we would be responsible for determining where and under what names to search, as well as what to file, where to file, under what names to file, and prepare and make all required filings—, the premium would approximate 20 basis points, based on that portion of the loan that is secured by personalty (the gross loan amount, less the value of real estate, as determined by appraisal or title insurance). Frequently, however, the lender or its legal counsel determines where and under what names to file. In those situations, the cost usually is between 2.5 and 6.5 basis points.

Please note that the premium is paid only once (like title insurance). Coverage also includes the systemic risk (i.e., losses resulting from errors in each recordation system that is accessed).

Letter from Gary S. Petler, President, Lien Priority Insurance Agency, Inc., to Peter A. Alces, Professor of Law, Marshall-Wythe School of Law, The College of William and Mary 1 (Nov. 9, 1994) (on file with author).

What secured parties need, so far as the filing system is concerned, is the *assurance* that they will have access to the debtor's assets (or at least the value thereof or the leverage provided by that access) in the event the debtor becomes unable (or unwilling) to satisfy the obligation owed the secured party. Thus, when a secured party invests legal fees in the filing system, it is buying insurance.⁴² This insurance is not inexpensive. Furthermore, even if the risks to which the secured party is exposed remain the same from one transaction to the next, i.e., the amount of the loan, the premium paid in the form of legal fees can vary dramatically by reference to items that are only tangentially related to that risk.⁴³

The point here is that those who would design a filing system must first come to terms with the cost of the current regime. That calculus must take into account the multifarious factors that determine the relationship between the cost of the current system and the protection it affords. This subsection has tried to suggest the nature of the costs involved. The next part of this Article turns to the benefit side of the equation: What does the current system buy at the current cost, and what should commercial transactors realistically expect a reformed system to provide in the future, in light of obstacles to reform?

II. BENEFITS OF THE CURRENT SYSTEM

After the ABA Task Force presented its findings to the Article 9 Study Committee of the Permanent Editorial Board for the Uniform Commercial Code, the members of the Study Committee were asked, in an informal poll, to describe their understanding of the commercial reasons for the filing system.⁴⁴

42. The secured party is certainly buying a portion of its counsel's malpractice insurance, but that insurance does not protect the client against all filing system risk. So long as counsel was not negligent in complying with the filing system, the client would have no recourse against the attorney in the event that a filing system malfunction, in the broader sense, impairs the client's collateral position.

43. See *supra* note 41 and accompanying text (comparing the costs of legal services and lien priority insurance in relation to size of loan).

44. The Study Committee members were asked to consider both the role of and the need for filing:

I would be very grateful if you might be able to take a few minutes to share with me your understanding of the commercial reasons for the filing system (whether or not you agree with those reasons). If any published materials reflect your understanding of the filing issues, it would be very helpful if you could provide me the appropriate citations. Particularly, I am concerned with focusing on the role of the filing system (i.e., to what extent it should be a commercial law "bulletin

Several members of the Study Committee responded to the inquiry,⁴⁵ and a few did so at some length, or at least in some depth.⁴⁶ Some members described the filing system as a sort of bulletin board for credit information concerning debtors. Others focused on the way that the system's claim-staking function serves as a form of fraud insurance for secured creditors. It is important to assess these claims as to what the current filing system *does*: Our conclusions should frame our ambitions for what we *want* the filing system to do in the future. The sections below address the different functions of the filing system identified by the respondents, and then compare what we know about the system with reasonable aspirations for it.

A. THE FILING SYSTEM AS BULLETIN BOARD

The filing system arguably functions as a bulletin board, providing credit information concerning debtors to interested parties. The bulletin board paradigm, however, raises the questions: Does the filing system provide reliable credit information, and, if it does, to whom is it provided?

A properly filed financing statement contains the names of the debtor and the secured party, an address of the secured party, a mailing address of the debtor, "and . . . a statement indicating the types, or describing the items, of collateral."⁴⁷ A party who searches the public filing records and discovers the financing statement will then know enough to ask the right questions: Is the named debtor in fact indebted to the secured party? Is the secured party of record the lender or an agent of the lender? Does the secured party's collateral interest in fact

board"), and in understanding why the contours and dynamics of particular commercial contexts may determine the necessity of filing. Also, who would be victimized if the filing system does not work properly, or if there were no filing system at all? Finally, it would be worthwhile for me to develop a sense of attorney costs that the present system entails.

Letter from Peter A. Alces, Professor of Law, Marshall-Wythe School of Law, The College of William and Mary, to members of the UCC Permanent Editorial Board Article 9 Study Committee (June 11, 1991) (on file with author).

45. I received written responses from Howard Ruda, Of Counsel, Hahn & Hessen; Bradley Y. Smith, Davis, Polk & Wardell; Edwin E. Smith, Bingham, Dana & Gould; Steven L. Harris, Professor, University of Illinois College of Law (Co-Reporter of Study Committee); Paul M. Shupack, Professor, Benjamin N. Cardozo School of Law, Yeshiva University; and Morris W. Macey, Macey, Wilensky, Cohen, Wittner & Kessler.

46. The following portions of this Article will not attribute particular arguments to particular respondents.

47. U.C.C. § 9-402(1).

reach the assets described?⁴⁸ In short, a search reveals the potential interests of prior secured parties, at least in sufficient form to provoke inquiry of the debtor and those prior secured parties. Without access to filed financing statements, the potential creditor would have to rely on representations made by the debtor and information acquired through the creditor's own investigation.⁴⁹

No careful counsel would suggest that the filing system is a surrogate for a thorough credit investigation, but the filing system, even when it works imperfectly,⁵⁰ does provide information about prior claims to the debtor's assets. There are, of course, claims to the debtor's assets that would not be disclosed by filed financing statements.⁵¹ Still, the filing system need not provide perfect and complete information to be a valuable source of information. It is from this perspective that the filing system as "bulletin board" argument proceeds.

Proponents of the bulletin board view argue that the filing system can also provide interested parties with useful information beyond that required by a minimal Article 9 financing statement. It provides creditors with the means to assert their interest in the debtor's assets, even if that interest arises as a matter of contract rather than by operation of Article 9. Edwin E. Smith, a leading commercial attorney and a member of the Article 9 Study and Revision Committees, explained:

48. Given the operation of § 9-203(1)(a) and § 9-402(1), the secured party will have a perfected collateral in the debtor's assets properly described in both the security agreement and the financing statement. If the descriptions are not coextensive, the secured party will be perfected only to the extent of the more limited of the two descriptions.

49. Professor Mooney points out that even with the Article 9 filing system, a creditor interested in the debtor's title to particular property must still investigate further:

[E]ven if a debtor is in possession of goods and no filings are found, an interested person nevertheless must conduct further investigation to determine the nature and existence of conflicting claims to the goods. Such investigation is necessary even in order to determine the appropriate filing office to be searched. As a general matter, the Article 9 scheme extends only to whatever rights in the goods which the debtor might have. The nature and extent of the debtor's rights must be divined from the debtor or other sources.

Mooney, *supra* note 31, at 749 (citations omitted).

50. The party searching the filing system who comes across an improperly filed financing statement is on notice of the claim represented by that financing statement and would be subordinate to that creditor's claim. U.C.C. § 9-401(2).

51. See, e.g., *id.* § 9-310 (providing that certain business liens "given by statute or rule of law . . . take[] priority over a perfected security interest").

I also seem to have little problem with the concept of the Article 9 filing system being used as a commercial "bulletin board". I have seen this technique used on various occasions for negative pledge agreements and subordination agreements. In the case of a negative pledge agreement, of course, it is in the interest of the creditor in whose favor the negative pledge is granted to put other creditors on notice of the existence of a negative pledge. In the case of a lender filing a subordination, it is in the interest of the debtor to provide comfort to a new senior creditor extending credit to the debtor that the senior creditor will in fact be senior. Although neither example fits squarely into the original purposes of the Article 9 filing system, it seems to me that the commercial "bulletin board" approach, by providing even additional information about the debtor than that required by the Article 9 filing system, is useful. And, as the examples indicate, can benefit either the creditor or the debtor depending on the particular circumstances.⁵²

Even if secured creditors and debtors file nothing more than the prototypical forms of financing statement, rather than the forms of agreement that Smith discussed, the system will provide information that searchers may find useful beyond merely making the priority determination. Those in the business of selling money may rely on the filing system in order to find potential customers in what can be a very competitive market, by discovering who has borrowed from whom and in order to acquire what. There is no reason that inquisitive competitors could not search the system to see what the business down the street or across town has been up to lately.

The system also operates as a bulletin board when it provides just the information that those who designed the system intended it to disclose: the relative priority of claims to assets of particular debtors. It affords those interested in doing business with the debtor on a credit basis invaluable information about the debtor's ability to provide sufficient security, information that can determine the terms upon which the creditor will make credit available to the debtor.

Dean Douglas Baird was one of the first commentators to reflect on the bulletin board potential and reality of the filing system.⁵³ He concluded that the system does operate as a reliable and worthwhile bulletin board for the benefit of prospective secured creditors, but does not effectively serve the interests of

52. Letter from Edwin E. Smith, Bingham, Dana & Gould, to Professor Peter A. Alces, Marshall-Wythe School of Law, The College of William and Mary 1-2 (July 31, 1991) (on file with author).

53. Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53 (1983).

other transactors, such as unsecured creditors. Without a filing system,⁵⁴ Baird explained that potential secured creditors

would have to investigate [the debtor's] financial condition in greater detail or charge a higher rate. Alternatively, [the secured creditor] could shift (but not eliminate) the risk by forcing [the debtor] to post a bond or by finding some third party to guarantee [the debtor's] ownership of the property he possesses.⁵⁵

Baird started from the appropriate perspective, the relative costs and benefits of abandoning the filing system,⁵⁶ and concluded that the system is worth the candle:

The information that the Code provides secured creditors in its filing system is exactly tailored to their need to know whether any claim they make to a particular asset will have priority over any other. The filing system is, in effect, a place where secured creditors stake claims to the debtor's property.⁵⁷

Baird is correct. The existence of the filing system is the best argument for the filing system. If the system did not exist, there would be no certain way to "stake a claim" to a debtor's assets.⁵⁸ The filing system is not merely *evidence* of a claim to particular personal property, it is the sum and substance of that claim. So the overwhelming benefit of the system is not the information it provides, but the legal consequences that flow from the existence of the information source. In Baird's words, "it makes the existence of property rights public in a clear and unambiguous way."⁵⁹

This vision of the system may overstate its efficacy,⁶⁰ and it certainly fails to consider the consequences of the filing system's

54. Baird noted that many discussions of the Article 9 filing system "do not address the question[] why there should be any filing system at all." *Id.* at 55.

55. *Id.* at 56. The type of guaranties Baird suggested are common, although the secured party generally has the guarantor assume secondary liability for the principal obligation rather than guarantee the debtor's ownership. This is essentially the same as having the guarantor guarantee ownership, but is short of having an insurance company issue a title policy. Baird noted that a creditor could "rely on a third party (similar to a title insurance company) to provide information and to guarantee the information's accuracy." *Id.* at 58.

56. *Id.* at 60.

57. *Id.* at 62.

58. Baird recounted Professor Schwartz's and Dean Scott's application of a "prospecting" theory to the filing system: "[T]hese rules . . . allow a creditor who has discovered a good credit risk (like a miner who has discovered a valuable mineral deposit or an inventor who has hit upon a new idea) to have exclusive rights to the financing opportunity." *Id.* at 63 (citing ALAN SCHWARTZ & ROBERT SCOTT, *COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES* 594-97 (1982)).

59. *Id.* at 63.

60. Baird may have more confidence in the filing system than the ABA Task Force Study would suggest is warranted. He asserts: "[A] creditor can lend money to a debtor with confidence because he knows (by looking at the

uncertainty. A secured party who has done nothing wrong or careless may be a victim of the system if the system's deficiencies compromise its effectiveness at providing information. Because the filing system establishes priority, the cost of mistakes is greater than it would be if the system were merely a source of information. Furthermore, the cost of making sure there are no mistakes may be greater even in cases where there are no mistakes. Thus, there are costs both when the system fails and when it works, because it works so uncertainly, and the prospects for making its operation more certain are not favorable.⁶¹ The cost of the system when it does properly describe the priority of contestants to the debtor's assets is a cost that we have come to ignore, but must not ignore, if we want to make an argument for a system in anything like its current form.

Baird also considered what information the system actually needs to provide in order to effectively give notice of the possible existence of prior security interests. His conclusion does not support an elaborate bulletin board conception. The filing system, rather than rewarding inquiry with the full details of recorded security interests, merely "gives notice only of a duty to inquire further"⁶² to determine if prior security interests encumber a debtor's assets. A filing system can perform this notice function without providing much in the way of a bulletin board. If, however, we want the filing system only to perform a notice function, why should the statute require that a filed financing statement contain much beyond the name of the secured party and the debtor? One answer is that the system is a priority register, not just an information source, and we might not want to make it too easy to gain a priority claim to assets. Another answer would be that we do trust the system to provide some information, to operate *incidentally* as a partial bulletin board, even if we do not want to come to terms with the consequences of the system's failure to provide the information effectively.

files) that no other existing creditor can claim an interest in the property superior to his own." *Id.* at 63 (citation omitted).

61. The political obstacles to reform are considerable: The filing system is not particularly important to Secretaries of State, the public officials charged with its maintenance. Indeed, there may be undesirable consequences for a Secretary of State who endeavors to effect real reform of the system.

62. Baird, *supra* note 53, at 61. Baird did acknowledge that there is nothing in the UCC that requires the secured party of record to respond to third-party inquiries. *Id.* As a matter of fact, however, there may be good business reason for creditors to cooperate with one another.

On balance, it may be that we would be most comfortable with a system that merely imparts inquiry notice. A pure inquiry notice system would provide less (and less specific) information than the current partial bulletin board system, but it might cost less to maintain. Also, the less ambitious our design of the system, the less that can go wrong with it. If the system then fails to provide information that the market demands, the market, I assume the law-and-economics types will point out, will obtain the information some other way.⁶³ And it is not clear that this other way will cost as much as the current system costs. The work that must be done to support that determination has not yet been done in the various Article 9 contexts, nor is it clear that it is even contemplated.

Wholly apart from Baird's conclusion that the system does not really serve as a bulletin board to inform the commercial choices of *unsecured* creditors is the question of whether adjustment of the system could enhance its utility by providing reliable information to unsecured creditors at a reasonable cost. It may be that unsecured creditors do not use the current system because the benefit of using it is not worth the cost. That is, the information the system provides unsecured creditors is too incomplete to be of much use to unsecured creditors and obtaining that incomplete information is too costly. The revisers of Article 9 could enhance the value of the information the system provides or reduce the cost of obtaining that information. That is, they could do so in theory. But I doubt whether they could do so in fact: Requiring candor and truthfulness in filings would likely prove to be merely a hortatory admonition.

In any event, it is not clear how much unsecured creditors really need financial information concerning the value of their individual debtor's assets. Many if not most unsecured creditors who sell on open account do so and then worry later if the debt is not satisfied. The cost of the goods and services provided by unsecured creditors probably reflects, to the extent the market will bear, some premium to cover bad debts. If it cost unsecured creditors nothing to find out which accounts will be paid and which will not before the fact, they would certainly take advantage of that information and price their goods or services accordingly. But even perfect information about a debtor's payment history is only probative and not determinative of the debtor's

63. Edwin Smith's commentary on this Article notes alternative sources of credit information. See Edwin E. Smith, *Commentary on Abolish the Article 9 Filing System by Professor Peter Alces*, 79 *MINN. L. REV.* 715, 718 (1995).

payment in the future. So the price charged by an unsecured creditor would reflect a certain nonpayment risk anyway, even if unsecured creditors had perfect information about the payment histories of all of their debtors.

Baird recognized that the filing system does not provide perfect information; it affords inquiry notice, notice of little value unless you are prepared to pursue the inquiry. Insofar as it is unclear that the system will provide unsecured creditors more reason to inquire than they would have without first reviewing the system, or will reduce the cost of such an inquiry, there is not much information that the system has to offer unsecured creditors. After all, by deciding not to require collateral, the unsecured creditor is agreeing to be subordinate to later-in-time perfected secured parties. So even if the unsecured creditor were to learn something from the system, later events could render the most perfect information moot.⁶⁴

Using the filing system would also impose costs on the unsecured creditor, i.e., the cost of discovering where to search the filing records, actually searching those records, and then distilling from those records legal and financial information pertinent to the unsecured creditor's credit decision. Insofar as the creditor contemplating secured status⁶⁵ or the potential purchaser of the debtor's assets⁶⁶ runs the risk of obtaining actual knowledge of a misplaced filing, the unsecured creditor may be even worse off for having performed a search of the system.⁶⁷

It is also true that many unsecured creditors would have no way to search a filing system before they could assert a claim against the debtor's assets. Nonconsensual creditors, those with claims arising from the debtor's tortious activity, are not within the contemplation of the notice function of the filing system. But

64. Baird noted that, although the filing system is not designed to serve the interests of unsecured creditors, it is of some use to them. Baird, *supra* note 53, at 61-62. He concluded that those who have argued in favor of abolishing the system have done so because they have failed to appreciate that the system is meant to serve the interests of secured, not unsecured, creditors. *Id.* at 62 (citing Allison Dunham, *Inventory and Accounts Receivable Financing*, 62 HARV. L. REV. 588 (1949)).

65. Or, the unsecured creditor who later takes a judicial lien.

66. The buyer of equipment would likely not be a buyer in the ordinary course of business and so would take subject to any security interest, even an unperfected security interest, of which that buyer has knowledge. U.C.C. § 9-301(1)(c).

67. *See id.* § 9-401(2) (providing that deficient filings are nonetheless effective "against any person who has knowledge of the contents of such financing statement").

some consensual creditors, the less sophisticated perhaps, might not even know that there is an Article 9 filing system, and even a larger group of creditors would not appreciate the consequences of the notice filing system in any event.

Yet the most prominent reason why unsecured creditors may as well ignore the Article 9 filing system is the fact that federal bankruptcy law effectively gives unsecured creditors a lien against the debtor's assets when they most need one: when the debtor is in bankruptcy. As Professor White has demonstrated, a great deal of Article 9 filing system action occurs in the bankruptcy court under the current regime.⁶⁸

For the reasons discussed in the foregoing paragraphs, it is not difficult to appreciate why the filing system does not serve an informational need of unsecured creditors. The question remains, then, whether the informational benefits that the system provides secured creditors justify the associated costs it imposes on them.

The current system, so far as secured creditors are concerned, provides a far from perfect bulletin board. Apart from the priority ordering function, the filing system is a relatively convenient, if not very reliable, place to put information that you would like other potential or existing⁶⁹ secured parties to acquire. There is, however, no guaranty that anyone will actually learn what you want them to learn and no filing system sanction imposed for a failure to heed the bulletin board information.

Furthermore, it may be that a cost of enhancing the bulletin board function is disruption of the priority function of the filing system. The more we ask of the system the greater the cost in cluttering the system—more paper, more attorney time going through it, more opportunity for error. At some point, it could be that the cost of providing certain information exceeds the commercial benefits of providing it. At least it would seem that we should have a better sense of the costs and benefits of the status quo before we decide to increase the burdens on the system. Do we know enough to say with any confidence that the benefits of relying on the system to provide broader credit information would exceed the costs of such a model? That is unlikely, insofar as we have yet to come to terms with the costs of the current system in each of the various secured credit contexts. We have

68. See White, *supra* note 3, at 830-41.

69. See U.C.C. § 9-312(4)-(5) (providing certain later purchase money secured parties priority over prior secured parties of record).

continued to *assume* the efficacy, the inevitability of the system; we have yet to *establish* the system's efficacy.

B. THE FILING SYSTEM AS FRAUD INSURANCE

Many commentators argue that the filing system's primary purpose is to provide creditors with insurance against the risk that a debtor will impose secret liens on its assets to frustrate the claims of creditors.⁷⁰ There are two principal ways in which this fraudulent "secret lien" problem might arise. The first form involves a conspiracy between a debtor and a creditor to deceive the debtor's other creditors. As Professor Paul Shupack⁷¹ and Morris Macey have noted,⁷² the filing system establishes, with some certainty, "the earliest possible date for perfection of the interest of the secured party."⁷³ Without the date certainty that the filing system provides, an unscrupulous debtor and creditor could, in some states, defraud earlier lien creditors. For instance, Mr. Macey noted that, prior to the enactment of Article 9 in Georgia, a bill of sale to secure debt was effective to perfect a collateral interest in personal property and did not require filing for perfection.⁷⁴ A debtor and creditor could defraud earlier lien creditors by backdating a bill of sale that created a security interest in the creditor's favor.

The Article 9 system is not, however, the only conceivable means to prevent such fraud. For instance, this type of fraud might be avoided by requiring some official notation on an official record stating the date on which a debtor granted a collateral interest in particular property.⁷⁵ Such a device would not

70. See, e.g., David M. Phillips, *Flawed Perfection: From Possession to Filing Under Article 9* (pts. 1 & 2), 59 B.U. L. REV. 1, 209 (1979) (advocating greater reliance on perfection through filing that serves as insurance to many creditors rather than perfection through possession).

71. Letter from Paul M. Shupack, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, to Professor Peter Alces, Marshall-Wythe School of Law, The College of William and Mary 1-2 (July 29, 1991) (on file with author).

72. Letter from Morris W. Macey, Macey, Wilensky, Cohen, Wittner & Kessler, to Professor Peter A. Alces, Marshall-Wythe School of Law, The College of William and Mary 1 (July 2, 1991) (on file with author).

73. Letter from Paul M. Shupack to Professor Peter Alces, *supra* note 71, at 1.

74. Letter from Morris W. Macey to Professor Peter A. Alces, *supra* note 72, at 1.

75. This type of record would be desirable in any event given the timing issues that may arise in Article 9 litigation—concerning future advances, after-acquired property, and purchase money security interests—and in subsequent bankruptcy proceedings. See 11 U.S.C. §§ 547, 548 (1988) (covering preferences

be foolproof, but it might close enough of the fraudulent-dating loophole to justify its adoption. The test is whether the device buys enough protection at sufficient savings over the status quo to reduce the real cost of secured lending.

The filing system also prevents pure debtor fraud—the kind that the debtor commits without the help of a collusive creditor by granting successive collateral interests in the same property without notifying each secured party of the (prior) adverse claimants. This is the true secret lien problem and, for some, it is the *raison d'être* of the filing system. If the filing system did not provide an effective means to avoid the risk of pure debtor fraud, there might not be any remaining viable argument in favor of the filing system. So if there is to be a filing system, it must reduce, if not eliminate entirely, this fraud risk.⁷⁶

There are two interrelated elements to the secret lien fraud risk: Some claims against the debtor's property may remain "secret" but effective notwithstanding the Article 9 filing system, and enterprising debtors who find their schemes frustrated by Article 9 may well find other means to defraud a secured creditor.

Article 9 gives effect to a number of ostensibly "secret" liens. For instance, section 9-310 recognizes the priority of certain non-Article 9 collateral interests arising by operation of state law so long as the liens are possessory.⁷⁷ Given the possession requirement, these potentially secret liens do not pose a serious threat to the integrity of the filing system.⁷⁸ Also, counsel for secured lenders spend time reviewing the available compendia of non-uniform state liens prior to closing secured loans so that their creditor clients can try to obtain necessary subordination agreements, or at least so that counsel's closing opinion letter can except assets within the scope of the secret liens.

Professor Lynn LoPucki has developed a catalog of ten scenarios in which the current filing system would not reveal an effective prior claim to the debtor's assets to even a very diligent secured party-searcher of the filing records:⁷⁹

and fraudulent transfers). See generally PETER A. ALCES, *THE LAW OF FRAUDULENT TRANSACTIONS*, chs. 5-6 (1989 & Supp. 1994) (describing statutory and common law responses to various types of fraudulent dispositions).

76. There may be so many other debtor-fraud risks that the risk of pure debtor fraud is relatively insignificant.

77. U.C.C. § 9-310.

78. Ostensible ownership issues would not be implicated because the collateral interests recognized in U.C.C. § 9-310 are possessory.

79. LoPucki, *supra* note 6, at 7-9.

1. Filings against the debtor's predecessor in title;⁸⁰
2. Defective filings;⁸¹
3. Filings not yet appearing of record;⁸²
4. Filings in former name of debtor;⁸³
5. Effective filings in other jurisdictions;⁸⁴
6. Filings against mobile goods prior to debtor's relocation;⁸⁵
7. Local filings that remain effective after debtor relocates;⁸⁶
8. Filings relating to goods whose characterization has changed;⁸⁷
9. Automatic perfection contexts;⁸⁸ and
10. Filings that diligent search would not reveal but which courts later determine a diligent search should have revealed.⁸⁹

There are, as well, claims to assets that are effective by operation of some other, non-Article 9 filing system, e.g., tax liens and judgments.⁹⁰

It is difficult to tell whether reform of the system could avoid the problems associated with these hidden (if not secret) interests. Whether we should even attempt to eliminate all such hidden interests should be a matter of cost/benefit analysis: Recognizing that no system will be airtight, what are the marginal costs of getting closer to a vacuum compared with the marginal benefits of each incremental step? Before we can even compose that equation, we must frame our reasonable aspirations for the system.

80. See *id.* at 7 & n.5 (citing U.C.C. § 9-402(7) & cmt. 8; Jay L. Westbrook, *Glitch: Section 9-402(7) and the U.C.C. Revision Process*, 53 GEO. WASH. L. REV. 408 (1984)).

81. *Id.* at 7 (citing U.C.C. § 9-403(1)).

82. *Id.* (citing Filing System Task Force, *supra* note 10, at 57-63).

83. *Id.* (citing Westbrook, *supra* note 80).

84. *Id.* at 8 (citing U.C.C. § 9-103(1)(d)).

85. *Id.* (citing U.C.C. § 9-103(3)(e)).

86. *Id.* (citing U.C.C. § 9-401(3)).

87. *Id.*

88. *Id.* at 8-9; see also Phillips, *supra* note 70 (advocating more structured filing system to avoid problems inherent in perfection through possession).

89. LoPucki, *supra* note 6, at 9 & n.19 (citing Zekan, *supra* note 13).

90. See Baird, *supra* note 53, at 59 n.18.

C. WHAT'S A FILING SYSTEM TO DO?

Commentators have wondered for some time just what it is we want the filing system to achieve. Baird concluded that we want the system to provide a place to stake claims to assets.⁹¹ Other commentators focus on debtor (and secured party) fraud problems.⁹² Still others focus on the bulletin board benefits the filing system provides.⁹³ Although it may be that true consensus about the role of the filing system has yet to be realized, there does seem to be general agreement that the system enhances the value of a creditor's collateral interest in the debtor's assets.⁹⁴ Without the certainty of priority (at whatever level) that the system provides, secured creditors would have to charge a higher interest rate to compensate themselves for the increased risk to which they would be exposed if there were no similarly certain means to assure priority. This argument, however, depends on the assumption that the incremental benefit provided by the system is greater than the cost of providing that benefit.

So, to assess the value of the current filing system, it is necessary to measure the incremental benefit and to appreciate the true costs. The thesis of this Article is that the commentators who have heretofore extolled, or at least assumed, the benefits of the current filing system have failed to come to terms with either the costs of the system or the incremental benefits it provides. Furthermore, proponents of reform of the filing system—and all of Article 9, for that matter—compound the problem of inadequate cost/benefit analysis by proposing agenda that do not properly consider the real and probably insurmountable⁹⁵ obstacles to reform. But it is only after careful cost/benefit analysis

91. *Id.* at 63.

92. *See supra* notes 73-78 and accompanying text (discussing arguments that date certainty from filing system prevents various types of fraud).

93. *See* LoPucki, *supra* note 6, at 31-37 (discussing benefits of "bulletin board" approach to Article 9 filings); *supra* note 52 and accompanying text (quoting letter from Edwin E. Smith).

94. *See* Baird & Jackson, *supra* note 5, at 175 (explaining that the filing system provides secured parties with inexpensive means to perfect collateral interests, enabling secured parties to charge lower interest rates than if they lacked certainty about priority of their claims). The authors do note, however, that "[t]he Code assumes that [the benefit provided by the filing system] outweighs the costs imposed upon secured parties by the requirement that they take possession or file." *Id.*

95. The term "insurmountable" is used here in an economic sense: If the benefits of overcoming obstacles to reform are less than the costs of achieving reform, the obstacles are insurmountable for all intents and purposes.

that the important work on an alternative to the current filing system should properly proceed.

Contemporary apologists for the filing system have urged its expansion: They advocate adjusting the filing system so that it would apply to more contexts than those currently contemplated by Article 9. Baird and Jackson would impose a filing requirement in lease transactions to respond to an ostensible ownership problem⁹⁶ that Professor Mooney has proven does not exist.⁹⁷ Professor LoPucki recognizes that the current system is not only incomplete, but fatally defective,⁹⁸ and yet he proposes that the design of a revised system be enhanced so that searchers could obtain more—and more reliable—information from a review of filings.⁹⁹

These arguments for expansion apparently fail to recognize that by increasing the burden we impose on the system we would make it less reliable. The ABA Task Force Report demonstrates that many systemic deficiencies are a product of the volume of information that the system accumulates. If the current system is collapsing of its own weight, how do we improve it by compounding the problems that currently plague it? Furthermore, the proposals for expansion of the system do not offer evidence, empirical or otherwise, that secured creditors cannot and do not now obtain the information that the proposed enhancements would provide. Nor do they demonstrate that the costs saved by having the system provide the information are more than the increased costs imposed on the system, and therefore on secured credit, by having the system provide the information that concerned creditors now seem to be able to discover (to their satisfaction) without the help of the filing system.

Professor LoPucki's proposal does make clear that the enhanced role he perceives for the system would only evolve as the system takes greater advantage of technological innovation.¹⁰⁰ He notes that there is substantial room for improvement given the relative lack of sophistication in the current system. He is right about the deficiencies of the status quo, but he fails to recognize that the very same factors that have prevented the sys-

96. See Baird & Jackson, *supra* note 5, at 186-90 (arguing that filing lease transactions would avoid potential conflicts from third-party interests in personal property).

97. See Mooney, *supra* note 31.

98. See LoPucki, *supra* note 6, at 6-15 (arguing that the current system is too cumbersome and unreliable to allow complete searches).

99. *Id.* at 15-31.

100. *Id.*

tem from keeping up with the ostensible information needs of secured creditors under the current law will also prevent the system from satisfying secured creditors' desires for the foreseeable future. To oversimplify, there are two principal impediments: a lack of funds and a lack of incentive. The case has simply not been made to filing system operators that they have anything to gain from improving the system. Keep in mind that the Maryland Secretary of State has no reason to care about how her West Virginia counterpart searches for and files financing statements.

It is from this pessimistic perspective that my conception of a filing system emerges. The system should do no more than we are absolutely certain it could do well, namely, insuring a secured party by providing a memorandum of collateral interest that clearly affords the secured party the priority rights provided by Article 9. I am not convinced that the memorandum need be published or notorious so long as it exists and the secured party is *assured* the first-in-time priority that is the premise of Article 9. The next part of this Article describes a filing regime that could effectively serve the secured party's (and the secured credit system's) need for this type of credit insurance that the current system is designed—but fails—to provide.

III. THE STATE ASSURANCE MODEL

A. A PLACE TO START

Although it is evident that secured creditors look to the filing system to stake claims to assets of their debtors, the extent to which they *actually rely* on the system is uncertain, and likely varies from one creditor and one transaction to the next. Bradley Smith, a member of the Article 9 Study Committee, explained that in his "own practice, which focuses on big ticket transactions and large companies, the functioning of the filing system is of relatively limited importance. My clients tend to rely on other due diligence measures to a greater extent."¹⁰¹ If that observation reflects the experience of similarly situated commercial counsel, it would be worthwhile to take that lack of

101. Letter from Bradley Y. Smith, Davis Polk & Wardwell, to Professor Peter A. Alces, Marshall-Wythe School of Law, The College of William and Mary 1 (July 12, 1991) (on file with author). It may be that not all counsel appreciate, as Mr. Smith does, the limited efficacy of the current system. To the extent people think it works more reliably than it actually does (and they are likely to think so because almost all loans are repaid) they are likely to miscalculate its value and be comfortable paying for it at the current rate.

reliance on the system into account when deciding what alternative to the status quo might adequately serve commercial interests. How much insurance in the form provided by the filing system do creditors such as those represented by Smith need to buy, and how much should they have to pay for it?

So my imagination of a world without a filing system begins with a very limited view of the benefits provided by the system, a view informed by the scope, efficacy, and commercial value of the current system. Admittedly, I paint my picture of the filing system landscape with a broad brush. My arguments in favor of abolishing the current system and starting all over again—without *assuming* either the need for or the effectiveness of the current system—proceed from what may be insufficient discrimination among the various secured transaction contexts. It may well be that the present filing system works better in some settings and not so well in others (determined by reference to the type and value of the collateral and the sophistication of the creditors and debtors as well). Nonetheless, I would impose the burden on those arguing in favor of the present filing regime to provide empirical evidence of its efficacy. That is, those who would defend a filing requirement must establish that the secured credit system is more efficient with that requirement than without it. To the extent that they can demonstrate in particular contexts that a filing requirement works (and not merely because it does not often matter that it fails), a revised Article 9 should, through statute and regulation, provide for its application to those contexts.¹⁰² Even in those limited contexts, however, advocates of a filing system must demonstrate that imposition of a public notice requirement is the least expensive, most efficient means to the desired end.

From these premises, from this limited filing theory, an alternative emerges.

102. This type of inquiry into the extent that a filing requirement works in particular situations distinguishes Mooney's article in response to Baird and Jackson's ostensible ownership thesis. See Mooney, *supra* note 31 (critiquing proposals to extend filing requirement to leases); Baird & Jackson, *supra* note 5 (arguing for extending Article 9 notification rules to leases and other bailments). In fact, Mooney's argument is so convincing that it would seem he has already made the case for excepting purchase money security interests in equipment (the Article 9 analogue of lease transactions) from the Article 9 filing requirement. I am indebted to Professor David Frisch for recognizing this consequence of the Mooney critique.

B. A SKETCH OF THE STATE FILING ASSURANCE MODEL

The central purpose of Article 9 filing is to allow creditors to stake their place in the priority line. Perversely, the system allows creditors to stake their claims but requires them to spend a great deal of money to learn if their claims might be valid. Creditors' counsel must sift through piles of documents to produce uncertain opinions on priority. A new filing system should focus on Article 9's claim-staking insurance function but provide creditors with an efficient, inexpensive means to verify the validity of their security interests. One easy way to realize this goal would be to provide state filing offices the power to determine priority.

Under the current Article 9 filing and search systems, the different filing offices accept financing statements, put them into the system, and provide access to the records the filings create. The efficacy of the system, as the preceding parts of this Article have demonstrated, depends on the system's providing a certain way for secured creditors to assert their claims to the debtor's assets. It is the filing offices that control the information that determines the priority of an asserted claim. But the filing office in no way makes the determination that a particular creditor has a prior claim. The filing offices only provide access to the information from which that conclusion might be inferred.

Many of those who have been concerned with the operation of the filing system have argued that the filing offices, and individual filing officers, should be mere conduits for financing statements: They should accept whatever financing statements creditors present to them so long as the creditors pay the required fee. They should then let the courts and counsel sort out priority claims after the fact. There is a good deal to commend this view. Filing office staffs usually do not have the legal training to exercise the type of judgment that is required to determine Article 9 priority. A fact of bureaucratic life is that there is significant turnover in filing offices, where even the best paid administrators may not command the salaries that would attract people to dedicate their professional lives to the sweet science of Article 9 financing statements.

Consider, however, what would happen to the cost of the filing system if the filing offices issued *assurances* that the secured party filing a financing statement had a particular priority claim to the debtor's assets. That is, would the costs of the current system be reduced without too great a loss of benefit if filing offices provided creditors the same assurance that a private in-

sure could provide by issuing something like credit insurance? Filing offices would certainly have to increase the fees they charge to reflect the insurance cost of providing such priority assurances. But this reform would also eliminate a substantial portion of the attorneys' fee cost generated by the current system.¹⁰³ Secured creditors' counsel would have no reason to issue a priority opinion because the assurance of the filing office would *determine* priority.

If filing offices insured creditors against priority risk, then the costs of the system's malfunction would be imposed on the actors in the best position to maintain the system: the public filing offices. Shifting the risk of priority loss would provide incentive to develop and maintain coherent practices to make the priority determination more certain. It would, in sum, cause the state filing offices to internalize what are now externalities. Every dollar in claims not paid out of the state insurance fund would be money that the state could keep, so there would be real compensation for assuring the integrity of the system.

While requiring filing offices to make priority determinations would entail that filing officers exercise legal judgment, due to the determinative nature of that judgment, it should cost secured creditors less than what they currently pay when buying uncertain priority opinions from attorneys. The uncertainty of the present system costs money; the state assurance filing system would eliminate that uncertainty. Once counsel no longer opines as to priority, counsel should be satisfied as long as the filing officer issues the priority assurance. And if the filing officers require that the collateral description be printed on orange paper, creditors' counsel need only comply; she need not reason why. Counsel will be comfortable with the filing office's judgment, because the secured creditor is protected whether the filing office erred in its priority judgment or not.

Such a system would also avoid most of the wasteful Article 9 litigation over perfection described by Professor White.¹⁰⁴ Outside of the bankruptcy context, an unperfected secured party has priority over an unsecured creditor.¹⁰⁵ In the bankruptcy context, however, if a creditor loses *perfected* status, then the creditor also loses *secured* status.¹⁰⁶ This naturally creates an

103. The attorney for the creditor would still prepare the financing statement.

104. See White, *supra* note 3 (discussing the cost of unnecessary filings and litigation regarding secured creditors' perfection).

105. U.C.C. § 9-301(1).

106. The Bankruptcy Code provides that:

incentive for trustees in bankruptcy to litigate the issue of perfection so as to create a windfall for the unsecured creditors. Under the regime proposed here, however, so long as the secured party receives the dated certificate of priority from the filing office, the secured creditor has nothing to fear from the trustee in bankruptcy: The security interest will, necessarily, be perfected. This result would naturally decrease the trustees' incentive for litigation. The state filing officer's assurance would also determine the date of perfection for purposes of preference and fraudulent transfer inquiries in bankruptcy.¹⁰⁷

Certainty of perfection in this context would have the added benefit of reducing attorneys' fees related to preparation of financing statements. Again, creditor's counsel would no longer have to worry whether a bankruptcy judge could *later* determine that the creditor's collateral interest is unperfected: The issuance of the priority certificate would foreclose the perfection inquiry. As the requirements for and success of perfection would be clearer under the state assurance filing model, attorneys could prepare filing documents with less worry and more efficiency.

The state filing assurance system would also prevent fraud, much as the current system does. By providing a certain date for perfection, it would prevent debtors and creditors from colluding to manufacture the priority of a secured party to defraud later creditors.¹⁰⁸ The state filing assurance alternative would also respond to the other type of fraud risk, the true "secret lien" risk that the debtor will fail to disclose to one potential secured party the existence of a competing security interest. The current filing system prevents this sort of fraud by ensuring that a creditor considering the extension of secured credit need not rely on the debtor to disclose existing collateral interests. If the state filing office issues a priority certificate, based on the filing of-

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of . . .

(1) 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 creditor exists.

11 U.S.C. § 544 (1988).

107. See *id.* §§ 547-48 (establishing 90-day and one-year limitations periods).

108. See *supra* notes 70-76 and accompanying text (discussing possible fraud in absence of certain dates for perfection).

ficer's review of the records, a creditor would not have to rely on the debtor's representation any more than the creditor would have to rely on the debtor under the current regime.

Furthermore, the state filing assurance model could reduce the risk of secret liens by requiring that debtors disclose claims to the debtor's assets as part of the priority certificate process. The debtor would also be required to disclose those events that impair the priority of a filed financing statement under the current law.¹⁰⁹ In addition, it might well prove worthwhile for states to coordinate their practices to develop a system of interstate checks to aid verification when a debtor's business crosses state lines.¹¹⁰ This disclosure obligation could be continuing, so that creditors with "filings of record" (or who otherwise subscribe to the system) would receive pertinent notices¹¹¹ until they file a termination statement.¹¹² Of course, creditors can currently provide in loan covenants that debtors make such disclosures at the inception of and during the course of the credit relationship. But the state could impose criminal sanctions on individuals for false swearing.¹¹³

Although a private insurance (rather than a state filing assurance) alternative to the current system might be an improvement over the status quo, one real shortcoming of that type of reform is that it would not effect dramatic improvement of the system itself.¹¹⁴ Private insurers would continue to insure cred-

109. See *supra* notes 79-90 and accompanying text (outlining scenarios in which the current filing system fails to reveal effective prior claims).

110. Interstate cooperation in verifying claims would reduce the risk of secret liens in several of the 10 scenarios that Professor LoPucki identified as posing the danger of secret liens. See *supra* notes 86-87 and accompanying text (noting risks when filings appear in other jurisdictions and when filings are made against mobile goods before debtor's relocation).

111. Notices would issue, for example, when the debtor reports a change of name, change of location, change of location of collateral, or change in corporate structure. Cf. U.C.C. § 9-401 (stating that a proper filing remains effective even though the debtor's location or the location of the collateral subsequently changes).

112. An ongoing disclosure obligation might provide states with an opportunity to share filing system information as a means to check a debtor's veracity. This would not be unlike the states' reciprocity systems in the case of drivers' licenses.

113. See Baird, *supra* note 53, at 61 ("If the legal system needs to be changed to give general creditors more protection, additional civil and criminal penalties for debtor misbehavior seem more appropriate than requiring more information in the filing system.") (citing Jeffrey Helman, *Ostensible Ownership and the Uniform Commercial Code*, 83 *COM. L.J.* 25, 31 (1978)).

114. A state assurance system would best operate as the intermediate step toward privatization of filing system insurance. Were the states to fix certainly

itors against the uncertainties still inherent to the system. Although private insurance would rationalize how creditors pay for uncertainty, it would not alter the fact that uncertainty costs money.

Individual states' adoption of the state filing assurance alternative, by contrast, would immediately remove uncertainty from the system, reducing the cost of secured credit. Furthermore, because the state would be selling priority certificates rather than merely providing access to its records, the state could make a good deal of money from the business and still charge less than the filing system attorneys' fees under the status quo. The filing fee would represent the aggregation of risk of loss because of filing system error rather than an amount determined by private counsel's review of sometimes ambiguous records.

Further enhancing its chances for enactment, a revised Article 9 that settles with certainty the perfection issue in the bankruptcy context would likely win the support of the large institutional creditors. The state assurance filing model guarantees perfection and thereby destroys the danger that these creditors now face of losing their *secured* status because a trustee in bankruptcy prevails upon a court to defeat the creditors' *perfected* status.

For those who favor the bulletin board model and argue that the filing system is a source of valuable (albeit expensive) information beyond the perfection issue, there would be no reason that filing offices could not continue to sell access to their files. But once the priority certificate issues, further review of the files would not divest a collateral interest. The certificate would establish both perfection and priority absolutely.

Finally, to ensure that the state assurance system described here in fact provides what the market demands and no more,¹¹⁵ the system would be voluntary, an option for creditors willing to pay for the certainty the assurance provides. A creditor unwilling to pay for perfection and priority assurance could simply file a financing statement and pay only a filing fee, not an assurance "premium." Provision of the assurance as an alternative rather

creditors' perfected status and priority, private insurers could less expensively insure creditor-policy holder's positions because the perfection and priority determinations would be made at the initiation of the credit, not post hoc, in the bankruptcy context. The insurer would not have to charge a premium to reflect the risk of post hoc unperfection.

115. See *supra* part III.A (discussing need to frame the filing system's goals in light of the credit system's actual needs).

than requiring all creditors to pay for protection some of them may not want vindicates market integrity: Real cost savings are accomplished by spreading risk, but only when the transactor determines that it is more efficient to spread the risk rather than, effectively, to self-insure.

CONCLUSION

This Article has described the state of the current Article 9 filing system in terms of its costs and benefits. It has focused attention on an element of cost that has been largely ignored, attorneys' fees. It has also suggested that the cost of reforming the current system, given the substantial political obstacles to reform, would be greater than current advocates of reform might appreciate. The Article has also endeavored to distill the benefits provided by the current filing system, and has argued that the benefits are not what they may seem to be. The cost of the system can only be understood in terms of the very limited benefits the system provides.

Ultimately, this Article argues that the current system fixes a butterfly upon a wheel, expends too much to realize too little. All of the significant benefits provided by the current system could be provided at far less cost if the incentive for maintaining the system were imposed on the entities in the best position to improve the system: state filing offices. State coffers would benefit from the cost savings enjoyed by the resulting reduction in filing system uncertainty and attorneys' fees. That should not be a hard sell with state legislatures and would encourage, rather than frustrate, states' adoption of a revised Article 9.