How to Adjudicate a Debtor Name Dispute under Revised Article 9

Introduction

As a starting point, let me get two things off my chest. First, I have heard it said that Revised Article 9 has weakened the avoidance power of bankruptcy trustees. This is hardly true, at least in my area of expertise, the filing of and searching for financing statements under former and Revised Article 9. In fact, the drafters purposely raised the bar for filers by eliminating the application of the "minor error" exception to debtor names. In so doing, they increased the clout of bankruptcy trustees as arbiters of what is a sufficient, not-seriously-misleading, effective financing statement. Second, the courts so far have generally made a mess of adjudicating Revised Article 9 filing cases on the debtor name issue.

By shedding light on the second issue, I will provide ammunition for bankruptcy trustees to hold filers fully accountable to get debtor names right under Revised Article 9.

Bankruptcy trustees must conduct extensive due diligence with respect to creditors that claim security interests in collateral of the debtor. In my companion article, "How to Review UCC Financing Statements," I summarize the due diligence steps you must take to decide whether to challenge a claimed security interest that requires filing of a UCC financing statement. In this article I examine in fine detail how a bankruptcy trustee should manage litigation with respect to a debtor name entered on a financing statement that is determined to be so different from the correct name that the financing statement is seriously misleading, thereby voiding the security interest altogether.

Many laws require giving public notice by filing a form or document with a government agency. The key to finding a relevant form or document among those filed has always depended on the agency's system of indexing the names of the parties listed on the form or document. Historically, one of the most contentious details with respect to the effectiveness of a UCC financing statement or other lien notice has been whether the debtor name entered on the notice is CLOSE ENOUGH TO CORRECT to have legally provided notice of the lien. The types of lien notices of interest to a bankruptcy trustee include:

1. UCC financing statements filed under Revised Article 9
2. UCC financing statements filed under former Article 9
3. Federal tax lien notices
4. State tax lien notices
5. Local tax lien notices
6. Judgment lien notices
7. Farm product notices
8. Special filings, such as aircraft lien and patent lien notices

In the good old days, that is, before the effective date of Revised Article 9,[1] analysis by the courts of indexed name cases pretty much followed the same track with respect to whether a name as entered on any one of these lien notice forms was close enough to correct. The vast majority of opinions decide whether the debtor name error was harmless (for example, as a "minor error" under former Article 9) by applying the "reasonably diligent searcher" rule.[2] Under this rule, if a reasonably diligent searcher could be expected, in the court's opinion, to locate the lien notice in the public record even though the name as entered on the notice was only similar to the correct name, then the name entered on the form was close enough to correct to provide constructive notice to the public.

A sampling of classic debtor name cases associated with these types of lien notices include the following:

1. UCC (former Article 9)— *Mines Tire*[3]
2. Federal tax lien—*Richter's Loan*
3. Judgment lien—*Waicker*

[1] The effective date of Revised Article 9 was July 1, 2001 in most states, with the exception of Alabama, Florida and Mississippi (January 1, 2002), Connecticut (October 1, 2001), and Virgin Islands (April 1, 2002).
[2] In a few instances in the past, courts have held notice filers to a higher standard, that is, that the filer has a duty to get the name right, but that was clearly the minority opinion under former Article 9 (See *ITT*).
[3] In this article, case citations are abbreviated. A complete list of case citations appears at the end of this article.

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Revised Article 9 attempts to unburden the searcher from the "reasonably diligent searcher" rule with respect to UCC financing statements by requiring the filer to put the "debtor's correct name" on the financing statement. I am not going to dwell on how successful that effort may turn out to be, but rather will focus in this article on the new methodology that court should be—but have not been—using to analyze and decide debtor name cases under the new law.

Step #1—Decide Which Law Applies

Revised Article 9 contains a totally new set of provisions with respect to determining the sufficiency of a debtor name entered on a UCC financing statement. These provisions separate Revised Article 9 law from the case law that should still apply both to pre-effective-date UCC financing statements and to all non-UCC notice filings. However, recent court cases have failed to recognize this difference. As a result, courts have been applying the wrong law to debtor name cases. To choose the right law, the court should first apply these two tests to any lien notice.

Test 1: Is the notice a non-UCC notice filing?

The laws that apply to names entered on non-UCC notices has not changed. It is therefore inappropriate to assume that a new state law like Revised Article 9 somehow overrides federal law and other, unrelated state law.[4] The court should not apply Revised Article 9 law to notice types 3-8 listed above. Rather, it should apply the "reasonably diligent searcher" or other case law that continues to apply to name on such notices.

Trustee Recommendation: In deciding whether the debtor name on a non-UCC lien notice is a serious error, use the same analysis you have historically used prior to Revised Article 9.

Test 2: Is the notice a pre-effective-date financing statement, that is, one filed prior to the effective date of Revised Article 9 that has not been amended under Revised Article 9?

The transition rule Rev. UCC §9-705, properly interpreted, permits the debtor name rules in effect under former Article 9 law (the "minor error" rule) to apply until the financing statement is amended under RA9,[5] at which time the debtor name rules of Revised Article 9 begin to apply. In two of the first cases relevant cases, the courts misapplied the one year rule in Rev. UCC§9-705(a) to pre-effective-date financing statements.[6] The court should apply the former Article 9 "minor error" rule and relevant case law to debtor names on these unamended, pre-effective-date UCC financing statements.

Trustee Recommendation: The transition rules take the reasonable view that it is inherently unfair to apply the new, tougher Revised Article 9 debtor name rule retroactively to a debtor name entered on a financing statement before the new law was enacted. It would be irresponsible, therefore, for a bankruptcy trustee to claim to the court that the stricter Revised Article 9 debtor name rules apply. However, at the point an amendment is filed to a pre-effective-date financing statement, the filer is responsible to bring the financing statement up to Revised Article 9 standards, and the strict debtor name rule is thenceforth in effect.

Trustee Recommendation: Before challenging any of these notice filings based on errors in a debtor name, apply the "reasonably diligent searcher" rule, not the Revised Article 9 debtor's correct name rule, to individual debtor names that contain a common nickname and to organization names that contain abbreviations.

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[4] A lower appeals court in the only recent applicable federal tax lien case that I am aware of (*Spearing Tool*), applied a newly minted, IRS-unfriendly "reasonably diligent filer" rule to the detriment of the IRS, which had made no mistake in entering its version of the debtor name on its tax lien notice. Even though the facts indicate that the federal tax lien was properly filed in the name "the debtor used…on the federal tax lien," the US District Court, on appeal form the bankruptcy trial court, ruled in favor of the secured lender because "It is not reasonable for searchers to conduct one search for liens that might include federal tax liens, and require them to conduct separate, multiple searches under the debtor's multiple possible names for a possible federal tax lien. The burden on the government to include corporate taxpayers' registered names seems slight by comparison." An appeal has been filed in the 6th Circuit Court of Appeals.

[5] The word "amendment" is redefined by Revised Article 9 to include continuation and termination statements.

[6] *Erwin* and *Kinderknecht.*

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Step #2—Apply Revised Article 9 Rules

The term "financing statement" is redefined in Revised Article 9 to include both the initial financing statement and any amendments thereto. (That's the reason in Test 2 above that the new law only begins to apply upon amendment of a pre-effective-date UCC filing.) If Revised Article 9 has been determined by the facts to apply to a financing statement, the next phase of adjudication is to apply the relevant provisions of Revised Article 9, IN THE RIGHT ORDER.

My review of new cases reveals that both litigants and courts are unfamiliar with the new law. Because of this, the law is being interpreted in ways that suggest a former Article 9 mindset. There are four questions that the court needs to consider. Before stepping through them, the court needs to be aware of a related issue.

The Multiple Debtor Name Issue

According to UCC §1-102(5)(a), words in the singular include the plural. The official commentary makes the point that according to this usage there may be more than one debtor or secured party listed on a financing statement. However, the commentary fails to note that the use of the word "name" includes its plural, "names," as well. **Thus, there is no stricture in Revised Article 9 that a debtor may have only one name.** The early Kansas debtor name cases adjudicated under Revised Article 9 (*Erwin* and *Kinderknecht*) make this point. It is both clear and obvious from an analysis of just these two cases that courts have no trouble declaring that a debtor can have more than one correct name.[7] In recognition of this fact, I have phrased the first two questions below in the plural.

Furthermore, once the courts ponder this issue, I conjecture that they will eventually decide that the diligence standard for filers will be to list **at least one** correct debtor name on a financing statement, and that, as a consequence, a reasonably diligent searcher under Revised Article 9 will be required to search on **all** "reasonably" correct debtor names.[8]

Question 1: What are all the correct names of the debtor under Rev. UCC §9-503?

Revised Article 9 provides very specific rules to determine the name of a registered organization, and specific sources for the names of most other organizations, including trusts. The court should be expected to have the least trouble applying the new law to registered organizations and to organizations named in written documents to determine the exact name as it appears, including upper/lower case, punctuation and corporate ending. On the other hand, the law provides little guidance with respect to certain organization names or to the variations of first-middle-last names of individuals. Courts have already had trouble applying common sense to individual names, and that issue will not go away anytime soon.

In all instances, the analysis of what constitutes a correct name should be pursued by the court independently of and prior to any other considerations, such as possible searching issues. Once the list of correct names has been determined, the court will likely concede (as in *Erwin* and *Kinderknecht*) that each of those names is "sufficient" according to Rev. UCC §9-503.

Trustee Recommendation: As part of your financing statement review procedures, make sure to consider whether the named debtor may have more than one correct name. Especially with respect to individual names, do not assume that the obviously correct or full legal name is the only one a reasonable court will accept. Only challenge debtor names that you are convinced are clearly and convincingly incorrect. Let a competing secured party do the heavy lifting if it wants to make a federal case based on a close call.

Question 2: Is (are) the debtor name(s) on the financing statement one of (all of) the correct names, that is, "sufficient," under Rev. UCC §9-503?

The next step is for the court to compare its list of correct debtor names to the name as entered on the financing statement.

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[7] The appellate court in the *Kinderknecht* case disagreed with the trial court that Terry Kinderknecht was a correct name, but accepted that Terrance J. Kinderknecht and Terrance Joseph Kinderknecht were both correct names.

[8] I argue in my publication *UCC Revised Article 9 Alert* that even organizations, including registered ones, can have more than one correct name under Rev. UCC §9-503. Names of individuals provide the most obvious example of multiple correct debtor names. My correct names reasonably include at least Carl Ernst, Carl R. Ernst and Carl Raymond Ernst, and I have one son whose correct names include at least C. Alexander Ernst.

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a. Debtor name is sufficient—If the court determines that the name on the financing statement is sufficient, the case analysis is concluded, the case is over, and the filer wins.[9]

Even if a debtor name on the list does not agree exactly in style or punctuation with the name on the financing statement, I expect the court will accept certain close approximations, such as:

(1) The debtor name on the financing statement is all capital letters, but correct name contains lower case letters, eg, ERNST PUBLISHING CO., LLC v. Ernst Publishing Co., LLC
(2) Letters in the debtor name on the financing statement agree with the correct name, but not the punctuation, eg, ERNST PUBLISHING CO LLC v. Ernst Publishing Co., LLC
(3) The corporate ending of the organization name on the financing statement agrees with the correct name, but is not abbreviated the same way, eg, ERNST PUBLISHING CO LIMITED LIABILITY COMPANY v. Ernst Publishing Co., LLC.

The court must remember, however, not to fall back into the analytical mode of former Article 9 and other non-UCC lien law where the concept of "minor error" or "harmless error" becomes a legal issue. The "minor error" door is closed.

Trustee Recommendation: Consider giving the creditor the benefit of the doubt if the name on the financing statement agrees with the correct name except for the types of minor technical differences mentioned here. Otherwise, the court may crush your case with the quote from official comment #2 to Rev UCC §9-506 about "fanatical and impossibly refined reading of statutory requirements."

b. Debtor name is not sufficient—If, on the other hand, the debtor name is determined not to be sufficient, the financing statement is "seriously misleading " under Rev UCC §9-506(b), and the court must next tackle Question 3.

Question 3?: Does the filing office provide a search using a form of "standard search logic" as contemplated in Rev. UCC §9-506(c)?

Having determined in the analysis of Question 2 that the financing statement is seriously misleading as a matter of law, the court can now consider whether Rev. UCC §9-506(c) can be invoked to save the filer from the twin doom of an ineffective financing statement and an unperfected security interest. For the court to use this provision, the filing office in which the financing statement was filed must itself pass a test. It must have an indexing system that provides a search using something called "standard search logic." The "if any" phrase in the provision tells the court that not every filing office provides such logic. Therefore, the court cannot proceed without making a determination of fact about Question 3.[10]

In my publication, *UCC Revised Article 9 Alert*, I write extensively about what "standard search logic" means and how it varies from other forms of search logic. For the purpose of this article, let me make just a few observations the court should be made aware of so its analysis proceeds in the right direction:

(1) Unlike former Article 9, Revised Article 9 contains a provision, Rev. UCC §9-526, requiring offices to adopt and publish administrative rules. Most but not all state central filing offices have adopted rules. Except in a couple of states, these rules are not applicable to land recording offices.
(2) One of the purposes of administrative rules is to further define terms not defined in the law. In accordance with Rev. UCC §9-526(b)(2), the International Association of Commercial Administrators has developed a set of model rules, which include rules defining "standard search logic," (Rule 503.7 and others). Most state central filing offices that have adopted rules have adopted a form of the model "standard search logic" rule.
(3) It is fair to say that the search principles embodied in the model rules can be applied to determine whether a filing office without administrative rules provides this type of search.

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[9] However, courts have not yet figured out when to stop writing. If Mike Erwin or Terry Kinderknecht is a correct debtor name, that's it, end of case. There is no particular sense in then babbling on about how the trustee or competing secured party might have found the name in a search of the index.

[10] No court has yet shown any appreciation of this question. My view is that approximately 10 state central filing offices, including Florida, and all land recording offices **do not provide** any search using "standard search logic." *Summit Staffing* is a Florida case that ignores this question, invoking the "reasonably diligent searcher" rule in a filing office that has neither administrative rules nor "standard search logic."

(4) Many filing offices, like the Kansas central filing office, provide both a "standard search logic" search and another form of more flexible, unofficial, uncertified search. Results of other forms of search logic are not admissible in court.[11]

a. Filing office does not provide a search using "standard search logic"—If the court determines that the filing office does not provide a "standard search logic" search, the Rev. UCC §9-506(c) test cannot be used, the financing statement is "seriously misleading" under Rev. Ucc §9-506(b), and the case analysis is concluded, the case is over, and the filer loses.

b. Filing office provides a search using "standard search logic"—If the court determines that the filing office provides a "standard search logic" search, the Rev. UCC §9-506(c) test can be used, The court should proceed to tackle Question 4.

Trustee Recommendation: The prevalence with which the "reasonably diligent searcher" rule is invoked in UCC and non-UCC debtor name cases prior to Revised Article 9 indicates an inclination of courts to favor the secured party over the hypothetical lien creditor. You may have an uphill battle to convince the court not to skip this step in its analysis process. Therefore, it is crucial that you become familiar with the model administrative rules[12] so you can assess whether the filing office has officially adopted administrative rules and whether these rules indicate the use of "standard search logic."

Question 4: Would an official search of the filing office index, as of the appropriate date, of one of the "correct" debtor names, using by the office's "standard search logic," disclose the otherwise insufficient debtor name as entered on the financing statement?

This question takes a lot of words to state because the court must take care that the test is conducted fairly.

A fair search requires consideration of the following elements:

(1) Was the search performed on the filing office's own system? In some offices, the searcher may perform online the same official search as the filing office performs from a written request, using the official filing office system provided on the Internet.
(2) As of what date should the search be performed? In a bankruptcy case, an appropriate date might be the date the court received the initial bankruptcy filing. Since a trustee's search will not be conducted until days, weeks or months later, the court should make sure that the program logic did not change during that time period.[13]
(3) Were search requests obtained for each of the exact, correct forms of the name? As indicated above in my discussion of multiple debtor names, I think the searcher will be required to search under all the correct names determined in Question 1. Also, there is no fudging allowed in the format of the names. If a correct name including punctuation is "Ernst* Pub-Co., LLC," it must be requested just that way.[14]
(4) Did the search results report contain only an exact list of matching results? No page flipping on a computer screen or review of similar name lists is allowed.

a. The search discloses the debtor name entered on the financing statement—The financing statement is not seriously misleading under Rev. UCC §9-506(c) even though the name is not sufficient under Rev. UCC §9-503.

b. The search fails to disclose the debtor name entered on the financing statement—The name has failed the test, so the financing statement remains seriously misleading under Rev. UCC §9-506(b).

Trustee Recommendation: Obtain a statement from the filing office (a) that it uses "standard search logic," and (b) that the "standard search logic" used as of the date of your search was the same as programmed as of the date of the bankruptcy filing. Never allow the secured party to submit to the court

[11] Official comment #2 to Rev. UCC §9-506 recognizes that substitutes for an official search are not permitted to be used in court: "A financing statement that is seriously misleading under this section is ineffective even if it is disclosed by (i) using a search logic other than that of the filing office to search the official records, or (ii) using the filing office's standard search logic to search a data base other than that of the filing office."
[12] The model administrative rules are available at www.iaca.org under the Secured Transaction Section.
[13] For example, search logic changed completely on August 12, 2004 in the California central filing office.
[14] If the filing office does not allow a search request to be entered with punctuation, special characters, and/or upper/lower case, it is an indication that the office may not be using a form of "standard search logic."

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any search results other than the results of an official filing office search that uses (a) the whole debtor name as search input and (b) "standard search logic."

Debtor Name Cases

I have applied these four questions to recent cases, and summarize the courts analysis and my comments in the charts below. In these charts, F.S. stands for financing statement and SSL for "standard search logic."

Erwin **(Kansas)**

Question	Court	Comments
1. Correct Names	Mike Erwin, Michael A. Erwin	Whether "Mike" should be a correct name is moot.
2. Name on F.S.	Mike Erwin	Analysis should have ended here because this name is one of the correct names.
3. SSL Available	Used non-SSL search.	Unnecessary.
4. 9-506(c) Match	Searcher should have searched under all correct names.	Unnecessary.
Conclusion	Filer wins.	Filer wins.

Note: The court's opinion contains lots of other analysis errors, including failure to do Step #1. The case should have been tried under former Article 9 law.

Kinderknecht **(Kansas)**

Question	Bankruptcy Trial Court	Bankruptcy Appellate Panel
1. Correct Names	Terry Kinderknecht (signed that way), Terrance J. Kinderknecht	Terrance J. Kinderknecht (no nicknames allowed by this court) Terrance Joseph Kinderknecht
2. Name on F.S.	Terry Kinderknecht	Terry Kinderknecht
3. SSL Available	Yes	Yes
4. 9-506(c) Match	Searcher should have searched under all correct names.	Search would not find the name on the F.S. (Any or all names issue not discussed.)
Conclusion	Filer wins.	Trustee wins.

Note: The trial court reached the same conclusion as in *Erwin*, based on accepting the nickname as a correct name; my comments on *Erwin* apply equally to the trial court opinion in *Kinderknecht*. The appellate panel correctly analyzed the difference between the two forms of search logic provided by the filing office.

Pankratz **(Kansas)**

Question	Court	Comments
1. Correct Names	Rodger House	Actual spelling of first name, as signed on security agreement.
2. Name on F.S.	Roger House	Entered name was misspelled.
3. SSL Available	Yes	
4. 9-506(c) Match	Search would not find name on F.S.	
Conclusion	Competing secured party wins.	Correct conclusion under Revised Article 9, but case tried under wrong law.

Note: Court failed to do Step #1. The case should have been tried under former Article 9 law. Court made the same mistake as the *Erwin* court in misinterpreting Rev UCC §9-705(a).

Receivables Purchasing **(Georgia)**

Question	Court	Comments
1. Correct Names	Network Solutions, Inc.	
2. Name on F.S.	Net work Solutions, Inc.	Space added on the F.S in middle of first word.
3. SSL Available	Assumed yes	The Georgia system office has published no

		rules regarding its "exact search" logic, so it is a matter of facts not determined in the court analysis whether the search logic constituted "standard search logic."
4. 9-506(c) Match	Search would not find name on F.S.	True
Conclusion	Competing secured party wins.	Same result if SSL were deemed not available.

Note: If this debtor name error had occurred in a filing office that provides IACA model search logic, the debtor name on the F.S. would have been found, the financing statement would have been effective, and the defending secured party would have won!

***Summit Staffing* (Florida)**

Question	Court	Comments
1. Correct Names	Summit Staffing of Polk County, Inc.	
2. Name on F.S.	Summit Staffing	Former DBA
3. SSL Available	Assumed yes	It is easily provable that the privatized Florida UCC filing system does **not** have "standard search logic."
4. 9-506(c) Match	Yes	Defendant used the old-style, page-flipping method to find the record. Plaintiff failed to make the appropriate argument to counter this unacceptable search method.
Conclusion	Filer wins.	Trustee should have won if properly litigated.

***Spearing Tool* (Michigan)**

This is a federal tax lien case, but was treated like a Revised Article 9 case by the District Court to which it was initially appealed. It has now been appealed by the IRS to the 6th Circuit Court of Appeals.

Question	Bankruptcy Trial Court	District Court on Appeal
Revised Article 9 Applies?	No	Yes
1. Correct Names	Spearing Tool and Manufacturing Co. (per Articles of Organization) Spearing Tool & Mfg. Company, Inc. (per tax returns)	Spearing Tool and Manufacturing Co.
2. Name on F.S.	Spearing Tool & Mfg. Company, Inc.	Spearing Tool & Mfg. Company, Inc.
3. SSL Available	Not applicable.	Not discussed, but filing office does have "standard search logic.
4. 9-506(c) Match	Not applicable.	Search would not find the name on the F.S.
Conclusion	IRS wins. "Reasonably diligent searcher" rule invoked.	Competing secured party wins.

Note: I think the district court got this all wrong. It is not an Article 9 case, period. Let's see what the 6th Circuit says.

Conclusions

1. Bankruptcy trustees are on the front line in the battle to figure out what the laws of filing and searching under Revised Article 9 really mean.

2. Trustees should not hesitate to target financing statement filing and content errors and to appeal trial court decisions that don't make sense.

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3. Appeal courts need to get more of these cases so good case law can prevail. Until then, filers and searchers will continue their old, sloppy habits.

Case Citations

Cases mentioned in this article are in alphabetical order by name of debtor.

Most of the cases listed below are summarized by Keith A. Rowley, Associate Professor of Law, on the site of the Law School at University of Nevada in a continually updated list. Click the "RA9 Cases" button at http://www.law.unlv.edu/faculty/rowley/article_9_updates1.htm

In re Erwin, 50 U.C.C. Rep. Serv. 2d 933, 2003 WL 21513158 (Bankr. D. Kan. 2003)

ITT Commer. Fin. Corp. v. Bank of the West, No. 97-50500, 5th Circuit, 166 F.3d 295; 1999 U.S. App. LEXIS 620; 37 U.C.C. Rep. Serv. 2d (Callaghan) 855.

In re Kinderknecht, 300 B.R. 47, 51 U.C.C. Rep. Serv. 2d 1234 (Bankr. D. Kan. 2003), *rev'd*, 308 B.R. 71 (B.A.P. 10th Cir. 2004)

In re Mines Tire,[15] 194 B.R. 23; 1996 Bankr. LEXIS 353; 28 Bankr. Ct. Dec. 1086

Pankratz Implement Co. v. Citizens National Bank, No. 02-C-647 (Kan. Dist. Ct., Reno County Dec. 31, 2003)

Receivables Purchasing Co. v. R&R Directional Drilling, L.L.C., 588 S.E.2d 831 (Ga. Ct. App. 2003)

Crestmark Bank v. United States (*In re Spearing Tool & Mfg. Co.)*, 292 B.R. 579, 51 U.C.C. Rep. Serv. 2d 572 (Bankr. E.D. Mich.); *rev'd*, 302 B.R. 351 (E.D. Mich. 2003); appealed to US Court of Appeals, 6th Circuit (2004, Case # 04-1053)

Richter's Loan Co. v. United States, No. 15971, UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, 235 F.2d 753; 1956 U.S. App. LEXIS 5069; 56-2 U.S. Tax Cas. (CCH) P9706; 49 A.F.T.R. (P-H) 1799, June 22, 1956

In re Summit Staffing Polk County, Inc., 305 B.R. 347 (Bankr. M.D. Fla. 2003)

GARY W. WAICKER et al. v. FABIO K. BANEGURA et al, 357 Md. 450, 745 A.2d 419, 2000 Md. LEXIS 39

[15] In this article, case citations are abbreviated. A complete list of case citations appears at the end of this article.

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