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Notes

TRADE NAME FILING: SHOULD IT BE SUFFICIENT TO PERFECT A SECURITY INTEREST UNDER U.C.C. SECTION 9-402?*

One way a secured party may perfect his security interest under the Uniform Commercial Code is to file a financing statement under the debtor's name. Though many debtors use trade as well as legal names, the Code has failed to make clear whether a filing under the debtor's trade name alone is sufficient to perfect a security interest. This Note discusses the accepted per se and ad hoc analyses as well as the more recent "flexible" approach to this problem. The author concludes that though a limited "flexible" approach is workable, the best solution is to amend section 9-402 to require the filing of the debtor's legal name explicitly.

INTRODUCTION

BEFORE THE ENACTMENT of article 9 of the Uniform Commercial Code (UCC or Code), the law governing secured transactions consisted of a variety of complex,¹ irregular,² and unclear³ security devices. The drafters of article 9 sought to develop a "simple and unified structure" to enable creditors to create security in-

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1. See U.C.C. § 9-101 comment (1977).

The recognition of so many separate security devices had the result that half a dozen filing systems covering chattel security devices might be maintained within a state, some on a county basis, others on a state-wide basis, each of which had to be separately checked to determine a debtor's status.

Id.

2. See *id.*

[A]n unfiled chattel mortgage was by the law of many states 'void' against creditors generally; a conditional sale, often available as a substitute for the chattel mortgage, was in some states valid against all creditors without filing, and in states where filing is required was, if unfiled, void only against lien creditors.

Id.

3. See *id.*

It was often baffling to try to maintain a technically valid security interest when financing a manufacturing process, where the collateral starts out as raw materials, becomes work in process and ends as finished goods. Furthermore, it was by no means clear, even to specialists, how under pre-Code law a security interest might be taken in many kinds of intangible property—such as television or motion picture rights—which have come to be an important source of commercial collateral.

Id.

terests⁴ with greater certainty and lower cost than was possible under the pre-Code laws.⁵ Yet, secured creditors⁶ still confront difficulties under article 9, as illustrated by the controversy surrounding the correct filing of the debtor's name in a financing statement.

Filing a financing statement is one means⁷ by which a secured party can perfect his security interest.⁸ Perfection is intended to provide third parties with notice of prior security interests in the collateral.⁹ By providing this notice, the secured creditor's interests in the collateral will generally be superior to the interests of third parties.¹⁰

The drafters of the UCC intended to create a filing process that requires minimal formalities¹¹ but provides adequate notice to third parties.¹² Section 9-402 of the Code defines the elements of an effective financing statement.¹³ While the drafters considered it to be a radical improvement over the pre-Code law, section 9-402 generated enough controversy to be revised substantially in the Code's 1972 amendments.¹⁴

Section 9-402's failure to instruct secured parties whether to file their financing statements under the debtor's legal name, trade name, or both particularly troubled the courts.¹⁵ Without such instruction a subsequent creditor wishing to ascertain whether a security interest in his debtor's collateral existed had no idea how to conduct an effective search.

4. *Id.* § 1-201(37) defines "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation."

5. *Id.* § 9-101 comment.

6. *Id.* § 9-105(1)(m) defines a secured party as "a lender, seller, or other person in whose favor there is a security interest."

7. The secured party may also perfect his interest through possession. *Id.* § 9-302(1)(a).

8. A critical reading of U.C.C. § 9-303(1) and comment 1 discloses that perfection does not guarantee the secured party's superior rights in every case. As one commentator succinctly noted, "Perfection through possession or filing does not assure the financier of victory; it merely keeps him in the contest." 1A P. COOGAN, W. HOGAN, D. VAGTS & J. McDONNELL, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, § 6C.01[2], at 6C-10 (1984) [hereinafter cited as P. COOGAN & W. HOGAN].

9. See U.C.C. §§ 9-302, -304 to -306. See generally 1A P. COOGAN & W. HOGAN, *supra* note 8, § 6C.01[1]-[4], at 6C-4 to -15 (discussing notice under the UCC); Baird & Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 179-96 (1983) (discussing problems of separating ownership from possession).

10. See U.C.C. § 9-301.

11. *Id.* § 9-101 comment.

12. *Id.* § 9-402 comment 2.

13. See U.C.C. § 9-402; see also U.C.C. § 9-402 (1962) (amended 1972).

14. See *infra* notes 68-76 and accompanying text.

15. See U.C.C. § 9-402 (1962) (amended 1972).

In the 1972 revision of the UCC¹⁶ the drafters added a provision declaring a financing statement "sufficient" if it listed the debtor's legal name, among other things.¹⁷ Courts disagree, however, whether the revision *requires* the listing of the debtor's legal name, or whether the listing of his trade name is allowable. Some courts have ruled that section 9-402 implicitly requires the debtor's legal name in the financing statement.¹⁸ Other courts have validated financing statements not providing the debtor's legal name where there has been sufficient information to alert searchers about possible prior security interests.¹⁹ In a recent case, *National Bank v. West Texas Wholesale Supply Co. (In re McBee)*,²⁰ the court developed a flexible approach that found a middle ground between these two approaches.²¹ This Note analyzes the various judicial responses to the confusion surrounding the filing of the debtor's name.²² The Note suggests that although the *McBee* flexible approach is workable,²³ a better solution to the problem is to amend

16. The 1972 version of U.C.C. § 9-402 is in effect (with limited modifications depending on the jurisdiction) in 41 states and the District of Columbia. See ALA. CODE § 7-9-402 (Supp. 1983); ALASKA STAT. § 45.09.402 (Supp. 1983); ARIZ. REV. STAT. ANN. § 44-3141 (Supp. 1983); ARK. STAT. ANN. § 85-9-402 (Supp. 1983); CAL. COM. CODE § 9402 (West Supp. 1983); CONN. GEN. STAT. ANN. § 42a-9-402 (West Supp. 1983); D.C. CODE ANN. § 28-9-402 (Supp. 1984); FLA. STAT. ANN. § 679.402 (West Supp. 1983); GA. CODE § 11-9-402 (1982); HAWAII REV. STAT. § 490:9-402 (Supp. 1983); IDAHO CODE § 28-9-402 (1984); ILL. ANN. STAT. ch. 26, § 9-402 (Smith-Hurd 1974); IOWA CODE ANN. § 554.9402 (West Supp. 1983); KAN. STAT. ANN. § 84-9-402 (1983); ME. REV. STAT. ANN. tit. 11, § 9-402 (Supp. 1983); MD. COM. LAW CODE ANN. § 9-402 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 106, § 9-402 (West Supp. 1983); MICH. COMP. LAWS ANN. § 440.9402 (West Supp. 1983); MINN. STAT. ANN. § 336.9-402 (West Supp. 1984); MISS. CODE ANN. § 75-9-402 (1981); MONT. CODE ANN. § 30-9-402 (1983); NEB. REV. STAT. § 9-402 (1980); NEV. REV. STAT. § 104.9402 (1979); N.H. REV. STAT. ANN. § 382-A:9-402 (Supp. 1981); N.J. STAT. ANN. § 12A:9-402 (West Supp. 1983); N.Y. U.C.C. § 9-402 (McKinney Supp. 1983); N.C. GEN. STAT. § 25-9-402 (1983); N.D. CENT. CODE § 41-09-41 (1983); OHIO REV. CODE ANN. § 1309.39 (Page Supp. 1983); OKLA. STAT. ANN. tit. 12A, § 9-402 (West Supp. 1983); OR. REV. STAT. § 79.4020 (1981); 13 PA. STAT. ANN. tit. 13, § 9402 (Purdon Supp. 1983); R.I. GEN. LAWS § 6A-9-402 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 57A-9-402 (Supp. 1984); TEX. BUS. & COM. CODE ANN. § 9.402 (Vernon Supp. 1983); UTAH CODE ANN. § 70A-9-402 (1980); VA. CODE § 8.9-402 (Supp. 1984); WASH. REV. CODE ANN. § 62A.9-402 (Supp. 1983); W. VA. CODE § 46-9-402 (Supp. 1984); WIS. STAT. ANN. § 409.402 (West Supp. 1983); WYO. STAT. § 34-21-951 (Supp. 1984).

17. U.C.C. § 9-402(1).

18. See *infra* notes 52-59 and accompanying text. One commentator has argued that the 1972 amendments explicitly require the debtor's legal name. 1A P. COOGAN & W. HOGAN, *supra* note 8, § 6C.05[2], at 6C-46.

19. See *infra* notes 60-66 and accompanying text.

20. 714 F.2d 1316 (5th Cir. 1983).

21. See *infra* notes 112-125 and accompanying text.

22. See *supra* notes 18-21 and accompanying text.

23. See *infra* note 153 and accompanying text.

the Code to make clear that the financing statement must contain the debtor's legal name to be valid.²⁴

I. NOTICE FILING UNDER SECTION 9-402

Section 9-402 draws heavily from the "notice filing" approach of the Uniform Trust Receipts Act.²⁵ The UCC's drafters sought to create "[a] more rational filing system"²⁶ by attempting to keep formal requisites at a minimum²⁷ but still provide adequate notice to subsequent creditors.²⁸ The drafters struck a balance which places minimal formal burdens on the secured party²⁹ but provides a serious penalty for noncompliance: failure of perfection.³⁰ The courts, however, will ultimately decide the weight of the secured party's burden, since the Code merely requires "substantial compliance" with the filing requirements.³¹

Even if the secured party files a fatally defective financing statement, his rights are unlikely to be prejudiced;³² in most instances the debtor remains solvent and fulfills the obligation.³³ But if the

24. See *infra* notes 154-55 and accompanying text.

25. U.C.C. § 9-402 comment 2. "What is required to be filed is not . . . the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral." *Id.* See Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing,"* 47 IOWA L. REV. 289, 311-19 (1962), reprinted in 1A P. COOGAN & W. HOGAN, *supra* note 8, §§ 6.01, 6.03-04, at 461, 487-96.

26. U.C.C. § 9-101 comment.

27. See Coogan, *supra* note 25, at 291 (§ 9-402 financing statement "may be considered under traditional standards as giving only skeletal information"), reprinted in 1A P. COOGAN & W. HOGAN, *supra* note 8, § 6.01[3], at 464.

28. *National Bank v. West Texas Wholesale Supply Co. (In re McBee)*, 714 F.2d 1316, 1321 (5th Cir. 1983); *Brushwood v. Citizens Bank (In re Glasco, Inc.)*, 642 F.2d 793, 795 (5th Cir. 1981). See also 1A P. COOGAN & W. HOGAN, *supra* note 8, § 6C.03, at 6C-31 to-35 (identifying "privacy," "disclosure," and "facilitation" as the interests to be considered).

29. See U.C.C. § 9-402.

30. See, e.g., *Northern Commercial Corp. v. Friedman (In re Leichter)*, 471 F.2d 785, 787-88 (2d Cir. 1972).

31. U.C.C. § 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.").

32. See *id.* § 9-301 (persons with priority over unperfected security interests).

33.

[P]erfection is required only to give full validity to the security interest against third parties. It is not required between the secured party and the debtor himself. So long as the security interest has been properly obtained ('attached to use Article 9 terminology'), then the secured party can enforce it against the debtor whether or not the steps to perfect the security interest have been taken.

Shanker, *The General Secured Transactions Law Under Article 9 of the American Uniform Commercial Code and the British Crowther Report (Part 5)*, in SECURITY OVER CORPORAL

debtor becomes insolvent—the very risk from which the secured party wants protection³⁴—the secured party should anticipate a hostile reception to his claim in the debtor's bankruptcy proceeding.³⁵

In most cases, the secured party could have avoided failure of perfection if he had merely read the filing rules.³⁶ Although some version of the Code has been in force in nearly every state for at least fifteen years,³⁷ some people apparently are still unaware of its filing requirements.

A. *The Operation of a Notice System*

If a searcher³⁸ wishes to determine whether a security interest in certain collateral exists, he checks the index of financing statements in his jurisdiction's record office. The Code directs the filing officer of the jurisdiction to arrange the financing statements alphabetically by the name of the debtor indicated on the particular statement.³⁹ The searcher then looks under the debtor's name to determine whether there is a security interest in the collateral.

Though the procedure seems simple, the searcher may have dif-

MOVEABLES 49 (J. Sauveplanne ed. 1974); 1 P. COOGAN & W. HOGAN, *supra* note 8, § 1.04, at 1-20 (only slight chance that secured party will need to assert his security interest in a bankruptcy proceeding). See also U.C.C. §§ 9-501 to -505 (secured party's rights when debtor defaults).

34. The bankruptcy code may render unenforceable even properly perfected security interests. See generally Coogan, *The New Bankruptcy Code: The Death of a Security Interest?*, 14 GA. L. REV. 153 (1980).

35.

The secured creditor now steps into this unhappy situation and demands that he be paid in full or that the security he bargained for be turned over to him, regardless of how many others go unpaid. Unsecured creditors [and other secured creditors with apparently lower priority] who look forward to the prospect of getting less than ten cents on the dollar will not take kindly to the idea that one of the creditors is going to get one hundred cents or something near it. At this point, their representative . . . begins his diligent search for one or more flaws in the title of the secured party, and in a surprising number of cases, he is successful.

1 P. COOGAN & W. HOGAN, *supra* note 8, § 1.04, at 1-18. The bankruptcy trustee's incentive for discovering errors is found in § 9-301, which gives lien creditors priority over unperfected security interests. U.C.C. § 9-301(1)(b), (3).

36. 1 P. COOGAN & W. HOGAN, *supra* note 8, § 3AA.12[14], at 3AA-28.

37. See *supra* note 16.

38. "Searcher" is used in this Note to mean a subsequent creditor.

39. U.C.C. § 9-403(4). The 1972 version of the Code also provides that the secured party may, at his own option, index the debtor's trade names. *Id.* § 9-403(5). The additional notice provided by this cross-index benefits secured parties by minimizing the number of challenges to the financing statement. While this option creates an additional expense, it is less expensive than requiring creditors to file a separate financing statement for every trade name. *Id.* § 9-403(5); 2 R. ALDERMAN & R. DOLE, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE, 891, 969 n.417 (2d ed. 1983).

ficulty finding the name. If the name given on the financing statement differs from that known to the searcher, he may not discover the security interest. Furthermore, the secured party could list the debtor's name in one of four incorrect ways. First, the secured party might have misstated the name. A searcher looking for "Excel Department Stores" might miss a financing statement listed under "Excel Stores, Inc."⁴⁰ Second, the secured party might have listed a trade name similar to the debtor's legal name. A searcher looking for "Henry Platt" might miss a financing statement listed under the debtor's trade name, "Platt Fur Co."⁴¹ Third, the secured party might have listed a trade name entirely different from the debtor's legal name. A searcher looking for "Cynthia McBee" or "Joe Ben Colley" would certainly miss a financing statement listed under the debtor's trade name, "Oak Hill Gun Shop," without further information.⁴² Fourth, the secured party might have misspelled the name. A searcher looking for "Tri-State Molded Plastics, Inc." might miss "Tri-State Moulded Plastics, Inc."⁴³ To avoid these problems, the searcher should look for as many variations of the debtor's name as possible.

The searcher's task is further complicated by the practical limitations on his ability to make a thorough search. He may never see the file since a significant portion of searches are conducted by mail or telephone.⁴⁴ Even if the searcher were willing to visit the records office, the state may deny him access to the files.⁴⁵

The advent of computer-stored files may also frustrate a searcher's effort to discover the existence of a security interest. If a searcher misstates even a single letter in the debtor's name, he may fail to retrieve a financing statement from the computer.⁴⁶

40. See *In re Excel Stores, Inc.*, 341 F.2d 961 (2d Cir. 1965). The prior creditor may also have misspelled the debtor's name. See *infra* note 46.

41. See *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

42. See *National Bank v. West Texas Wholesale Supply Co. (In re McBee)*, 714 F.2d 1316 (5th Cir. 1983).

43. See *Huntington Nat'l Bank v. Tri-State Molded Plastics, Inc. (In re Tyler)*, 23 Bankr. 806 (Bankr. S.D. Fla. 1982).

44. 2 R. ALDERMAN & R. DOLE, *supra* note 39, at 1004.

45. Such states will conduct a search only if the searcher submits a written request. See *In re Lintz W. Side Lumber*, 655 F.2d 786, 791 (7th Cir. 1981) (omission of debtor's legal name found seriously misleading because government official searched records). But cf. *In re Reeco Elec. Co.*, 415 F. Supp. 238, 241-42 (D. Me. 1976) (questioning whether such state procedures are consistent with Code's "public inspection" language).

46. See *Huntington Nat'l Bank v. Tri-State Molded Plastics, Inc. (In re Tyler)*, 23 Bankr. 806, 809-10 (Bankr. S.D. Fla. 1982) (change in debtor's name from "Tri-State Moulded Plastics, Inc." to "Tri-State Molded Plastics, Inc." was seriously misleading since computer index would treat them as different); see also 1A P. COOGAN & W. HOGAN, *supra*

The drafters of section 9-402 intended to simplify the filing procedure. However, carelessly filed financing statements, practical limitations, and the lack of instruction in the section itself have complicated the process. The complexity of the search and uncertainty of its results undermine the drafters' intent.⁴⁷

B. Judicial Response to the 1962 Code's Failure to Require the Debtor's Name

The Code drafters should have written section 9-402 to require the debtor's legal name on a financing statement. Since they did not,⁴⁸ the responsibility fell on the courts to determine whether a financing statement needed the debtor's name to be sufficient. Two judicial responses evolved.⁴⁹ Under a per se approach, courts invalidated financing statements that omitted the debtor's legal name.⁵⁰ Under an ad hoc approach, other courts used a notice analysis and validated financing statements if they contained sufficient information to put subsequent creditors on notice of the security interest.⁵¹

Most courts followed the per se approach, and read a requirement for the inclusion of the debtor's name into section 9-402(1).⁵² Any financing statement containing only the debtor's trade name was invalidated.⁵³

note 8, § 6C.05[2] at 6C-55, n.149 (quoting Shapiro, *Filing*, in 3 CALIFORNIA COMMERCIAL LAW §§ 5.10, 5.80, 5.81 (Rosenblatt ed. 1966)). "[E]lectronic processing would treat the following names differently:

TV Sales Company
T V Sales Company
T.V. Sales Company
T-V Sales Company
Tee Vee Sales Company
Television Sales Company
Tele-vision Sales Company."

Id.

47. See U.C.C. § 1-102(2)(a).

48. "A financing statement is sufficient if it is signed by the debtor . . ." U.C.C. § 9-402(1) (1962) (amended 1972). The drafters of the 1972 revision added the phrase "gives the names of the debtor and the secured party," between the words "it" and "is." See U.C.C. § 9-402(1) (1977).

49. See *infra* notes 52-66 and accompanying text.

50. See *infra* notes 52-59 and accompanying text.

51. See *infra* notes 60-66 and accompanying text.

52. See, e.g., *In re Levins*, 7 U.C.C. Rep. Serv. (Callaghan) 1076, 1080-82 (Bankr. E.D. N.Y. 1970); *Bank of Mississippi v. Pongetti (In re Hill)*, 363 F. Supp. 1205, 1207-08 (Bankr. N.D. Miss. 1973); *In re Firth*, 363 F. Supp. 369, 371-72 (Bankr. M.D. Ga. 1973); *In re Eichler*, 9 U.C.C. Rep. Serv. (Callaghan) 1400, 1402-05 (Bankr. E.D. Wis. 1971).

53. See *supra* note 52. But see *In re Bengston*, 3 U.C.C. Rep. Serv. (Callaghan) 283, 287 (Bankr. D. Conn. 1965) (Court relied on the lack of requirement for the debtor's name in § 9-402(1) to uphold a financing statement listing only the debtor's trade name).

The courts' justification for the per se approach melded two Code policies: notice⁵⁴ and liberal construction of its provisions.⁵⁵ The Code drafters suggested that financing statements need only include minimal information to put a subsequent creditor on notice.⁵⁶ They also expressly recognized in section 9-402(8) that a financing statement "substantially compl[ying] with the requirements of [section 9-402] is effective even though it contains minor errors which are not seriously misleading."⁵⁷ The courts read the notice provision as a limitation on section 9-402(8). If the error in filing was significant enough to prevent the subsequent creditor from finding the financing statement, the security interest was unperfected.⁵⁸ As the court in *Northern Commercial Corp. v. Friedman (In re Leichter)* commented, "would a subsequent creditor looking under 'Leichter' [the debtor's legal name] be led to find the security interest filed and indexed under 'Landman' [the debtor's trade name]? We think not"⁵⁹

The more lenient ad hoc view developed concurrently with the per se approach. Some courts were willing to recognize questionable financing statements as long as they included sufficient information to put searchers on notice of the security interest.⁶⁰ These courts would compare the inaccurate name with the debtor's legal name.⁶¹ If a reasonable searcher would have discovered the inaccurate name, the searcher would be put on inquiry notice.⁶²

The court in *Brushwood v. Citizens Bank (In re Glasco, Inc.)*⁶³ used the ad hoc approach to recognize a financing statement in

54. U.C.C. § 9-402 comment 2; see also *Northern Commercial Corp. v. Friedman (In re Leichter)*, 471 F.2d 785, 787 (2d Cir. 1972); *In re Bengston*, 3 U.C.C. Rep. Serv. (Callaghan) 283 (Bankr. D. Conn. 1965).

55. U.C.C. § 1-102(1).

56. See authorities cited *supra* note 54.

57. U.C.C. § 9-402(5) (1962) (amended 1972), accord U.C.C. § 9-402(8) (1977).

58. See *Northern Commercial Corp. v. Friedman (In re Leichter)*, 471 F.2d at 787. See also *Arra v. First Fed. Sav. & Loan Ass'n (In re James Wells Enterprises, Inc.)*, 21 U.C.C. Rep. Serv. (Callaghan) 900 (Bankr. M.D. Fla. 1977); *In re Wishart*, 10 U.C.C. Rep. Serv. (Callaghan) 1296 (Bankr. W.D. Mich. 1972).

59. *In re Leichter*, 471 F.2d at 787. Section 9-403(4) is also used to justify the per se approach. That section requires the filing officer to index financing statements according to the debtor's name. Consequently, that section read together with § 9-402 implies the inclusion of the debtor's name in the financing statement. See U.C.C. §§ 9-402, -403(4).

60. E.g., *In re Excel Stores, Inc.*, 341 F.2d 961, 963-64 (2d Cir. 1965); *In re Gustafson*, 14 U.C.C. Rep. Serv. (Callaghan) 231, 236 (Bankr. W.D. Okla. 1973); *Siljeg v. National Bank of Commerce*, 509 F.2d 1009, 1012-13 (9th Cir. 1975).

61. *Siljeg*, 509 F.2d at 1012.

62. 1A P. COOGAN & W. HOGAN, *supra* note 8, § 6C.05[2], at 6C-42. See also *supra* notes 40-43 and accompanying text.

63. 642 F.2d 793 (5th Cir. 1981).

which the inaccurate name was radically different from the debtor's legal name. The financing statement listed "Elite Boats, Division of Glasco, Inc.," as the debtor, instead of "Glasco, Inc.," the corporation's legal name.⁶⁴ The court justified its decision on a local notoriety principle. Since the debtor was known in the community by the inaccurate name, subsequent creditors could not have been misled.⁶⁵ The court felt that "reasonably prudent creditors" would have searched under both the inaccurate name and the debtor's legal name.⁶⁶

C. *An Attempt to Incorporate a Per Se Approach Into the 1972 Code Amendments*

The divergent judicial solutions to the treatment of the debtor's name seemed to violate the Code drafters' goal of a "simple and unified structure."⁶⁷ The 1972 revision of section 9-402, now in effect, did not completely resolve the problem, however. The section reads, "A financing statement is sufficient if it gives the names of the debtor and the secured party"⁶⁸ A new subsection defines the type of name intended: "A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or the names of partners."⁶⁹ Comment 7 to section 9-402 indicates that the drafters thought trade names were "too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system."⁷⁰

The drafters of the 1972 amendments, by their use of the ambiguous word "sufficient," may have failed to make the requirement of the debtor's legal name absolute.⁷¹ Section 9-402 says "only that

64. *Id.* at 796.

65. *Id.*

66. *Id.*

67. U.C.C. § 9-101 comment.

68. *Id.* § 9-402(1).

69. *Id.* § 9-402(7).

70. *Id.* comment 7.

71. The authors of the 1972 amendment to § 9-402 may have disapproved of California's nonuniform version of the section. This possibility may be inferred from the comments made by William Burke during a panel discussion at the 1977 annual meeting of the American Bar Association. See 1 P. COOGAN & W. HOGAN, *supra* note 8, § 3AA.12[5]-[7], at 3AA-21 to -23.

The California provision formerly required the financing statement to set forth the debtor's legal name and his "trade name or style." CAL. COM. CODE § 9402(1) (West 1964) (amended by CAL. COM. CODE § 9402(1) (West Supp. 1984)). Courts interpreted the provision strictly and found that correct listing of the debtor's name but omission or incorrect listing of the trade name rendered a financing statement insufficient. National Cash Register

filings in the actual individual or partnership name are sufficient, not that such filings are 'necessary and sufficient.'"⁷² Had the drafters intended a per se rule, they should have stated that the debtor's legal name was *necessary* to perfect a security interest. Comment 7 asserts that trade names are "too uncertain and too likely not to be known."⁷³ This strong language is not, however, the law.⁷⁴

It seems apparent that the Code drafters could have created a per se rule.⁷⁵ The Alabama version of the Code contains an absolute requirement: "The name of the debtor in the financing statement *shall* be the individual, partnership or corporate name of the debtor, regardless of trade names or the name of partners."⁷⁶

Thus, the Code drafters and the courts have failed to create a consistent rule for the filing of a debtor's name. Basic policies argue in favor of invalidating financing statements that erroneously state the debtor's name. It is unclear, however, whether these policies demand per se invalidation or whether the ad hoc approach can be adapted to accommodate them. An analysis of the two approaches follows.

D. *Contrasting the Per Se and Ad Hoc Approaches*

1. *Uniformity*

One of the Code's underlying purposes is to "make uniform the law among the various jurisdictions."⁷⁷ The per se rule would advance that goal. For instance, if two states adopt identical Code provisions, a secured party who files an inaccurate financing statement should not receive greater rights in one state than he would receive in the other because of different interpretations of the

Co. v. Danning (*In re Thrift Shoe Co., Inc.*), 502 F.2d 1211 (9th Cir. 1974). The drafters rejected the California statute by indicating that the debtor's individual, partnership, or corporate name is sufficient, regardless of whether trade names are added. See U.C.C. § 9-402(7).

The California legislature has since repealed the 1962 version. See CAL. COM. CODE § 9402(1) (West Supp. 1984).

72. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 23-16, at 959 (2d ed. 1980).

73. U.C.C. § 9-402 comment 7.

74. *Brushwood v. Citizens Bank (In re Glasco, Inc.)* 642 F.2d 793, 797 n.1 (5th Cir. 1981) (Tuttle, J., dissenting).

75. See *supra* note 71.

76. ALA. CODE § 7-9-402 (Supp. 1983) (emphasis added). The Alabama Code does not tolerate "minor errors," however. See *id.* and comment. This deviation detracts from the force of the per se rule.

77. U.C.C. § 1-102(2)(c).

debtor's name requirement.⁷⁸

The ad hoc approach permits different results based on similar facts. The per se approach, however, avoids potential inconsistencies among jurisdictions. The courts have merely sidestepped difficult inquiries as to the searcher's diligence in determining whether a prior security interest exists.⁷⁹ The courts have invalidated financing statements upon finding the debtors' legal names missing.

It is questionable, however, whether the drafters of the Code intended blind uniformity to replace careful legal reasoning.⁸⁰ Uniform acceptance of the per se approach should be based upon the strength of its rationale, not upon the undifferentiated desire for uniformity.

2. *Unduly Burdening the Searcher*

The per se approach requires only a simple search for the debtor's legal name.⁸¹ In contrast, the ad hoc approach requires the searcher to check not only the debtor's legal name but also any prior or similar names and trade names as well.⁸²

Ad hoc jurisdictions must address the wisdom of placing these burdens on the party searching the files, especially since the secured party is initially required to make sure that the financing statement is not misleading.⁸³ A searcher will not know how many variations of the debtor's name to check to be reasonably safe. A subsequent creditor cannot be sure that a court will find a financing statement misleading; if he is not certain that he has searched for all possible variations of the debtor's name, the safest course may be for him to deny the debtor credit.

78. See *In re Osborn*, 6 U.C.C. Rep. Serv. (Callaghan) 227, 232-33 (Bankr. W.D. Mich. 1969).

79. See *infra* notes 150-52 and accompanying text.

80.

Uniform interpretation and application of the Code promotes the general welfare by simplifying interstate business activity. Generally speaking, [a state's] courts should apply the Code as it is applied in other jurisdictions and should avoid disharmonious interpretations. However, such reasoning when carried to the extreme would result in [that state] being consistently wrong simply for the sake of consistency, an obviously intolerable result.

Citizens Bank v. Ansley, 467 F. Supp. 51, 55 (M.D. Ga. 1979), *aff'd*, 604 F.2d 669 (5th Cir. 1979).

81. See *Huntington Nat'l Bank v. Tri-State Molded Plastics, Inc. (In re Tyler)*, 23 Bankr. 806 (Bankr. S.D. Fla. 1982).

82. Note, *The Effect of Errors and Changes in the Debtor's Name on Article 9 Security Interests*, 1975 DUKE L.J. 148, 162 (1975).

83. *Maremont Marketing, Inc. v. Centennial Indus. Inc. (In re Centennial Indus.)*, 3 Bankr. 416, 418 (Bankr. S.D.N.Y. 1980).

Opponents of the ad hoc approach are especially critical of trade name filings. Since these names can be changed often, to permit their filing would increase the burden on searchers, who would be required to search for and discover the debtor's previous trade names.⁸⁴

Moreover, the ad hoc approach assumes that a searcher will be alerted and prompted to investigate further if his search discovers only a minimal record.⁸⁵ Under this analysis, a reasonably prudent searcher⁸⁶ must check and discover all subtle variations of the debtor's name.⁸⁷

The scope of the search under the ad hoc approach could be limited to inaccuracies resembling the debtor's legal name, or to situations where the debtor's name is fairly unusual.⁸⁸ Thus, a financing statement covering property of Burley Haley Thomas which only lists Thomas' trade name, "West Coast Avionics," would be insufficient,⁸⁹ but a financing statement for Henry Platt listing "Platt Fur Co." as the debtor would be validated.⁹⁰ Although both financing statements are equally defective, the secured party's rights will depend upon the similarities between the debtors' trade name and his legal name.

Although it is unduly burdensome to require searchers to check a myriad of trade names,⁹¹ there are instances in which trade name filing eases the search. If a business usually identifies itself by a single trade name, that name may be the only one which the

84. "There is no limit to the number of assumed names that can be obtained. Some businessmen have a propensity for assumed names and may use a different one for each phase of their activities, adding and discarding as suits their desires." *In re Osborn*, 6 U.C.C. Rep. Serv. (Callaghan) 227, 232 (Bankr. W.D. Mich. 1969).

85. See *McMillin v. First Nat'l Bank & Trust Co. (In re Fowler)* 407 F. Supp. 799, 802 (W.D. Okla. 1975). "These assumptions place a heavy burden on prospective creditors although the Code contemplates that those seeking to perfect security interests bear the burden of properly filing. Burden shifting of this sort is for the legislature, not the courts." *Citizens Bank v. Ansley*, 467 F. Supp. 51, 55 (M.D. Ga. 1979).

86. See, e.g., *Brushwood v. Citizens Bank (In re Glasco, Inc.)*, 642 F.2d 793, 796 (5th Cir. 1981).

87. See 1A P. COOGAN & W. HOGAN, *supra* note 8, § 6C.05[2], at 6C-51 to -52.

88. See J. WHITE & R. SUMMERS, *supra* note 72, § 23.16, at 958.

89. *Van Dusen Acceptance Co. v. Gough (In re Thomas)*, 466 F.2d 51 (9th Cir. 1972).

90. *In re Platt*, 257 F. Supp. 478, 482 (E.D. Pa. 1966).

91. The ad hoc approach may be inconsistent with the way searchers conduct their investigation of the files. See *supra* notes 38-46 and accompanying text. See also *In re Mount*, 5 U.C.C. Rep. Serv. (Callaghan) 653, 655 (Bankr. S.D. Ohio 1968) (courts should consider "commercial reasonableness when construing 'minor errors'"). A searcher would be well advised to conduct his investigation personally, or to prepare a multitude of variable search requests, instead of relying on telephone or mail inquiries. This complicated procedure hardly represents the Code's goal of simplification. See U.C.C. § 1-102(2)(a).

searcher knows. Therefore, the searcher must make an additional inquiry to discover the debtor's legal name.⁹² This "only name known as" approach has its own limitations, which arise from the debtor's dual identity. While business creditors might not be misled by a trade name filing, personal creditors probably would be.⁹³

3. *The Problem of Careless Filing*

The per se approach punishes a secured party who, through carelessness, fails to file correctly. Conversely, the ad hoc approach may encourage careless filing. Arguably, the language of section 9-402(8) supports the ad hoc approach by allowing financing statements that only substantially comply with the filing requirements.⁹⁴ Critics point out that the minimum Code requirements must be met before the liberal construction and substantial compliance provisions can be invoked.⁹⁵ They contend that the courts use these provisions to eliminate all formal requirements,⁹⁶ and therefore promote careless preparation of financing statements.⁹⁷

The rationale for this argument is that, although the drafters sought to simplify the formalities surrounding secured transactions, they did not intend to eliminate them entirely. Nevertheless, it is difficult to see how upholding an erroneous financing statement will encourage the secured party to be careless. A defective financing statement creates major problems for the secured creditor in most jurisdictions; the secured party would probably not consciously jeopardize his secured interest⁹⁸ by ignoring the suggested

92. 4 R. ANDERSON, UNIFORM COMMERCIAL CODE § 9-402:31, at 501 (2d ed. 1971).

93. *Brushwood v. Citizens Bank (In re Glasco, Inc.)*, 642 F.2d 793, 796 (5th Cir. 1981). See also *Citizens Bank v. Sportswear Shoppe, Ltd. (In re Sportswear Shoppe)*, 15 Bankr. 970, 975 (Bankr. W.D. Mo. 1981). The "only name known as" approach is unavailable to secured creditors who file a financing statement under the name of a corporation's officer, unless the officer's name is the same as the corporation's exclusive trade name. *Id.* But see *In re Lintz W. Side Lumber*, 655 F.2d 786, 791 (7th Cir. 1981) (financing statement listing John and Mayella Lintz as debtors was seriously misleading when actual debtor was Lintz West Side Lumber, Inc.).

94. U.C.C. § 9-402(8).

95. See, e.g., *In re Firth*, 363 F. Supp. 369, 372 (M.D. Ga. 1973); *In re Levins*, 7 U.C.C. Rep. Serv. (Callaghan) 1076, 1082 (Bankr. E.D.N.Y. 1970); *Hobart Corp. v. North Cent. Credit Serv., Inc.*, 29 Wash. App. 302, 305-06, 628 P.2d 842, 844-45 (1981).

96. *Coca-Cola Bottling Plants, Inc. v. Tabenken (In re Brawn)*, 7 U.C.C. Rep. Serv. (Callaghan) 565, 576 (Bankr. D. Me. 1970).

97. *Citizens Bank v. Ansley*, 467 F. Supp. 51, 55 (M.D. Ga. 1979), *aff'd*, 604 F.2d 669 (5th Cir. 1979); cf. *In re Brawn*, 7 U.C.C. Rep. Serv. (Callaghan) 565, 576 (Bankr. D. Me. 1970).

98. *National Bank v. West Texas Wholesale Supply Co. (In re McBee)*, 714 F.2d 1316, 1324 n.8 (5th Cir. 1983). At best, the secured party may recover the security only after a protracted legal dispute.

procedures.⁹⁹

Carelessness becomes an important issue, however, when the secured party's oversight has harmed a third party. Assuming that the Code requires a thorough investigation,¹⁰⁰ searchers would be held to whatever information an investigation would have disclosed.¹⁰¹

When there is a dispute over the filing of a debtor's name, the court should examine the actual harm caused by the secured party's error. If the financing statement turns out to be defective, but does not mislead anyone, invalidation of the secured party's perfection will needlessly¹⁰² defeat the intentions of the parties involved.¹⁰³ When the third party actually has been misled, denial of perfection is appropriate since only the secured party could have avoided the error.¹⁰⁴

4. *The Problem of Deceptive Practices*

Under the ad hoc approach, the courts are affirming potentially deceptive practices by validating some financing statements which only list the debtor's trade name.¹⁰⁵ A debtor's trade name can be changed or disposed of at will.¹⁰⁶ The per se approach hinders these deceptive practices since the debtor is unlikely to change his legal name.

This concern about deceptive practices under the ad hoc view can be allayed through the use of the Code's good faith requirement.¹⁰⁷ If the secured party fails to make a reasonable inquiry to discover the debtor's various trade names, his good faith should be questioned. It is not unjust to compel the same level of inquiry from the secured party, who can prevent a misleading situation, as

99. J. WHITE & R. SUMMERS, *supra* note 72, § 23.16, at 958.

100. The ad hoc view suggests this result. See *supra* notes 60-66 and accompanying text.

101. See *Farns Assocs. v. South Side Bank*, 93 Ill. App. 3d 766, 772, 417 N.E.2d 818, 823 (1981).

102. But see *In re Lintz W. Side Lumber*, 655 F.2d 786, 792 (7th Cir. 1981) (bankruptcy trustee, a hypothetical creditor, prejudiced by seriously misleading financing statement).

103. "If under any principle of law or equity the validity of the security can be maintained it should be done to effectuate the will of the parties where third parties are not prejudiced." *In re Landolina*, 7 U.C.C. Rep. Serv. (Callaghan) 76, 78-79 (D. Conn. 1967).

104. Note, *supra* note 82, at 156. Of course, when the error is deliberate, perfection should always be denied. Good faith is a threshold requirement. U.C.C. § 1-203. See *In re Lintz W. Side Lumber*, 655 F.2d 786, 792 (7th Cir. 1981).

105. See *Brushwood v. Citizens Bank (In re Glasco, Inc.)* 642 F.2d 793 (5th Cir. 1981).

106. See *supra* note 84 and accompanying text. A number of states require fictitious names to be registered. See generally NATIONAL ASS'N OF CREDIT MANAGEMENT, CREDIT MANUAL OF COMMERCIAL LAWS, 1984, at 519-33 (1984).

107. See discussion about good faith *supra* note 104.

is required of the subsequent searcher attempting to discover prior security interests.

In sum, several basic policy arguments support a per se requirement that the debtor's legal name must be listed in the financing statement. A per se rule would enhance uniformity,¹⁰⁸ and would avoid unduly burdening searchers.¹⁰⁹ Without a per se rule, the Code's few formal requirements might be abolished,¹¹⁰ and deceptive use of trade names might be encouraged.¹¹¹ A "flexible" approach, discussed in the next section, can be adjusted to meet these same policy goals and provides a viable alternative to the per se approach.

II. THE FLEXIBLE APPROACH

Another judicial approach for dealing with incorrect filing of debtor names emerged in *National Bank v. West Texas Wholesale Supply Co. (In re McBee)*.¹¹² There the court validated a financing statement that listed a trade name which was materially different from the debtor's legal name.

A. *In re McBee*

An understanding of the *McBee* facts is essential to a discussion of the court's analysis. In January, 1979, Cynthia McBee applied for a loan from the National Bank of Texas, claiming to be a partner in the Oak Hill Gun Shop.¹¹³ The bank apparently took her at her word, gave her a loan secured by the gun shop's present and future inventory,¹¹⁴ and filed a financing statement listing "Oak Hill Gun Shop" as the debtor.¹¹⁵ McBee, however, was never a partner in the shop;¹¹⁶ Joe Ben Colley was its sole proprietor until May, 1980, when he sold it to McBee.¹¹⁷ Several days before the sale to McBee, West Texas Wholesale Supply Company sold goods to the gun shop on credit, which also was secured by the gun shop's inventory.¹¹⁸ The financing statement listed "Joe Ben Colley d/b/a Oak

108. See *supra* notes 77-80 and accompanying text.

109. See *supra* notes 81-93 and accompanying text.

110. See *supra* notes 94-104 and accompanying text.

111. See *supra* notes 105-07 and accompanying text.

112. 714 F.2d 1316 (5th Cir. 1983).

113. 714 F.2d at 1318.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

Hill Gun Shop" as debtor.¹¹⁹ To complicate matters further, McBee obtained a loan from RepublicBank in July, 1980, secured by the same collateral.¹²⁰ The financing statement listed "C.K. McBee dba Oak Hill Gun Shop" as the debtor.¹²¹

The court validated the financing statement for the first loan,¹²² which listed "Oak Hill Gun Shop" as the debtor, even though the debtor's legal name was Joe Ben Colley. Since the two names were completely dissimilar, the ad hoc approach was unavailable to the court.¹²³ The court looked to *Glasco* as a starting point,¹²⁴ but created a flexible approach by imposing additional restrictions.¹²⁵

B. Coverage Restricted to Business Loans

The flexible approach is not available when the competing security interests involve both business and personal creditors.¹²⁶ *McBee* was unusual in that all secured creditors were business creditors;¹²⁷ in most cases, both personal and business creditors will be attempting to reach the debtor's assets. In the latter case, a financing statement that lists the trade name of a debtor will be invalidated under the flexible approach¹²⁸ since

a single debtor is necessarily held out to the credit community under two names, that of the individual and that of the business. The individual's credit for personal needs is unrelated to business. A personal creditor would not necessarily be aware of the business or trade name, and thus may not discover the security interests filed solely under the business name.¹²⁹

C. Providing Best Notice to Creditors

While the flexible approach only applies to business loans, it does allow a liberal, but reasoned interpretation of the debtor's name requirement. The *McBee* court acknowledged that trade

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1325.

123. See *supra* notes 60-66 and accompanying text.

124. See *supra* notes 65-66 and accompanying text.

125. See *infra* notes 130-32 and accompanying text.

126. See *In re McBee*, 714 F.2d at 1324 n.6. "This is not the case of a personal loan; there a creditor might not reasonably be expected to know or search under a business name." *Id.*

127. See *id.* at 1318.

128. See *id.* at 1324 n.6.

129. *Id.* (quoting *Brushwood v. Citizens Bank (In re Glasco, Inc.)*, 642 F.2d 793, 796 (5th Cir. 1981)).

name filings could be misleading,¹³⁰ but believed that the Code's principle of providing notice to third parties could be satisfied without prohibiting those filings as suggested in Comment 7.¹³¹ The court examined the three possibilities available to National Bank, the first secured party, and concluded that a filing under "Oak Hill Gun Shop" provided "equal, if not superior, notice of prior security interests."¹³²

This reasoning indicates the court's awareness of the Code's attempt to minimize the invalidation of security interests due to rigid technicalities.¹³³ The court seems to have said that the requirements of section 9-402 can be met in alternative ways, provided that each way is consistent with the Code's underlying purpose to impose only minimal formalities for filing a financing statement.¹³⁴ Since section 9-402 seems to create simply a sufficiency, not a sufficiency *and necessity* test, the court's rationale was reasonable. The court declared that it would accept erroneous filing statements only where mistakes could be reconciled with the Code's overall purposes.¹³⁵

1. *How Prudent Should a Reasonable Creditor Be?*

The *McBee* court indicated that creditors who wish to make loans to businesses must make additional inquiries beyond the debtor's legal name. It said that a "reasonably prudent creditor" should have searched the debtor's business name¹³⁶ since the loan was for business purposes and secured by business assets.¹³⁷ The gun shop inventory would or should have suggested a search under the name "Oak Hill Gun Shop."¹³⁸

130. *In re McBee*, 714 F.2d at 1321.

131. *Id.* at 1323.

132. The three possible names, according to the court were:

1. Joe Ben Colley: would not give notice to creditors of McBee;
2. Cynthia McBee: would fail to accurately reflect the gun shop's true ownership;
3. Oak Hill Gun Shop: the only name with a nexus between the owners.

Id. at 1323-24.

133. *See id.* at 1324.

134. *But see supra* notes 95-97 and accompanying text (Code's minimal requirements must be met).

135. The court recognized that its holding was an exception to the general rule which would invalidate a financing statement that gave the trade name instead of the debtor's legal name. 714 F.2d at 1321.

136. 714 F.2d at 1324.

137. *Id.*

138. *Id.* The decision in a similar case is distinguishable from *In re McBee*. *Goger v. United States (In re Eady)*, 4 Bankr. 1 (Bankr. N.D. Ga. 1979), a tavern owned by Julian Eady was being used as collateral under a financing statement listing "Janmar, Inc." as the

The court argued that the last creditor in the case, RepublicBank, had this duty of additional inquiry. Since McBee had only recently become the owner of the Oak Hill Gun Shop¹³⁹ the bank should have realized that there might have been prior security interests in the business collateral.¹⁴⁰ Because the Bank would not necessarily know whether the prior owner was an individual, a partnership, or a corporation, it should have searched under all possible names, including the trade name.

The court held that this argument did not apply to the second creditor, Wholesale Supply. Wholesale gave credit to Joe Ben Colley while he owned the gun shop.¹⁴¹ It could contend that a search in the records under "Oak Hill Gun Shop" would be burdensome since it already knew the business was owned by a sole proprietor.

In some instances, a "reasonably prudent creditor" test appropriately demands a search beyond the debtor's legal name. If a creditor, due to a course of previous dealings, is completely aware of the debtor's trade name, he cannot claim that a financing statement listing the trade name misled him.¹⁴² This test amounts to an extension of the Code's good faith provision¹⁴³ and applies only to

debtor. *Id.* at 2. Janmar, Inc. never owned the tavern, but Julian Eady was an officer of Janmar, Inc. *Id.* at 2-3. A creditor stood a greater chance of being misled in this situation, since he would logically search for the debtor's legal name, or possibly the name of the tavern, but not for "Janmar, Inc." *Id.* at 1, 3.

139. *In re McBee*, 714 F.2d at 1318.

140. *Id.* at 1324.

141. *Id.* at 1318.

142. *See* *Records & Tapes, Inc. v. Argus*, 8 Kan. App. 2d 255, 655 P.2d 133 (1982) (debtor name filed under trade name found valid; debtor's legal name was "Argus, Inc.," debtor's trade name was "Argus Tapes and Records"). The court commented:

If plaintiff had searched the record, it could not reasonably have been misled, and plaintiff does not claim it searched the record and was misled. The thrust of plaintiff's argument is that since Lieberman did not precisely list the debtor's exact legal name, Lieberman had not perfected its lien and therefore plaintiff has priority.

This is an oversimplification of the entire thrust of the UCC, and we cannot agree.

8 Kan. App. 2d at 257, 655 P.2d at 134.

143. By defining "good faith" to include reasonable attempts to ascertain the debtor's legal name, the flexible approach may expand the concept of good faith beyond the UCC definition. Under *McBee*, a secured party would be required to show that the debtor's trade name was consistently used, well-known in the community, and that reasonable efforts to learn the debtor's legal name proved fruitless. *In re McBee*, 714 F.2d at 1324 n.8. Courts probably would be reluctant to extend the definition of good faith this far, unless the circumstances should have warned the secured party that the debtor was using a trade name.

In a different context, willful ignorance has precluded the finding of good faith necessary to become a holder in due course under U.C.C. § 3-302. *See* *General Investment Corp. v. Angelini*, 38 N.J. 396, 403-05, 278 A.2d 193, 196-97 (1971) (given circumstances of case, failure to inquire amounted to willful ignorance and lack of good faith). *See also* *Burnett v. H.O.V. Corp.* (*In re Kalamazoo Steel Process*), 503 F.2d 1218, 1222 (6th Cir. 1974) (when

creditors aware of the debtor's trade name.¹⁴⁴

2. *How Particular Should a Trade Name Be?*

The *McBee* court implicitly addressed the criticism that trade names are highly susceptible to change and are therefore misleading. The court determined that filing under any trade name that was "consistently used and well known to creditors" would not be seriously misleading to third parties.¹⁴⁵

Under this test, a potential creditor who is searching for the name of a debtor with two trade names might be protected, even if he failed to discover both names. For example, the debtor in *Platt*¹⁴⁶ used two trade names.¹⁴⁷ Yet the court found that one of the names, which was similar to the debtor's legal name, gave sufficient notice to the searcher to make additional inquiry.¹⁴⁸ This might not be the case under *McBee*'s flexible approach. Unless both of the debtor's trade names were "consistently used and well known" they would be seriously misleading. Thus, the variety of trade names used by the debtor will be an important factor in determining whether a financing statement which only lists one of those names is misleading.¹⁴⁹

The "consistently used and well known" test has an inherent difficulty: when does a trade name become "consistently used"? In *McBee*, the two debtors used the name "Oak Hill Gun Shop" for less than two years.¹⁵⁰ While the court found this time period sufficient, other courts have rejected far longer time periods. In *Carter*

secured party knows that debtor intends to change names, Code's good faith requirement compels secured party to ensure that financing statement reflects both names).

144. A separate criticism of the reasonably prudent creditor test is articulated in *Northern Commercial Corp. v. Friedman (In re Leichter)*, 471 F.2d 785, 787 (2d Cir. 1982):

[T]he trustee in bankruptcy must be deemed to stand in the shoes of the most favored creditor, not simply one who could — by virtue of his dealings with the debtor acting under his trade name — be held to a semblance of knowledge of the true facts; even such a creditor, knowing how U.C.C. § 9-402 reads, might never search the filings under the trade name.

The *McBee* court indicated that since the financing statement was not seriously misleading, it was effective against the trustee in bankruptcy. 714 F.2d at 1325.

145. 714 F.2d at 1325.

146. *In re Platt*, 257 F. Supp. 478 (E.D. Pa. 1966).

147. 257 F. Supp. at 482.

148. *Id.*

149. See, e.g., *Citizens Bank v. Ansley*, 467 F. Supp. 51 (debtor used a number of names, never was a farmer even though financing statement showed "Ansley Farms"), *aff'd*, 604 F.2d 669 (5th Cir. 1979); *In re Moore*, 21 Bankr. 898, 899 (Bankr. E.D. Tenn. 1982) (debtor used between five and seven trade names).

150. 714 F.2d at 1318-19.

v. Greene County Bank (In re Wilhoit),¹⁵¹ the court refused to institute the "consistently used" gloss even though the debtor's business, located in a small community, had gone under the same trade name for twelve years.¹⁵² Thus, in the absence of any guidance, courts' rulings under the test may be contradictory and arbitrary.

D. *Should the Flexible Approach Survive?*

The value of the "flexible" approach should be assessed in light of which party should bear the inquiry burden. Should the original creditor be required to ascertain the debtor's legal name or should subsequent creditors be expected to search for anything which the circumstances surrounding the name suggest?

Arguably, the original creditor is in the best position to discover the debtor's legal name before he extends any credit. If that creditor fails to file correctly, he automatically loses his security interest.

Conversely, the flexible approach could be tolerated if courts were willing to restrict its use to situations in which third parties are not unduly burdened, but rather should have been aware of the trade name.¹⁵³

Assuming the flexible approach should be abolished, the language in section 9-402 must be amended to require the debtors' legal name in the financing statement explicitly.¹⁵⁴ The nonuniform Alabama amendment represents a step in this direction.¹⁵⁵

Other alternatives should be considered as well. One commentator has suggested a system that indexes the financing statement under the debtor's social security number for individuals or employee identification number for businesses.¹⁵⁶ This proposal would guarantee zero margin error; to allow any variation in the digits of the number would open the floodgates of abuse.

Moreover, the growth of computerized indexing suggests the need to reevaluate the application of the Code's minor errors provision to incorrect filing of the debtor's legal name. Since the computerization of the index prevents subsequent creditors from searching for alternative but similar names, minor errors in the

151. 6 Bankr. 574 (Bankr. E.D. Tenn. 1980).

152. The court followed a per se analysis and decided that, despite the long use of the trade name, it was not the debtor's legal name. This finding invalidated the financing statement. 6 Bankr. at 575.

153. See *supra* note 132 and accompanying text.

154. See *supra* notes 72-74 and accompanying text.

155. See *supra* notes 75-76 and accompanying text.

156. 1A P. COOGAN & W. HOGAN, *supra* note 8, § 6C.05[2], at 6C-54.

debtor's legal name will never become apparent to the subsequent creditor.¹⁵⁷ The minor errors provision could be amended to hold original creditors to an absolute duty to insure that the debtor's legal name is correct or risk losing their security interest. Minor errors by the original creditor could still be allowed in other elements of the financing statement.

III. CONCLUSION

As a caveat to creditors entering secured transactions, a noted commentator warned of the traps one could encounter in bankruptcy proceedings: "The lesson derived from the history of chattel security and bankruptcy laws is that if a statute can be interpreted in such a way as to defeat the secured party, it may very well be so interpreted."¹⁵⁸ Perhaps then the willingness of the court in *McBee* to read section 9-402 to protect secured parties represents an overall softening of attitudes toward security interests.

At some point, however, a secured party's laxity may encroach on the right of subsequent creditors to adequate notice of prior existing security interests. Arguably, the flexible approach marks this point, since the financing statement in *McBee* gave a name completely different from the debtor's legal name. The flexible approach should not apply unless the court is positive that all creditors were aware of the debtor's trade name and would naturally have searched for it.

Finally, the adoption of a flexible approach may signal a time for reassessing the respective burdens of creditors and third parties. Is it asking too much of secured parties, in order to preserve their security interests, to get one thing right?

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157. See *supra* note 46 and accompanying text.

158. See 1 P. COOGAN & W. HOGAN, *supra* note 8, § 1.04[5], at 1-20.