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CASENOTE

SECURED TRANSACTIONS—Financing Statement—Bulk Transfer—Financing Statement Covering After-acquired Inventory Filed Solely Under Debtor's Trade Name in Non-complying Bulk Sale Allows Seller's Secured Creditors a Perfected Security Interest in Purchaser's After-acquired Property and Priority Over Purchaser's Prior Secured Creditors to Extent of Value of Inventory Collateral Transferred.

In re McBee,
714 F.2d 1316 (5th Cir. 1983).

Joe B. Colley, who owned the Oak Hill Gun Shop, borrowed money from the National Bank of Texas.¹ National Bank of Texas then filed a financing statement solely under the trade name Oak Hill Gun Shop.² Colley took out a subsequent loan from Wholesale Supply to buy goods on credit,³ and Wholesale Supply filed a financing statement in the name of Joe B. Colley d/b/a Oak Hill Gun Shop.⁴ Later Colley sold the Oak Hill Gun Shop to Cynthia McBee who agreed to comply with the bulk sales laws,⁵ but in fact, effectuated a non-complying bulk sale.⁶ McBee took out

1. *See In re McBee*, 714 F.2d 1316, 1318 (5th Cir. 1983). Cynthia McBee actually went to National Bank of Texas to obtain the loan, holding herself out as a partner of the Oak Hill Gun Shop in an attempt to lend her credit worthiness to Joe B. Colley; however, the Bankruptcy court found no partnership existed. *See id.* at 1322.

2. *See id.* at 1318. National Bank of Texas filed a UCC-1 financing statement with the Secretary of State of the State of Texas purporting to collateralize all present and after-acquired inventory. *See id.* at 1318.

3. *See id.* at 1316.

4. *See id.* at 1316. Wholesale filed subsequent to National; however, Wholesale filed under the name of "Joe B. Colley d/b/a Oak Hill Gun Shop" whereas National merely filed under the trade name "Oak Hill Gun Shop." *See id.* at 1318.

5. *See id.* at 1318. The bulk sales laws in Texas require a transferee to require the transferor to furnish him with a list of creditors and thereafter give notice to such creditors or the bulk transfer will be deemed ineffective. *See* TEX. BUS. & COM. CODE ANN. §§ 6.104,

a loan with RepublicBank who filed a financing statement in the name of C.K. McBee d/b/a Oak Hill Gun Shop.⁷ Both the National Bank of Texas and the RepublicBank loans purported to be collateralized by "all present and after-acquired inventory of the gun shop."⁸ Wholesale Supply's financing statement purported to cover all inventory, proceeds, accounts receivable, "equipment, furniture and fixtures used in the debtor's place of business."⁹ Approximately five months later, McBee filed a petition in bankruptcy.¹⁰ The bankruptcy court determined that Wholesale Supply had first priority.¹¹ On appeal the Fifth Circuit rejected the bank-

6.105 (Tex. UCC) (Vernon 1968). The bulk sales laws in Texas are more stringent than in many states in that Texas adopted a provision which requires the transferee to assure that new consideration is applied so far as necessary to pay the debts of the transferor. *See id.* § 6.106. *See generally* Larson, *Article 6 of the Uniform Commercial Code: Bulk Transfers*, 44 TEXAS L. REV. 661, 664 (1966) (optional section 6.104 requires a bulk transferee to insure that new consideration is applied to transferor's debtors listed on creditor's list supplied by transferor).

6. *See In re McBee*, 714 F.2d 1316, 1318 (5th Cir. 1983). McBee failed to give proper notification of the transfer in bulk to Colley's creditors, thus rendering the bulk sale ineffective insofar as creditors of transferor are concerned. *See id.* at 1318-19; Lakin, *Bulk Transfers: What Hath the Uniform Commercial Code Wrought?*, 35 MD. L. REV. 197, 229 (1975) (unfortunately Code failed to provide remedies upon failure of transferee to comply with bulk sales provisions); *see also* TEX. BUS. & COM. CODE § 6.104 (Tex. UCC) (Vernon 1968) (bulk transfer made ineffective as against creditor of transferor absent compliance with provisions of Texas Business and Commerce Code (TBCC) regarding bulk transfers).

7. *See In re McBee*, 714 F.2d 1316, 1318 (5th Cir. 1983).

8. *See id.* at 1318-19. The court in *McBee* followed the rule that a security interest in inventory is usually assumed to cover after-acquired inventory; thus, the secured party's interest in the new inventory remains perfected. *See Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank*, 544 S.W.2d 947, 950 (Tex. Civ. App.—Dallas 1976, no writ).

9. *See In re McBee*, 714 F.2d 1316, 1318 (5th Cir. 1983). Wholesale's financing statement made no reference to after-acquired inventory. *See id.* at 1318. Many jurisdictions hold that a security interest in inventory of a business automatically covers after-acquired inventory. *See, e.g., In re Nickerson & Nickerson, Inc.*, 329 F. Supp. 93, 96 (D.C. Neb. 1971) (security interest in inventory covers after-acquired inventory); *Get it KWIK of Am. Inc. v. First Ala. Bank*, 361 So. 2d 568, 573 (Ala. Civ. App. 1978) (all inventory includes after-acquired inventory); *Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank*, 544 S.W.2d 947, 950 (Tex. Civ. App.—Dallas 1976) (security interest in inventory covers after-acquired inventory).

10. *See In re McBee*, 714 F.2d 1316, 1318-19 (5th Cir. 1983).

11. *See In re McBee*, 20 Bankr. 361, 364 (Bankr. W.D. Tex. 1982). The court determined that the financing statement filed by National Bank of Texas was insufficient to perfect since the financing statement was filed under the trade name of the debtor. *See id.* at 364. In fact, the owner of the gun shop was the actual debtor. Thus, Wholesale, the second to file was properly perfected by filing their financing statement under the owner's name and the trade name. *See id.* at 367; *see also In re Skinner*, 22 U.C.C. Rep. Serv. (Callaghan) 1286, 1291 (W.D. Mich. 1977) (addition of trade name after actual name of debtor does not affect validity of filing).

ruptcy court's holding.¹² Held: *Reversed and Remanded*. Financing statement covering after-acquired inventory filed solely under debtor's trade name in non-complying bulk sale allows seller's secured creditors a perfected security interest in purchaser's after-acquired property and priority over purchaser's prior secured creditors to extent of value of inventory collateral transferred.

The intent of the drafters of the Uniform Commercial Code (UCC) was to preserve the flexibility of commercial transactions.¹³ Article 9 of the UCC furthers that purpose¹⁴ by protecting secured creditors and creating a mechanism to notify potential creditors that a security interest in a particular item may exist.¹⁵ Once secured creditor status has been attained, a subsequent lien against the item¹⁶ or even a subsequent purchase of the debtor's entire business¹⁷ will not cause the secured party to lose his preferred position.¹⁸

12. See *In re McBee*, 714 F.2d 1316, 1320 (5th Cir. 1983). The Fifth Circuit rejected the bankruptcy court's rationale that filing solely under a trade name is misleading in all cases, stating that one should avoid rigid technicalities and focus on whether the Code's goal of providing notice was met. See *id.* at 1321.

13. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 16 (2d ed. 1980) (code to be liberally construed to further underlying purpose of liberalizing commercial transactions).

14. See D. BAKER, A LAWYER'S BASIC GUIDE TO SECURED TRANSACTIONS 5 (1983). Article 9 radically changed security law by replacing the many pre-code security devices with one device. See *id.* at 5; see also Sanford, *Debtor's Rights in Collateral As a Requirement For Attachment of a Security Interest Under the Uniform Commercial Code*, 26 S.D.L. REV. 163, 164 (1981) (article 9 aids in facilitation of free flow of commerce by allowing determination of secured creditor status based on perfection or nonperfection).

15. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 952 (2d ed. 1980). The purpose of article 9 is to provide notice to potential creditors of existing liens against a particular debtor. See *id.* at 952; see also Rapson, *Prefiling UCC-1's: The Proper Procedure for Perfecting Security Interest*, 14 U.C.C. L.J. 211, 213 (1981) (article 9 gives notice that secured party may have security interest in collateral described).

16. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 918 (2d ed. 1980). Generally, a creditor who perfects takes priority over those who perfect later yet is subordinate to those who perfected previously. The ultimate lien creditor is the trustee in bankruptcy whose power is derived from section 544(a) of the Bankruptcy Reform Act of 1978. See *id.* at 918; see also Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2596 (codified at 11 U.S.C. § 547 (1982)) (describes powers of trustee in bankruptcy).

17. See *Starman v. John Wolfe, Inc.*, 490 S.W.2d 377, 382 (Mo. Ct. App. 1973) (creditors of merchandise who have signed security agreement cannot be jeopardized by transfer in bulk); see also Comment, *Bulk Transfers in the Guise of Security: A Wolfe In Sheep's Clothing*, 60 U. DET. J. URB. L. 85, 86 (1982) (description of protection afforded secured creditors in bulk sale). Bulk transfers are governed by article 6 of the Uniform Commercial Code (UCC), which protects the transferor's creditors by requiring the transferee to request a list of creditors from the transferor and to give notice to such creditors of the impending transfer. See *id.* at 86.

18. See *id.* at 86.

To become a secured creditor, strict compliance with Article 9 is required.¹⁹ Once such requirements have been met, a creditor will have priority in inventory²⁰ against a subsequent lien creditor²¹ or a trustee in bankruptcy.²² To achieve priority status, one must have priority in time of filing or perfection, whichever occurs earlier.²³ Once a secured party has attained priority as to particular collateral or its proceeds, that position cannot be lost to a subsequent secured party who later attempts to achieve priority status.²⁴ A security interest is perfected when the last of the fol-

19. See D. BAKER, A LAWYER'S BASIC GUIDE TO SECURED TRANSACTIONS 99-100 (1983). The absence of requisite formalities in the execution of the security agreement, the financing statement pursuant to section 9.402, or the secured party's filing in the improper place may cause the secured party's interest to be vulnerable to claims of other competing creditors. See *id.* at 6; see also TEX. BUS. & COM. CODE ANN. §§ 9.203-9.402 (Tex. UCC) (Vernon 1968).

20. See TEX. BUS. & COM. CODE ANN. § 9.102(a)(1) (Tex. UCC) (Vernon 1968). Article 9 protects secured creditors of accounts, documents, instruments, general intangibles, consumer goods, equipment and inventory. See *id.* This casenote will deal specifically with inventory. See *id.*

21. See Rapson, *Prefiling UCC-1's: The Proper Procedure for Perfecting Security Interests*, 14 U.C.C. L.J. 211, 213 (1982). Once a secured party has attained a priority from the date of filing, such priority cannot be lost to a subsequent secured party who attempts to obtain secured status. See *id.* at 213.

22. See Russell, *An Overview of the 1978 Bankruptcy Code (or What Happened to the Secured Creditor's Collateral?)*, 21 S. TEX. L.J. 171, 173 (1979) (rights and powers of trustee in bankruptcy under sections 544, 545 or 549 subject to law that allows perfection of interest in such property before date of perfection); see also Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. OF LEGAL STUD. 53, 61 (1983) (trustee has status of hypothetical lien creditor representing all general creditors).

23. See *Manes Constr. Co. v. Wallboard Coatings Co.*, 497 S.W.2d 334, 336 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (properly filing financing statement to attain perfected security interest status only significant in determining priorities among conflicting security interest); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 1037 (2d ed. 1980) (justification for first to file rule is to protect filing system and prevent secured party from having to check for subsequent filings); see also TEX. BUS. & COM. CODE ANN. § 9.312(e)(1) (Tex. UCC) (Vernon Supp. 1982-1983) (first to file is first security interest perfected).

24. See TEX. BUS. & COM. CODE ANN. § 9.312(e)(1) (Tex. UCC) (Vernon Supp. 1982-1983) (conflicting security interests rank according to priority in time of filing or perfection); see also *Kimbell Foods, Inc. v. Republic Nat'l Bank*, 557 F.2d 491, 498 (N.D. Tex. 1977) (relation-back position was adopted by court, thus priority extends to advances made after another security interest has intervened). Many secured creditors file their financing statements prior to the final steps for completion of attachment in order to attain priority by filing first. See Pearson, *Absolute Versus Conditional Protection for Secured Parties: Problems of Lapsed Perfection Under Article 9 of the Uniform Commercial Code*, 17 HOUS. L. REV. 1, 5 (1979); see also D. BAKER, A LAWYER'S BASIC GUIDE TO SECURED TRANSACTIONS 154 n.26 (1983) (first to file rule justified based on premise that subsequent creditor may protect himself by merely checking files).

lowing items occurs: (1) a security agreement is executed;²⁵ (2) the debtor has rights in the collateral;²⁶ (3) the creditor has given value;²⁷ (4) a financing statement has been filed;²⁸ or the creditor has possession of the collateral.²⁹ In most instances, the last step in achieving perfection of a security interest in inventory is to file a financing statement since a creditor generally does not retain possession of the inventory.³⁰

25. See TEX. BUS. & COM. CODE ANN. § 9.203(a)(1) (Tex. UCC) (Vernon Supp. 1982-1983) (debtor must have signed security agreement or collateral must be in possession of secured party to comply with first step toward attachment of security interest); see also *Villa v. Alvarado State Bank*, 611 S.W.2d 483, 486 (Tex. Civ. App.—Waco 1981, no writ) (security agreement sets forth agreement between debtor and creditor and must contain description sufficient to identify collateral); Squillante, *The Security Agreement*, 86 COM. L.J. 184, 184 (1981) (purpose of security agreement is to establish terms and conditions of financial arrangement between indebted party and his creditor, effectively securing payment of obligation which created the security agreement). See generally D. WHALEY, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS 60 (1982) (security agreement must be in writing signed by debtor and describing collateral).

26. See TEX. BUS. & COM. CODE ANN. § 9.203(a)(3) (Tex. UCC) (Vernon Supp. 1982-1983); see also *Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank*, 544 S.W.2d 947, 950 (Tex. Civ. App.—Dallas 1976, no writ) (debtor must have rights in collateral for security interest to attach). For a general discussion of manner of perfection, see D. BAKER, A LAWYER'S BASIC GUIDE TO SECURED TRANSACTIONS 153-61 (1983).

27. See TEX. BUS. & COM. CODE ANN. § 9.203(a)(2) (Tex. UCC) (Vernon Supp. 1982-1983); see also *Shaw Equip. Co. v. Hoople Jordon Constr. Co.*, 428 S.W.2d 835, 840-41 (Tex. Civ. App.—Dallas 1968, no writ). Lack of consideration will cause the security interest to be unenforceable. See *id.* at 840-41; see also Mann & Phillips, *Timing of Perfection of Security Interest Under the Uniform Commercial Code and the Bankruptcy Reform Act*, 15 AKRON L. REV. 369, 370 n.10 (1981-1982) (security interest not enforceable against debtor unless value given).

28. See TEX. BUS. & COM. CODE ANN. § 9.302(a) (Tex. UCC) (Vernon Supp. 1982-1983). By negative implication, in all circumstances a financing statement must be filed except in the following exceptions of:

- (1) possession of collateral
- (2) temporary perfection
- (3) an assignment of an equitable interest in a decedent's estate or a trust
- (4) a purchase money security interest
- (5) an assignment of accounts
- (6) a collecting bank's security interest
- (7) an assignment for the benefit of the transferor's creditors

See *id.* § 9.302(a). See generally D. EPSTEIN, ENFORCING SECURED CLAIMS 52 (1983). Section 9.402 of the TBCC sets out the requirements of a financing statement, however, a copy of the security agreement may serve as a financing statement provided it contains the necessary information required by 9.402. See *id.* at 52.

29. See TEX. BUS. & COM. CODE ANN. § 9.302(a)(1) (Tex. UCC) (Vernon Supp. 1982-1983). For a discussion of perfection by possession of the collateral, see W. DAVENPORT & D. MURRAY, SECURED TRANSACTIONS 188 (1978). Possession perfects a security interest, which remains perfected as long as the creditor is in possession. See *id.* at 188.

30. See *Owen v. McKesson & Robbins Drug Co.*, 349 F. Supp. 1327, 1330 (N.D. Fla. 1972). As a general rule the final step to perfection is the filing of a financing statement. See

The financing statement serves a two-fold purpose in protecting the secured creditor³¹ and also in giving public notice that there is a security interest outstanding.³² Only a minimal amount of information is necessary to give the required notice.³³ Section 9.402 of the Texas Business and Commerce Code (TBCC) merely requires the names of the debtor and the secured party, the signature of the debtor, and a description of the collateral.³⁴ Much concern has arisen as to whether the document filed by the secured creditor satisfies the requirements of Section 9.402 of the TBCC and its underlying purpose of giving notice to potential creditors of possible outstanding security interests.³⁵

id. at 1330; Pearson, *Absolute Versus Conditional Protection for Secured Parties: Problems of Lapsed Perfection Under Article 9 of the Uniform Commercial Code*, 17 HOUS. L. REV. 1, 3 n.6 (1979). In order for a security interest to attach a creditor must give public notice by filing a financing statement pursuant to section 9.302(1). *See id.* at 3 n.6.

31. *Compare In re E.A. Fretz Co.*, 565 F.2d 366, 368 (9th Cir. 1978) (purpose of financing statement is to protect party in whose favor the security interest is created) *with* Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank, 544 S.W.2d 947, 949 (Tex. Civ. App.—Dallas 1976, no writ) (financing statement's purpose is to give notice to all creditors that security interest may be outstanding). The importance of the financing statement is evident when the person who files first gains priority over subsequent creditors. *See* Rapson, *Prefiling UCC-1's: The Proper Procedure for Perfecting Security Interest*, 14 U.C.C. L.J. 211, 215 (1981).

32. *See* University State Bank v. Gifford-Hill Concrete Corp., 431 S.W.2d 561, 568 (Tex. Civ. App.—Ft. Worth 1968, writ ref'd n.r.e.) (purpose of filing system to give fair notice to public). The drafters of article 9 adopted the concept of notice filing which was an idea first introduced in the Uniform Trust Receipts Act. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 952 (2d ed. 1980).

33. *See* N. BLAKELY, TEXAS LEGISLATIVE COUNCIL: ANALYSIS OF ARTICLE NINE OF THE UNIFORM COMMERCIAL CODE 96 (1954). Section 9.402 of the Texas version of the UCC requires simple formal requisites for the financing statement. The purpose of the financing statement is to provide a notice filing system. This system was adopted from the Uniform Trust Receipts Act, which allows only the financing statement without the security agreement, to be filed. *See id.* at 96. *But see* T. BLACK, SECURED TRANSACTIONS HANDBOOK 10 n.25 (1973) (financing statement need only contain information required by 9.402). While the financing statement need only contain a minimal amount of information it may also contain additional information and serve as the security agreement when considered together with other documents. *See id.* at 10 n.25.

34. *See* TEX. BUS. & COM. CODE ANN. § 9.402 (Tex. UCC) (Vernon Supp. 1982-1983); *see also* Sommers v. International Business Machs., 640 F.2d 686, 689 (5th Cir. 1981) (to be effective financing statement need only contain name and address of secured party and debtor, description of collateral, and signature of debtor); Pearson, *Absolute Versus Conditional Protection for Secured Parties: Problems of Lapsed Perfection Under Article 9 of the Uniform Commercial Code*, 17 HOUS. L. REV. 1, 5 n.10 (1979). The requirement of notice filing is satisfied if public record indicates the mere presence of an encumbrance and nothing more. *See id.* at 5 n.10.

35. *See, e.g., In re Permian Anchor Servs. Inc.*, 649 F.2d 763, 766 (10th Cir. 1982) (omission of debtor's address causes financing statement to fail to meet requirements of section 9.402, thus creating major errors in financing statement); *In re Excel Stores, Inc.*, 341

One area of particular concern is the requirement of filing the financing statement under the debtor's name.³⁶ If the debtor's name is wrong in the financing statement, subsequent indexing may also be incorrect, resulting in a failure of the purposes and rationale of the notice filing system.³⁷ To advance the ultimate goal of giving notice, Section 9.402(h) of the TBCC³⁸ allows a financing statement to be effective, despite any minor errors, as long as it is not substantially misleading.³⁹ The debtor's name can be incorrect in the financing statement due to misspelling,⁴⁰ or use of the debtor's trade name without the actual debtor's name.⁴¹ The courts have

F.2d 961, 963 (2d Cir. 1965) (misdescription of debtor referenced in financing statement as Excel Department Stores instead of Excel Stores, Inc. held not seriously misleading thus complying with section 9.402); *In re Colorado Mercantile Co.*, 299 F. Supp. 55, 58 (D.C. Colo. 1969) (mistake in secured party's name not found to be major error in financing statement, thus requirements of 9.402 met). See generally D. EPSTEIN, ENFORCING SECURED CLAIMS 53 (1983) (courts place varying emphasis on importance of each item required in financing statement and on what is considered seriously misleading).

36. See TEX. BUS. & COM. CODE ANN. § 9.402(a) (Tex. UCC) (Vernon Supp. 1982-1983) (financing statement will be sufficient if "it gives the names of the debtor").

37. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 956 (2d ed. 1980). Filing under the wrong name or misspelling the debtor's name can be seriously misleading to potential creditors, producing a false sense of security. This is so because the filing officer uses the debtor's name to compose his index. Subsequent parties then use the index in order to find any prior filings under the debtor's name. Should the financing statement be filed under a wrong or misspelled name it is unlikely the potential creditor will find the improperly filed financing statement. See *id.* at 956.

38. See TEX. BUS. & COM. CODE ANN. § 9.402(h) (Tex. UCC) (Vernon Supp. 1982-1983).

39. See *id.*; see also J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 953 (2d ed. 1980) (discussion of meaning of term "seriously misleading"). The policy reason behind section 9.402(h) is to discourage a fanatically technical reading of statutory requirements. White and Summers follow the theory that 9.402 contains two requirements: first, that the financing statement's error be minor; and second, that the error is not seriously misleading. Thus, while failure to sign the financing statement where debtor's name is clearly set out may appear not to be seriously misleading, failure to sign the financing statement is a major error. See *id.* at 954.

40. See, e.g., *In re Vaughan*, 4 U.C.C. Rep. Serv. (Callaghan) 61, 62 (W.D. Mich. 1967) (financing statement filed under "Vaught" when actual debtor's name was "Vaughan"); *In re Kulesza*, 4 U.C.C. Rep. Serv. (Callaghan) 66, 67 (W.D. Mich. 1967) (filed financing statement under misspelled name "Kuelesza" instead of "Kulesza"); *In re Brawn*, 6 U.C.C. Rep. Serv. (Callaghan) 1031, 1033 (D.C. Me. 1969) (financing statement filed under misspelled name "Brown" instead of debtor's actual name "Brawn").

41. See *Citizens Bank v. Ansley*, 467 F. Supp. 51, 55 (M.D. Ga. 1979) (financing statement filed under "Ansley Farms" trade name when actual debtor "Emery Ansley"); *In re Wishart*, 10 U.C.C. Rep. Serv. (Callaghan) 1296, 1298 (W.D. Mich. 1972) (financing statement filed under name "Wishart Equipment Co." instead of actual debtor "Horace Wishart"); *In re Hill*, 363 F. Supp. 1205, 1206-07 (N.D. Miss. 1973) (financing statement filed under trade name "Carolyn's Fashions" instead of individual debtor's name).

generally looked to whether a reasonable prudent searcher⁴² would be likely to find the financing statement indexed under either a misspelled name⁴³ or a trade name where the individual is the debtor.⁴⁴ If a reasonable prudent searcher would not be likely to find the financing statement under the incorrect name it is found seriously misleading and not effective to give priority.⁴⁵ Conversely, a finding that the financing statement is not seriously misleading will result in a properly filed financing statement,⁴⁶

42. See, e.g., *In re Nara Non Food Distrib., Inc.*, 9 U.C.C. Rep. Serv. (Callaghan) 747, 749 (1971) ("Nara Dist., Inc." held valid in that reasonable prudent man would find financing statement); *In re Hatfield Constr. Co.*, 10 U.C.C. 907, 912 (M.D. Ga. 1971) (reasonable prudent man would find financing statement filed under "Hatfield, Wayne L.", rather than "Hatfield Construction Co."); *In re Wishart*, 10 U.C.C. Rep. Serv. (Callaghan) 1296, 1298 (W.D. Mich. 1972) (diligent searcher could not find financing statement filed under trade name "Wishart Equipment Co." when actual debtor was "Horace Wishart", reasoning that notice requirement is not met). The *Wishart* court applied the reasonable prudent man test in its decision and discussed the ineffectiveness of allowing the filing of a financing statement under a trade name without indicating debtor's name by way of extreme example where last name is Smith and potential creditor must find financing statement of person doing business under name "Smith Plumbing Company." See *In re Wishart*, 10 U.C.C. Rep. Serv. (Callaghan) 1296, 1298 (W.D. Mich. 1972).

43. Compare *In re Vaughan*, 4 U.C.C. Rep. Serv. (Callaghan) 61, 66 (W.D. Mich. 1967) (financing statement not found seriously misleading although debtor "Vaughan" name misspelled in financing statement due to similarity of name) and *In re Kulesza*, 4 U.C.C. Rep. Serv. (Callaghan) 66, 67 (W.D. Mich. 1967) (financing statement not found seriously misleading despite misspelling of debtor "Kulesza's" name as "Kuelesza" due to similarity of name) with *In re Brawn*, 6 U.C.C. Rep. Serv. (Callaghan) 1031, 1037 (D.C. Me. 1969) (filing under name "Brawn" when debtor's actual name "Brawn" would be misleading since index would not reveal any filing under debtor's name) and *Bank of N. Am. v. Bank of Nutley*, 227 A.2d 535, 538-39 (N.J. Super. Ct. Law. Div. 1967) (financing statement filed under name "Kaplas" when actual debtor's name "Kaplan" seriously misleading since subsequent creditors not put on notice of prior security interest, coupled with fact that misspelling fault of secured party).

44. Compare *In re Glasco, Inc.*, 642 F.2d 793, 796 (5th Cir. 1981) (filing under trade name allowed where similar to debtor's name and corporation had stationery, letterhead, and checks in trade name) and *In re Platt*, 257 F. Supp. 478, 480-81 (E.D. Pa. 1966) (financing statement filed under trade name "Platt Fur Co." held not seriously misleading since trade name was sufficiently related to name of debtor "Henry Platt") and *In re Excel Stores, Inc.*, 341 F.2d 961, 962 (2d Cir. 1965) (financing statement under trade name "Excel Department Stores" not seriously misleading since interested persons would find related name and be put on notice of lien against actual debtor "Excel Stores, Inc.") with *Citizens Bank v. Ansley*, 467 F. Supp. 51, 55 (M.D. Ga. 1979) (court disallowed trade name filing because placed burden improperly on prospective creditors) and *In re Leichter*, 471 F.2d 786-87 (2d Cir. 1972) (financing statement filed under trade name "Landman Dry Cleaners" instead of legal debtor "Leichter" held seriously misleading thus undermining purpose of notice filing system).

45. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 958 (2d ed. 1980) (author questions whether diligent searcher would discover filing).

46. See TEX. BUS. & COM. CODE ANN. § 9.402(h) (Tex. UCC) (Vernon Supp. 1982-

the final step necessary to perfection of the security interest.⁴⁷

Once a creditor has achieved perfection he gains priority over subsequent lien creditors who attempt to perfect a security interest in the debtor's inventory.⁴⁸ The secured creditor also retains his preferred position as to the transferee of the debtor in a bulk sale.⁴⁹ The bulk sales laws in conjunction with Article 9 provide protection to the secured creditor by requiring the transferee in the bulk sale to request a list of creditors from the transferor,⁵⁰ and to give notice to the transferor's creditors of the upcoming bulk sale.⁵¹

Remedial provisions are provided for non-complying bulk transfers whereby the transfer is deemed ineffective⁵² against the creditors of the transferor.⁵³ The bulk transferee then becomes liable, as a receiver of the

1983) (financing statement is perfected despite minor errors where it is not substantially misleading).

47. See *In re Mcbee*, 714 F.2d 1316, 1330 (5th Cir. 1983) (final step to perfection generally filing of financing statement which results in perfection of security interests). See generally W. DAVENPORT & D. MURRAY, SECURED TRANSACTIONS 116 (1978) (final step to perfection is generally attained by possession of the collateral or filing of proper financing statement).

48. See T. BLACK, SECURED TRANSACTIONS HANDBOOK 35 (1982). Article 9 priorities are basically determined by a few general rules. The most important general rule is section 9.312(e) which contains the "race" provisions of the Code. Where there are conflicting security interests they rank in order of priority in time of filing or perfection, whichever occurs earlier. See *id.* at 37.

49. See TEX. BUS. & COM. CODE ANN. § 6.104 (Tex. UCC) (Vernon 1968). A bulk sale is defined as "any transfer in bulk and is not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory. . . ." See *id.* § 6.102; see also Hawland, *The Trouble with Article 6 of the UCC: Some Thoughts about Section 6.104*, 82 COM. L.J. 361, 362 (1977). A bulk transfer subject to Article 6 is ineffective against transferor's creditors unless transferee complies with the bulk sales laws. See *id.* at 362.

50. See TEX. BUS. & COM. CODE ANN. §§ 6.104-6.105 (Tex. UCC) (Vernon 1968) (transferee in bulk transfer must obtain a list of transferor's creditors or transfer deemed ineffective). The protected creditors referred to in section 6.104 are those holding claims arising out of transaction occurring prior to transfer. See *id.* § 6.104 comment 2.

51. See *id.* § 6.105. The notice in all cases must be given at least 10 days prior to the transfer. See *id.* § 6.105. Texas has opted to provide additional protection for secured creditors by adding the optional section 6.106, which requires transferees in a bulk sale to see that new consideration is applied toward debt of transferor. See *id.* § 6.106; see also Rudd, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEXAS L. REV. 597, 607 (1966) (section 6.106 requires bulk transferee to insure that new consideration is paid pro rata to transferor's creditors).

52. See TEX. BUS. & COM. CODE ANN. §§ 6.104-6.105 (Tex. UCC) (Vernon 1968) (transfer deemed ineffective absent compliance with bulk sale provisions).

53. See Hawland, *Remedies of Bulk Transfer Creditor Where There Has Been Compliance with Article 6*, 74 COM. L.J. 257, 262 (1969) (discusses remedies available to secured creditors). Where the transferee has complied with the bulk sales laws, the transferor's cred-

collateral and is bound to see that it, or its value is applied to satisfy claims of the transferor's creditors.⁵⁴ Such relief is primarily obtained from assets transferred in bulk.⁵⁵ The transferor's creditors may disregard the transfer and levy on the goods as though they still belonged to the transferor.⁵⁶ As a final resort, personal liability has been imposed on transferees in a non-complying bulk sale in states which have adopted optional Section 6.106.⁵⁷

The Fifth Circuit in *In re McBee*,⁵⁸ dealt with the filing of a financing statement solely under the debtor's trade name where the individual debtor was liable⁵⁹ and with the issue of remedies available to pre-transfer creditors in a non-complying bulk sale.⁶⁰ Writing for the majority, Judge Williams held that a security interest is properly perfected when filed solely under the debtor's trade name despite the fact that the individual debtor is liable.⁶¹ He reasoned that a financing statement filed solely under the debtor's trade name is not misleading in that the credit extended was related to the business and collateralized by inventory in the business.⁶² The court also relied on the fact that McBee's potential creditors should have known that McBee had recently acquired the gun shop and checked

itors may be protected by a temporary restraining order, invoking bankruptcy laws, fraudulent conveyance laws, or application of proceeds principles. *See id.* at 262.

54. *See* B & H Auto Supply v. Andrews, 417 S.W.2d 341, 346 (Tex. Civ. App.—Dallas 1967, no writ). The levy or receivership remedies are adequate where the transferee has retained possession of the inventory subject to the lien of post-transfer creditors. *See id.* at 346; *see also* Note, *Non-compliance with Article 6 of the Uniform Commercial Code Renders Bulk Transferee Personally Liable*, 26 BAYLOR L. REV. 694, 696 (1974) (liability of transferee is that of receiver).

55. *See* Hawkland, *Remedies of Bulk Transfer Creditor Where There Has Been Compliance with Article 6*, 74 COM. L.J. 257, 259 (1969). Post-transfer creditors can generally levy and execute against transferred property in any procedurally possible manner. *See id.* at 259.

56. *See* TEX. BUS. & COM. CODE ANN. § 6.104 comment 2 (Tex. UCC) (Vernon 1968).

57. *See, e.g.*, Cornelius v. JR Motor Supply Corp., 468 S.W.2d 781, 784 (Ky. Ct. App. 1971) (personal liability imposed); Bombanzi of Lexington, Inc. v. Tafel, 415 S.W.2d 627, 631 (Ky. Ct. App. 1967) (transferee liable to extent of value of assets received); *see also* Darby v. Ewing's Home Furnishings, 278 F. Supp. 917, 918 (W.D. Okl. 1967) (non-compliance with bulk sales laws renders transferee personally liable); Note, *Non-compliance with Article 6 of the Uniform Commercial Code Renders Bulk Transferee Personally Liable*, 26 BAYLOR L. REV. 694, 697 n.24 (1974) (section 6.106 seems to impose personal liability on transferee for non-complying bulk sale); Note, *Bulk Transferee Who Does Not Comply with Article 6 of the UCC is Personally Liable to Creditors of His Transferor*, 6 HOUS. L. REV. 194, 195 (1968) (failure to comply with bulk sales laws renders bulk transferee's title to goods voidable).

58. *See In re McBee*, 714 F.2d 1316 (5th Cir. 1983).

59. *See id.* at 1319.

60. *See id.* at 1317.

61. *See id.* at 1325.

62. *See id.* at 1328.

the debtor's source of title.⁶³ The courts interpreted Section 9.402(g) of the TBCC as requiring secured parties to make these subsequent checks on debtors under some circumstances.⁶⁴ The court concluded that to disallow filing under the debtor's trade name would be contrary to the purpose of the UCC of maximizing commercial flexibility and would cause the security interest to be defeated by formal and rigid technicalities.⁶⁵ Finding a perfected security interest by virtue of the filing under the debtor's trade name, the court then addressed the issue of priorities among secured creditors in an ineffective bulk sale.⁶⁶ The court held that pre-transfer secured creditors retained priority over post-transfer creditors, noting that the sanction for non-compliance with Article 6 is that the bulk sale is deemed ineffective.⁶⁷ Relying on the underlying purpose of the Code which favors unknowing prior creditors over potential creditors, the court invoked the remedy of allowing the pre-transfer secured creditors to retain their security interest in collateral transferred and after-acquired inventory of the transferee to the extent of the value of the assets transferred in the bulk sale.⁶⁸ The court viewed Texas' adherence to the rule that an interest in inventory cover after-acquired inventory as an indication that this rule should also operate in an ineffective bulk sale.⁶⁹ The court justified its decision by stating that the transferor could not complain since she was aware of prior interests in the inventory but failed to comply with the bulk sales laws.⁷⁰ The court further emphasized that the transferee's creditors are protected by the six month time limitation within which the Code allows pre-transfer creditors to assert a security interest after a non-complying bulk sale.⁷¹

There are a number of weaknesses in the court's decision.⁷² As to the issue of filing solely under the debtor's trade name, the weakest link in the majority's line of reasoning is the reliance on cases which recognized such

63. *See id.* at 1324. The official comment to section 9.402(g) states that a person who is interested in searching for the condition of ownership of the debtor should inquire into his source of title. In doing so, the comment indicates that a check into past ownership is necessary where "the circumstances seem to require." No explanation is given as to what these circumstances are. *See* TEX. BUS. & COM. CODE ANN. § 9.402(g) comment 8 (Tex. UCC) (Vernon Supp. 1982-1983).

64. *See In re McBee*, 714 F.2d 1316, 1328 (5th Cir. 1983).

65. *See id.* at 1325.

66. *See id.* at 1325.

67. *See id.* at 1328.

68. *See id.* at 1330.

69. *See id.* at 1330.

70. *See id.* at 1330; *see also* TEX. BUS. & COM. CODE ANN. § 6.111 (Tex. UCC) (Vernon 1968) (no action available against transferor after six months from transfer).

71. *See In re McBee*, 714 F.2d 1316, 1321-33 (5th Cir. 1983).

72. *See id.* at 1330.

filing when not seriously misleading.⁷³ Since those cases found a trade name not seriously misleading where it was substantially related to the individual debtor's name,⁷⁴ reliance on these cases is misplaced because "Oak Hill Gun Shop" is clearly not substantially related to the individual debtor's name, "Joe B. Colley".⁷⁵ The majority also relied upon the fact that this was a business-related loan collateralizing inventory used in the business as justification for filing under the trade name alone,⁷⁶ based on the assumption that a reasonably prudent creditor would search under a business name. This argument fails in two respects.⁷⁷ First, filing under a trade name would lead a creditor to believe the named business was liable

73. See, e.g., *In re Glasco, Inc.*, 642 F.2d 793, 795 (5th Cir. 1981) (financing statement filed under trade name "Elite Boats, Division of Glasco, Inc." not misleading although debtor's actual legal name "Glasco, Inc."); *In re Excel Stores, Inc.*, 341 F.2d 961, 963 (2d Cir. 1965) (filing under name "Excel Department Stores" rather than correct name "Excel Stores, Inc." sufficient under section 9.402); *In re Fowler*, 407 F. Supp. 799, 802 (W.D. Okla. 1975) (filing under trade name effective where not seriously misleading).

74. Compare *In re Platt*, 257 F. Supp. 478, 482 (E.D. Pa. 1966) (debtor's trade name, "Platt Fur Co.," sufficiently related to name of debtor, "Henry Platt," to require searchers to inquire further) with *In re Thomas*, 466 F.2d 51, 52 (9th Cir. 1972) (trade name differed more than slightly from debtor's real name "Burriss Haley Thomas" and as such financing statement was fatally defective) and *In re Firth*, 363 F. Supp. 369, 371-72 (M.D. Ga. 1973) (purpose of Code's notice filing system would be frustrated by holding that financing statement filed under trade name "National Photo Copy Equipment Co." gave proper notice since creditor searching under individual debtor's name "Firth" would not discover security interest).

75. See *In re McBee*, 714 F.2d 1316, 1321 (5th Cir. 1983) (court never stated that "Oak Hill Gun Shop" was substantially related to "Joe B. Colley" but justified use of trade name based upon business nature of loan and fact that it would not mislead business creditors).

76. See *id.* at 1321. The court distinguished between individual debtors and business debtors to justify trade name filing in that the business debtor is likely to be held out to the business community under the trade name. See *id.* at 1323-24. The case relied upon to substantiate this holding, however, allowed filing under the trade name due to the similarity of the trade name and the debtor's name. See *id.* at 1324 (citing *In re Glasco*, 642 F.2d 793 (5th Cir. 1981)); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 956 (2d ed. 1980) (trade name filing tolerated only where not misleading). White and Summers use this test to determine whether the financing statement is seriously misleading: Would a reasonably diligent searcher be likely to discover a financing statement indexed under the incorrect name? The commentators looked at such factors as whether the name used sounds the same as the real name, and whether the name is highly unusual. See *id.* at 958-65.

77. See *In re McBee*, 714 F.2d 1316, 1325 (5th Cir. 1983). The court presumed that a creditor who was attempting to ascertain prior security interests in collateral could certainly discover the filings under the name of the gun shop. The distinction between a personal loan and a business loan, as the court determined, was that a personal creditor would not be as likely to know the debtor's trade name. See *id.* at 1324; see also TEX. BUS. & COM. CODE ANN. § 9.402(a) (Tex. UCC) (Vernon Supp. 1982-1983). It is significant that the language of the specific statute requires the "debtor's name" not the debtor's "trade name." See *id.* § 9.402(a).

for debts when, in fact, the individual debtor is the indebted party.⁷⁸ Thus, filing under a trade name would frustrate the notice filing system by causing potential creditors to attempt to second-guess possible trade names of the person actually liable.⁷⁹ Second, and most importantly, the court has totally disregarded the specific language of official comment 7 of section 9.402(g) of the TBCC which disallows filing solely under a trade name due to its uncertainty and likelihood of being ignored.⁸⁰

Another weak area involves the ineffective bulk sale issue. In analyzing the ineffective bulk sale, the court attempted to provide a remedy for the pre-transfer secured creditor while it totally disregarded the post-transfer creditor's secured position, thus allowing the pre-transfer creditor to retain priority in after-acquired inventory.⁸¹ This decision is unique in that generally courts will allow pre-transfer creditors to execute and proceed against the inventory transferred at the time of the bulk sale, or the proceeds therefrom.⁸² Where the transferee has squandered the proceeds,

78. See TEX. BUS. & COM. CODE ANN. § 9.402(g) (Tex. UCC) (Vernon Supp. 1982-1983). The statute requires the name of the party who is liable as the debtor in the provision stating "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." *Id.*

79. See *In re Leichter*, 471 F.2d 785, 786 (2d Cir. 1972) (financing statement filed solely under trade name "Landman Dry Cleaners" not under Leichter's own name). The court looked to the purpose of the notice filing system in determining that if the actual debtor's name is missing from the financing statement the purpose of the general statutory scheme would certainly be undermined. See *id.* at 786-88. This is so because the creditor would look under the debtor's name "Leichter" and would not find the trade name "Landman Dry Cleaners." See *id.* at 786-88. A decision to allow filing under the trade name would invariably cause the creditor, who may be a trustee in bankruptcy, to check all possible trade names rather than simply the statutory requirement of checking the actual debtor's name. See *id.* at 788.

80. See TEX. BUS. & COM. CODE ANN. § 9.402(g) comment 7 (Tex. UCC) (Vernon Supp. 1982-1983) (specifically disallows trade name filing making no exceptions for business debtor). While the Code does not allow filing under a trade name alone, the converse, filing solely under the individual debtor's name is specifically allowed by the statute. See *id.* § 9.402(g).

81. See *In re McBee*, 714 F.2d 1316, 1331 (5th Cir. 1983). The court stated that a transferor can retain an interest in property that has been transferred which he no longer owns and in after-acquired property of the transferee. See *id.* at 1331. The court based its holding on the fact that the original security interest against Colley extended to after-acquired inventory. See *id.* at 1331. Thus, the transferee is not in a position to complain since she (McBee) was aware that the prior financing statement covered after-acquired inventory. See *id.* at 1328. Further, the court held that the transferee's creditors should have inquired whether the transferee in the bulk sale complied with the bulk transfer statutes. See *id.* at 1328. *But see* Hawkland, *The Trouble with Article 6 of the UCC: Some Thoughts About Section 6-103*, 82 COM. L.J. 113, 114 (1977) (transferee only person responsible for ineffective bulk sale).

82. See *McKissick v. Foremost-McKesson, Inc.*, 8 U.C.C. Rep. Serv. (Callaghan) 1301,

Texas courts have held the transferee personally liable.⁸³ Certainly the Code provisions regarding the ineffective bulk sale should be enforced against the transferee, but secured creditors of the transferee should not suffer for the mistake of their debtor.⁸⁴ The court then contradicts itself, justifying its harsh decision against the transferee's creditors under the official comment to Section 9.402(g), which provides that, where circumstances warrant, a transferee's creditors should check into the prior source of the transferee's title.⁸⁵ A check into prior source of title would be fruitless, however, due to this court's decision to permit filing under a trade name alone.⁸⁶

When the foregoing analysis is applied to the case at hand, it is evident that the decision to allow pre-transfer creditors the right to retain priority in after-acquired inventory was merely an attempt by the court to provide a remedy for the pre-transfer creditor where no remedy has been provided by statute.⁸⁷ This decision, however, overzealously favors the pre-transfer secured creditor, ignoring the Code's underlying purpose of protecting all

1305 (5th Cir. 1971) (ineffective bulk sale allows pre-transfer creditors to avoid transfer, issue execution, and proceed against transferred property or proceeds therefrom).

83. *See* *Anderson & Clayton Co. v. Ernest*, 610 S.W.2d 846, 849 (Tex. Civ. App.—Amarillo 1980, no writ) (transferee held personally liable in ineffective bulk sale). For a detailed discussion of the personal liability incurred by the transferee in a non-complying bulk transfer, see Note, *Bulk Transferee Who Does Not Comply with Article 6 is Personally Liable to Creditors of His Transferor*, 6 HOUS. L. REV. 194, 196 (1968) (Texas by its adoption of section 6.106, undoubtedly agrees with theory that transferee should see that transferor's creditors are paid).

84. *See* *Anderson & Clayton Co. v. Ernest*, 610 S.W.2d 846, 849 (Tex. Civ. App.—Amarillo 1980, no writ); *see also* *B & H Auto Supply, Inc. v. Andrews*, 417 S.W.2d 341, 346 (Tex. Civ. App.—Dallas 1967, no writ). Personal liability extends only to the value of the inventory transferred, thus the transferee and not the transferee's creditor, is liable. *See id.* at 346.

85. *See In re McBee*, 714 F.2d 1316, 1328 (5th Cir. 1983). Court had no sympathy for transferee's creditors based on official comment 8 wherein the transferee's creditors are warned to check into the prior source of title where the circumstances warrant. *See id.* at 1328.

86. *See id.* at 1325. A filing under the trade name "Oak Hill Gun Shop" as allowed by the court would not enable the creditor to find a prior owner. *See id.* at 1325. This is due to the fact that the statute requires that when a person is checking the source of ownership, he check the debtor's (McBee's) source of title. *See id.* at 1325. Official Comment 8 specifies that the manner of searching for the debtor's source of title is to search in the *name* of the *prior owner*. *See* TEX. BUS. & COM. CODE ANN. § 9.402(g) comment 8 (Tex. UCC) (Vernon Supp. 1982-1983).

87. *See* TEX. BUS. & COM. CODE ANN. § 6.104 (Tex. UCC) (Vernon 1968) (transfer deemed ineffective upon transferee's failure to comply with sections 6.104 and 6.105); *see also* *Hawkland, Remedies of Bulk Transfer Creditors Where There Has Been Compliance With Article 6*, 74 COM. L.J. 257, 257 (1969). While the Code has provided that a bulk transfer will be deemed ineffective as against pre-transfer creditors, no remedies are set out to address the matter. *See id.* at 257.

secured creditors, including post-transfer creditors.⁸⁸ In order to alleviate the harsh results of this decision, Texas should adopt a new bulk sales provision setting forth the remedies available to protect secured creditors.⁸⁹ The pre-transfer creditor's remedies should be limited to the actual inventory transferred in the bulk sale or to its proceeds.⁹⁰ As a last resort, the transferee should be responsible for his own failure to comply with bulk sales laws by imposition of personal liability.⁹¹ A new statute setting

88. See *Southwestern Drug Corp. v. McKesson & Robbins*, 172 S.W.2d 485, 487 (Tex. 1943) (purpose of article 6 is to protect *all* secured creditors from illegal transfers); see also J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 299-300 (2d ed. 1980) (purpose of notice filing system to protect secured creditors and give notice to potential creditors of outstanding claim against debtor).

89. See *TEX. BUS. & COM. CODE ANN* § 6.104(1) (Tex. UCC) (Vernon 1968). The Code sets the stage by deeming the transfer ineffective against the transferor's creditors but does not follow through and specify any remedial provisions available to the transferor's creditors. See *id.*; Lakin, *Bulk Transfers: What Hath the Uniform Commercial Code Wrought?*, 35 MD. L. REV. 197, 228 (1975) (term "ineffective" is undefined in the UCC but seems to mean "voidable"). The Code defined a non-complying bulk sale as "ineffective" but did not set out statutory remedies; thus leaving creditors to remedies available under local and/or federal laws. Thus, the Code did not grant any specific remedies to the creditors. See *id.* at 229; Larson, *Bulk Transfers: Some Interpretive Problems*, 2 RUT.-CAM. 101, 115-16 (1970) (remedies not specified in Code, thus, creditor forced to pursue local remedies).

90. See *Anderson & Clayton Co. v. Ernest*, 610 S.W.2d 846, 848 (Tex. Civ. App.—Amarillo 1980, no writ) (transferee liable for inventory transferred or proceeds resulting therefrom). This court followed the majority of jurisdictions in holding the transferee liable for the value of inventory transferred or proceeds therefrom. See *id.* at 849; Lakin, *Bulk Transfers: What Hath the Uniform Commercial Code Wrought?*, 35 MD. L. REV. 197, 229 (1975) (discusses various remedies provided in majority of jurisdictions). One commentator states that basically the remedy will depend on the jurisdiction but generally the following remedies are provided:

- (1) an action against the transferee for the proceeds of the transfer,
- (2) execution levied directly against the property in the possession of transferee as if no sale had ever taken place,
- (3) garnishment of the proceeds in the possession of the transferee,
- (4) attachment of the property in the possession of the transferee,
- (5) injunction to prevent proposed transfer or,
- (6) petition for the appointment of a receiver for the transferred property or an accounting of the proceeds.

Lakin, *Bulk Transfers: What Hath the Uniform Commercial Code Wrought?*, 35 MD. L. REV. 197, 229 (1975).

91. See *Darby v. Ewing's Home Furnishings*, 278 F. Supp. 917, 919 (W.D. Okla. 1967) (failure to comply with bulk sales laws renders transferee personally liable to creditors of transferor); see also Note, *Bulk Transferee Who Does Not Comply with Article 6 Is Personally Liable to Creditors of His Transferor*, 6 HOUS. L. REV. 194, 196 (1968) (states which have adopted additional section 6.106 generally provide for personal liability of transferee). Several jurisdictions have adopted optional section 6.106 of the UCC which provides for personal liability of the transferee due to the additional language, "[T]his duty of the transferee runs to all the holders of such debts, and may be enforced by any of them [the creditors] for

forth the above-mentioned remedial provisions not only will provide a remedy for the pre-transfer creditor in an ineffective bulk sale but also will protect the secured position of the post-transfer creditor.⁹²

McBee represents an attempt by the Fifth Circuit to deal with the problems of invoking the proper remedy for parties involved in a non-complying bulk sale.⁹³ Although the majority acknowledged that the effect of a non-complying bulk sale is to treat the transfer as ineffective,⁹⁴ it refused to apply the remedial provisions which have been established by case law.⁹⁵ This decision promotes inequity in that it provides priority for "later in time" secured creditors in a bulk sale even over a transferee's "prior in time" secured creditor who will lose secured status.⁹⁶ The court further inhibits the flexibility of commercial transactions by allowing perfection by filing the financing statement of an individual debtor solely under a trade name.⁹⁷ *McBee* will result in prolonging the potential creditor's inquiry as to debtor's names, activities, and business interests, and will create an atmosphere of insecurity in the effectiveness of the notice filing system.⁹⁸ To prevent the disastrous results of this decision, a new

the benefit of all." See Note, *Bulk Transferee Who Does Not Comply with Article 6 Is Personally Liable to Creditors of His Transferor*, 6 Hous. L. Rev. 194, 196 (1968).

92. See W. HAWKLAND, *SALES AND BULK SALES* 214 (3d ed. 1976) (non-compliance with bulk transfer laws renders transfer "ineffective" against transferee; however, Code has only indirectly set out remedies by referencing state laws).

93. See *In re McBee*, 714 F.2d 1316, 1329 (5th Cir. 1983) (invoked remedy of allowing pre-transfer creditor rights in after-acquired inventory of transferee); see also W. HAWKLAND, *SALES AND BULK SALES* 214 (3d ed. 1976) (Code has provided no remedies for "ineffective bulk sale").

94. See *In re McBee*, 714 F.2d 1316, 1329 (5th Cir. 1983); see also TEX. BUS. & COM. CODE ANN. §§ 6.104-6.105 (Tex. UCC) (Vernon 1968) (failure to comply with sections 6.104 and 6.105 renders transfer ineffective as to pre-transfer creditors).

95. See *Eagle Drug Co. v. White*, 182 S.W. 379, 382 (Tex. Civ. App.—Amarillo 1919, no writ) (creditors may levy against item transferred or value). Adhering to case law which has attempted to provide remedial provisions, a transferor's creditors should be allowed to levy and execute on inventory transferred to transferee or proceeds therefrom. See *id.* at 395; *Darby v. Ewing's Home Furnishings*, 278 F. Supp. 917, 919 (W.D. Okla. 1967) (personal liability imposed on transferee who fails to comply with bulk sales provision). But see *Anderson & Clayton Co. v. Ernest*, 610 S.W.2d 846, 848 (Tex. Civ. App.—Amarillo 1980, no writ) (personal liability not imposed unless transferee converts property to his own use).

96. See W. DAVENPORT & D. MURRAY, *SECURED TRANSACTIONS* 1 (1978). Today a creditor who wants to be certain that his loan will be repaid takes a special interest in property, such as inventory, in order to become secured and thus protected against both secured and unsecured creditors. See *id.* at 2.

97. See *In re McBee*, 714 F.2d 1316, 1320 (5th Cir. 1983). The court determined that "Oak Hill Gun Shop" for debtor's trade name was not seriously misleading where debtor's actual name was "Joe B. Colley". See *id.* at 1320.

98. See *In re Thomas*, 466 F.2d 51, 52 (9th Cir. 1972). Where a trade name differs more than slightly from the debtor's name the financing statement is fatally defective, due to

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statute should be enacted which clarifies the remedial provisions available to the pre-transferee's creditors.⁹⁹

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the onerous burden placed on the person searching the index to determine any possible names under which the debtor is filed. *See id.* at 52.

99. *See Note, Bulk Transferee Who Does Not Comply with Article 6 Is Personally Liable to Creditors of His Transferor*, 6 Hous. L. Rev. 194, 196 (1968) (need exists for statutory remedies for transferee's non-compliance with bulk sale provisions); *see also* W. HAWKLAND, SALES AND BULK SALES 214 (3d ed. 1976) (Code drafters failed to provide necessary remedies for ineffective bulk sales).