

IN RE C. W. MINING COMPANY: RECENT CASE HIGHLIGHTS THE IMPORTANCE OF USING A DEBTOR'S EXACT NAME ON A UCC FINANCING STATEMENT TO PERFECT A SECURITY INTEREST

In order for the filing of a financing statement to perfect a security interest against a registered organization¹ debtor, the financing statement must provide, among other things, the name of the debtor indicated on the public record of the debtor's jurisdiction of organization that shows the debtor to have been organized.² A secured creditor that fails to properly perfect its security interest may be treated as having an unsecured claim in the debtor's bankruptcy proceeding. A recent Utah District Court decision underscores the importance under Article 9 of the Uniform Commercial Code (the "*UCC*") of providing the exact name of the debtor (including punctuation) on a financing statement. This memorandum discusses the case, reminds secured creditors to use caution in the preparation of financing statements and discusses certain pending clarifications to the UCC that provide guidance as to how to determine the correct name of a registered organization.

In *In re C. W. Mining Company*, 2013 WL 888677 (D. Utah, March 8, 2013), the United States District Court for Utah, Central Division, affirmed in part an Order entered by the United States Bankruptcy Court for the District of Utah. The District Court held that financing statements that do not provide a debtor's registered organization name exactly as indicated in the official records of the debtor's jurisdiction of organization are "seriously misleading" under Utah law and insufficient to perfect any security interest that the secured party possesses.³

C. W. Mining Company ("*CWM*") operated a mining company, with its primary asset being Bear Canyon mine, an underground coal mine located in Emery County, Utah. During the time period in which CWM operated Bear Canyon mine, Standard Industries, Inc. ("*Standard*") acted as CWM's coal broker under various verbal agreements and at least two written agreements. The written agreements detailed the contractual arrangement between CWM and Standard and, among other things, made provisions for Standard to advance money to CWM. The written agreements further granted Standard a security interest in substantially all of CWM's

¹ UCC Section 9-102(a)(70) defines "registered organization" as an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.

² See UCC Section 9-503(a)(1).

³ The District Court decision also addressed other issues on appeal, including whether the agreements between one secured party and the debtor were purchase contracts transferring ownership of assets from the debtor to the secured party or merely disguised security agreements under which the debtor retained its ownership interest in the assets subject to any properly perfected security interest of the secured party. This memorandum discusses only the issue of whether each secured party had a properly perfected security interest to the extent the agreements in question were in fact security agreements.

assets. CWM also obtained financing from various other sources, each of which was also granted a security interest in CWM's assets.⁴

Standard and the other secured creditors correctly sought to perfect their respective security interests in CWM's assets by filing financing statements with the Utah Division of Corporations and Commercial Code (the "*UDCC*"). CWM was identified as "CW Mining Company" or "CW Mining Company." in each of the filed financing statements. However, pursuant to the *UDCC*'s public records (the *UDCC* also maintains the public records for all registered organizations that organize under Utah law), "C. W. Mining Company" is CWM's exact name. Each of the financing statements omitted the periods and spaces after the first two letters of CWM's registered name and instead ran the first two letters together. In the bankruptcy proceeding, the director of the *UDCC* testified that the Utah database search engine will retrieve search queries only if they contain exactly the same spacing and punctuation as the database entry. Thus, the financing statements filed by Standard and the other secured creditors do not appear under a search of the *UDCC*'s records using the *UDCC*'s standard search logic and CWM's proper name.

The Bankruptcy Court ruled in favor of CWM, allowing CWM to avoid all of the security interests claimed by Standard and the other secured creditors. The Bankruptcy Court held that because the financing statements filed by Standard and the other secured creditors did not appear under a search of the *UDCC*'s records using standard search logic, the financing statements were "seriously misleading and did not perfect any security interest."

On appeal, the District Court affirmed the Bankruptcy Court decision on the issue of whether the financing statements properly perfected Standard's and the other secured creditors' security interests. The District Court held that Utah law requires that to be effective, a financing statement must indicate the collateral covered and provide the name of the debtor and the secured party. If the debtor is a registered organization, a financing statement sufficiently provides the name of the debtor only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization that shows the debtor to have been organized. A financing statement that does not contain the debtor's registered organization name is "seriously misleading."

The District Court also considered the argument made by Standard and the other secured creditors that their financing statements qualified for the "escape hatch" provision under the Utah Code. Under the Utah Code, the "escape hatch" provision provides that if a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor, the name provided does not make the financing statement seriously misleading. The District Court rejected this argument, reasoning per the testimony of the director of the *UDCC*

⁴ The interpretation of the agreements between CWM and the other financing sources was not an issue on appeal, and the District Court decision does not provide any detail with respect to the various financings obtained by CWM from sources other than Standard.

that a search using the UDCC's standard search logic and CWM's registered organization name does not reveal the financing statements filed by Standard and the other secured creditors under CWM's incorrect name. The District Court further elaborated that the safe harbor provided by the "escape hatch" provision was expressly tied to the actual search logic used and that it was irrelevant for purposes of the provision whether further reasonable diligent search would have discovered the financing statements. Therefore, Standard and the other secured creditors could not avail themselves of the safe harbor provision under the Utah Code.

This decision highlights the importance of meticulous attention to detail in the preparation of financing statements. To perfect a secured party's security interest against a debtor that is a registered organization, a financing statement must provide (among other things) the exact name of the debtor. Even punctuation and spacing should match exactly. Further, a secured party should not rely on safe harbor-type rules under the UCC of any particular jurisdiction. As this decision demonstrates, the search logic of the filing office in a jurisdiction might not retrieve financing statements containing names that are very close to, but not exactly the same as, a debtor's name.

The Article 9 Joint Review Committee Members, Advisors and Observers⁵ considered this issue and because some concern was expressed about determining the name of a registered organization debtor for the purpose of providing the debtor's name on a financing statement, the amendments to the Official Text of Article 9 of the UCC approved in 2010 by the American Law Institute and the Uniform Law Commission (the "**Amendments**") clarify that for a financing statement to be sufficient, the name of a registered organization debtor provided on the financing statement must be the name reflected on the "public organic record"⁶ of the registered organization. If the public organic record has been amended, the name of the debtor to be provided on the financing statement is the name provided on the most recent amendment. A state's business entity database is not a public organic record as defined by the Amendments. The Amendments also modify the definition of "registered organization" to reflect that an organization is a registered organization if it is formed solely under the law of a single state by the filing of a public organic record with the state rather than, as under current Article 9, by the state's merely being required to maintain a public record showing that the organization has been organized.⁷ This change will more accurately reflect that the term "registered organization"

⁵ Cindy J. Chernuchin was an Article 9 Joint Review Committee Observer.

⁶ "Public organic record" is a new defined term added by UCC Section 9-102(a)(68). It clarifies which "public record" is the correct source of a debtor name for purposes of Section 9-503(a)(1). It includes not only the articles of incorporation or equivalent formation records filed to create a business entity, but also the record initially filed by a business trust, legislation that creates an organization, and a government-issued charter that forms an organization. The effect of the new definition, along with the corresponding changes to the definition of "registered organization" in Section 9-102(a)(71), is to expand the scope of entities subject to the name requirements for registered organizations in Section 9-503(a)(1).

⁷ See Section 9-102(a)(71). The definition of "registered organization" is changed to incorporate the new definition of "public organic record" added by Section 9-102(a)(68). The result is that some entities that are formed without the need for the filing of a public record will become registered organizations when the Amendments take effect. The requirements for sufficiency of a registered organization debtor name in Section 9-503(a)(1) are modified to reflect the new definition.

includes an organization whose formation emanates from the act of making a public filing. The Amendments do not change current law with respect to search logic. Each filing office establishes its standard search logic through administrative rules. The Amendments include other revisions that affect filing, such as providing that a filing office will no longer be permitted to reject a financing statement that fails to include the type of organization of the debtor, the jurisdiction of organization of the debtor, or the organizational identification number of the debtor or a statement that the debtor has none.⁸ The uniform forms of initial and amendment financing statements dated April 20, 2011 have been updated to reflect the Amendments by eliminating these fields. Filers should continue to use the current forms until the Amendments are effective in the applicable state and use the new forms on or after the effective date in any state that has adopted the Amendments. As of April 3, 2013, thirty-six (36) states have enacted the Amendments.

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⁸ See UCC Section 9-516(b)(5)(C).