

Strict Liability for Ineffective UCC-1: Guidance for Secured Creditors



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On May 31, the U.S. Bankruptcy Court for the Northern District of Georgia, in *In re Wastetech, LLC*, granted a bankruptcy trustee's motion for summary judgment, holding that the secured party's UCC-1 financing statement was ineffective to perfect its security interest in the debtor's assets. The court found the financing statement was ineffective because it did not include the debtor's legal name, which the debtor changed without notifying the secured party, and it did not reasonably identify the collateral subject to the security interest.

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The case provides important guidance to creditors, including:

- Creditors should always conduct due diligence on the information required on a financing statement, regardless of their relationship with the debtor.
- It is best practice for a creditor to be specific when listing collateral for security interest, unless the financing statement covers all assets or all personal property.

Background

Wastetech, LLC executed six purchase and sale of future receivables agreements in favor of Silverline Services Inc. that gave Silverline a security interest in “all of Wastetech’s future receivables, inventory, equipment, goods, accounts, investment property, and other personal property and assets.” The first agreement was signed and dated on June 13, 2017, and the last agreement was signed on September 26, 2017. On July 7, 2017, Wastetech legally changed its name from NTC Waste Group, LLC to Wastetech, LLC.

Silverline did not file a financing statement until November 14, 2017. In the financing statement, Silverline identified the debtor as “NTC Waste Group, LLC.” The description of collateral described Silverline’s security interest in “certain future receivables sold by said business seller and purchased by Crown Funding Group, Inc.” pursuant to a receivables agreement entered into on August 7, 2017. None of the six receivables agreements were entered into on that date.

Wastetech filed for Chapter 7 bankruptcy in early 2018. The trustee subsequently initiated an adversary proceeding based on the inaccurate UCC-1 to subordinate Silverline’s claims, to avoid any transfers of receivables from Wastetech to Silverline, and to recover any transfer for the benefit of the estate.

The definitive issue in the proceeding was whether Silverline’s security interest in Wastetech’s collateral was unperfected because (1) Wastetech’s name listed in the financing statement was inconsistent with its name in the public record as of the date of recording due to the name change and/or (2) the collateral description in the financing statement was not adequate because the agreement date and the secured creditor name contained in the collateral description were inaccurate.

Analysis

Debtor's Name Listed in the Financing Statement

Under the Bankruptcy Code, the trustee has the power to avoid a creditor's security interest if the interest has not been perfected. UCC § 9-503 provides that, for a financing statement to be effective for purposes of perfection, if the debtor is a registered organization, the financing statement must provide "the name that is stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name." This record is typically a company's articles of incorporation, certificate of formation or similar document.

The only exception to this rule applies when "a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, would disclose such financing statement." At the time of the filing, Wastetech's name as shown in public record was Wastetech, LLC. Wastetech's name in the financing statement was incorrect unless the safe harbor applied.

The trustee provided evidence of searches conducted using "Wastetech" or "Wastetech, LLC" as the debtor, which produced no financing statements. Silverline argued that a search of "wastetech" in the records of the Georgia Corporations Division led to Wastetech, LLC, formerly known as NTC Waste Group, LLC. The court did not validate Silverline's argument because Silverline relied on a general corporate search and not a filing office search.

Silverline also argued that Wastetech continued to operate under its former name after the name change, creating a misleading impression. The court found that it was irrelevant whether the secured party was confused or misled by its ongoing relationship with the debtor. The court noted that the official comments to the Uniform Commercial Code state that "it is the secured party's responsibility to provide the name of the debtor sufficiently in a filed financing statement." The court distinguished between the case that Silverline cited to support its argument — *Western Auto Supply Co. v. McKenzie*, 489 S.E.2d 537 (Ga. App. 1997) — and the case before the court because in *Western Auto Supply* the debtor's name change occurred after the filing of the UCC-1, not before. The court stated that the name requirement is simple, and the liability for failing to comply is strict.

Description of Collateral Does Not Adequately Identify the Collateral

In order for a financing statement to be effective, the statement must adequately describe the collateral covered by the financing statement. There are two ways to sufficiently indicate the collateral under the UCC. UCC § 9-504 provides that a financing statement sufficiently indicates the collateral if it provides one of the following:

- a description of the collateral pursuant to UCC § 9-108 (by specific listing, category, type of collateral defined in the UCC, quantity, formula or procedure, or any other method if the identity of the collateral is objectively determinable)
- an indication that the financing statement covers all assets or all personal property (*i.e.*, the “super-generic description”).

The purpose of this requirement is to raise a red flag to third parties that further investigation may be necessary to determine whether an asset is subject to a security interest. Silverline’s description was too specific, describing the collateral as “certain future receivables.” If the description had been “all future receivables of the Debtor” or had been identical to the language of the receivables agreements (“all of Wastetech’s future receivables, inventory, equipment, goods, accounts, investment property, and other personal property and assets”), the court stated that the description would have met the requirements under UCC § 9-108.

In the alternative, a secured party could use the underlying agreement as an indicator of the specified collateral. However, Silverline’s description of the receivables agreement in the financing statement was inaccurate: The agreement date did not match the date of any of the six executed receivables agreements, and the counterparty to the receivables agreement is listed as “Crown Funding Group, Inc.,” which is not a name on any of the receivables agreements. The court held that, given the ambiguity, the information in the financing statement failed to provide a “key” to the relevant agreement and thus the collateral’s identity.

Takeaways

Creditors should take careful notice of the information requested on a financing statement in order to protect their security interests. Even in ongoing business relationships, a creditor should perform due diligence when handling transactions to confirm the correct legal name of the debtor. Additionally, debtors can be required to provide representations and warranties as to their legal name, and to covenant that they will inform the secured party of any changes to their legal name.

If a secured party does not obtain a blanket interest in all the debtor's assets or a category of assets, it is best practice to be as specific as possible when describing the collateral and, if referring to another document, to accurately describe the reference document in the financing statement.