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Legal Briefs from the Attorneys of
Mackall, Crouse & Moore, PLC

Creditors' Corner

Monday, November 2, 2009
Volume 9, Number 10

DEFICIENCY JUDGMENT NOT ALLOWED ON REVENUE BOND DEBT

The Minnesota Court of Appeals held that a lender who holds a revenue bond is limited in collection to those specific assets the bond identifies as sources for repayment.

In *American National Bank of Minnesota v. Housing and Redevelopment Authority for the City of Brainerd*, (Case No. A08-1814, Minn. App. Oct. 13, 2009), a lender, ANB, sought to collect a deficiency judgment from the HRA after the proceeds from a foreclosure sale on ten properties were insufficient to satisfy the revenue note ANB purchased from HRA to finance construction of the properties. The revenue note specifically identified the sources of repayment from which ANB could collect to satisfy the indebtedness under the revenue note including: the proceeds of the sales of the ten model homes; an interest reserve fund; and a mortgage on the properties. The project defaulted and ANB foreclosed its mortgage. Even though the proceeds of the foreclosure were insufficient to satisfy the debt, the court refused to grant a deficiency judgment.

The court found that ANB did not have a standard promissory note, under which it would have unlimited recourse against all of debtor's assets. Instead, ANB had purchased revenue bonds, which under Minn. Stat. § 469.034, subd.1, are payable from specific sources identified in the bond transcript. *See* Minn. Stat. § 469.034, subd. 1. They are distinct from general obligation bonds which are payable from the issuer's general revenues. In this case, the thirteen closing documents which comprised the "bond transcript" did not list any recourse against the issuer other than those specific assets listed above, and thus ANB could not recover a deficiency, notwithstanding that it complied with all foreclosure laws necessary to preserve a deficiency.

8TH CIRCUIT COURT OF APPEALS REVISITS AND LIMITS FEDERAL PREEMPTION OVER NATIONAL BANKS

The 8th Circuit Court of Appeals limited the doctrine of preemption that normally permits national banks to remove lawsuits to federal court.

In *Thomas v. US Bank National Assoc. et al.*, No. 08-3302, (8th Cir. 2009), a Missouri plaintiff brought an action in state court alleging violation of Missouri statutes limiting the types and amounts of closing costs and fees a lender can charge on second mortgage residential loans. The defendant, a national banking association, removed the matter to federal district court alleging that the Depository Institutions Deregulation and Monetary Control Act ("DIDA") preempted state law claims because the National Bank Act had been found by the U.S. Supreme Court to preempt state law. The district court agreed and concluded that DIDA provided the exclusive remedy for usury claims against federally insured banks and dismissed the plaintiff's case.

The plaintiff appealed to the 8th Circuit Court of Appeals arguing that DIDA was materially different than the National Bank Act and that preemption did not apply where state law allowed a higher interest rate than the interest rate set forth in DIDA. The 8th Circuit found that complete preemption did not exist in this case because the language of DIDA did not reflect the intent of Congress to provide the exclusive remedy for a claim against a federally insured bank. The court based that conclusion on the plain language of the statute which says that the state interest rate allowed is only preempted "if" exceeded by the rate prescribed in the federal statute. Here the allowed state rate exceeded the allowed federal rate. The court remanded the case to state court for trial.

This decision is contrary to the result reached in the 4th Circuit and casts doubt on how other regulatory statutes may be interpreted. The attorneys at Mackall, Crouse & Moore are experienced in regulatory litigation and can assist in handling these issues before the various state and federal courts.

FRAUD JUDGMENTS ARE NON-DISCHARGEABLE EVEN AFTER A TEN-YEAR RENEWAL

The Bankruptcy Court for the District of Minnesota held that fraud judgments remain non-dischargeable even after ten years so long as the action to renew the judgment is filed timely.

In *Swart v. Dahl (In re Dahl)* No. 09-1255 (D. Minn. 2009), Swart held a state court judgment against debtors John and Cindy Dahl based on claims of fraud, deceit and embezzlement, entered in September, 1998. Swart commenced a state court action in August, 2008 to renew the judgment, in advance of the expiration of the ten-year term for enforcement. Debtors filed bankruptcy in October, 2008, staying the state court renewal action. Swart commenced an adversary action in the bankruptcy case to assert that the debt was non-dischargeable. Debtors claimed that the action was barred because the judgment was not renewed within ten years, and argued that the facts which supported entry of the original judgment merged into the judgment so that such facts could not support entry of a second judgment. The bankruptcy court held in favor of Swart, which was affirmed by



the district court. The court held that the action was not time barred, because the renewal lawsuit was commenced before the ten year period had expired. It also stated that the action was simply to extend the life of an existing judgment, and that merger did not apply. The debt was held non-dischargeable.

This case shows how important it is to properly document and prove fraud when a judgment is obtained. The attorneys at Mackall, Crouse and Moore regularly obtain and enforce judgments, and have extensive experience in state, federal and bankruptcy courts.

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