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

Creditors' Corner

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MINNESOTA INCREASES JUDGMENT RATE TO 10% FOR JUDGMENTS EXCEEDING \$50,000

For judgments exceeding \$50,000, Minnesota has increased the interest rate that accrues on most state court judgments to 10%. For judgments under \$50,000 the judgment rate will remain at 4%. The rates are effective as of August 1, 2009. This is the first year Minnesota set a higher interest rate for judgments exceeding \$50,000.

DISTRICT COURT AWARDS LENDER ATTORNEYS FEES INCURRED IN DEFENSE OF CLAIMS BROUGHT BY BORROWER, AS A COST OF COLLECTION

The United States District Court for the District of Minnesota recently enhanced a creditor's ability to recover attorneys fees against a borrower suing the lender. In *David L. Boone d/b/a Craft Plumbers v. Wells Fargo Bank, N.A.*, 07-3922 (D. Minn. 2009), Boone sued Wells Fargo on a variety of claims. Wells Fargo counterclaimed against Boone based on his default under the terms of the loan. After Wells Fargo succeeded on its counterclaim and defeated Boone's claims, it moved for recovery of \$119,790.59 in attorneys fees and costs incurred in defense of Boone's claims. The loan documents permitted recovery of the costs of collection, including attorneys fees. Boone objected to payment of the attorneys fees incurred by Wells Fargo solely to defend his claims. The court found for Wells Fargo, concluding that the legal expense to defend against Boone's claims fell within Boone's obligation to pay costs and attorneys fees incurred to collect Boone's debt. If Boone had been successful on his claims, the amount Wells Fargo would have recovered would have been less.

EQUITABLE SUBORDINATION REQUIRES HARM

Equitable subordination allows the bankruptcy court to alter the priority of claims due to the misconduct of one creditor. When a bankruptcy court subordinates a claim it essentially re-characterizes the claim as equity. Equitable subordination was a common-law doctrine and the standards have been set forth most clearly in *In re Mobile Steel Co.*, a 1977 Fifth Circuit Court of Appeals case. As stated in that case, equitable subordination requires inequitable conduct that results in injury to creditors or confers an

unfair advantage on the “bad actor” creditor. In the absence of any harm to other creditors, equitable subordination under Section 510 of the bankruptcy code is not an appropriate remedy.

There is also harm to the creditors when the misconduct is committed by an insider of the debtor. Inequitable conduct by an insider can result from fraud, breach of fiduciary duty, leaving the debtor undercapitalized, or using the debtor as an alter ego. The attorneys at Mackall, Crouse, and Moore, PLC have litigated equitable subordination issues, and have obtained protection for innocent creditors, particularly against insiders who have tried to gain an advantage over general creditors.

ENFORCEABILITY OF A JURY WAIVER CLAUSE IN A LOAN AGREEMENT

Loan documents frequently state that the borrower waives any right to a jury trial. Typically, any written agreement that sets forth a provision that is not ambiguous is enforced pursuant to its terms regardless if the lender orally promises otherwise. This is frequently accomplished through application of the parol evidence rule, which provides that any evidence outside of the four corners of the contract is inadmissible to interpret the contract, unless the language in the contract itself is ambiguous.

The parol evidence rule is not strictly applied, however, with regard to a jury waiver provision. That is because a waiver of a jury right presents a Constitutional issue, which outweighs any competing principles of contract law. Under the Constitutional test, a jury right can be waived only if the evidence indicates that a formal waiver was knowing and voluntary. The Court can consider all the evidence, notwithstanding the clarity of the language provided in the loan agreement. Thus, where, as in the seminal case, *K.M.C., Co. Inc. v. Irving Trust Company*, 757 F.2d 752 (6th Cir. 1985), a borrower states in an affidavit that the lender orally promised that the jury waiver clause would never be enforced, the Court is free to believe the affiant and permit a jury trial, even though the loan documents signed by the borrower unambiguously waived the borrower’s right to a jury. Where a loan agreement has a jury waiver clause, the borrower has the burden to show that the waiver was not knowing and voluntary.

In a recent federal case, *JP Morgan Chase Bank, NA v. Winget*, 08-cv-13845 (E.D. Mich. 2009), the court held that where a lender orally promises not to sue a borrower under certain conditions does not mean that the lender modified the provisions in the loan documents stating that the borrower waives a jury trial. The borrower argued that the lender orally promised not to sue under a guaranty, and that by implication that lender also promised not to enforce the jury waiver in the guaranty. The court disagreed with this argument and held that an inconsistent oral representation must directly address the jury waiver clause in order for the court to determine whether it could ignore the jury waiver in the written contract.

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