MCM ATTORNEYS AT LAW
MACKALL CROUNSE & MOORE PLC

Advertising Material

FACING THE ISSUES® Legal Briefs from the Attorneys of Mackall, Crounse & Moore, PLC

Creditors' Corner

Wednesday, April 01, 2009
Volume 9, Number 3

Collateral Transfer Agreement between Lenders did not require signature of both parties.

In *Thomas & Wong General Contractor v. The Lake Bank,* (8th Cir. 2009), the Court held that enforcement of a collateral transfer agreement did not require both lenders to sign the agreement. Lake Bank borrowed money to Beardmore Investments, Inc. Thomas & Wong became a subsequent lender to BDV investments, an affiliate of Beardmore, for the purpose of using the proceeds to satisfy indebtedness owed to Lake Bank. Thomas & Wong would advance funds to pay Lake Bank upon receipt of proper collateral assignments from Lake Bank. At one point, Lank Bank faxed a letter promising to transfer various pieces of collateral if Thomas & Wong advanced $500,000 to pay down the amount owed by Beardmore to Lake Bank. The letter was signed only by a person on behalf of Lake Bank. Lake Bank failed to transfer the collateral, but Thomas & Wong advanced the $500,000. The BDV loan went into default, and Thomas & Wong sought to enforce Lake Bank's promise to transfer the collateral.

Lake Bank argued that the collateral transfer promise in the facsimile was not enforceable because it did not comply with the statute of frauds, which requires that both parties to sign a credit agreement. Under the statute, "a debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." MINN. STAT. § 513.33.

While the collateral transfer agreement potentially qualified as a "credit agreement" under the statute, the court denied application of the statute as a "financial accommodation" because Thomas & Wong was not a "debtor" seeking to "maintain an action on a credit agreement." The statute defined a debtor as "a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor." The court found that in order for Thomas & Wong to qualify as a debtor, Lake Bank must qualify as a creditor, who under the statute, is one "who extends credit under a credit agreement." The court found that since Lake Bank did not extend credit to Thomas & Wong, Thomas & Wong was not a debtor of Lake Bank. As a result, Thomas & Wong did not sue Lake Bank as a "debtor," and Thomas & Wong could enforce the collateral transfer promise in the facsimile, even though it had not signed the agreement.

Trustee may obtain Judgment in the amount Parents paid to refinance Mortgage for Property fraudulently transferred to them by their Son

In *Grueneich v. Doeling*, (Case No. 08-6048), the Bankruptcy Appellate Panel affirmed that Debtor fraudulently transferred property to his parents, that his parents were not good faith transferees, and that the Trustee may obtain a judgment against the parents in an amount they paid to refinance a mortgage on the property.

The parents claimed to pay the fair market value of the property of $115,600, by offering $50,600 in debt cancellation and refinancing a mortgage of $65,000. The Court found that there was inadequate evidence to support the debt cancellation and that this did not count as value provided in exchange for the transfer. While the refinance provide some value to Debtor in satisfying his personal liability on the mortgage, the amount did not constitute reasonably equivalent value in comparison with the property's fair market value. Therefore the transfer was constructively fraudulent due to insufficient value for the exchange.

The Court further found that the parents were not protected as good faith transferees because they knew Debtor could not afford the mortgage payments, and they had paid property taxes and CRP expenses on Debtor's behalf shortly before the transfer. Therefore, they were on inquiry notice of Debtor's insolvency at the time of the transfer.

The Court's finding of the parents' bad faith had an additional consequence. Not only would the parents need to return the property to the Bankruptcy Estate, but the Court could also enter judgment in the amount the parents paid to refinance the mortgage. The parents' initial satisfaction of Debtor's mortgage on the property constituted an improvement under the Bankruptcy Code, and they could not retain this improvement if they acted in bad faith. It did not matter if the source of funds to satisfy this mortgage came from another loan that would encumber the property. Since the value of the improvement could not be returned to the Estate through a surrender of the property because of the new refinanced mortgage, Trustee received a money judgment against the parents for $65,000.

court could not disallow or equitably subordinate until it determined that the claims had been sold as opposed to assigned. The case of *In re Metiom* holds that an assignment of claims is still subject to all of the defenses and disputes of the debtor.

MCM ATTORNEYS AT LAW
MACKALL CROUSE & MOORE PLC

Advertising Material

FACING THE ISSUES® Legal Briefs from the Attorneys of Mackall, Crounse & Moore, PLC

Creditors' Corner

Wednesday, April 01, 2009
Volume 9, Number 3

Claims Trading Standards continue to evolve

In the recent case of *In re Kreisler*, 546 F. 3d 863 (7th Cir. 2008) the Court adopted what may be viewed as a "no harm, no foul" approach to claims trading, which is the purchasing or assigning of claims in a bankruptcy. Claims trading continues to grow and there are many new players in the market seeking to acquire a "position" in a case for a variety of reasons, many of which are undisclosed at the time. There have been several decisions in this area over the past years that have put those buying and selling claims at some shifting risks.

When there is no bankruptcy involved, claims trading is a simple contractual process. Once there is a bankruptcy, the rights, burdens, claims and defenses are not always clearly defined. *In re Kreisler* holds that an assignee of claims is not subject to equitable subordination unless evidence of inequitable conduct is established in the case. Previously, *In re Enron* held that the Careful planning and drafting is required in the event you seek to buy, sell or assign claims in a bankruptcy. The attorneys at Mackall, Crounse and Moore are able to help your institution through this process in order to shield you from unexpected claims and other harsh circumstances.

If you have any questions, please call one of the following in our MCM Creditors' Remedies group:

Timothy D. Moratzka
(612) 305-1456
tdm@mcmlaw.com

Allen E. Christy, Jr.
(612) 305-1490
aec@mcmlaw.com

Robert S. Lee
(612) 305-1448
rsl@mcmlaw.com

Patrick C. Summers
(612) 305-1473
pcs@mcmlaw.com

Stacy A. Woods
(612) 305-1409
saw@mcmlaw.com

Matthew A. Anderson
(612) 305-1401
maa@mcmlaw.com

Andrew P. Moratzka
(612) 305-1418
apm@mcmlaw.com

Mychal A. Bruggeman
(612) 305-1478
mab@mcmlaw.com

"MCM has prepared these materials for informational purposes only and not as legal advice or **recommendations for specific situations**. Receipt of this information does not create an attorney-client relationship. You should not act upon this information without seeking professional counsel **for specific legal guidance**."

If you do not wish to receive future newsletters from Mackall, Crounse & Moore, please email mcmlaw@mcmlaw.com with the subject of Unsubscribe.

IMPORTANT NOTICE:

Any tax information contained in this email or its attachments is not intended, and cannot be used by the taxpayer or any other person, to avoid any civil or criminal tax penalties which the Internal Revenue Service or another governmental agency may impose on the taxpayer or any other person for acting in reliance upon information contained in this email or its attachments.

1400 AT&T Tower · 901 Marquette Avenue · Minneapolis, MN 55402
Telephone: 612.305.1400 · Fax: 612.305.1414
E-mail: mcmlaw@mcmlaw.com · Web: www.mcmlaw.com