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

Creditors' Corner

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WHAT DEFINES A SECURITY INTEREST OUTSIDE OF THE UCC?

Avoid the assumption that filing a UCC-1 in the correct county or state government office perfects all security interests. Article 9 of the Uniform Commercial Code defines a security interest as “an interest in personal property or fixtures, which secures payment or performance of an obligation.” In other words, it governs a consensual security interest in personal property, which a debtor grants to a secured party in a contract or other consensual manner. Article 9 is not particularly focused on non-consensual liens such as: (1) liens that arise by statute or common law; or (2) liens that arise by way of judgment, attachment or levy. Also remember that Article 9 of the UCC only covers personal property with the notable exception for fixtures-- which are defined as “goods that have become so related to particular real property that an interest arises under real property law.”

Sometimes the UCC is broader than one might think because it can supply certain rules for agricultural liens, consignments and the sale of accounts, payment intangibles or promissory notes. At other times it is narrower in that it excludes perfection issues covered by federal patent, trademark and copyright statutes, certificate of title laws or those interests arising out of insurance policies. Liens against trains, boats and planes are perfected through other federal laws and agencies. For instance, a lien against railroad equipment is perfected through the Surface Transportation Board. Liens in aircraft and certain vessels are perfected with the Federal Aviation Administration and the United States Coast Guard, respectively. On the other hand, trademark and copyright laws may require dual perfection both under the UCC and under the applicable federal law.

Practice Pointer: Lenders should be mindful that certain collateral requires actions and knowledge outside of the comfortable confines of the UCC. Attorneys at Mackall, Crouse & Moore, PLC are experienced in perfecting liens and litigating priority disputes with regard to all types of loan collateral.

AUTOMATIC STAY DOES NOT APPLY IN DEBTOR'S THIRD BANKRUPTCY FILING WITHIN A YEAR

In 2005, Congress established new roadblocks against serial bankruptcy filers for the benefit of secured creditors looking to quickly foreclose on their collateral. Notwithstanding its intentions, the changes drafted have been deemed ambiguous by certain courts who have failed to fully enforce the laws in favor of secured lenders.

For instance, Section 362(c)(3) of the Bankruptcy Code provides that if an individual debtor files a case within one year after a dismissal of a prior bankruptcy case, the automatic stay shall terminate within 30 days after the filing. Although the debtor can apply to extend the stay, and termination does not occur after a conversion to or immediate re-filing of a chapter 11 or 13 case, the 30-day rule was meant to expedite matters for secured creditors. Nonetheless, courts have read the statute too narrowly and found that it specifically only terminates the stay with respect to any "action taken with respect to a debt or against property securing a debt." Several courts concluded that the section does not explicitly terminate the stay with respect to actions against "property of the estate," which includes most property of the debtor until such is abandoned by the trustee, or exempted by the debtor without objection. Thus, in some jurisdictions the statute has done little to improve the rights of secured creditors.

The next section in the Bankruptcy Code, Section 362(a)(4), provides that if a debtor has filed two or more cases during the previous year, the automatic stay will not take effect upon the third filing. Once again the rule does not apply when prior cases were converted or immediately re-filed under another chapter after dismissal. There are also opportunities for the debtor or other creditors to re-impose the stay. As with Section 326(a)(3), the statute also does not specifically refer to actions against "property of the estate."

Because of this omission, a recent debtor who had filed a number of bankruptcies in the prior year sought to stay a foreclosure sale upon her third bankruptcy filing because the real property qualified as "property of the estate" when she filed. The Bankruptcy Appellate Panel rejected her argument in In re Bates (8th Cir. BAP No. 10-6084, March 23, 2011). Although Section 362(c)(4) did not specify "property of the estate," it also did not refer to "actions taken with respect to a debt or property securing the debt." Section 362(c)(4) instead simply states that the stay does not apply, without describing or distinguishing between classes of property. The court found that the termination should apply broadly, and that the debtor could not stay the foreclosure sale.

Practice Pointer: There are a number of arguments found in the automatic stay provisions arising from the 2005 statutory revisions that have not received significant attention from the courts. The bankruptcy attorneys at Mackall, Crouse, & Moore, PLC, are familiar with such provisions and can advise whether any may apply when your borrower seeks to use bankruptcy to delay or defeat your attempts to recover collateral.

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