

**"Advertising Material"**

January 1, 2008 • Volume 8, Number 1

FACING THE ISSUES[®]

LEGAL BRIEFS FROM THE ATTORNEYS OF MACKALL, CROUNSE & MOORE, PLC

Creditors' Corner**Judgment Superior to Later Recorded Mortgage**

Simons v. Schiltz, A-06-1999, (Minn.Ct.App. December 4, 2007), involved a priority dispute between a mortgage held by Sterling State Bank and a judgment in a dissolution decree. The January 2002 dissolution decree declared that the homestead was security for payment of property settlement to Ann Marie Simons. Former spouse Bryan Schiltz obtained a loan from Sterling in March 2002, secured by a mortgage recorded on April 16, 2002. Sterling took a second mortgage on the homestead a month later. In advance of the Sterling mortgages being recorded, Simons notified Sterling in writing of her claimed security interest. Simons recorded the dissolution judgment several hours before the first Sterling mortgage was recorded. The Court of Appeals held that a court order expressly securing a monetary award with an interest in real property creates a lien that is superior to a later recorded mortgage recorded by a creditor with notice of the court order.

Automobile Lenders Can Lose Purchase-Money Status For Loans That Include Amounts To Pay-Off Negative Equity On A Borrower's Trade-In Vehicle

In re Lavigne, 2007 WL 3469454 (Bkrtcy. E.D. Va. 2007), involved bifurcation of a "910-day" claim. There, GMAC received assignment of a purchase-money automobile loan made to Lavigne that included an amount to satisfy the negative equity on a trade-in vehicle. Within 910 days thereafter, Lavigne declared bankruptcy, and sought bifurcation of GMAC's secured claim. Lavigne argued that the amount financed to pay off the negative equity of his trade-in was not purchase-money.

The court found that "purchase money" is defined by state law. Under Article 9A-103(a)(2) of Virginia's UCC, purchase money is the "value given to enable the debtor to acquire rights in or the use of collateral." The court found that value given the pay-off the consumer's negative equity was not akin to sales taxes, titling fees, finance charges, interest, or similar expenses incurred as "component[s] of the cost of the vehicle." As stated by the court, "the liability for negative equity was not incurred in connection with acquiring the vehicle." The court also found that under Virginia law, purchase-money loans become non-purchase money when a debtor refinances the loan. The court held that financing to pay off the negative equity on a trade-in was not purchase money.

The court held that the remaining indebtedness owed to GMAC was purchase money under the dual-status rule, which allows a court to apportion a lender's purchase and non-purchase money interests. Thus, the debtor could not transform GMAC's entire claim into unsecured. Lenders should be aware that some jurisdictions under these circumstances apply the transformation rule, which recasts the entire debt non-purchase money for ease of administration.

In the context of the 910-day rule, a creditor in a jurisdiction applying the transformation rule may be at-risk for losing its entire secured claim if it finances the negative equity of a borrower's trade-in vehicle. This may become an issue frequently litigated, as the court noted that the "practice of financing negative equity in vehicles has been on the rise in recent years... [and that] J.D Power and Associates now estimates that 38% of all new car buyers have negative equity at the time of trade-in."



Saturday, June 14, 2008 • Volume 8, Number 1

Changes to Federal Rules of Bankruptcy Procedure

Numerous changes to the Federal Rules of Bankruptcy Procedure became effective December 1, 2007. A revised rule regarding the assumption, rejection, and assignment of executory contracts and unexpired leases is noteworthy. Under certain cases, the rule now permits the combining of up to 100 of these contracts and leases into a single omnibus motion seeking to assume or assign the executory contracts or unexpired leases. Although the amendment establishes minimum standards to ensure the protection of the claimants' due process rights, we encourage our clients to review any such motions it receives closely and to contact us with any questions.

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