

FACING THE ISSUES®

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

Creditors’ Corner

INTELLECTUAL PROPERTY AS COLLATERAL

Intellectual property (“IP”) consists of trademarks, patents, trade secrets, copyrights and a variety of ancillary property rights. These can comprise a significant portion of a borrower’s balance sheet. UCC and FASB rules were modified in the 1990’s in recognition of this. Lending transactions now place value directly on IP and the lending documents must contain representations and warranties about IP and covenants relating to IP. Due diligence must include whether or not the borrower’s rights in IP can be transferred to a creditor and how enforcement will occur in foreclosure. Since infringement is of particular importance, prompt reporting requirements must be implemented. If the borrower only has a license to use IP, that right may be non-assignable in bankruptcy. If a domain name is involved, the law is unclear as to the status of the various interest holders, web-hosts, etc. A receiver may be required to protect and administer IP in an insolvency situation.

PRACTICE POINTER: Lending transactions involving significant IP are an opportunity for lenders and require careful analysis of value, transferability, perfection, and insolvency situations.

ABANDONMENT OF A PROJECT IS DETERMINED BY VISIBLE EVIDENCE, NOT THE SUBJECTIVE INTENT OF THE CONTRACTOR.

An uncompleted construction project commenced before recording a mortgage can create problems for lenders, particularly if there is no visible evidence of ongoing improvements. Because a mechanic’s lien takes priority from the date of the first visible improvement, a mechanic’s lien potentially takes priority before a mortgage even if later there is little or no evidence of the ongoing project. The issue becomes whether the contractor asserting the lien abandoned the project. Abandonment nullifies the lien’s priority from the date of the first visible improvement. The Minnesota Court of Appeals recently held that the test for abandonment relies on the outward manifestations related to the property.

In *Superior Construction Services v. Belton*, (Minn. App. 2008), a contractor commenced a home improvement project in 2002, completing most of the project by January 2003. Work that remained included interior cabinet work, counter tops and heat registers – items that upon visible inspection would not indicate an ongoing construction project. The contractor did not work on the project in 2003 or 2004. At the end of 2004, the owners executed and recorded a mortgage with Town & Country Credit Corporation. The court found that the contractor intended to finish the project, demonstrated partially by the contractor not billing the owner until 2005, after the owner agreed to recommence the project. But all visible evidence showed no ongoing project.

The court held that intent to abandon a project must be established by objective manifestations, not the parties’ personal and subjective intent. According to the court, “mortgagees would be unduly prejudiced by a rule allowing priority based on subjective intent to continue a project, if outward appearances suggested that the project had been completed or abandoned.”



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