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FACING THE ISSUES®

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

Creditors' Corner

Right to Redeem Arises After Docketing of Judgment Establishing Lien

At issue in *C & M Real Estate Services, Inc. v. Ganesh Thondikulam*, No. A06-1459 (Minn. App. 2007) was the timeliness of a judgment lien creditor's filing of a notice of intent to redeem. There, the mortgage on the real estate at issue had been foreclosed on May 27, 2004, and the mortgagee purchased the sheriff's certificate of sale at the foreclosure. A lien creditor filed the required documents to docket its judgment on November 10, 2004. On November 17, the mortgagee assigned its rights to C&M Real Estate Services, Inc. ("C&M"). However, due to delays at the court, the lien creditor's judgment was not actually docketed until November 29. The creditor filed a notice of intent to redeem from a foreclosure of certain real property on November 29, about an hour and a half *before* the lien creditor's judgment was docketed. The lien creditor then tendered funds to the sheriff and subsequently conveyed the property by warranty deed to Ganesh Thondikulam, a real estate investor. C&M commenced an action to determine rightful ownership to the property. The Minnesota Court of Appeals held that a purported lien creditor has no right to redeem property from foreclosure if the notice of intent to redeem is filed before the docketing of the judgment that establishes the lien.

Mackall, Crouse & Moore, PLC, Attorney Matthew A. Anderson successfully argued the appeal on behalf of C&M.

Know Your Credit Agreement-Technical Default

Default rates have been steadily climbing since late 2003. The number of borrowers requesting amendments to loan covenants has been increasing since late 2005 according to Standard & Poor's, a Division of The McGraw Companies, Inc. Loan covenants govern the relationship and the lender should make sure they understand the following terms in the credit agreement:

- Pay close attention to the reporting requirements, particularly those relating to lawsuits and inter-company/insider transactions.
- Enforce notice provisions by asking about those circumstances noted above.
- Discuss the borrower's financials with the borrower and ask any questions.
- Know who the "point person" is for the borrower.

If you do not think the borrower is forthcoming, take it to the chief credit officer.

Waiver of Jury Trial

It has been several years since lenders began to insert jury waiver provisions in loan documents. To enforce a jury waiver provision in a note and guaranty, it is always best to display the provision conspicuously so that it can later be prima facie evidence that the borrower entered into it knowingly and voluntarily. One court has found this to require capital letters in bold print in order to create a rebuttable presumption that there was a waiver. *GE v. Small*, No. 05-0482 (Tex. 2007). The court held that waiver requires intentional relinquishment of a known right or intentional conduct inconsistent with claiming the right.

Despite Congressional intent to limit bifurcation of any debts against real property, the court here found that a principal residence still has to qualify as "real property," which is an issue determined under state law. The parties agreed that Alabama law did not define Debtor's mobile home as real property because Debtor did not own the land underneath the mobile



At issue in *In re Bartolome*, 2007 WL 2774467 (Bankr.M.D.Ala. 2007), was the ability of a debtor to bifurcate a creditor's claim to a mobile home. There, the debtor attempted to eliminate the unsecured portion of a creditor's claim in a mobile home. Under section 1322(b)(2) of the Bankruptcy Code, a debtor can modify and bifurcate any debt "other than a claim secured only by a security interest in real property that is the debtor's principal residence." In 2005, Congress further defined the term "debtor's principal residence" as "a residential structure, including incidental property, without regard to whether that structure is attached to real property... includ[ing] an individual condominium or cooperative unit, a mobile or manufactured home, or trailer." 11 U.S.C. § 101(13).

Despite Congressional intent to limit bifurcation of any debts against real property, the court here found that a principal residence still has to qualify as "real property," which is an issue determined under state law. The parties agreed that Alabama law did not define Debtor's mobile home as real property because Debtor did not own the land underneath the mobile home. As a result, the creditor's claim remained subject to bifurcation.

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