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Creditors' Corner

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PROPOSED CHANGES TO MINNESOTA BANKRUPTCY PROCEDURES WILL INCREASE THE COSTS OF LIFTING THE AUTOMATIC STAY

The local rules committee for the Bankruptcy District of Minnesota issued a draft proposal for new documentation requirements when a creditor seeks to lift the automatic stay to foreclose a mortgage or repossess personal property. The documentation required under the new rule exceeds prior requirements. It is expected that the changes will increase the costs of lifting the automatic stay in Minnesota. The new documents and information required include:

- The identity of the original holder of the obligation secured by the security interest or mortgage and every subsequent transferee, if known to the creditor, and documentation evidencing the security interest, its perfection and the assignment of the mortgage or security interest to the creditor;
- A description of the real or personal property;
- The value of the real or personal property and the valuation method;
- The total amount of the pre-petition arrearage owed to the creditor;
- The amount of the monthly installment payments at issue and their due dates;
- The debtor's post-petition payment history, detailing principal, interest, and escrow in default as of the date of the filing of the motion;
- An itemization of all other post-petition charges due as of the date the motion is filed, including attorney fees and costs;
- Where necessary to establish lack of equity, the identity and an estimate of the amounts due all lienholders, in order of priority; and
- If the motion is based on a default in payment to the chapter 13 trustee, documentation of that default.

While Mackall, Crounse & Moore, PLC's previous practice was to include most of this information, our bankruptcy practice group opposed this proposed rule and criticized the changes as unnecessarily burdensome and costly. If the rule goes into effect and you use Mackall, Crounse & Moore, PLC to lift the automatic stay, we will contact you regarding any changes needed in referral documentation to meet the new requirements.

THE IMPORTANCE OF NEGOTIATING LANDLORD WAIVERS

Most lending policies should require landlord waivers as part of the closing documentation for loans. In a troubled loan scenario, a landlord waiver may play an important role in conducting a successful and unimpeded liquidation or wind-down. Many states provide landlords with a lien on all the goods of their tenants and, in some instances, that lien may be a priming lien which steps ahead of the bank lender. The best process is to evaluate where the most important and valuable collateral is kept and where the books and records of the borrower are kept, assuming there are multiple locations. A landlord waiver should be required for those locations. The waiver should require subordination to the lender, waiver of statutory rights of the landlord, reasonable access to the leased premises and the ability to occupy those premises for removal or dismantling of collateral. A lender may agree to pay some minimal rent in certain instances.

As a practice pointer, once the transaction closes, the lender should send a fully executed waiver to the borrower and the landlord. The borrower should countersign and acknowledge that the waiver is in effect. The attorneys at MCM can assist in policy drafting or the forms necessary to obtain the landlord waiver.

FAIR DEBT COLLECTION PRACTICES ACT HAS MINIMAL APPLICABILITY WHEN CREDITOR TAKES ACTION ONLY TO ENFORCE OR FORECLOSE LIEN

A recent decision of the United States District Court for the District of Minnesota clarified that a creditor that simply seeks to foreclose its collateral is subject to only limited restrictions under the Fair Debt Collection Practices Act. Those limitations defined by statute require that the lender has a valid security interest or lien, that the lender intends to take possession of the collateral, and that the property is not otherwise exempt from dispossession under other applicable law. The broader regulations under the FDCPA that govern "collection practices" do not apply.

In this case, a townhouse association sought to foreclose its lien against a unit owner that failed to pay a roof repair assessment. In connection with its attempts to foreclose, the association, and its attorney, failed to provide correct dollar amounts of the debt on lien notices, stated an incorrect redemption date, made an improper claim for attorneys' fees, and failed to properly deliver an initial demand letter. While all events potentially violate the FDCPA's broader prohibitions on certain collection practices, the Court dismissed the owner's claims because the alleged wrongful events took place as part of the association's actions to only enforce and foreclose a lien. *See Gray v. Four Oak Court Association*, *Inc.*, (District of Minnesota) Case No. 07-4424.

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