

THE EAGLE 9[®] NEWSLETTER



The First American Corporation

UCC DIVISION

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UCC EAGLE 9[®] policies insure commercial loan transactions, including

- Mixed-collateral loans
- Asset-based loans
- Mezzanine lending
- Fixtures
- Loan workouts/bankruptcy
- Equipment leasing
- Existing loan portfolios
- Project finance

INTRODUCTION

Here we are again; at the end of summer and time for another Newsletter from the UCC Division of First American. There has been some significant news since our last Newsletter. First of all, the UCC Division is now a part of the National Commercial Services component of First American Title Insurance Company. This is an organizational change that will be transparent to our customers, but of great benefit to the UCC Division. NCS provides the land title support primarily to commercial real estate lending. Because of the significance of UCC insurance to real estate mezzanine lending, the obvious synergy of combining the commercial land title and UCC insurance products of First American argued strongly for the organizational change. Now, if you hear the term “NCS”, you now know what the reference means.

Of much greater importance is the report from Moody’s Investors Service titled: US CMBS and CRE CDO: Moody’s Approach to Rating Commercial Real Estate Mezzanine Loans. The Report was authored by Daniel B. Rubock, Senior Credit Officer for Moody’s, and released on March 29, 2007. The Report acknowledges that real estate mezzanine lending now has a natural capital markets outlet and Moody’s now rates such credits in their own right. In response to this market, the Report outlines Moody’s view of a baseline “credit neutral” mezzanine loan structure, and then describes how Moody’s will apply that view in rating mezzanine loans.

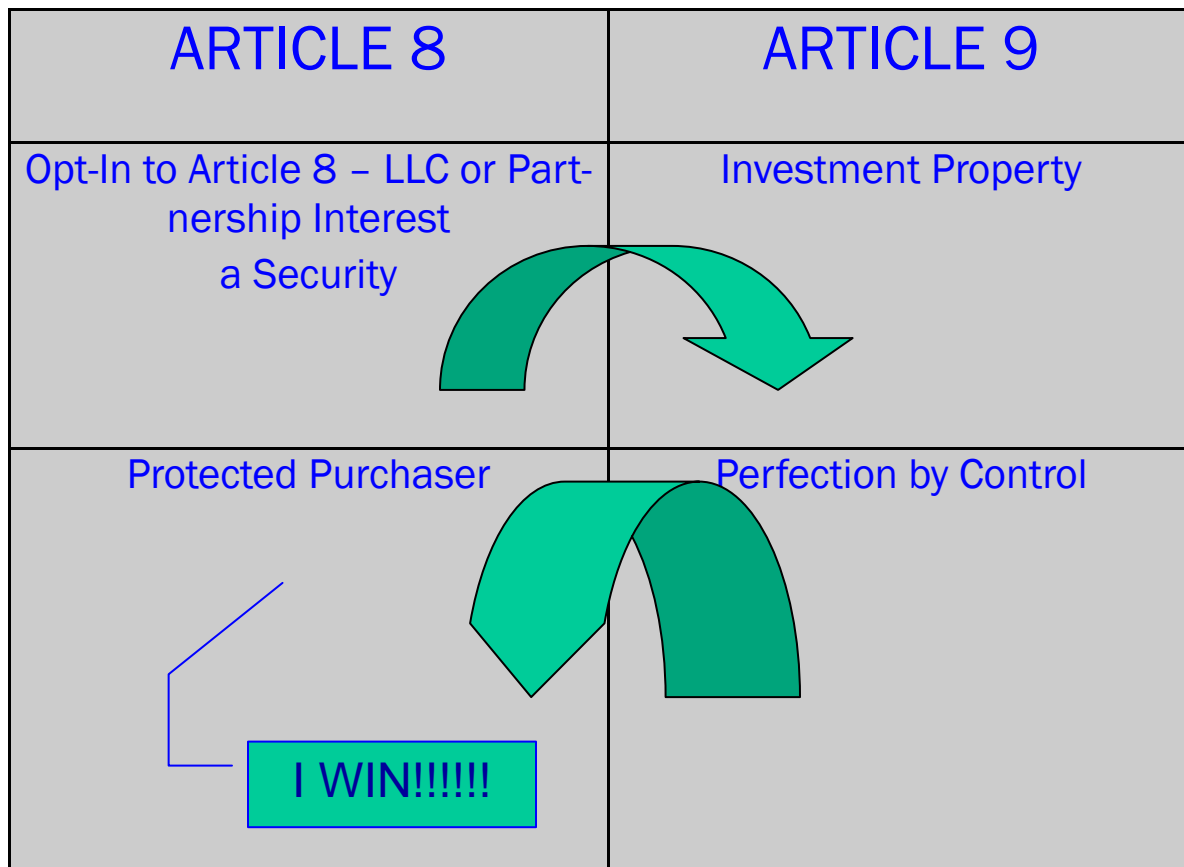
From the perspective of the UCC Division, two conclusions by Moody’s with respect to UCC insurance are indeed gratifying and vindicate our position that there is a “Right” way to do real estate mezzanine lending, at least with respect to the interplay between Article 8 and Article 9 of the Uniform Commercial Code, and from the lender’s perspective. If you are a borrower, or a lender with no bargaining power, just do the opposite.

The Moody’s Report states:

“Therefore, Moody’s expects that mortgage loan borrowers will irrevocably “opt-in” to Article 8 of the UCC and will certificate the partnership or LLC membership interest that will be pledged to the mezzanine lender.”

“Therefore, Moody’s generally expects that mezzanine loans presented for rating will have the benefit of ... in all cases ... of a ‘UCC insurance policy’ where available.”

We at First American’s UCC Division have the industry and legal expertise to assist you in meeting Moody’s expectations whether or not your real estate mezzanine lending transaction involves securitization and rating. We have insured control perfection under Article 9 and Protected Purchaser status under Article 8 in hundreds of real estate mezzanine loan transactions; we lead the industry effort in Blackstone/EOP for example; and in other loan and acquisition transactions where equity interests in entities is either collateral or acquired assets. We know what we are doing and we are ready to help. As the chart below shows, being a Protected Purchaser is the status no lender or asset purchaser would intentionally decline or avoid.



Further, the commercial lawyer who up to now was concerned about recommending UCC insurance to his or her client, concerned about the impression that he or she was asking the client to insure the lawyer’s work, now has a third party recommending UCC insurance as an effective risk management tool. Given filing office error and the risk of not having the “correct” debtor name, issues we have discussed in past issues of the Newsletter, the commercial lawyer should want to off-load the entire Perfection function with its related significant risks without commensurable compensation, on to an insurance company. Now the commercial lawyer has an explanation beyond the lawyer’s desire to effectively manage risk. As land title became more and more accepted as an effective risk management tool, so now UCC insurance is gaining acceptance as a prudent and cost effective way for lenders and their lawyers to manage risk. A law firm that files its client’s financing statements is taking on significant risk without adequate compensation.

The entire Moody’s Report is available at <http://www.eagle9.com/downloads/MoodyMarch2007.pdf>. Again, we at the UCC Division, now part of NCS, stand ready to assist in any way we can.

Following the Case Summary, for which we again want to thank Steven O. Weise of Heller Ehrman LLP, Los Angeles, Teresa Wilton Harmon of Sidley Austin LLP, Chicago, and Lynn A. Soukup of Pillsbury Winthrop Shaw Pittman LLP, Washington D.C., and our regular feature “ Local Filing Issues, “ we have included, in keeping with the mezzanine lending theme, an article by Jim Prendergast in *The Practical Real Estate Lawyer* entitled “Secured Real Estate Mezzanine Lending (with Form).” To access a copy of the article go to <http://www.eagle9.com/downloads/SecuredRealEstateMezzLend.pdf>.

As mentioned above, the UCC Division has insured lenders’ Secured Creditor and Protected Purchaser status over hundreds of real estate mezzanine lending transactions. The transactions have varied from over Ten Billion to under One Million in insurance coverage. The complexity of Article 8 for the real estate practitioner is only one of the reasons for using the services of the UCC Division. Off load the entire Perfection and Priority risk to us.

We are also offering a program on mezzanine lending and UCC insurance in selected cities over the next few months. Following is the schedule and contact information to attend. We look forward to seeing you there!

Lecture Series Dates and Schedule

7:30—8:30 a.m.

Networking

8:30—10:00 a.m.

Presentation

One hour CLE Credit available in select cities

Boston

9/20

InterContinental Boston
500 Atlantic Ave.
Boston, MA 02210

New York

9/25

First American Title
633 Third Ave.
New York, NY 10017

Dallas

9/26

The Belo Mansion
2101 Ross Ave.
Dallas, TX 75201

Houston

9/27

The Houston Club Downtown
811 Rusk Ave.
Houston, TX 77002

Atlanta

10/3

Woodruff Arts Center
1280 Peachtree St. NE
Atlanta, GA 30309

Charlotte

10/4

OMNI Charlotte Hotel
132 East Trade St.
Charlotte, NC 28202

Miami

10/5

JW Marriott
1109 Brickell Ave.
Miami, FL 33131

Chicago

10/17

Metropolitan Club
Sears Tower, 67th Floor
233 South Wacker Dr.
Chicago, IL 60606

Cleveland

10/18

Hilton Garden Inn
1100 Carnegie Ave.
Cleveland, OH 44115

Los Angeles

11/13

The California Club
(Gregory Schultz, member)
538 S. Flower St.
Los Angeles, CA 90071

RSVP

Online at ucc.mezzlending@firstam.com or call 800.700.1191

CASES OF INTEREST

PERSONAL PROPERTY SECURED TRANSACTIONS

SCOPE OF ARTICLE 9 AND EXISTENCE OF A SECURED TRANSACTION

GENERAL

Espinosa v. United of Omaha Life Ins. Co., 137 P.3d 631, 60 UCC Rep Serv 2d 321 (NM Ct. App. 2006) - The debtor entered into a structured settlement agreement in connection with settling a tort claim. The settlement included an annuity. The debtor borrowed money and granted a security interest in the annuity. The annuity prohibited its assignment. Under former Article 9, the court held against the secured party. The scope of former Article 9 excluded all tort claims and insurance claims.

Comment: Article 9 brought commercial tort claims within the scope of Article 9 in UCC § 9-109(d)(12) (although other types of tort claims remain excluded) but claims under an insurance policy remain excluded (unless they are health-care-insurance receivables or proceeds of collateral covered by Article 9, or under a non-uniform California version of UCC § 9-109). UCC §§ 9-109 (d)(8), 9-315, 9-322. Note that there has been significant debate over the appropriate treatment of annuities under Article 9 and some states (including New York and Virginia) provide for special treatment of annuities in their versions of UCC § 9-109.

Banc of American Strategic, Inc. v Cooker Restaurant Corp., 2006 Ohio 4567, 2006 Ohio App. LEXIS 4507 (Ohio Ct. App. 2006) - Security interest did not attach to Ohio liquor license because debtor had no property right in the liquor license under Ohio law. The court cited Comment 3 to UCC § 9-408, which notes “[n]either this section nor any provision of this Article determines whether a debtor has a property interest”.

Comment: UCC § 9-203(b)(2) provides that a security interest is enforceable against the debtor (i.e. “attaches”) and third parties with respect to the collateral only if the debtor has rights in the collateral or the power to transfer rights in the collateral to the secured party. While UCC § 9-408 may invalidate a state law that would prohibit assignment of collateral such as a liquor license, there will still not be an enforceable security interest if as a matter of state law the debtor does not have sufficient rights in the collateral for the security interest to attach. The courts should be careful in deferring to definitions of “property” developed under other law for other purposes.

LEASING

In re WorldCom, Inc., 339 B.R. 56, 58 UCC Rep Serv 2d 913 (Bankr. S.D.N.Y. 2006) - A “lease” did not fit within the bright-line test for when a “lease” constitutes a “security interest” rather than a true lease under revised UCC §1-203(b). The court could still evaluate all the facts and circumstances of the transaction under UCC §1-203(a) to determine whether the lessor had retained a meaningful reversionary interest in the goods and the transaction was therefore a true lease. The court noted that the leased goods were a fungible part of a much larger pool of nearly identical, unmarked equipment and thus it was unlikely that the lessor would be able to identify and take the goods back at the end of the “lease.” The court held that the “lease” created a security interest.” See also Comment 3(b) to UCC §9-102.

SALES

Fodale v. Waste Management of Michigan, Inc., 718 N.W.2d 827, 271 Mich. App. 11, 59 UCC Rep Serv 2d, 853 (Mi. App. 2006) - A Secured party's option to purchase a debtor's interest in a redemption agreement for a set price upon the debtor's default was a "security interest" governed by Article 9. It constituted an invalid pre-default waiver of the debtor's right to notification of disposition, the right to a commercially reasonable sale, and the right to any surplus.

SECURITY AGREEMENT AND ATTACHMENT OF SECURITY INTEREST

Eureka VIII LLC v Niagara Falls Holdings LLC, 899 A.2d 95, 2006 WL 1579712 (Del. Sup. Ct. 2006) - An LLC member breached the LLC agreement by allowing a secured creditor to gain voting control over the membership interest in violation of a term of the LLC agreement. The secured creditor succeeded only to the member's passive economic rights.

Comment: This result is consistent with UCC § 9-408, which permits the attachment, creation and perfection of a security interest in a general intangible (but not the enforcement of the security interest) in the face of an anti-assignment provision, and provides that the account debtor (i.e., the LLC) need not recognize the rights of the secured party, and UCC § 9-406, which generally requires an account debtor to recognize the secured party's rights to payments in respect of collateral consisting of a payment obligation. Delaware has enacted non-uniform versions of UCC §§ 9-406 and 9-408, as well as adding related provisions to its LLC and other entity statutes.

PERFECTION—PREPARATION OF FINANCING STATEMENT

In re Tyingham Holdings, Inc. (The Official Committee of Unsecured Creditors for Tyingham Holdings, Inc. v. Suna Bros. Inc.) 354 B.R. 363 (Bankr. E.D. Va. 2006) - A financing statement listed the debtor's name as "Tyingham Holdings". The debtor was a Virginia corporation listed on the Secretary of State's records as "Tyingham Holdings Inc." An official UCC search using the filing office's standard search logic under the name "Tyingham Holdings Inc." did not pick up the financing statement. Therefore, the financing statement was seriously misleading and insufficient to perfect the security interest. UCC § 9-506(a), (c).

Comment: The IACA Guidelines indicate that ending "noise words" (such as "Inc.," "Co." or "Corp.") will be disregarded by standard search logic, but that may not be the case in a specific state if that state does not sue the IACA model search logic.

PRIORITY—COMPETING SECURITY INTERESTS

In re Commercial Money Center, Inc., 350 B.R. 465, 60 UCC Rep Serv 2d 584 (BAP 9th Cir. 2006) - The court held that payment streams under leases can be separated from the chattel paper, and then constitute payment intangibles. The court also held that under the facts of this case, the "payment intangibles" were not "sold" and instead the "seller" had borrowed money from the "buyer" (collateralized by the payment intangibles) because the seller retained (through its reimbursement obligations under a surety bond that covered the payment of the payment intangibles) full recourse for defaults by the lessees. So, because the transaction was not a "sale," the "buyer" did not get the benefit of automatic perfection that applies to true buyers of payment intangibles and had failed to perfect its security interest.

Comment: A true buyer of payment intangibles arising from chattel paper, which is relying on automatic perfection, should not rest on its laurels. Another secured party that takes possession of the chattel paper will generally have a "superpriority" in the chattel paper. UCC §§ 9-330(a) and (b). As such, it will also have a superpriority in the cash proceeds of the chattel paper. UCC §§ 9-330(c)(1) and 9-322(c)(2). The payments under the payment intangibles would normally be cash proceeds of the chattel paper. UCC § 9-102(a)(9). Thus, the secured

party in possession of the chattel paper general would have priority in the collections over the buyer of the payment intangibles (not in possession of the related chattel paper). UCC § 9-318 Comment 4 points out that in limited circumstances the seller has the “power” to transfer rights that it does not have (this being one of those limited circumstances). See also UCC § 9-203(b)(3) and Comment 6.

DEFAULT AND FORECLOSURE

NOTICE AND COMMERCIAL REASONABLENESS OF FORECLOSURE SALE

Lister v. Lee-Swofford Investments, L.L.P., 195 S.W.3d 746 (Tex. Ct. App. 2006) - A public foreclosure sale of inventory of tractor parts was widely advertised, and circulars describing the auction were mailed to parts dealers. The sale was commercially reasonable despite a low sales price and the absence of parts dealers at the sale because the procedures were commercially reasonable. UCC § 9-627.

GMAC v. Honest Air Conditioning & Heating, Inc., 933 So. 2d 34 (Fla. Ct. App. 2006) - A secured party conducted a foreclosure sale and received a check from the buyer of the collateral. The check bounced. The secured party took that risk and could not collect the balance due from the debtor.

EFFECT OF FAILURE TO GIVE NOTICE, CONDUCT COMMERCIALLY REASONABLE FORECLOSURE SALE OR OTHERWISE COMPLY WITH PART OF ARTICLE 9

In re Schwalb, 347 B. R. 726, 60 UCC Rep Serv 2d 755 (Bankr. D. Nev. 2006) - Debtor pawned two titled vehicles. The signed pawn tickets constituted security agreements and the pawn broker perfected its security interest by noting its lien on the certificates of title. Article 9, including UCC § 9-602's anti-waiver provisions, limited the secured party's foreclosure and contractual forfeiture rights.

REAL PROPERTY SECURED TRANSACTIONS

Federal Deposit Ins. Corp. v. Owen, 88 Conn. App. 806, 873 A.2d 1003, 57 UCC Rep Serv 2d 440 (Conn. App. 2005) - The running of the statute of limitations on a note secured by a mortgage does not prevent the foreclosure of the mortgage itself. The running of the statute of limitations bars the availability of a judicial remedy to collect the note, but does not destroy the existence of the debt.

City of New York v. Breonics Inc., 5660/05, 236 N.Y.L.J. 69 (N.Y.S.Ct. 2006) - A contract requiring a seller of land to care for retired police horses violated the rule against perpetuities.

FRAUDULENT TRANSFERS

Pension Transfer Corp. v. Beneficiaries (In re Freuhauf Trailer Corp.), 444 F.3d 203 (3d Cir. 2006) - An employer modified its pension plan to increase the payments to key employees to induce them to stay with the employer during a time of financial problems. The increase in effect transferred to the employees a portion of a surplus in the pension plan that otherwise would have gone to the employer. The court held that for purposes of the fraudulent transfer laws the right to the surplus was "property" of the employer and that the increase in the payments to the employees was a "transfer." Before considering the "totality of the circumstances" to evaluate the amount of "value" received by the transferor (the employer) for purposes of determining whether the transferor received "reasonably equivalent" value for fraudulent transfer purposes, the court must consider whether the transferor received "any" value. If there is "some" value, then the court must measure the value given and the value received, including "indirect" and "intangible" value received by the transferor. However, the calculation does not have to be "precise" where it is evident that the benefits are "minimal", as the court held was the case here.

FINANCIAL INSTITUTIONS

REGULATORY AND TORT CLAIMS—GOOD FAITH, FIDUCIARY DUTIES, INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE, LIBEL, INVASION OF PRIVACY

In re Scott Acquisition Corp., 344 B.R. 283 (Bankr. D.Del. 2006) - Directors and officers of an insolvent corporation owe fiduciary duties to both its creditors and the corporation itself.

Ary Jewelers, LLC. v. IBJTC Business Credit Corp., 414 F. Supp. 2d 90 (D. Mass. 2006) - A potential lender backed out of deal upon learning of a foreign bribery scandal involving a principal of the prospective borrower. The first lender later informed another potential lender of those facts, and the second lender did not proceed with the deal. The borrower may have a claim for tortious interference with business relations against the first lender.

In re First Alliance Mortgage Company, 471 F.3d 977 (9th Cir. 2006) - A lender to an entity that defrauded its borrowers could be liable for aiding and abetting the fraudulent activities of its borrower. Under California tort law, a person can be liable for aiding and abetting the tort of another if the person alleged to have engaged in the aiding and abetting "knows" that the other person's conduct constitutes a breach of duty and gives "substantial assistance or encouragement" to the other person's activities that are a tort.

In re Miller v. Bank of America, 144 Cal.App.4th 1301, 51 Cal. Rptr. 3d 223 (Cal. Ct. App. 2006) - A bank could apply overdrafts to deposits of otherwise exempt Social Security benefits without violating the exempt status of those benefits. The court distinguished the decision in *Kruger v. Wells Fargo Bank*, 521 P.2d 441 (Cal. 1974), where the court held that a bank could not set off on unrelated claims against exempt assets held in a deposit account.

AGENTS BANKS

In re United Airlines, 438 F.3d 720 (7th Cir. 2006) - As a debtor approached its bankruptcy filing, the trustee for some airport construction bonds refused to release reimbursement payments it owed to the debtor under the bonds. The court concluded that while the trustee had a fiduciary duty to its bondholders, it also had a duty of good faith and fair dealing to the debtor, which was a third-party beneficiary of the bond agreements. The court stated that “[O]ur decision today stands for the simple proposition that parties will be held to their deals and that one party may not manipulate the timing of its payments to exploit the vulnerabilities of the other”.

UCC—SALES AND PERSONAL PROPERTY LEASING**CONTRACT FORMATION AND MODIFICATION; STATUTE OF FRAUDS; “BATTLE OF THE FORMS;” CONTRACT INTERPRETATION; TITLE ISSUES****GENERAL**

Dow Chemical Co. v. General Electric Co., 2005 WL 1862418, 58 UCC Rep Serv 2d 74 (E.D. Mich. 2005) - An exchange of e-mail messages could satisfy the statute of frauds for the sale of goods where there was evidence of an intent to form an agreement.

PERFORMANCE, BREACH AND DAMAGES

AmerisourceBergen Corp. v. Dialysist West, Inc., 445 F.3d 1132, 59 UCC Rep Serv 297, *reprinted as amended*, 465 F.3d 946 (9th Cir. 2006) - In a transaction subject to Article 2, an agreement allowing a set off between different obligations not arising under the same agreement was not enforceable due to the displacement of commonlaw setoff rights under UCC § 2-717.

PERSONAL PROPERTY LEASING

Wells Fargo Bank, N.A. v. BrooksAmerica Mortgage Corp., 419 F.3d 107, 57 UCC Rep Serv 2d 980 (2d Cir. 2005) - A court enforced a "hell or high water clause" against a lessee in favor of an assignee of a lessor, even though the lessor was in breach of its obligations to the lessee. UCC § 9-403.

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COMMERCIAL PAPER, ELECTRONIC FUNDS AND TRANSFERS

NEGOTIABLE INSTRUMENTS AND HOLDER IN DUE

May Margaret Bibler v. Arcata Investments 2, LLC, 2005 WL 3304127, 58 UCC Rep Serv 2d 244 (Mich.App. 2005) - A note's reference to a mortgage for rights to accelerate and other terms permitted by Article 3 does not destroy the negotiability of the note. UCC § 3-104.

LETTERS OF CREDIT, INVESTMENT SECURITIES, AND DOCUMENTS OF TITLE

LETTERS OF CREDIT

MSF Holding Ltd. v. Fiduciary Trust Company International, 435 F.Supp.2d 285 (S.D.N.Y. 2006) - A letter of credit was issued in favor of a parent corporation. Its subsidiary sought to enforce the letter of credit. The court held that the attempt by the subsidiary to enforce the letter of credit was a de facto assignment of the letter of credit. Because the assignment did not comply with the requirements of UCC § 5-116, it was not valid and the subsidiary did not have standing to enforce the letter of credit on behalf of the beneficiary of the letter of credit.

INVESTMENT SECURITIES

Highland Capital Management LP v. Schneider, 460 F.3d 308, 60 UCC Rep Serv 2d 837 (2d Cir. 2006) - Notes issued by an entity to shareholders of acquired corporations could be "securities" under Article 8.

CONTRACTS

FORMATION, SCOPE, AND MEANING OF AGREEMENT

In re Adelpia Communications Corp., 342 B.R. 142, 46 Bankr. Ct. Dec. 148 (Bankr. S.D.N.Y. 2006); *denial of motion for reconsideration* at 2006 WL 2927222 (Bankr. S.D.N.Y. 2006) - A debtor had an obligation to pay interest computed from a grid based on market rates and the debtor's financial condition. The loan documents provided that this information was to be reported by the borrower on a compliance certificate and that the compliance certificate would serve as the basis for the interest rate calculation. The loan documents did not provide that debtor would be retroactively obligated to pay more interest for a period if the debtor inaccurately reported its financial condition. As a matter of contract interpretation, the lenders could not recover additional interest they would have received if a compliance certificate had been accurate.

Comment: This case has resulted in a change in the way many banks document grid interest transactions.

OTHER LAWS AFFECTING COMMERCIAL TRANSACTIONS

PROFESSIONALS

AG Capital funding Partners, L.P. v State Street Bank and Trust Company, 842 N.E.2d 471 (N.Y. 2005) - Based on the allegations of a complaint, an issuer's counsel (law firm) may have assumed a duty to deliver to an indenture trustee documents necessary to make the issuer's debt issuance secured by existing collateral under the indenture. The documents allegedly were not delivered and the noteholders accepted a discounted claim in the issuer's bankruptcy due to the possible lack of a security interest in the collateral. The court dismissed the claims against the lawyers for attorney malpractice and for negligent misrepresentation in the absence of privity or near privity between the lawyers and the noteholders. The court allowed a claim to proceed against the lawyers on the basis that they may have assumed a duty to deliver the documents.

Mega Group, Inc. v. Pechenik & Curro, P.C., 32 A.D. 3d 584 (N.Y.A.D. 2006) - The decision involved the sale of a business. There was pending litigation against the entity being sold. The seller's counsel's legal opinion did not say anything about the absence of litigation. The buyer argued that "in the opinion letter, the attorneys had a duty to disclose Halton's then pending claims against Mega." The buyer also submitted a statement from an expert who averred that:

"a reasonable and competent attorney should recognize that, where a corporation is conveying substantially all of its assets, any opinion letter generated in connection therewith should disclose any known claims for damages as against the transferring corporation."

The court correctly rejected the proposition that the lawyer had a duty to come forward with information that was not covered by the agreed scope of the opinion letter:

"As a term of the purchase/sales agreement, the parties to the sale carefully circumscribed the details to be contained within the opinion letter; no evidence exists that the attorneys were called upon to venture opinions beyond those agreed upon."

Comment: There may be an ethical issue if the attorney knew the client was making a false representation.

Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006) - An attorney can be a "debt collector" generally, and thus subject to all the restrictions imposed by the Fair Debt Collection Practices Act, even when doing nothing more than enforcing a security interest.

First American. All you need to know.

LOCAL FILING ISSUES

IS IT STILL BREATHING?

A Look at Best Practices When Determining the Effectiveness of a UCC-3 Termination

Before Revised Article 9 took effect in July of 2001, many state filing offices required that the Secured Party of record execute the UCC-3 termination statement before they would accept the document for filing. Following the enactment of RA9, with the signature requirement lifted, many searchers began to fear a filer uprising leading to an inevitable epidemic of fraudulently filed termination statements. While this foretelling may have been a bit dramatic, searchers today must pause to ask the question: Is this a valid termination statement?

Remember that the *acceptance* by the filing clerk of any UCC financing statement has little to do with the *effectiveness* of the lien. Although a physical signature is no longer required on the face of our UCC financing statements, authorization is. With few exceptions, the filing offices are obligated to accept and index submitted financing statements. However, according to §9-510(a) and §9-509(d), a filed termination statement is effective only if authorized by the secured party of record. Even in the event of no remaining obligation secured by the collateral, a debtor is not necessarily authorized to file a termination on their own behalf. Unfortunately, our UCC search reports offer little more than an indication of the filing and an image that may contain little information (especially if filed electronically). Searchers are left with the burden of determining the effectiveness of the filed termination statement.

But it's not simply the fraudulent filers or the filers who do not understand the authorization requirements that muddy the effectiveness issue. A good-intentioned filer who makes an honest mistake when transposing their initial financing statement number onto their UCC-3 document can cause a termination statement to be filed against another party's lien. The filing offices' administrative procedures under former Article 9 allowed for filing clerks to review the UCC-3 amendment document to determine its validity prior to indexing. Oftentimes, the filing clerks would cross-check the name of the secured party of record against the name of the authorizing party on the document to be sure they were one and the same. This would sometimes help to safeguard against an incorrect initial financing statement reference. This procedure is no longer accepted. Today, clerks are instructed to tack the amendment onto the initial financing statement regardless of the other indicators. Under Revised Article 9, it is not the job of the filing clerk to investigate the filer's intentions, but the job of the searcher.

Luckily, there are some warning signals that searchers can pick up on when doing an examination of their search results. Any termination statement that is authorized by the debtor is a termination statement that deserves another look. Debtor parties may terminate on their own behalf only after an authenticated request to the secured party of record has gone unanswered (§9-513). While this certainly does occur in the busy world of commercial transactions, it is also likely that an unsophisticated Debtor is not aware of the official requirements for self-authorizing of a termination filing.

While not required in many states, filers will often indicate the original filing date beside the original file number in box #1 of an amendment filing. When reviewing the copy of the termination statement, an examiner can often catch a referenced date that is not correct. This might be an indication that the lien has been mistakenly filed against an unrelated UCC-1.

Subsequent to filing an authorized termination, secured parties often remove the lien's information from their in-house databases to avoid future tracking of the UCC. Therefore, coming across a financing statement's history that indicates a termination *followed* by another type of amendment is a red flag that the secured party of record probably did not intend to terminate or did not intend to file a subsequent amendment.

Know your borrower. Sometimes the termination of a working capital lien simply doesn't make sense. If a termination filed against Copy Place's lease lien on a copy machine is present, we may assume that all is well. However, if a termination is filed against Big Old Bank's lien on "all assets", our examiner may wonder how Debtor is funding his business. Perhaps this is the termination that our examiner would choose to investigate.

Of course, there are no guarantees that our searcher will be able to find comfort with every termination reflected on his or her search results. A certain amount of risk is inherent when basing decisions on any lien search. Thankfully, there are groundbreaking risk-shifting products on the market that will not only protect our searcher, but reduce much of the time-consuming due-diligence process associated with determining filer's priority or the lien encumbrances of the collateral. Eliminate the guess work. Consider First American's Eagle9® Lender's and Buyer's policies when contemplating your next commercial transaction.

A UCC ARTICLE OF INTEREST

To access a copy of the article go to <http://www.eagle9.com/downloads/SecuredRealEstateMezzLend.pdf>