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Foreclosure Are Stayed and New Notices Are Required

By Michael G. Cortina

On April 5, 2009, Gov. Quinn signed into law Senate Bill 2513 which, among other things, amended the Illinois Mortgage Foreclosure Law by adding Section 15-1502.5. This new section requires banks to give certain notices to mortgagors, stays foreclosure proceedings for a certain period of time, and prevents these new provisions from being waived.

The new law only applies to residential real estate in which the mortgagors reside. The procedures and forbearances noted in the new section only apply once for any particular mortgage, and do not apply at all if the mortgagor has filed for bankruptcy relief. Unless it is amended, the new section will expire on April 5, 2011.

No foreclosure of residential real estate can be filed until the provisions of this new section are met.

A mortgage must be delinquent for 30 days before a mortgagee can send the mortgagors a notice that they may wish to seek approved housing counseling. No foreclosure can be filed before the mailing of this notice. The notice shall be headed in bold 14-point type "GRACE PERIOD NOTICE" and shall contain certain words. The required notice must be as follows:

GRACE PERIOD NOTICE

Your loan is more than 30 days past due. You may be experiencing financial difficulty. It may be in your best interest to seek approved housing counseling. You have a grace period of 30 days from the date of this notice to obtain approved housing counseling. During the grace period, the law prohibits us from taking any legal action against you. You may be entitled to an additional 30 day grace period if you obtain housing counseling from an approved housing counseling agency. A list of approved counseling agencies may be obtained from the Illinois Department of Financial and Professional Regulation.

In addition to the language noted above, the notice must also list the Department of Financial and Professional Regulation's current consumer hotline, the Department's Web site, and the telephone number, facsimile machine number, and mailing address of the mortgagee. No other information may be contained in the notice in order for it to be valid under the new section.

No foreclosure can be filed against the mortgagors until at least 30 days from the date that the Grace Period Notice was mailed by regular, first-class mail to the mortgagors at the address of the property at issue.



During the grace period, if an approved counseling agency provides written notice to the mortgagee that the mortgagors are seeking approved counseling services, then no foreclosure can be instituted for at least 30 days from the date of the notice from the approved counseling agency to the mortgagee.

Mortgagees must comply with this new section of the Illinois Mortgage Foreclosure Law in order for the foreclosure to be valid. The failure of a mortgagee to comply with the law could result in affirmative defenses to mortgage foreclosures being filed. If

a mortgagor is successful in challenging a mortgage foreclosure case, not only will the case be dismissed and the mortgagee have to begin the process all over, but the mortgagors could seek to have the mortgagee pay for its attorneys' fees for getting the foreclosure dismissed.

If you have any questions or need any assistance in complying with this new law, please contact Mike Cortina or any of the attorneys in SmithAmundsen's Financial Services Group.

The Workout Agreement Process: *Lender Beware*

By Thomas P. Scherschel

Workout negotiations and agreements are common in general, and even more so in the current credit environment. Workouts serve a number of purposes and are often beneficial to the borrower and to the lender. Particularly in today's credit market, reasonably acceptable workouts can strengthen a lender's balance sheet and avoid an excess of REO properties sitting in inventory for an unpredictable amount of time.

However, it is important to enter into any loan discussions, including workout negotiations, with an element of caution in order to avoid allegations that oral agreements were either promised or reached before a meeting of the minds actually occurs. Illinois Courts recognize a cause of action for breach of an oral contract to loan money in the future, *First Nat'l Bk of Wheaton v. Jones*, 169 Ill. App. 3d 277 (3d Dist. 1988), including an agreement to continue to refinance or roll over a debt, *The Delcon Group, Inc. v. Northern Trust Corp.*, 187 Ill. App. 3d 635 (2nd Dist. 1989). Like any other oral contract, the party seeking to enforce the agreement must be able show that the alleged agreement contains sufficient definitiveness to be enforceable. *McClellan v. Banc Midwest, N.A.*, 164 Ill. App. 3d 304 (4th Dist. 1987). Therein lies the problem, for both sides. And that problem can lead to long delays in the lender's recoupment of principal and interest, regardless of the outcome of the time consuming and expensive litigation that can flow from allegations of breach of an oral contract.

The Illinois Credit Agreements Act (815 ILCS 160/1 *et seq.*) provides some relief from such pitfalls when the loan involved is a commercial loan, as a "Credit Agreement" under the Act means "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." (815 ILCS 160/1(1)) Thus, regardless of whether a borrower attempts to characterize a note as "personal" or "business," explicit language of the note stating that the loan was intended for commercial purposes will control. *Whirlpool Fin. Corp. v. Sevaux*, 874 F. Supp. 181 (N.D.

Ill. 1994), *aff'd*, 96 F.3d 216 (7th Cir. 1996). To the extent a loan is a commercial loan, even typical personal defenses, such as economic duress and fraud, are barred if such claims are based on the existence of an oral credit agreement. *Lasalle Bus. Credit, Inc. v. Lapidis*, F. Supp. 2d, 2003 U.S. Dist. LEXIS 2901 (N.D. Ill. Feb. 27, 2003).

The protections of the Credit Agreements Act do not extend to any loan that can accurately be characterized as a personal loan for family or household purposes or in connection with the issuance of credit cards. In workout situations involving, for example, a residential mortgage, or if there is any suggestion that a loan would not fit within the protections of the Credit Agreements Act, certain procedures should be routinely followed. First, any written materials presented to the borrower should include the admonishment that no agreement to loan funds will be considered final until a written agreement is reached between the parties and is finalized as evidenced by the signature of the borrower and the lender. Likewise any discussion which goes any farther than the presentation of rates and the request for personal financial statements, should be followed by written communication, such as an e-mail, reiterating that no promise has been made nor should the extension of credit be assumed unless and until final approval of the lender is given in writing. Workout situations involving personal loans are rife with opportunity for claims of promissory estoppel and waiver. In these situations, the lender or the lender's representative should follow up each negotiation with a standard correspondence or e-mail reiterating that no promise has been made, nor should any promise be assumed, nor does the lender waive any terms, conditions or defaults under the existing loan documents, and the terms, conditions and obligations of all existing loan documents shall remain in full force and effect unless and until such time as a final agreement may be reached and reduced to a writing signed by the borrower and the lender.

Lastly, to the extent that there is any question about the law that will be applied to any dispute, Illinois Courts will enforce a written choice of law agreement contained in a valid contract. *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185 (7th Cir. 1996). Thus, it is a good idea to make sure any writing memorializing a workout or forbearance agreement contains an appropriate recitation of the state law that will be used to resolve any dispute.

Delay in Perfection May Void Security Interest

By Andrea E. Olness

Pursuant to the preferential-transfer provisions of 11 USCS § 547(b), a trustee in bankruptcy under Chapter 7 has the power to “avoid,” or recover, transfer of a debtor’s interest in property that is made “for or on account of an antecedent debt” and within 90 days prior to bankruptcy. Subject to certain statutory exceptions, the trustee in bankruptcy can recover the payment and force the creditor to take its chances with the rest of the debtor’s unsecured creditors. The purpose of the preferential transfer provisions of the Bankruptcy Code is to discourage creditors’ “race to the courthouse” and transfers by an insolvent debtor which harm existing creditors due to the resulting decrease in debtor net assets. A debtor is presumed to have been insolvent on and during 90 days immediately preceding the date of filing of his bankruptcy petition. 11 USCS § 547(f).

A bank may be protected under 11 USCS § 547(c)(1), the so called “contemporaneous exchange transfers,” exception to the rules regarding preferential transfers. Payments by a debtor in exchange for a secured creditor’s release of its lien or security interest on debtor’s property (e.g. refinance situations) do not affect equality of distribution of estate assets and are therefore protected from avoidance by the trustee. 11 USCS § 547(e)(2)(A) creates a 10-day grace period in which to perfect a security interest and avoid preference liability. Specifically, 11 USCS § 547(c)(1) provides: A transfer of assets from a debtor to creditor within the statutory preference period cannot be voided if:

1. the parties *intended* that the transfer be part of a contemporaneous exchange for new value given to the debtor and;
2. the transfer was, in fact, *substantially contemporaneous*. (1) 11 USCS sec. 547(c)(1)(emphasis added)

What does “substantially contemporaneous” mean? In *Pine Top Ins. Co. v. Bank of America*, 969 F.2d 321 (7th Cir. 1992), the court found that a 2-3 week delay in collateralization of letters of credit did not defeat the substantially contemporaneous nature of an exchange. The following facts were relevant:

- a) the debtor was in dire financial straits and needed new credit to cover its reinsurance obligations;
- b) the creditor bank stepped in to provide this credit at the request of a longtime customer;
- c) from the outset, debtor agreed to creditor bank’s demand for security in exchange for this new credit;
- d) because of the urgent circumstances, creditor bank issued letters of credit before the requisite security agreements were in order; and
- e) creditor bank *had taken immediate steps* to begin the collateralization process.

In contrast, the court in *In re Messamore*, 250 B.R. 913 (S.D. Ill. 2000) found that a bank’s delay from July 6, 1999, to August 25, 1999, before perfection of a security interest in a refinanced mobile home did not constitute a contemporaneous exchange. On June 29, 1999, Anna Bank promptly mailed the payoff amount to the original lienholder bank and requested they forward the mobile home title directly to Anna Bank. Instead, the original lienholder bank released its lien on July 6, 1999 and forwarded the title directly to the debtors. Anna Bank subsequently obtained the title from the debtors and mailed it to the Illinois Secretary of State on August 25, 1999, requesting a corrected title indicating Anna Bank’s security interest. The debtors filed for Chapter 7 bankruptcy relief on September 13, 1999. The court noted that creditor Anna Bank could not explain the delay in obtaining the vehicle’s title from the debtors and could not note what steps it had taken to obtain the title from the debtors. Thus, even though the parties obviously intended the transfer be part of a contemporaneous exchange for new value, the transfer was voided and the bank was left to compete with other unsecured creditors for payment because the transfer was not in fact, substantially contemporaneous.

Moral? Take immediate steps to perfect your security interests and be prepared to provide documentation of the specific steps taken and dates thereon. The failure to immediately perfect a security interest could allow a trustee in bankruptcy to avoid a mortgage or other security interest rendering the bank nothing more than a general unsecured creditor.

Ain't No Stopping It Now

By Kelly N. Stulginskis

There are many things in life that you can't stop- like time, the weather, death, and taxes. The Supreme Court of Illinois has added cashier's checks to the "unstoppable" list. The Court recently addressed the issue of whether a bank may issue a stop payment order on a cashier's check in *MidAmerica Bank FSB v. Charter One Bank*.

In this case, a woman purchased a \$50,000 cashier's check for Essential Technologies of Illinois (ETI), a company of which her son was the president. ETI deposited the check in its MidAmerica account, but the woman requested that Charter One stop payment on the check four days later. Charter One complied with the woman's request and refused to honor the check when MidAmerica presented it for payment. MidAmerica then returned the check to ETI and removed \$50,000 from the company's account. MidAmerica then filed suit against Charter One.

MidAmerica alleged that Charter One's stop payment order was wrongful and violated the Uniform Commercial Code. The trial court found in favor of MidAmerica, but the appellate court reversed the circuit court's holding that MidAmerica could enforce the cashier's check against Charter One Bank.

In addressing this issue, the Supreme Court of Illinois first looked to section 4-403 of the UCC, which provides: "[a] customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account..." 810 ILCS 5/4-403(a) (West 2002). Because a cashier's check is an item drawn on the issuing bank and not on the customer's account, the Court held that section 4-403 of the UCC did not give the woman the right to request that Charter One stop payment. Further, since this was an inappropriate request by the woman, Charter One's refusal to pay was also wrongful, subjecting the bank to liability under section 3-411 of the UCC. 810 ILCS 5/3-411 (West 2002).

The Court also looked at precedent for support for its holding. The Court previously held in *Gillespie v. Riley Management Corp.* that a person who purchases a cashier's check can cancel the check at any point until the check enters the stream of commerce. 59 Ill.2d 211 (1974). Therefore, the Court reasoned, in this case, the woman had no right to stop payment on the check once she had given the check to ETI.

Similarly, the appellate court has previously addressed this issue in *Able & Associates, Inc. v. Orchard Hill Farms of Illinois, Inc.*, finding that a bank does not have the right to stop payment on a cashier's check because of the status of a cashier's check. The appellate court found that a cashier's check is the equivalent of cash and allowing a bank to stop payment on a cashier's check would undermine the purpose of a cashier's check- as a substitute for cash. The Court also upheld a cashier's check's status as a "cash equivalent", rather than as a "demand note" as MidAmerica argued, again relying on the comments to the UCC.

Finally, and rather interestingly, the Court also found that Charter One could still enforce its rights to the cashier's check although the actual check had been lost, relying on section 3-309 of the UCC. Sub-section (a) states:

"A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, the whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." 810 ILCS 5/3-309 (West 2002).

Because the cashier's check was lost after it was dishonored by Charter One, the Court held that MidAmerica still had the right to enforce payment of the cashier's check and found in its favor. The appellate court's ruling on this issue was, therefore, reversed.

This recent case therefore further emphasizes that a bank's issuance of a stop payment order on a cashier's check is wrongful and violates the UCC. Additionally, the purchaser of a cashier's check does not have the right to request a stop-payment order once the check has entered the stream of commerce. However, in this case, it was the bank that was "punished" for its wrongful refusal to pay the cashier's check, not the purchaser. Accordingly, banks should be wary of any request by a customer to stop payment on a cashier's check as it is the bank that will be held liable for any wrongful stop-payment order. Additionally, this case should make financial institutions reflect on the importance that is given to a cashier's check because this importance is readily protected by Illinois courts.

About SmithAmundsen

SmithAmundsen offers experienced, efficient, and proactive counsel on a wide range of legal and business issues. Our goal is to become our clients' primary source for legal services and business advice, the lawyers you turn to when you need to "get it done right." In addition to litigation, we also practice non-traditional means of resolving cases. We understand the importance of "bottom line" analysis in our legal advice to clients.

Mission Statement

SmithAmundsen provides the quality legal services that our clients require to achieve their goals. Each of us strives to demonstrate the highest degree of professionalism in our relationships with the bench, the bar and in business transactions. Our success is built upon this foundation of integrity, shared values, a commitment to exceeding client expectations, and the use of creative approaches to resolve client matters efficiently. We distinguish ourselves from our competitors by our commitment to the professional development of our lawyers and staff.

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