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Intersection of Civil Forfeiture and Article 9

***State v. Pressley*, ___ So.3d ___, 2012 WL 1371389 (Ala. Civ. App., 2012).**

A grandmother purchased a truck for her grandson who used it to transport methamphetamine. The grandmother and grandson had an oral agreement that the grandmother and grandson had an agreement whereby the grandson would pay the grandmother the purchase price of the truck. The grandson delivered the certificate of title – which listed him as owner and had no liens noted – to the grandmother who locked it in her lockbox without looking at it.

The state sought to claim that the truck was forfeit under Ala. Code section 20-2-93(a)(5) which permits the seizure of conveyances used to transport, receive or sell controlled substances. The grandmother claimed to fall into a safe harbor of the seizure statute which provides that a “bona fide lienholder” who had no knowledge and who could not, through “reasonable diligence,” have discovered the activities leading to the forfeiture, defeats the interest of the state’s interest in the forfeiture.

The court had previously decided a similar case in *Jester v. State*, 668 So. 2d 822 (Ala. Civ. App. 1995), and the opinion in the instant case sought to clarify that previous holding. The court held that a security interest in personal property is governed by article 9, and that the grandmother’s claim to the vehicle could only arise from being a “bona fide lienholder” under article 9. The problem in this case was that there was only an oral security agreement, and thus the requirement in 9-203 that there be an authenticated security agreement was not met. The court repeatedly referred to this requirement as in the nature of a “statute of frauds,” and clarified that similar language in the *Jester* case also referred to 9=203, not the general Alabama statute of frauds.

The opinion drew two dissents, one written. The dissent pointed out that the forfeiture statute does not preclude a “lienholder” from having something other than an article 9 security interest in forfeited property. Because the state had not cited article 9 at all in the lower court proceedings, the dissent argued that the trial court decision in favor of the grandmother should not be overturned.

Is a Contingent Guarantor Subject to the Alabama Mortgage Recordation Tax

***Ex Parte Jim Walter Resources, Inc.*, ___ So.3d ___, 2012 WL 29187 (Ala., 2012).**

Section 40-22-2 of the Alabama Code provides

No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt which conveys any real or personal property situated within this state or any interest therein or any security agreement or financing statement provided for by the Uniform Commercial Code . . . shall be received for record or for filing in the office of any probate judge of this state unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be received for record or for filing. . . .

A contingent guarantor sought to record certain mortgages which secured its contingent guaranty liability in the Jefferson County Probate Court, Birmingham Division, which permitted the filing without the recordation tax because of a letter from the Alabama Department of Revenue which stated that the filings were exempt from the tax. However, despite producing the same letter, the guarantor was assessed the tax when it sought to record similar mortgages in the Tuscaloosa Probate Court. The guarantor brought a mandamus action to require the Tuscaloosa Probate Court to permit recordation without assessing the tax.

The Supreme Court of Alabama granted mandamus, holding that section 40-22-2 applies to mortgages that secure an “actual existing debt,” not a contingent guaranty which may never turn into an actual debt. In doing so, the court agreed with an Attorney General Opinion of June 23, 1978 which had previously opined in the same fashion concerning the application of the recordation tax.

Does the Status of a Manufactured Home as Realty for Purposes of Ad Valorem Taxation Affect the Priority of Competing Creditors Secured by the Home?

***Green Tree-AL LLC v. Dominion Resources, L.L.C.*, ___ So.3d ___, 2011 WL 3963010 (Ala. Civ. App. 2011).**

A debtor purchased a manufactured home financed by a secured creditor, who properly perfected its security interest by notation on the home’s certificate of title. The debtor placed the home on some real property she owned. The real property was sold for taxes to a purchaser who spent funds to rehabilitate the property including the manufactured home. When the debtor defaulted on her obligations to the secured creditor, that creditor filed a detinue action to obtain the manufactured home.

The Alabama Court of Civil Appeals held that the secured creditor was entitled to the manufactured home even though that home was taxable as part of the real property under Alabama law. The court reviewed the law surrounding security interests in manufactured homes and noted that such security interests are effective until the certificate of title covering the home is cancelled, a procedure defined by statute. Until that time, the home was subject to the security interest in favor of the financier. The court noted that although the treatment of manufactured homes seems to be different for purposes of taxation and for purposes of secured transactions, a holding in favor of the secured creditor would vindicate secured transactions law while doing no violence to the tax statutes. On the other hand, the opposite holding would vindicate the tax statutes at a grave cost to the secured transactions statutes that apply. Thus, the former approach is the better way to harmonize the disparate statutes at issue.

Denial of Discharge for Falsely Claiming a Security Interest

***In re Dorsey*, 2011 WL 4914841 (Bankr. M.D. Ala. 2011).**

In an age-old ploy to conceal assets in plain view from the bankruptcy estate, a debtor claimed on his bankruptcy schedules that some property was subject to a filed UCC-1 form in favor of a close friend. Despite “voluminous” documentation, there never was a UCC-1 form. The court, of course, denied discharge under section 727 of the bankruptcy code. The court was particularly concerned by the debtor’s attorney’s apparent complicity in carrying out the fraud on the court by filing false bankruptcy pleadings. The court noted that it was simply not credible that the debtor had no complicity with his lawyer in filing out the bankruptcy schedules. Even if the lawyer had acted alone in doing so, the debtor still should be denied a discharge under the “your lawyer, your fault” rule.

The Definition of a True Lease Under Alabama Law

***In re HB Logistics, LLC*, 460 B.R. 291 (Bankr. N.D. Ala. 2011).**

The Alabama Legislature has enacted Alabama Code section 32-8-60.1 which reads:

In the case of motor vehicles as defined in Section 32–8–2(10), notwithstanding any other provision of law, a transaction does not create a sale or security interest merely because the transaction provides that the rental price is permitted or required to be adjusted under the agreement either upward or downward by reference to the amount realized upon sale or other disposition of the motor vehicle.

The issue in the case was how this statute was affected by the adoption of the revised UCC, especially section 1-203 which specifies a detailed analysis for distinguishing a true lease from a disguised sale transaction. The court held that there is no conflict between the UCC and section 32-8-60.1 as they can be read together harmoniously. Thus, the leases at issue were true leases under either test.

Breach of Express Warranty

***Cahaba Disaster Recovery, LLC v. Rodgers*, 2012 WL 253437, (S.D. Ala. 2012).**

The parties contracted for the sale of an “absorbent” oil boom in the wake of the Deepwater Horizon explosion in the Gulf. The actual boom that was delivered was not “absorbent.” The buyer initially accepted the boom, but when it discovered that it did not conform to the contract, it sued for damages for breach of contract and express warranty under article 2. The court found for the buyer, finding that a clear express warranty had been violated, and that the short delay in discovery the lack of conformity with the contract was permissible under article 2. Finally, the court applied article 2's measure of damages for breach of warranty, recovery of the purchase price. The damages would have been reduced by the value of the boom actually delivered, which was not returned, except that the boom had no value to the buyer whatsoever.

Sufficiency of Complaint Under Fair Debt Collection Act

***Rees v. Ellis, Painter, Ratterree & Adams, LLP*, 2012 WL 1500108 (11th Cir.).**

The 11th Circuit overruled the district court and agreed with borrowers' allegations that a dunning letter and enclosed documents sent to them by the law firm representing the lender stated that the lender thereby “demand[ed] full and immediate payment of all amounts due, that the firm was “attempting to collect a debt,” and that a second document stated that the firm was “acting as a debtor collector attempting to collect a debt” sufficiently alleged that the letter and enclosures constituted an attempt to “collect” the borrowers' debt, within the meaning of the Fair Debt Collection Practices Act. The fact that the dunning letter and other documents related to the enforcement of a security interest did not prevent them from also relating to the collection of a debt.

Jurisdiction to Decide Cases Arising Under the Federal Telephone Consumer Protection Act of 1991 (the “TCPA”)

***Mims v. Arrow Financial Services, LLC*, 2012 WL 125429 (U.S.) (reversing and remanding *Mims v. Arrow Financial Services, LLC*, 421 Fed.Appx. 920 (C.A.11-Fla. 2010)).**

The U.S. Supreme Court reversed the 11th Circuit and a majority of circuit courts of appeals in holding that there is federal subject matter jurisdiction over private actions brought pursuant to the TCPA. That statute provides remedies for consumers against abusive telemarketers. The Florida petitioner alleged in federal court that the defendant had violated TCPA by repeatedly calling his cellphone with a recorded message attempting to collect a debt. The Supreme Court held that although TCPA did vest rights to action under the statute in state courts, there was no clear intent to completely divest federal courts of subject matter jurisdiction. Because section 1331 of the federal civil procedure code vests subject matter jurisdiction in federal courts for all cases arising under federal law, and the TCPA is a federal statute, cases arising under that statute could be litigated in federal district court.

“Affiliates” of a Secured Creditor: Are They Secured Creditors?

***In re Borges*, 2011 WESTLAW 4101096 (Bankr. D.N.M.).**

A security agreement covering a herd of dairy cattle only named one of three related creditors as the secured party. However, the cross-collateralization clause stated that the security agreement covered all of the debtor’s debts to any “affiliated institutions” of the secured party. The financing statement named only the secured party named in the security agreement. The court reasoned that the security agreement read as a whole granted a security agreement to all three of the plaintiff/creditors. However, because the financing statement only named one of those creditors as the secured party, only that creditor had a perfected security interest.

Attorney Contingency Fee Arrangements as Accounts

***CapTranTanglewood LLC v. Thomas N. Thurlow & Assocs.*, 2011 WESTLAW 2969835 (S.D. Tex.).**

Attorney contingency fee arrangements are “accounts” under article 9 as they set up a right to payment for services rendered.

Commercial Reasonableness of a Foreclosure Sale

***In re Inofin, Inc.*, 455 B.R. 19 (Bankr. D. Mass. 2011).**

A portfolio of collateral consisting of “retail installment contracts” between automobile sellers and buyers – which had been assigned to the debtor and in turn used as collateral for a loan – was sold at a foreclosure sale. The court held that the sale was not commercially reasonable for the following reasons: no notice to a requesting creditor; publication notice in a general publication but no specialized publications; the auctioneer was paid only \$500 to auction several million dollars worth of collateral, thus showing no incentive to maximize the price; the date was incorrect on one notice; the attorney for the secured party had never performed a foreclosure sale of personal property and the inexperience showed; the price at the sale where the secured creditor bid in was 50% of the face value of the contracts and based on the creditor’s “gut” feeling; and, the auctioneer made no effort to solicit bidders to attend the sale.

Earnest Money Deposits and the Scope of Article 9

***In re Harbour East Development, Ltd.*, 2011 WESTLAW 3035287 (Bankr. S.D. Fla.).**

Earnest money deposits made as part of the sale of condominiums were proceeds of real property, and therefore covered by the secured creditor’s perfected real estate mortgage lien. Moreover, the deposits were in constructive possession of the creditor because the deposits were held by an escrow agent who acknowledged in an authenticated record that he was holding them on behalf of the secured creditor. Thus, even if the deposits were within the scope of article 9, the secured creditor had a security interest perfected by possession.

Constructive Possession of Goods Leads to Transfer of Title

***Farm Credit of N.W. Fla., ACA v. Easom Peanut Co.*, 2011 WESTLAW 4057786 (Ct. App. Ga.).**

Several peanut growers transferred peanuts to a peanut processor specified by the buyer/peanut broker. The contracts of sale reserved “beneficial title” in the peanuts to the growers. The court held that the transfer to a bailee of the buyer led to constructive possession of the goods by the buyer, and that the reservation of beneficial title was a reservation of a security interest. Thus, the broker’s lender’s perfected security interest in the goods defeated the reservation of title by the seller under 2-401(2). Moreover, the secured creditor’s interest defeated the bailee’s statutory lien in favor of the peanut processor.

Priority of PMSI vs. Judgment Lien; Conversion Damages for Secured Creditor Where Judgment Creditor Refused to Turnover Collateral and Sold It

***Stanley Bank v. Parish*, 46 Kan.App.2d 422, 264 P.3d 491 (2011).**

The secured creditor's PMSI was superior to a judgment lien in favor of a creditor of the owners of an automobile where the judgment creditor's execution on the automobile took place one year after the perfection of the security interest by notation on the electronic certificate of title. The notation on the certificate of title was accomplished by filing the proper documentation with the DMV. The fact that the DMV later erroneously issued a "clean" certificate of title without any security interests noted made no difference as the judgment creditor had actual knowledge of the PMSI. Finally, the judgment creditor did not convert the automobile by seizing it and selling it at a foreclosure sale, but it did constitute conversion when the PMSI holder later demanded that the judgment creditor turn over the vehicle or the proceeds of the sale, and the judgment creditor refused.

Priority Dispute: Right to Setoff vs. Unperfected Secured Creditor

***First Dakota Na. Bank v. First Nat. Bank of Plainview*, 2011 WESTLAW 4382147 (D. S. Dak.).**

A bank covered the overdrafts of a depositor, in effect making unsecured loans to their customer. Proceeds from the sale of livestock which were collateral for a loan from a second bank were deposited into the account. The court held that the first bank's right to setoff was superior to the unperfected security interest of the second bank. In order for the second bank to have been perfected, it would have had to exercise control over the account, something it failed to do. Thus, because the right to setoff is superior to an unperfected security interest, the depository bank prevailed.

Name of Debtor on Financing Statement Seriously Misleading

***In re Harvey Goldman & Co.*, 455 B.R. 621 (Bankr. E.D. Mich. 2011).**

The debtor corporation's name, according to its incorporation documents, was Harvey Goldman & Co. The debtor filed a document with the state of Michigan a certificate of assumed name which indicated that it would be doing business as "Worldwide Equipment Company." The secured creditor filed a financing statement with the Secretary of State which named the debtor as World Wide Equipment Co. The court held that the financing statement was insufficient to perfect the creditor's security

interest. A search of the Secretary of State's records using normal search protocol using the debtor's actual name did not reveal the financing statement, and thus the security interest was unperfected. The court rejected the secured creditor's clever argument that a search of Michigan's Department of Licensing and Regulatory Affairs revealed a cross reference between the debtor's legal name and its assumed name, and therefore article 9's requirement of a "search of the records of the filing office" was met. The court held that the "filing office" refers only to the Secretary of State, not to any other department of state government, even if that alternative department maintains files of debtors' names.

***In re Miller*, 2012 WESTLAW 32664 (Bankr. C.D. Ill.).**

The financing statement listed the debtor's name as Bennie A. Miller, the name by which he was known in the community and that was on his driver's license, his social security card, his income tax returns, his deed to his residence, his credit card, etc. However, the name on his birth certificate was Ben Miller, and a search for Ben Miller using standard search logic did not yield the financing statement with the name "Bennie A. Miller." Thus, the court held, the financing statement filed with the name "Bennie A. Miller" was ineffective to perfect the security interest.

Whether Description of Collateral Was Seriously Misleading

***In re D & L Equipment Inc.*, 457 B.R. 616 (E.D. Mich. 2011).**

When a financing company purchased a secured creditor's interest in a secured loan to an equipment company, the financing company filed an amended financing statement. The financing statement correctly identified the new secured creditor, but it did not change the description of collateral which was "equipment and inventory financed by [the original secured creditor]." The DIP acting as the bankruptcy trustee argued that the security interest was unperfected, at least with regard to any collateral financed by the new secured creditor. The District Court rejected the DIP's argument. The court reasoned that the purpose of a financing statement is to put subsequent searchers on inquiry notice, and that the financing statement in this case sufficiently put subsequent searchers on notice that the inventory and equipment of the debtor might be subject to the secured creditor's security interest. The "financed by" clause was not sufficient to confuse a reasonable, subsequent searcher, and therefore not enough to render it seriously misleading.

Can a Secured Creditor Seek a Deficiency Judgment Without First Selling Collateral?

***First Chatham Bank v. Landers*, 2011 WESTLAW 4501968 (D.S.C.).**

A lender perfected a security interest in shares of stock by taking possession of the stock. When the debtor defaulted, the secured creditor sought a deficiency judgment against the debtor even though the stock had not yet been sold, and thus the value of the stock (which was not publicly traded) had not yet been determined. The District Court held that there was no need to sell the collateral before suing for a deficiency as the remedies provided by article 9 are cumulative. The court distinguished a case where a court denied a deficiency judgment to a secured creditor in possession of repossessed collateral by noting that the collateral in the instant case was not repossessed – the creditor had always been in possession of the collateral. Is this reasoning convincing?

Duty of Good Faith Breached by Secured Party's Post Repossession Behavior

***Tudisco v. Duerr*, 89 A.D.3d 1372, 933 N.Y.S.2d 140 (N.Y. App. Div. 2011)**

The secured creditor repossessed certain construction equipment, the debtor brought an action against the creditor for conversion. The equipment at issue was worth more than the amount owing the creditor, and the creditor refused to sell or to comply with the requirements for strict foreclosure. Instead, the creditor simply kept the collateral. The court held that by acting in this fashion, the secured creditor was liable to the debtor for conversion. A creditor cannot simply keep collateral without complying with article 9's sale or strict foreclosure procedures.

Is a Lender's Perfected Security Interest in Accounts Receivable of a Construction Company a PMSI?

***In re Deckers Const., Inc.*, 461 B.R. 143 (Bankr. D.P.R. 2011).**

A lender lent money to finance projects of a construction company secured by the accounts receivable generated by the projects. A previously perfected secured creditor also had a valid security interest in the debtor's accounts receivable. The second lender argued that the transaction with the debtor led to a PMSI – the loan for individual projects was necessary to give rise to the accounts receivable, and thus met the definition of a PMSI. The court rejected this argument, noting that the second lender provided funds to complete the debtor's obligations under contracts, not to in any way obtain the accounts receivable. Indeed, the accounts receivable did not even exist

until the projects were completed. Since this was not a PMSI transaction, the normal first to file or perfect rule applies, and the preexisting secured lender defeats the second lender.

Can a Security Agreement Be Voided Because a Seller of Automobiles Did Not Have the Proper License From the State

Hanson v. 5K Auto Sales, LLC, 2011 WESTLAW 6755138 (D. Minn.).

The seller of automobiles financed a sale and retained a security interest in a Cadillac. The buyer defaulted, and the seller hired two persons to repossess the vehicle, which they did following a brief altercation where the debtor and her mother sustained “minor injuries.” The debtor argued that the security agreement between her and her seller was void because the seller did not have the proper license from the state to be selling automobiles. The court rejected this argument, noting that article 9 explicitly states that where a statute conflicts with a security agreement would only have the effect specified by the statute. That is, such a conflict does not vitiate the security agreement. Thus, the seller’s lack of a proper license does not affect the underlying security agreement. However, there was a triable issue of fact on the question of breach of the peace in the repossession. The court rejected the argument that the secured creditor was not responsible for its hired independent contractors who actually did the repossession.

Sufficiency of Security Agreement

In re Bucala, 464 B.R. 626 (Bankr. S.D.N.Y. 2012).

Noting that New York courts follow the “composite document rule,” the court read a promissory note and purchase agreement together to find “clearly” that the parties had engaged in a secured transaction. Moreover, a typographical error which led to the wrong year of manufacture being listed in the promissory note did not affect the validity of the security agreement where the mobile home was described in great detail including its vehicle identification number. Moreover, even though the secured creditor never perfected the security interest, this does not affect the rights of the secured party vis a vis the debtor. Finally, because the trustee refused to pursue this cause of action, the debtors brought the case on their own. The court held that the debtors did not have standing to maintain the suit.

Where to Perfect a Security Interest in Mexican Crops?

***Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A.*, 228 Ariz. 533, 269 P.3d 709 (Ariz. App. 2012).**

A priority dispute between two secured creditors boiled down to where to perfect a security interest in grapes grown in Mexico. The court noted that revised article 9's use of the debtor's location as the place of filing only applies if the jurisdiction is one where perfection of a security interest depends upon a public filing. At the time this case arose, Mexican law apparently did not comply with this requirement. In such cases, the place of filing is in the District of Columbia. Because Del Monte did not comply with this, their security interest was defeated by D & H's. Moreover, because Del Monte sold the grape crop having refused upon demand to turn it over to the senior secured creditor, it was liable for damages for conversion.