

Say What You Mean!! Erroneous Termination Statement Binds Secured Creditor

On October 17, 2014, in the case of *Official Committee of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.*, No. 325, 2014, 2014 WL 5305937 (Del. Oct. 17, 2014), the Delaware Supreme Court considered the following question certified to it by the Second United States Circuit Court of Appeals:

Under Article 9... for a UCC-3 termination statement to effectively extinguish the perfected nature of a UCC-1 financing statement, is it enough that the secured lender review and knowingly approve for filing [the termination statement]... or must the secured lender intend to terminate the particular security interest that is listed on the UCC-3?

Id. at *1 (citation omitted).

JPMorgan Chase Bank, N.A. ("Chase") was agent for a syndicate of lenders owed \$1.5 billion for a term loan to General Motors Corporation ("GM"). On October 30, 2008, seven months before GM's Chapter 11 filing, attorneys for Chase, intending to terminate only certain liens relating to a synthetic lease, mistakenly terminated Chase's lien on GM's assets securing the term loan. Although Chase acknowledged that it directed its counsel to file the termination statement, no one at Chase or the two outside law firms representing Chase noticed the error when reviewing the termination statement prior to its filing. GM agreed with Chase's contention that neither party intended that Chase's lien on the term loan assets be terminated.

Once GM's Chapter 11 case was filed, Chase advised the Unsecured Creditors Committee ("UCC" or the "Committee") of the inadvertent error. In July 2009, the Committee filed an adversary proceeding in the United States Bankruptcy Court for the Southern District of New York seeking a finding that the termination statement was effective as filed, and that Chase was an unsecured creditor with respect to its term loan. In the adversary proceeding, Chase argued that it had not authorized its counsel to terminate its lien on the term loan assets and because the termination statement was not authorized, it was ineffective to terminate Chase's lien on those assets.

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The Bankruptcy Court agreed with Chase's position and the Committee appealed to the Second Circuit, contending that so long as Chase authorized the filing of the UCC-3 termination statement, it was effective to terminate all interests listed in it, even if certain interests were erroneously included. The Committee argued that this result is required by UCC section 9-513, which provides in pertinent part that "upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective." The Second Circuit certified the question set out above to the Delaware Supreme Court.

Analyzing UCC section 9-513, the Supreme Court agreed with the Committee that all a secured creditor must do is authorize the filing to be bound by its consequences. "[The] unambiguous language [of the section] promotes sound policy," said the Court. "It is fair for sophisticated transacting parties to bear the burden of ensuring that a termination statement is accurate when filed." *Id.* at *5. The Delaware legislature could have provided that termination statements are effective only to terminate interests the secured party intends to terminate; or that a secured party must authorize and understand the filing for it to be effective. However, the legislature did not so provide and it would be inappropriate for a court to engraft such conditions when the statutory language is unambiguous. *Id.*

Even if the statutory language had been ambiguous, the Court said it would likely have reached the same conclusion, observing that a secured creditor ought to carefully review and understand what is in the termination statement. "A secured party is the master of its own termination statement; it works no unfairness to expect the secured party to review a termination statement carefully and only file the statement once it is sure that the statement is correct." *Id.* Otherwise, parties would have little incentive to ensure the statements were accurate. *Id.* at *6. Moreover, said the Court, under the UCC's notice filing system, parties must be able to rely on the filed record. To require subsequent lenders to inquire into the factual accuracy of every filing would disrupt and undermine secured lending markets. *Id.* at *7.

The Court's holding is not surprising, but stands as a stark reminder that secured parties and their counsel must carefully review the accuracy of all financing statements, termination statements and amendments they file. Even if the debtor agrees that a mistake in a filing was inadvertent, competing lienors and other creditors will be unforgiving and valuable rights will likely be lost.



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