BURNS & LEVINSON LLP

FINANCE LAW
UPDATE

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HOW WE'RE DIFFERENT: PARTNER-LEVEL ATTENTION

It is an unfortunate fact of life for those of us who represent lenders that our bills are paid by the people on the other side of the table — the borrowers. While this is the custom, it adds extra weight to the usual concern about legal fees, since it means the borrower is paying for attorneys whose jobs are, in large part, to oppose their interests.

As a result, we often get suggestions from borrowers on how to keep our legal costs down, since it is our practice to have partners involved in all of our bank engagements, no matter how small. Two suggestions we often get are: (i) let borrower's counsel prepare the documents, and (ii) have paralegals do the work.

A recent case reveals the danger of following these suggestions. In *Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A.*, a paralegal from borrower's counsel prepared the documentation, and as a result the lender lost the security for a $1.5 billion loan.

General Motors ("GM") had two credit facilities with a syndicate of lenders headed by JPMorgan, a $300 million lease financing and a $1.5 billion term loan. Uniform Commercial Code ("UCC") financing statements were filed for the two credits, and as the lease financing neared maturity, GM — the borrower — asked its counsel to prepare the documents needed to release the collateral for that obligation.

A partner at GM's law firm delegated the work to an associate, who handed it off to a paralegal. The paralegal ordered a UCC search and prepared terminations for all UCC-1s recorded by JPMorgan with the Secretary of State of Delaware — both lease financing *and* term loan. The documents were sent to the bank and its counsel, who apparently didn't review them very carefully. GM's counsel recorded terminations as to *all* the Delaware filings, leaving the banks exposed on the term loan.

Perhaps lender's counsel was lulled into complacency by the identity of the borrower — the thought that GM could go bankrupt probably never entered their mind. But GM *did* go bankrupt, which brings parties into the discussion other than the borrower, the lender and their respective counsel — namely, unsecured creditors, who stand to gain if a lender's secured claims can be knocked down to unsecured status.

Unsecured creditors challenged JPMorgan's security for the term loan and lost in bankruptcy court. They won on appeal, however, convincing the Second Circuit that a secured lender's "subjective intent" to release some but not all of its UCCs didn't matter. What counted was the termination itself, not the bank's understanding of what borrower's counsel had prepared.

The UCC is typically considered a minor document at a closing, but the GM case makes clear that it has an importance disproportionate to its size. So, while an offer of help from borrower's counsel is appreciated, we'll say, "Thanks, but no thanks."

FINANCE PRACTICE:

Burns & Levinson's finance attorneys have extensive experience in both the origination of commercial loans and in all aspects of loan enforcement, including workouts, debt restructurings, collection actions and reorganizations and liquidations in bankruptcy.

We represent both lenders and borrowers in commercial loans on a local, regional and national basis. We assist in structuring, negotiating, and documenting all aspects of commercial loans, from term sheet to closing. These include asset-based and cash flow loans, secured and unsecured lines of credit and term loans, tax-exempt bond financings, loan syndications and participations, as well as all forms of real estate finance.

Because we represent both lenders and borrowers, we have a unique understanding of the business perspectives of the parties to a loan transaction. This enables us to focus on the issues that matter, enhancing efficiency and reducing expenses.

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