

NEWS ALERT

Message from the Chair



Karen DeSalvo

Ruskin Moscou Faltischek, P.C.'s Commercial Lending Practice Group has prepared this Alert to help keep you apprised of recent developments in the commercial finance area. This Alert contains

information and recent court decisions dealing with the perfection of security interests, confidentiality, early termination fees, mechanics' liens and maritime liens. If I can be of assistance in any commercial finance matter, please contact me at 516-663-6585 or by email at kdesalvo@rmfpc.com.

Commercial Lending Practice Capabilities

- Commercial Loan Transactions
- Factoring and Purchase Order Financing
- Intercreditor and Subordination Agreements
- Loan Workouts

Priority of Maritime Liens

Many typical business transactions may indirectly become subject to maritime law and affect not only the rights of the parties to the transaction but also their lenders. Maritime law is a separate body of substantive and procedural law. When maritime law is applied to a particular set of facts, it can result in a very different outcome than would occur if other relevant laws or statutes were applied.

Commercial lenders must be on the alert for transactions that may become subject to maritime law, including transactions that involve advances on in-transit inventory while aboard a vessel. An example of maritime law's impact on commercial lenders is the maritime lien that provides a proprietary interest in a vessel which gives the lienholder the right to proceed directly against the vessel and its contents, including inventory on board the vessel. The priority of liens on a vessel is subject to the Ship Mortgage Act, not the Uniform Commercial Code.

The priority of liens on vessels followed by most courts in the U.S. is: (i) Court expenses incurred while the vessel is in the custody of the court; (ii) wages of seamen; (iii) salvage and general average; (iv) tort claims; (v) repairs, supplies, necessaries and contract claims prior to the recording of a ship's mortgage; (vi) ship mortgages; (vii) repairs, supplies, necessaries and other contract claims after the filing of a ship's mortgage; (viii) liens of a maritime nature that are created by state law; (ix) tax liens; (x) non-maritime liens; and (xi) non-lien claims. In light of the differences between maritime law and other laws governing commercial transactions, it is important to consider the entire business operations of an entity prior to entering into any agreement to purchase goods or to lend money.

Understanding Mechanic's Liens

The mechanic's lien is created by statute and in New York State is codified in Article 2 of the lien law. It is a statutory lien that secures payment to contractors, laborers and suppliers of materials that repair, maintain or improve real or personal property. Notice of a mechanic's lien can be filed in the county clerk's office against the property that was repaired or improved.

In New York, a subcontractor can file a mechanic's lien regardless of whether or not the general contractor was paid in full. The lien can expire if (i) not extended (one year automatic extension and thereafter by court order), or (ii) a foreclosure action is not commenced within one year from the filing of the lien or during any extension period, or (iii) a notice of pendency is not filed.

Title companies will not generally omit a mechanic's lien exception from a title insurance policy unless the lien has been paid or replaced with a bond. The filing of mechanics' liens are increasing and lenders and borrowers need to fully understand how a mechanic's lien affects the real and personal property of the borrower prior to entering into a financing transaction.



About the Firm

Founded in 1968, Ruskin Moscou Faltischek P.C. has emerged as Long Island's preeminent law firm. As specialized as we are diverse, we have built cornerstone groups in all of the major practice areas of law, and service a diverse and sophisticated clientele. With more than 60 attorneys, superior knowledge of the law, polished business acumen and proven credentials, Ruskin Moscou Faltischek has earned a reputation for excellence and success. It is this ongoing achievement that makes us an acknowledged leader among our peers and the preferred choice among business leaders.

The strength of Ruskin Moscou Faltischek's resources greatly enhances what we can accomplish for our clients – to not only solve problems, but to create opportunities. We take pride in going beyond what is expected from most law firms. The invaluable contacts and relationships we have nurtured in the financial, venture capital and business communities heighten our value-added services. Our knowledge of technology and business models enables us to guide clients to the next level in their business evolution. Our intellectual capital, multidisciplinary approach, and our ability to navigate through the complexities of each court and administrative forum in which we practice enables us to efficiently and cost effectively provide professional excellence and achieve success for our clients.



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No Perfection if Debtor's Name is Incorrect

Loss of perfection and priority may be the cost of not getting the debtor's name correct on a Uniform Commercial Code financing statement. As the court held in *Host America Corporation v. Coastline Financial, Inc.*, the proper corporate name absent periods in the name can be fatal. In this case, the court found that a financing statement filed in Utah with the debtor's name as "KWM Electronics Corporation" instead of "K.W.M. Electronics Corporation" was seriously misleading because a search of the UCC records using Utah's standard search logic would not have found the financing statement and, therefore, the creditor was not perfected. The creditor claiming priority bears the responsibility to get the debtor's name correct.

Liability for Breach of Confidentiality

The sharing of credit information between lenders may create liability. In *Ary Jewelers, LLC v. IB JTC Business Credit Corp.*, 414 F.Supp. 2d 90 (D. Mass. 2006), the court held that a prospective lender violated banking industry confidentiality standards by disclosing to another potential lender that it had declined the proposed borrower's request for financing and providing the reason for the declination. The sharing of credit information was held to wrongfully interfere with the prospective borrower's efforts to obtain financing from another lender.

Early Termination Fees

The New York Court of Appeals in *JMD Holding Corp. v. Congress Financial Corporation*, 4 N.Y.3d 373, 828 N.E.2d 604, 795 N.Y.S.2d 502 (2005) held that an early termination fee imposed by Congress Financial Corporation was not a penalty but rather liquidated damages that Congress and JMD Holding Corp. had agreed to when they executed the loan documents. Liquidated damages are agreed upon at the time a contract or agreement is entered into and are used when it is difficult to predict what actual damages may be incurred. In order for the early termination fee to be deemed a penalty, JMD Holding Corp. would have had to show that any damages Congress would have sustained due to the early termination of the loan were attainable at the time the loan documents were executed.

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Tuesday, December 5, 2006

8:30 - 10:30 a.m. at the law offices of
Ruskin Moscou Faltischek, P.C.,
1425 Reckson Plaza, Uniondale, NY

To register, call 516-663-5353 or email info@rmfp.com

The Commercial Lending Alert is published to provide clients, colleagues and friends of Ruskin Moscou Faltischek, P.C. with information about developments in commercial lending matters. It is not a substitute for legal advice and should not be construed as imparting legal advice generally or on specific matters.