



Factor Beware: A Judgment Lien Creditor in California May Have Priority Over Your Security Interest

Denise Field, Esq., and Robert Zadek, Esq.

A factor may receive notice from a judgment creditor that the judgment creditor holds a judgment lien on the accounts of the factor's client, and be tempted to ignore the notice, since the judgment lien is later in time than the factor's perfected security interest. However, if the factor continues to advance funds, under California law, it may be at risk of losing its priority on the personal property to the judgment lien creditor.

Although most lien priority issues are resolved by the UCC, priority between the holder of a judgment lien on personal property and a conflicting security interest in the same personal property is determined according to the provisions of California Code of Civil Procedure ("CCP") § 697.590, *not the UCC*. Except as specifically provided therein, conflicting interests in the same personal property are determined by priority at the time of filing or perfection. CCP § 697.590(b)

Under the CCP, the factor which perfects its security interest in personal property prior to the filing of a judgment lien may have priority over the judgment lien in certain circumstances, although it may have limited rights with respect to future advances. The factor with a prior perfected security interest which makes advances after the judgment lien is filed, has priority with respect to those advances only to the extent they are made: (a) within forty-five (45) days after the judgment lien attaches; (b) without knowledge of the judgment lien; or (c) pursuant to a commitment made without knowledge of the judgment lien. CCP § 697.590(f). "Knowledge" of the judgment lien means actual knowledge. UCC § 1202(b). Thus, once the factor receives the notice of judgment lien from the judgment creditor, or actually learns of the judgment lien, the "45 day clock" starts to run, and advances made thereafter are subordinated to the judgment lien (remember that the lien creditor must have filed a Notice of Judgment Lien in the UCC records in order to prime the factor's security interest as to such post-45 day future advances).

The filing and service of the judgment lien are the crucial alerts which should cause the factor to consider whether or not to make future advances. The fact that a judgment is obtained against the debtor is not the critical element in

determining priority without the judgment lien creditor taking the steps to file and serve.

How can the factor making advances to the debtor protect itself against a judgment lien creditor? The factor may advance without losing priority within forty-five days after the judgment lien attaches or when it acquires knowledge of the lien. Knowledge of the judgment lien is critical. The factor should always use a service to monitor filings with the Secretary of State against its debtor. If the factor changes its address, it should immediately file a notice of the change of address with the Secretary of State. However, even though a factor files the change of address, under CCP § 697.590(f), a judgment lien creditor may send proper notice by mail to the address provided in the security agreement; if the address has changed, the factor may not receive the notice and not be aware of the 45 day time period running. This "loophole" makes the monitoring of a filing of notice of judgment lien with the Secretary of State even more critical. The factor may also consider an amendment to the security agreement solely to provide its new address. In addition, the factor may also choose to negotiate with the judgment lien creditor and enter into a payment arrangement which specifies priority. Of course, the factor may also choose to wait until the judgment is satisfied before it makes further advances.



Denise Field is a Shareholder in the Litigation Practice Group in the San Francisco office. She can be reached at 415.227.3547 or dfield@buchalter.com.



Robert Zadek is Of Counsel in the Bank and Finance and Insolvency and Financial Solutions Practice Groups in the San Francisco office. He can be reached at 415.227.3585 or rzadek@buchalter.com.