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Secured Transactions

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the further benefit of eliminating criminal influences from positions of plan management, for underwriters make it a practice to investigate the background and character of those for whom they have been invited to issue a bond. They are loath to insure losses when convicted criminals are closely involved in financial activities, the honest administration of which is vital to the underwriter's profit. Already apparent are the difficulties faced by one major union in obtaining the bond coverage required by the Landrum-Griffin Act, even when allowed "blanket bonds."[36] Thus the inability of a questionable individual to obtain a bond, together with other judicial, administrative and financial sanctions, should make the Welfare and Pension Plan Disclosure Act the protector of employee benefits that it was originally intended to be.

The amendments, in addition to clarification and enforcement sections, include a provision for a council to advise the Secretary of Labor regarding enforcement and interpretation of the act.[37] Hopefully, the House committee reporting the bill was correct in its expectation that the council will render great help to the Secretary and gain the cooperation of interested groups.[38]

STEPHEN M. RICHMOND

SECURED TRANSACTIONS

New Jersey has recently amended sections 9-204 and 9-312 of its Commercial Transactions statute[1] by deleting three subsections, all relating to security interests in after-acquired property.[2]

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[36] 51 Lab. Rel. Rep. 106 (Oct. 1, 1962).

[37] Section 16(a) (setting forth new section 14 of the act).

[38] U.S. Code Cong. & Ad. News 511 (1962).

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[1] N.J. Stat. Ann. §§ 12A: 9-204 & 9-312 (1961).

[2] Section 9-204. When Security Interest Attaches; After-Acquired Property; Future Advances.

(1) A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(2) For the purposes of this section the debtor has no rights

[(a) in crops until they are planted or otherwise become growing crops, in the young of livestock until they are conceived;]

. . . .

(4) No security interest attaches under an after-acquired property clause

[(a) to crops which become such more than one year after the security agreement is executed except that a security interest in crops which is given in conjunction with a lease or a land purchase or improvement transaction evidenced by a contract, mortgage or deed of trust may if so agreed attach to crops to be grown on the land concerned during the period of such real estate transaction;]

Section 9-312. Priorities Among Conflicting Security Interests in the Same Collateral.

[(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than 3 months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such

The deletion of two of the subsections (9-204(4)(a) and 9-312(2)) presents few problems. Section 9-204(4)(a) provided that a security interest would attach only if the debtor planted his crops within one year after the date of the execution of the security agreement. This restriction, however, would not necessarily prevent the creditor from enforcing his security interest, although not attached, in an action against the debtor.[3] The difficulty would arise where the farmer made a second security agreement with a different creditor, using the same after-acquired collateral. If the first agreement was fifteen months before the farmer planted and the second agreement ten months before, the second would prevail, assuming both filed. The reason is that under section 9-312(5)(b) the first creditor to perfect prevails, and under section 9-303(1) "A security interest is perfected when it has *attached* and when all of the applicable steps required for perfection have been taken." (Emphasis supplied.) Thus, if the one year rule prevents the first creditor's interest from ever attaching, he will never be able to perfect his interest since attachment is a prerequisite to perfection. This rule would discourage creditors from entering into security agreements with farmers too far in advance of planting time. But now that section 9-204(4)(a) has been deleted the risk to the creditor is eliminated, and agreements in advance of one year before planting time may be more frequent. The second portion of the subsection, which excepted real estate transactions from the one year limitation has been deleted, but no change results, for the elimination of the rule ends the need for the exception.

A second pitfall in the path of the secured party who contracted with the farmer long before planting time has been removed with the deletion of section 9-312(2). Prior to the amendment, the provision provided that if creditor X loaned the farmer money and when the crops were not yet planted the debt became due, creditor Y, who loaned the farmer money three or more months after the debt to X became due, would prevail, if the crops were not planted until three months after Y executed his agreement with the farmer. The priority did not apply if the debt owed X, the first creditor, was due less than six months before planting time. This priority rule has been deleted.

The two deletions when considered together reflect a rejection of the pre-amendment statutory hostility towards long-term security agreements involving interests in after-acquired collateral. The security agreement may safely be executed more than one year before planting time, and the farmer's debt may be due more than six months before planting. This change will facilitate long-term loans but will likely discourage subsequent loans made shortly before planting using the *same* after-acquired collateral. At least the decision

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earlier interest secures obligations due more than 6 months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.]

[3] Section 9-203. Enforceability of Security Interest; Proceeds, Formal Requisites.

(1) . . . a security interest is not enforceable against the debtor or third parties unless

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops . . . a description of the land concerned. In describing collateral the word 'proceeds' is sufficient . . . .

as to whether to execute a security agreement well before planting will not be hampered by these statutory priority considerations, and perhaps the economic realities of the situation will play a more decisive role.

The third deletion (section 9-204(2)(a)) seems to have little, if any, practical significance. In property theory the difference is noticeable. The debtor now has rights in crops *before* they are planted or otherwise become growing crops, and in the young of livestock *before* they are conceived. Thus, since under section 9-204(1) a security interest attaches when there is an agreement, value given, and *debtor's rights* in the collateral, the security interest now attaches immediately after the agreement is executed and value is given. This earlier attachment also means that the perfection of the interest occurs earlier since perfection requires attachment. In terms of factual application, however, the difference between the presence of section 9-204 (2)(a) and its deletion is not clear. The rules of priority in section 9-312(5) suggest that the concept of attachment is superfluous.[4] Under section 9-312(5)(a) the first creditor to file has priority and attachment is irrelevant. Under subsection (5)(b) the first to perfect takes priority where no filing priority is present, and under (5)(c) the first to attach takes priority if neither has perfected. At first glance this rule would seem to be altered if the rule as to the time of attachment was changed. But consider the following hypothetical: A loans money to F and receives as security crops to be grown in June. Before June, B also loans F money and is given as collateral the same crops to be grown in June. When June comes, the crops are planted. Neither A nor B has filed or otherwise perfected. Prior to the deletions, security interests attached when the crops were planted. In other words, both the interest of A and that of B attached simultaneously when F planted his crops. Thus the attachment offered no aid in determining priority. Since neither creditor had filed or otherwise perfected, the only criterion remaining to determine priority was which security agreement was executed first. Applying this test, A took priority in the crops.

Under the amendment making the deletions, the two interests no longer attach simultaneously. A's interest attaches when he executes his agreement and gives value. B's interest attaches in a like manner. Applying section 9-312(5)(c), since neither have filed or otherwise perfected, the first to attach takes priority. Again the creditor who prevails is A. In both instances, with and without section 9-204(2)(a), the priority results are identical.

The effects of the deletion of the one year limitation rule (section 9-204

[4] Section 9-312:

(5) In all cases not governed by other rules stated in this section . . . priority between conflicting security interest in the same collateral shall be determined as follows:

(a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) and whether it attached before or after filing;

(b) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) and, in the case of a filed security interest, whether it attached before or after filing; and

(c) in the order of attachment under Section 9-204(1) so long as neither is perfected.

(4)(a)) and the three month priority rule (section 9-312(2)) on the farmer's financial dealings with his creditors will be more ascertainable after the amendment has had time to operate. Similarly, only time will tell if the deletion of section 9-204(2)(a) is really, as the foregoing analysis suggests, inconsequential. The infinite potential in the law for novel fact situations should caution one that perhaps such is not the case.

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TRADE REGULATION

FEDERAL

On October 15, 1962, Congress enacted into law an amendment[1] to Section 9(a) of the Census Bureau Reports Act.[2] The amendment specifically provides that no department, bureau, or agency of the government, other than the Department of Commerce, shall have access to copies of census reports retained by the reporting companies.[3] The effect of this amendment is to extend to the company-retained copies of census reports the same immunity from legal process previously accorded only to the original reports which had been submitted to the Census Bureau solely for statistical purposes.

The amendment was precipitated by the United States Supreme Court decision in *St. Regis Paper Co. v. United States*.[4] Prior to this decision, three lower federal court decisions,[5] a presidential proclamation,[6] an Attorney

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1 Pub. L. No. 87-813 (Oct. 15, 1962).

2 13 U.S.C. § 9 (1958).

3 13 U.S.C. § 131 (1958) provides that a census of manufacturing shall be taken, compiled and published every five years. 13 U.S.C. § 224 (1958) imposes a fine of $500 or imprisonment for not more than sixty days or both upon the owner, official, agent or person in charge of any company who, when requested, neglects or refuses to answer completely and correctly to the best of his knowledge all questions relating to his company contained in any census form.

4 368 U.S. 208 (1961). The Federal Trade Commission subpoenaed certain corporate records of the St. Regis Paper Co. in connection with its investigation of St. Regis for possible violations of the antitrust laws. When the Commission found that the information supplied was not sufficient for a finding, an order was issued to require the production of other corporate records including file copies of reports previously submitted to the Census Bureau. St. Regis claimed that such reports were confidential and refused to turn them over to the Commission. The United States, at the request of the Commission, brought suit in the district court seeking a mandatory injunction to compel compliance with its order.

5 FTC v. Dilger, 276 F.2d 739 (7th Cir. 1960); FTC v. Orton, 175 F. Supp. 77 (S.D.N.Y. 1959); United States v. Bethlehem Steel Corp., 21 F.R.D. 568 (S.D.N.Y. 1958). The *Bethlehem* court held that the privileged status was accorded the *information* furnished to the Census Bureau and not merely the reports.

6 46 Stat. 3011 (1929). President Hoover, following the enactment of the Census Bureau Reports Act, proclaimed:

> The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required.