PUBLICATION UPDATE

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COMMERCIAL FINANCE GUIDE

Publication 395 Release 34 June 2024

HIGHLIGHTS

- Chapters 6, 12, 14, 15, 16, and 26 were updated to bring law and analysis up to date.

Some updates include:

- **Senior Consensual Liens**—In a situation where a third party cash flow lender is providing a term loan to the borrower, the term lender and accounts financing lender should enter into an intercreditor and subordination agreement to account for their priorities as to the borrower's collateral. Each lender typically has been granted a security interest in all assets of the borrower. The accounts financing lender typically has a first priority lien on the borrowing base assets; it may have a second priority on all other assets. The term lender typically has a second priority lien on the borrowing base assets and a first priority lien on all other assets. This is sometimes called "split-lien" priority. Alternatively, the lenders need to decide who has a first lien on all the assets on the borrower, including the receivables, and who has the second, which will be documented in the intercreditor and subordination agreement. *See* § 6.02[4][f].
- **SOFR as the New Benchmark Rate**—In the United States, the Alternative Reference Rates Committee (ARRC)—a group of private industry entities and

official-sector entities, including the SEC, that was convened by the Federal Reserve Board and the Federal Reserve Bank of New York to plan the market's transition away from U.S. dollar (USD) LIBOR—selected SOFR as the preferred alternative rate for USD LIBOR. SOFR is a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities. SOFR is published by the Federal Reserve Bank of New York and is determined based on directly observable U.S. Treasury-backed repurchase transactions. The Federal Reserve Bank of New York began publishing SOFR on April 3, 2018. *See* § 14.02[4][d].

- **LIBOR Act**—The Consolidated Appropriations Act of 2022 (Omnibus Spending Bill) (H.R. 2471), signed by President Biden on March 15, 2022, contains, among other initiatives, the Adjustable Interest Rate (LIBOR) Act. The LIBOR Act solves the legal uncertainty regarding how "Tough Legacy" contracts—contracts that reference LIBOR as a benchmark rate and that do not contain either a specified replacement rate or a replacement mechanism—should be treated after USD LIBOR ceased publication on June 30, 2023. *See* § 14.02[4][e]
- **Contractual Subordination**—Contractual subordination is an agreement among two or more creditors of a common debtor which sets forth their rights with respect to loans to such common debtor, including rights with respect to shared collateral. Subordination Agreements are also designed to set forth the relative rights and priorities of the holders of competing liens in the same collateral. Subordination Agreements alter the relative ranking of claims in respect of indebtedness. As a result, certain debt becomes "senior" and other debt becomes "subordinated." *See* § 15.03[3][d].
- **UCC Article 9**—Article 9 of the Uniform Commercial Code ("UCC") (as adopted by all 50 states) governs secured transactions, including the rules for perfecting a lien on collateral (consisting of personal property and fixtures). The category of "general intangibles" under the UCC is a general catch-all category that includes any personal property that does not fall into one of the other categories of collateral. *See* § 16.01.
- **Perfection by Filing**—Perfection is a means by

which a secured creditor puts other secured creditors on notice of its security interest in the collateral. Perfection is the means by which a secured creditor's lien becomes enforceable against other third-party creditors (as opposed to having a lien that is enforceable against merely the debtor). Perfection establishes priority among different secured creditors who may have perfected security interests in the same collateral with the general rule that "first to perfect is first in priority". Additionally, a perfected security interest gives a secured creditor rights against the collateral if the debtor breaches its obligations, as well as additional recovery rights in bankruptcy as compared to other creditors. *See* § 16.05[2].

- **Lanham Act**—The Lanham Act gives priority only as to conflicting recorded "assignments. If the interest granted is a security interest, not an assignment, then the UCC supplies the priority rules and the secured party must perfect under the UCC in order to benefit from those rules. A security interest in a trademark that is perfected under the UCC is protected against a bankruptcy trustee as lien creditor. The UCC also protects against later secured parties who perfect under the UCC. It should also protect against subsequent bona fide purchasers of state registered trademarks, since most state recording acts cover only "assignments," (except buyers in ordinary course of business, if the debtor were a dealer in trademarks). *See* § 16.10[4][a]
- **Corporate Transparency Act (CTA)**—The Corporate Transparency Act (CTA) was enacted on January 1, 2021 as part of the Anti-Money Laundering Act of 2020 in the National Defense Authorization Act for Fiscal Year 2021 (31 U.S.C. § 5336). The CTA requires certain business entities to (1) report certain beneficial ownership information to the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), (2) disclose information about its creation and registration, and (3) report any change to previously reported information within the specified time period. The CTA is aimed at promoting financial transparency. Companies were required to begin their CTA reporting on January 1, 2024 depending on their date of organization or registration. The CTA provides

for civil and criminal penalties for violations. The CTA exempts 23 types of entities from the definition of reporting company and its reporting requirements, including many of the entities for which an opinion giver is typically required to furnish a legal opinion in a loan transaction, including large operating companies, banks, credit unions, depository institution holding companies, and investment companies. *See* § 26.04[7].

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Publication 395 Release 34 June 2024

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VOLUME 1

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