TRANSACTIONS AND TRIALS

BERMAN AND SABLE NEWSLETTER

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We wish to thank our readers for the large number of responses we received to our first Newsletter. In fact, many of the responses were even favorable. In view of all this feedback, we decided to conduct an informal poll in order to obtain a profile of our readers. The question was: "What did you like most about Berman and Sable's first Newsletter?" Here are the results. Nearly 51% said they liked the color paper we used, best. Over 42% said they liked the humorous "Glossary of Words and Phrases", best. Nearly 7% said they thought the articles were best. While we are now huddling to try to get a Newsletter to fit our reading audience's taste, we decided to send out this second issue anyway. We didn't think it informative enough to just send out a shocking lime green blank piece of paper, even though that's apparently what our readers want. So, for your reading enjoyment, here is our Second Issue.

Deficiency Judgments in Bankruptcy No Pain = No Gain

By Maria K. Tougas

If you have ever been a creditor trying to recover property from a borrower in a foreclosure case, you know that nothing is more frustrating than having the borrower file bankruptcy, usually on the day the Court has scheduled your Motion for Judgment of Foreclosure, or even worse, on the eve of the day you are to take title to the property. The major effect of a bankruptcy petition on a creditor is to stop you dead in your tracks, until you obtain a relief from the automatic bankruptcy stay (U.S. Bankruptcy Code §§ 362 and 363).

Even if the relief from stay is a "slam dunk" because the debtors and bankruptcy trustee do not object, an Order for Relief from Stay could still take a couple of months; but if it's contested . . . well, I am not even going to go there today! An uncontested relief from stay is, of course, still not the end of it. After the Order for Relief enters, you must march back to state court, and pick up where you left off to get a judgment of foreclosure or reopen the judgment that you already got prior to the bankruptcy, in order to set new law days. (Hopefully, the debtors won't file another bankruptcy in the interim.)

Then the fun really starts, because you may now find that the value of the property is less than the debt. If there is no further intervening bankruptcy, a Motion for Deficiency Judgment would be the next step. A Motion for Deficiency Judgment is no picnic in and of itself, because it must be filed within 30 days of title vesting (if you file after 30 days, you are out of luck), and requires a re-appraisal of the property as of the date title vests, as well as a hearing on the value of the property, at which the debtors can present opposing evidence.

But because of the delay and expense, the decision to pursue a deficiency judgment is more problematic if a bankruptcy is filed. Ask your client or yourself the following: (1) do you really need to go through the hassle and expense of obtaining a deficiency judgment against debtors, who probably do not have very much, or (2) can you just wait and see what happens in the bankruptcy case? If you choose option number 2, you may lose out altogether, because in Hartford Bankruptcy Court the rule seems to be that if you fail to obtain a deficiency judgment in State Court, your Proof of Claim will not be

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BERMAN AND SABLE
ATTORNEYS AT LAW

100 Pearl Street
Hartford, Connecticut 06103
Telephone: (860) 527-9699
Telecopier: (860) 527-9077

195 Church Street
New Haven, Connecticut 06510
Telephone: (203) 495-6200
Telecopier: (203) 496-6220

"allowed", and you will not be entitled to share in bankruptcy distributions. (In the Matter of *Joanne D. Beaulieu, Inc.* Case No. 97-25436, September 1, 1998) So, in Hartford, at least, after you get an Order for Relief from Stay in Bankruptcy Court, if you want to ensure your Proof of Claim will be allowed in the bankruptcy case, you must choose option number 1 above.

If you're in Bridgeport or New Haven Bankruptcy Court, the rule appears to be slightly different. First, you get an Order for Relief from Stay in Bankruptcy Court, then you must go to state court and finish your foreclosure action, then you go back to Bankruptcy Court and ask the court to allow you to get a deficiency judgment, then you go back to state court and actually get the deficiency judgment, and then your Proof of Claim will be "allowed" (Note: you should always file a Proof of Claim before the "bar date" passes, even if you're still in the process of obtaining the deficiency judgment).

How's that for no pain . . . no gain?

Berman and Sable News

- ***PB Real Estate, Inc. v. Dem II Properties (50 Conn. App. 741, Oct. 1998); Upheld on Appeal.*** *Attorney Maria Tougas successfully argued the appeal of her trial court victory. The case stands for the conclusion that a distribution from an LLC to its members is analogous to a distribution from a partnership to its partners and is subject to postjudgment execution against an individual member.*
- ***Milestone Reached.*** *Berman and Sable recently celebrated its 20th Anniversary. Thanks to all for your well wishes.*
- ***Worthwhile Gift.*** *We at Berman and Sable appreciate the warm "thank-you" from Open Hearth in recognition of our gift of computers to their valuable cause.*
- ***A Run for the Money.*** *Berman and Sable recently co-sponsored the Greater Hartford Jewish Community Center 5K Road Race held at CIGNA Headquarters in Bloomfield. Congratulations are in order for attorneys Michael Berman, Melvin Simon,*

"Investment Property" as Collateral — UCC Update

By Ellen S. Levine

As some of you may know, Connecticut's codification of Articles 8 and 9 of the Uniform Commercial Code have been revised to include a new category of defined property--"investment property"--which includes all sorts of property especially attractive to creditors--cash, cash equivalents and securities. Primarily, this new category of property encompasses brokerage accounts (containing certificated and non-certificated securities) and money market funds which are held by others ("Securities Intermediary") for the account of the Debtor. A brokerage company or a trust company are examples of a Securities Intermediary. The new law became effective October 1, 1997 with a four month "grace period" within which all secured creditors who wished to perfect their lien on investment property would have to amend and/or re-file their UCC-1 financing statements and their security agreements to include investment property as a category of collateral or as proceeds of other property taken as collateral. As a precaution, filings should be made in the appropriate filing office of the location of the Debtor and, if different, in the appropriate filing office of the location of the securities account.

Security interests in investment property may also be achieved by "control". Indeed, perfection by control may be crucial to ensuring the secured party's priority in such cases. When the new law was written, various members of the securities community lobbied for and won special concessions. As a result, the Securities Intermediary has, unless waived by agreement, a priority lien in the investment property under its "control" to the extent of any present or future fees, margin calls or other debt incurred. In addition with respect to other secured creditors claims to investment property, absent an agreement to the contrary, the Securities Intermediary need only acknowledge receipt of notice of such liens and need not recognize priority among such claims. A secured creditor who has a filed UCC-1 financing statement and obtains "control" of the investment property has priority over one who has perfected only by filing the financing statement.

One method for a secured creditor to obtain

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control is to have the Securities Intermediary enter into a "Control Agreement". In the Control Agreement, the secured creditor should have the Securities Intermediary acknowledge the secured creditor's interest and agree to treat the investment property as a "financial asset" under the UCC. Moreover, the Securities Intermediary should be made to represent that it has no loans to the Borrower and has not agreed to hold the assets in the securities account for any other secured party. In addition, the secured creditor should require a covenant by the Securities Intermediary that it will neither accept nor acknowledge any other "Control Agreements" or other third party interests with respect to the Borrower's securities account. The Securities Intermediary should covenant that it will not extend credit or any other financial accommodation to the owner of the securities account until the secured creditor acknowledges in writing its agreement to release the securities account. Finally, the Securities Intermediary should agree not to offset any of its claims against the investment property. Provisions such as these ensure the secured party's control and the priority of its lien. For those Securities Intermediaries who have balked at these requirements, we have found that, in exchange for the account, a new Securities Intermediary is more than happy to accommodate the secured creditor's requests.

A second method of perfection by control available to a secured party, is to rename the account to the "Secured Party, as secured party for John Doe". Once the account is renamed, only the secured party may authorize new debt against it. If this method of control is chosen, the secured party should remember to use John Doe's tax ID or Social Security Number on the account to avoid income tax and capital gains issues. In addition, ONLY the secured party should be a permitted signer on the account.

It should be especially noted that if the original financing statement, or an amendment thereof, does not mention "investment property" as a category of collateral or proceeds, (a) the secured creditor will NOT be able to claim an interest in investment property as proceeds of existing collateral and (b) in a collection or other enforcement proceeding, investment property would have to be garnished or attached and would be subject to the usual defenses to such actions. Re-filing a UCC-1 financing statement to show "investment property" as a category of collateral filed after the four month grace period will, of course, not result in the same priority as the original filing. However, for those who have missed the deadline, it is still recommended that the filing be made and, in addition, the Control

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Glossary of Words and Phrases

Legal•ese	*Language designed to confuse by use of contradictory terminology such as: a "long brief" or a "Stay Motion". See also: psycho-babble.*
Blanket security (a/k/a security blanket)	*A warm "fuzzy" most often associated with the Peanuts character, Linus. See also: thumb sucking.*
UCC	*The hospital unit located closest to the CCU.*
Summary Process	*The traditional pastime of tanning oneself between the months of June and September.*
"Out•of•formula"	*A mother's frantic cry at 3 o'clock in the morning.*
Court	*The process by which one lawyer pursues another lawyer for a "date".*

Depositions . . . Beware of the Clinton Trap!

By Michael P. Berman

January 17, 1998 may well be a date like December 7, 1941 or November 22, 1963 that will live forever in the annals of American history. It is the date of the deposition of President Clinton in the case of *Paula Jones vs. William Jefferson Clinton, et al.* (She also sued a State trooper.) This was a civil case. No one was going to be found "guilty". No one was going to jail. The case was simply whether one person was going to have to pay another person money ("damages") because of an alleged wrongful act. There are thousands of such cases pending in courts throughout the United States. And thousands of depositions are conducted in civil cases every year. But, something went wrong that day, and now the whole world is in turmoil. A deposition is part of what has become known in civil cases as the "discovery process"; that is, the routine part of a civil case where each side is allowed to see what the other side's case is. This can be done by several permitted means. In fact all of them can and are used in any case. One side can require the other side to answer written interrogatories. (For example: "What are the names and addresses of all people known to you who witnessed the accident?") One side can require the other side to produce relevant documents. (For example: "Produce for copying all inter-

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departmental memos in which the hazards of smoking were mentioned.") But, by far, the most direct way to find out what the other side's case is about, or what they know about your case, is the deposition.

A deposition is a procedure which usually takes place in a lawyer's, or a stenographer's, office, long before the trial begins. The format is one where a person who has relevant knowledge about important facts in the case (the "witness", also known as the "deponent") will be required to answer under oath, face to face, questions, asked by a lawyer who represents a party to the case. Usually, the lawyer and the witness are on opposite sides of the case. Sometimes a witness may be neutral, such as a bystander. Present in the deposition room are the "witness", the lawyer asking questions of the witness, the lawyer representing the interests of the witness, and a stenographer taking down by machine everything that is said. (Attorneys will sometimes go "off the record" when they are discussing a scheduling or procedural aspect they don't want to be taken down . . . often it's a request to take a break so the witness can go to the bathroom. This apparently happened several times during Clinton's deposition.)

Why should one side be allowed to know what the other side's case is all about? This is a frequently asked question. [Incidentally, while every state has rules and procedures on depositions in civil cases (Conn. Practice Book §36-26, *et seq.*; Conn. Gen. Stat. §52-148a), few states have such rules in criminal cases, so the element of surprise is still very much alive in criminal cases. Ask the sports announcer, Marv Albert!] The chief reasons for depositions and elaborate discovery procedures in civil cases are to discourage lengthy trials with detailed questioning of witnesses who turn out to be unimportant, and to encourage settlement by demonstrating to one side or the other that his or her case is "weak" or that the other side's case is "strong".

But, depositions can be lethal. Anything a witness says at a deposition can be used against that witness and possibly others on the same side, at trial. Furthermore, since a witness's responses to the lawyer's questions are under oath, the penalties for perjury (lying under oath) apply. A DEPOSITION IS NOT TO BE TAKEN LIGHTLY! Sometimes it is a challenge for a lawyer to convince his or her own witness, who is about to have a deposition taken by the other side, that the witness cannot just breeze in and breeze out with little or no preparation. In remarking about the "Monica Lewinsky" question at his deposition in the Paula Jones case, President Clinton later explained in his Grand Jury testimony that he didn't know he was going to be asked that question.[1] Assuming that his lawyers were experienced, and adequately prepared him for his deposition in the Paula Jones case (which may be an incorrect assumption since he was an active, sitting President and may not have devoted enough time to preparation), one can only assume Clinton was not prepared for this question because he did not share information about Monica Lewinsky with his own lawyers. When a client keeps relevant information secret from his or her own lawyer, this is a lawyer's worst nightmare! (One of them, anyway!)

[1] *Following is an edited excerpt from the Clinton deposition, January 17, 1998.*

Mr. Fisher (Jones' lawyer):

Q. And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?

President Clinton:

A. I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.