

2009

# Mobile Echocardiography v. DAT : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Joseph M.R. Covery; Parr, Waddoups, Brown, Gee & Loveless; Roger G. Jones; Bradley Arant Boult Cummings; Attorneys for Appellee.

James E. Magleby; Magleby and Greenwood; Attorneys for Appellant.

---

## Recommended Citation

Brief of Appellee, *Mobile Echocardiography v. DAT*, No. 20090735 (Utah Court of Appeals, 2009).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/1852](https://digitalcommons.law.byu.edu/byu_ca3/1852)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS	
IN THE MATTER OF THE APPLICATION OF BUDDY W. GREGORY FOR THE JUDICIAL DISSOLUTION OF GREGORY, BARTON & SWAPP, P.C. nka GBS LEGAL CLINIC, P.C.	APPELLEE'S BRIEF
MOBILE ECHOCARDIOGRAPHY, INC.,  Appellant,  v.  DAT&K, LLC  Appellee.	Case No. 20090735
Appeal from the Fourth Judicial District Court, Utah County, State of Utah Honorable Samuel D. McVey, Case No. 0504014	
<div> <div> <p>Roger G. Jones Bradley Arant Boult Cummings, LLP 1600 Division Street, Suite 700 Nashville, Tennessee 37203 Telephone: (615) 252-2323 Facsimile: (615) 252-6323</p> </div> <div> <p>James E. Magleby (7247) MAGLEBY &amp; GREENWOOD, P.C. 170 South Main Street, Suite 350 Salt Lake City, Utah 84101 Telephone: (801) 359-9000 Facsimile: (801) 359-9011</p> <p><b>Attorneys for Appellant Mobile Echocardiography, Inc.</b></p> </div> </div> <div> <p>Joseph M.R. Covey (Utah Bar No. 7492) PARR WADDOUPS BROWN GEE &amp; LOVELESS 185 South State, #1300 Salt Lake City, UT 84111 Telephone: (801) 532-7840 Facsimile: (801) 532-7750</p> <p><b>Attorneys for Appellee DAT&amp;K LLC</b></p> </div>	

IN THE UTAH COURT OF APPEALS	
IN THE MATTER OF THE APPLICATION OF BUDDY W. GREGORY FOR THE JUDICIAL DISSOLUTION OF GREGORY, BARTON & SWAPP, P.C. nka GBS LEGAL CLINIC, P.C.	APPELLEE'S BRIEF
MOBILE ECHOCARDIOGRAPHY, INC.,  Appellant,  v.  DAT&K, LLC  Appellee.	Case No. 20090735
Appeal from the Fourth Judicial District Court, Utah County, State of Utah Honorable Samuel D. McVey, Case No. 0504014	
<div> <div> Roger G. Jones Bradley Arant Boult Cummings, LLP 1600 Division Street, Suite 700 Nashville, Tennessee 37203 Telephone: (615) 252-2323 Facsimile: (615) 252-6323 </div> <div> James E. Magleby (7247) MAGLEBY &amp; GREENWOOD, P.C. 170 South Main Street, Suite 350 Salt Lake City, Utah 84101 Telephone: (801) 359-9000 Facsimile: (801) 359-9011 </div> </div> <div> Attorneys for Appellant Mobile Echocardiography, Inc. </div> <div> Joseph M.R. Covey (Utah Bar No. 7492) PARR WADDOUPS BROWN GEE &amp; LOVELESS 185 South State, #1300 Salt Lake City, UT 84111 Telephone: (801) 532-7840 Facsimile: (801) 532-7750 </div> <div> Attorneys for Appellee DAT&amp;K LLC </div>	

## **Table of Contents**

	<b><u>Page</u></b>
<b>I. STATEMENT OF JURISDICTION .....</b>	<b>1</b>
<b>II. STATEMENT OF THE ISSUES .....</b>	<b>1</b>
<b>III. STATEMENT OF THE CASE.....</b>	<b>5</b>
<b>IV. STATEMENT OF THE FACTS .....</b>	<b>8</b>
<b>A. The Agreement Between GBS and GBS's Clients .....</b>	<b>8</b>
<b>B. The Agreement Between GBS and the Texas Firms.....</b>	<b>10</b>
<b>C. The Agreement Between GBS and MEI.....</b>	<b>10</b>
<b>D. The Absence of an Agreement Between MEI and GBS's Clients.....</b>	<b>12</b>
<b>E. The Litigation Between MEI and GBS .....</b>	<b>15</b>
<b>F. The MEI Security Agreement.....</b>	<b>18</b>
<b>G. MEI's Receipt of All Amounts Withheld from Clients' Recoveries.....</b>	<b>19</b>
<b>V. SUMMARY OF ARGUMENT .....</b>	<b>20</b>
<b>VI. ARGUMENT.....</b>	<b>21</b>
<b>A. The Trial Court's Finding that GBS Had Rights in the Disputed Funds is Not         Clearly Erroneous.....</b>	<b>21</b>
<b>B. The Trial Court Was Not Bound to Accept Conclusory Statements of Subjective         Intent From Witnesses that Were Not Credible. ....</b>	<b>24</b>
<b>VII. CONCLUSION.....</b>	<b>25</b>
<b>VIII. ADDENDUM.....</b>	<b>27</b>

## TABLE OF AUTHORITIES

Page

### Cases

<u>Green River Canal Co. v. Thayn</u> , 84 P.2d 1134, 1141 (Utah 2003) .....	24
<u>Parduhn v. Bennett</u> , 2005 UT 22, 112 P.3d 495 (Ut. 2005).....	3
<u>Plateau Mining Co. v. Utah Div. of State Lands and Forestry</u> , 802 P.2d 720, 725 (Utah 1990)..	24
<u>State v. Visser</u> , UT App. 215, ¶ 12, 31 P.2d 584, 586 (Ut. App. 2001) .....	5, 24

### Statutes

Tenn. Code Ann. § 47-9-301 .....	2
Tenn. Code Ann. § 47-9-203 .....	2, 3
Utah Code § 70a-9a-203 .....	3
Utah Code § 78-2a-3(2)(i) .....	1
Utah Code Ann. § 38-2-7 .....	21
Utah Code Ann. § 70A-9a-301 .....	2

### Rules

Rules 1001-1004 of the Utah Rules of Evidence.....	14
--	----

## **I. STATEMENT OF JURISDICTION**

Appellant, Mobile Echocardiography, Inc. ("MEI"), has appealed the following orders entered by the Fourth District Court, Utah County, Utah (the "Trial Court"): (i) Findings of Fact, Conclusions of Law and Order Regarding Interpleading Funds entered March 4, 2009 (the "March Order") (attached to MEI's Brief as Addendum 1); and (ii) Order Denying MEI's Motion to Reconsider and Granting MEI's Motion for Certification as a Final Order entered July 21, 2009 (the "July Order") (attached to MEI's Brief as Addendum 2). The March Order and the July Order awarded Appellee, DAT&K, LLC ("DAT&K")<sup>1</sup>, \$442,768.03 that had been interplead with the Trial Court (the "Disputed Funds"). This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § § 78A-4-103(2).

## **II. STATEMENT OF THE ISSUES**

Gregory Barton & Swapp, P.C ("GBS") filed a petition for dissolution in the Trial Court, and Mark D. Hashimoto was appointed the receiver for GBS. See Petition for Dissolution of Gregory Barton & Swapp, P.C [R. 000014]; Receivership Order [R. 000207-195]. The Disputed Funds were withheld from recoveries by GBS's clients in connection with settlements of their lawsuits against the maker of the diet drug Fen-Phen. Both DAT&K and MEI claimed the Disputed Funds, and, therefore, the Disputed Funds were interplead with the Trial Court.

---

<sup>1</sup> DAT&K is the successor in interest to Advocate Capital, Inc.

GBS was indebted to DAT&K, and DAT&K held a security interest in all monies owed to GBS by its clients for attorney's fees and payment of costs and expenses incurred by GBS in connection with the Fen-Phen cases. GBS engaged MEI to perform echocardiography services for GBS in connection with the Fen-Phen cases. GBS agreed to pay MEI for those services when GBS received payment from its clients. GBS's clients agreed to pay GBS for expenses incurred in connection the Fen-Phen cases including, but not limited to, expenses incurred for echocardiography services.

DAT&K contended that GBS's clients owed the Disputed Funds to GBS as payment of expenses incurred by GBS, and, therefore, DAT&K's security interest attached to the Disputed Funds. On the other hand, MEI contended that GBS's clients owed the Disputed Funds directly to MEI, rather than to GBS, and, therefore, DAT&K's security interest did not attach to the Disputed Funds. Following an evidentiary hearing, the Trial Court found that GBS's clients owed the Disputed Funds to GBS as payment of expenses incurred by GBS, rather than to MEI, and, therefore, DAT&K's security interest attached to the Disputed Funds.

MEI misstates the issues in this case. First, Utah Code Ann. § 70A-9a-203 has no applicability to this case. DAT&K's security agreement is governed by Tennessee law, see Trial Exhibit 1, at p. 7 [R. 3995, 4106], and, therefore, the issue of whether DAT&K's security interest attached to the Disputed Funds is governed by Tennessee law, see Utah Code Ann. § 70A-9a-301, Official Comment 2 (the law applicable to issue of attachment and enforcement is the law specified in the security agreement); Tenn. Code Ann. § 47-9-301, Official Comment 2 (same). Tenn. Code Ann. § 47-9-203

provides that a security interest attaches when the secured party gives value, the debtor has rights in the collateral and the debtor executes a security agreement. Even if Utah law were applicable, which it is not, Utah Code § 70A-9a-203 and Tenn. Code Ann. § 47-9-203 are substantively the same.<sup>2</sup> Copies of Section 70A-9a-203 and Section 47-9-203 are attached hereto as an Addendum.

Second, and more importantly, this case is not about whether a secured creditor can make a claim to money in which the debtor that granted the security interest never had ownership in the first place. DAT&K did not contend, and the Trial Court did not hold, that a security interest may attach to property in which the debtor does not have rights. DAT&K and the Trial Court expressly recognized that DAT&K's security interest attached to the Disputed Funds only if GBS had rights in the Disputed Funds. See 5-5-08 Trans. at p. 56 [R.6535]. The Trial Court found that DAT&K had rights in the Disputed Funds because GBS's clients owed the Disputed Funds to GBS as payment of expenses incurred by GBS for echocardiography services. The only issue on appeal is whether that finding is clearly erroneous.

In Parduhn v. Bennett, 2005 UT 22, 112 P.3d 495 (Ut. 2005), the Utah Supreme Court set forth the standard of review applicable to the Trial Court's finding that GBS had rights in the Disputed Funds:

The standard of review applicable to findings of fact merits separate discussion. Not all findings of fact are created equal: some are

---

<sup>2</sup> MEI does not dispute that DAT&K gave value or that GBS authenticated a security agreement describing the collateral. MEI's only argument is that GBS did not have rights in the Disputed Funds and, therefore, DAT&K's security interest did not attach to the Disputed Funds.



ultimate findings of fact, upon which the resolution of a particular issue turns, while others are subsidiary facts supporting the ultimate findings. While we review both for clear error, *RHN Corp.*, 2004 UT 60 at ¶ 35, 96 P.3d 935, we have recognized that findings of fact "must show that the court's judgment or decree follows logically from, and is supported by, the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 28, 70 P.3d 35 (internal quotations omitted). Because a finding of fact need only be supported by sufficient subsidiary facts to justify it, one erroneous subsidiary finding does not necessarily render the ultimate factual finding erroneous as well.

To successfully challenge an ultimate finding of fact, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *Chen*, 2004 UT 82, ¶ 76, 100 P.3d 1177 (internal quotations omitted). An appellant "must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *Id.* at ¶ 77 (internal quotations omitted). Moreover, an appellant may not simply review the evidence presented at trial, nor may she "reargue the factual case [she] presented in the Trial Court." *Id.* If an appellant argues that no evidence supports a factual finding, the burden to marshal does not then shift to the appellee; rather, the appellee may prove that the appellant did not meet her marshaling burden by presenting a "scintilla" of evidence supporting the district court's finding. *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 22, 54 P.3d 1177. A challenge to an ultimate finding of fact is tantamount to a claim that there are insufficient subsidiary facts to support that finding. Accordingly, a challenge to a subsidiary finding is really a challenge to the ultimate finding it supports. A party challenging a subsidiary finding must therefore marshal evidence in support of the ultimate finding.

2005 UT at ¶¶ 24-25, 112 P.2d at 502-03. If the appellant fails to properly marshal the evidence, the appellate court assumes that the evidence supports the trial court's findings. See *Chen v. Stewart*, 2004 UT 82, ¶ 3, 100 P.3d 1177, 1196 (Ut. 2004).

In the instant case, the Trial Court's findings of fact hinged, in part, on its determination that MEI's witnesses, Mr. Keith Barton and Mr. Alan Fidler, were not credible. This Court must defer to the Trial Court's determination that MEI's witnesses were not credible.

To the extent that findings of fact are based on a determination of credibility, we defer to the trial court. See Gardner v. Madsen, 949 P.2d 785, 790 (Utah Ct.App.1997). The trial court has the responsibility to determine the credibility of testimony. "A trial court's factual findings [regarding defendant's competency] will not be overturned unless they are clearly erroneous." State v. Lafferty, 20 P.3d 342, 2001 UT 19, ¶ 45, 415 Utah Adv. Rep. 29. "We give deference to the trial court's factual findings because of its superior position to assess credibility." Id.

State v. Visser, UT App. 215, ¶ 12, 31 P.2d 584, 586 (Ut. App. 2001).

### III. STATEMENT OF THE CASE

GBS, the Williams Bailey Law Firm, L.L.P. ("Williams Bailey"), Blizzard, McCarthy & Nabers, L.L.P. ("BM&N"), Keith L. Barton ("Barton"), and DAT&K entered into that Settlement Agreement dated March 7, 2007 (the "Texas Firms Settlement Agreement") regarding the proceeds from the settlement of the Fen-Phen cases. See Trial Exhibit 14 [R. 4106, 3995]. The Trial Court approved the Texas Firms Settlement Agreement and authorized the Disputed Funds to be interplead without the necessity of the parties filing a separate interpleader action. See Order Granting Motion for Order entered April 2, 2007 [R. 2851]. DAT&K moved the Trial Court to release the Disputed Funds to DAT&K [R. 3227]. MEI objected to DAT&K's motion and moved the Trial Court to release the Disputed Funds to MEI [R. 003396]. No other party filed a timely response or objection to DAT&K's motion.

On May 5, 2008, the Trial Court conducted a non-evidentiary hearing of the DAT&K and MEI motions to release the Disputed Funds. The Trial Court denied both motions finding that there is "a genuine issue of material fact regarding the nature of GBS's interest in the funds." See 5-8-08 Transcript at p. 56 [R.6535]. The Trial Court also found that, if GBS had an ownership interest, a lien interest, a right to payment from, or any other interest in the Disputed Funds, the Disputed Funds would be paid to DAT&K. Id. at p. 57 [R. 6535].

On February 6, 2008, the Trial Court conducted an evidentiary hearing regarding the issue of whether GBS had rights in the Disputed Funds. Following the evidentiary hearing, the Trial Court entered the March Order awarding the Disputed Funds to DAT&K. The Trial Court made the ultimate finding of fact that GBS had rights in the Disputed Funds, and, therefore, DAT&K's security interest attached to the Disputed Funds. The Trial Court also made the following subsidiary findings of fact to support its ultimate finding:

1. DAT&K is the secured party under a 2001 "Master Loan and Security Agreement" pursuant to which GBS granted DAT&K a security interest in all monies owed to GBS by its clients for attorney's fees and payment of costs and expenses incurred in connection with the Fen-Phen cases. See March Order at pp. 1-2;

2. GBS and its principal, Mr. Keith Barton, engaged MEI to perform initial "screening" echocardiograms ("ECGs") on GBS's clients and, in cases where the initial ECG resulted in the right evidence, to perform "full study" ECGs on GBS's clients. See March Order at p. 2;

3. GBS and Mr. Barton expressly agreed in writing that GBS would be responsible for paying all costs to MEI. See March Order at p. 6;

4. GBS took the Fen-Phen cases on a contingency fee basis under which GBS would receive forty percent (40%) of the client's recovery as attorney's fees and would be paid for all costs paid or advanced by GBS out of the remaining sixty percent (60%) of the client's recovery. See March Order at p. 3;

5. DAT&K's security interest attached to all attorneys fees and rights to payment and reimbursement under the contingency fee agreement between GBS and its clients. See March Order at p. 3;

6. The testimony of Mr. Barton, and MEI's principal, Alan Fidler, regarding their intent was not credible. See March Order at p. 10;

7. Mr. Fidler gave conflicting testimony regarding whether MEI had any right to payment from any source other than GBS and Mr. Barton. See March Order at p. 6;

8. The conduct of Mr. Barton and MEI in the litigation between them indicate their intent that MEI would only look to GBS and Mr. Barton for payment. See March Order at p. 10; and

9. The Disputed Funds did not come from the clients' sixty percent (60%) share of the recoveries. See March Order at p.12.

MEI moved the Trial Court to reconsider the March Order arguing that the Trial Court erred in finding that the Disputed Funds did not come from the clients' sixty percent (60%) share of the recoveries. In the July Order, the Trial Court agreed with MEI

that the Disputed Funds came from the clients' sixty percent (60%) share of the recoveries but reaffirmed its decision awarding the Disputed Funds to DAT&K. The Trial Court explained:

MEI is correct on this point in that having now reviewed the hearing transcript, the Court finds the funds came from the 60% of the recovery attributed to the clients' account. The parties stipulated to this fact and the Court amends its finding accordingly to reflect the stipulation. However, that fact does not alter the Court's ultimate ruling because there is a great deal more to the story as stated in the original order ....

As stated in the Order, the funds may be from the client's 60% but still allocated to go elsewhere, such as to reimburse Mr. Barton's firm or to pay for the firm's obligations from which it was holding its clients harmless under the contingent fee agreements. *The Court's findings indicate MEI had no privity with any contract that would give it a direct right of action against the clients and Mr. Barton's firm assumed liability for ECG costs incurred by MEI. ...*

\*\*\*

The broad scope of DAT&K's security interest allowed it to attach to the funds as they went through GBS or its predecessor destined for someone other than the clients' personal bank accounts. As reflected by the Court's findings, the settlement agreement and other documents indicated the nature of the funds.

July Order at pp. 1 and 2 (*emphasis added*).

#### IV. STATEMENT OF THE FACTS

##### A. The Agreement Between GBS and GBS's Clients

GBS entered into a Contingency Fee Agreement with its clients in the Fen-Phen cases, which provided that GBS's clients would pay GBS, from the clients' sixty percent (60%) share of the recoveries, for all costs and expenses incurred by GBS in connection

with its representation. See Trial Exhibit 11 [R.4106, 3995]. Section 4(b) of the Contingency Fee Agreement provides as follows:

I (we) will *incur* various costs and expenses in performing legal services under this Agreement. *You agree to pay for all costs, disbursements, and expense owed by you in connection with this matter, or which have been paid or advanced by me* (us) on your behalf and for which have not previously paid or reimbursed to me (us), if I (we) reach a settlement or judgment on your behalf, or if our services are terminated for any reason by you.

Trial Exhibit 11 at § 4(b) (*emphasis added*). Moreover, the Contingency Fee Agreement granted GBS a lien against the client's portion of any recovery to secure the client's obligation to pay GBS for costs and expenses incurred by GBS. Section 5 of the Contingency Fee Agreement provides as follows:

You hereby grant us a lien, as provided by Utah Code Ann. 78-51-41 (1996) on any and all claims or causes of action that are the subject of our representation under this Agreement. My (our) lien will be for any sums owing to me (us) for any *unpaid costs*, or attorneys' fees, at the conclusion of my (our) services. *The lien will attach to any recovery you may obtain*, whether by arbitration award, judgment, settlement or otherwise.

Trial Exhibit 11 at § 5 (*emphasis added*). The clients were obligated to pay GBS for the obligations incurred by GBS to MEI.

**B. The Agreement Between GBS and the Texas Firms**

GBS and the Texas Firms entered into that Fen-Phen Referral Agreement dated August 6/8, 2002 (the "Fen-Phen Referral Agreement"). See Trial Exhibit 13, p. 1 [R.4106, 3995]. The Fen-Phen Referral Agreement provided for GBS to refer Fen-Phen cases to the Texas Firms, the division of the attorneys' fees from those cases between GBS and the Texas Firms and the payment of expenses and other monies related to those cases as more fully set forth therein. Id. GBS expressly represented in the Fen-Phen Referral Agreement "*that the fee agreements with the clients are on a 40% contingency basis plus reimbursement of costs and expenses (which are deducted from the client's portion of the recovery).*" Id. (*emphasis added*).

**C. The Agreement Between GBS and MEI**

MEI and GBS entered into a letter agreement dated November 14, 2000 (the "MEI Letter Agreement"). See Trial Exhibit 7 [R.4106, 3995]. The MEI Letter Agreement provided for MEI to provide echocardiography services to GBS in connection with the Fen-Phen cases including both initial screens and full studies. Id. The MEI Letter Agreement also provided for GBS to make monthly payments to MEI within thirty (30) days of GBS's receipt of the invoice from MEI. Id. Pursuant to the MEI Letter Agreement, MEI sent monthly invoices to GBS for both the initial screens and the full studies. See Trial Exhibit 15 [R.4106, 3995].

Following execution of the MEI Letter Agreement, MEI and GBS reached a verbal agreement that GBS would not pay for the full studies until GBS received payment

from GBS's clients. Mr. Alan Fidler, president and co-owner of MEI, testified as follows:

Q. Okay. You gave me a description of that in your prior deposition. I'll just read it to you and ask you if that was correct.

"As for the time that they were to be paid, it does not stipulate when the full studies would be paid." Again, speaking of Exhibit 7. "*We had a verbal understanding that the full studies would be paid when he received payments on their cases when they settled.*" He didn't have the money at the time to be paying for full studies. And as we discussed earlier, all the financial obligation he had to borrow from Texas. And he came to me and he told me, 'I can't pay you for the full studies until I get paid.' And I agreed to postpone the payment until that time."

Is that correct?

A. Yes.

Q. Is that an accurate statement of your agreement?

A. Yes.

2-6-09 Trans. at p. 179 (*emphasis added*). According to Mr. Fidler, GBS and MEI agreed that, when GBS received payment from its clients, GBS would pay MEI. Id.

The agreement between GBS and MEI is also evidenced by GBS's accounting records. Mr. Hashimoto, in his capacity as receiver for GBS, took possession of, and familiarized himself with, GBS's financial records. Mr. Hashimoto testified as follows:

Q. . . . In connection with your review of the books and records, the financial statements of – of Gregory, Barton & Swapp, do you know how Gregory, Barton & Swapp accounted for their obligations to MEI? We've heard some earlier testimony that – we heard some earlier testimony that invoices were delivered by MEI to Gregory, Barton & Swapp on a monthly basis but those were not paid. How were they accounted for on the books and records of Gregory, Barton & Swapp?



A. They were booked as an expense, contract labor and included as part of their accounts payable.

Q. So that was an obligation that they had, they booked it in the accounts payable money they owed to MEI; is that correct?

A. That's the way it was accounted on their general ledger.

Q. And if money came in from a client recovery, money came in, how was that accounted for?

A. It was accounted for a part of the gross revenue of Gregory, Barton & Swapp.

Q. So the monies that came in, whether they were attorneys fees or whether they're client recovery costs, they were all accounted for as income to Gregory, Barton & Swapp; is that correct?

A. That's correct.

2-6-09 Trans. at pp. 181-82. GBS's accounting records make absolutely clear that GBS's clients were obligated to pay GBS for the echocardiography services and, in turn, GBS was obligated to pay MEI for the echocardiography services.

**D. The Absence of an Agreement Between MEI and GBS's Clients**

MEI provided the echocardiography services to GBS and looked solely to GBS for payment. In the Settlement Agreement & Mutual Release dated September 29, 2004 (the "MEI Settlement Agreement"), MEI and Mr. Barton expressly acknowledged that MEI provided the echocardiography services to GBS. See Trial Exhibit 10 at p. 1, § 2 [R.4106, 3995]. Further, MEI never looked to GBS's clients for payment. Mr. Fidler testified that MEI did not gather any billing information for GBS's clients and never sent any invoices to GBS's clients. See 6-2-09 Trans. at p. 128. Moreover, when asked

whether MEI had a right to receive payment from the clients, Mr. Fidler testified that MEI did not:

Q. You did not think you have a right to proceed against the clients directly to receive payment, correct? That was your understanding, correct?

A. Yes.

Id. at p. 135. Finally, MEI never looked to the clients' recoveries for payment. MEI admitted that it was simply irrelevant to MEI whether GBS's clients recovered anything. GBS owed MEI for the initial screens and the full studies regardless of whether GBS's clients obtained any recovery. Mr. Fidler testified as follows:

Q. So is it accurate to say what happened in the underlying lawsuits in which Gregory, Barton & Swapp represented these clients, you were looking at Gregory, Barton & Swapp to get paid? It didn't make any difference whether there was a recovery or not, Gregory, Barton & Swapp owed you the money; is that correct?

A. Basically.

2-6-09 Trans. at p. 132.

GBS's clients did execute GBS Screening Information Sheet (the "Information Sheet") that was to be filled out and signed prior to MEI performing an initial screen or a full study. See Trial Exhibit 21 [R.4106, 3995]. By signing the Information Sheet, the client consented to GBS and MEI performing "health care screening" and agreed to hold GBS and MEI harmless for the results obtained. Id. The Information Sheet also provided that the cost of any full study would be "deducted" from any settlement the client later obtained. Id. The Information Sheet did not grant MEI any lien, did not obligate the client to pay MEI and did not provide that payments withheld from the

client's settlement would be paid to MEI. While the Information Sheet authorized a deduction from the client's recovery, it is utterly and completely silent regarding what was to be done with the monies deducted. Id.

At the evidentiary hearing, MEI attempted to offer testimony that GBS's clients also executed so-called lien agreements in favor of MEI. Neither MEI nor Mr. Barton had produced copies of these alleged lien agreements in response to DAT&K's discovery requests and did not offer these alleged lien agreements into evidence at trial. Instead, MEI attempted to elicit testimony from Mr. Barton and Mr. Fidler regarding the content of these alleged lien agreements that had never been produced. DAT&K objected to the admission of this testimony under Utah's best evidence rule codified at Rules 1001-1004 of the Utah Rules of Evidence. See 2-6-09 Trans. at pp. 22-28. The Trial Court sustained that objection. Id.

MEI argues in a footnote that, because testimony regarding the contents of the Contingency Fee Agreements was admitted without the introduction of the originals or copies of the executed Contingency Fee Agreements, the Trial Court should have also admitted testimony regarding the alleged lien agreements. MEI Brief at p. 9, fn. 6. MEI fails to mention the salient fact that MEI did not object to admission of the testimony regarding the Contingency Fee Agreements whereas DAT&K objected to admission of testimony regarding the alleged lien agreements. MEI does not argue that the Trial Court

erred in excluding testimony regarding the alleged lien agreements under the best evidence rule.<sup>3</sup>

**E. The Litigation Between MEI and GBS**

In 2002, a dispute arose among MEI and GBS regarding the quality of the full studies performed by MEI for GBS. See Trial Exhibit 10 at p. 1, § 2 [R.4106, 3995]. MEI filed suit against GBS seeking payment in full of the amounts GBS owed MEI for the initial screens and full studies. Id. at p. 1, § 3. Although the principal issues in the litigation were the quality of the full studies performed by MEI and the amount that should be paid MEI for the full studies, neither MEI nor GBS joined GBS's clients as parties.

GBS, Mr. Barton and MEI later entered into the MEI Settlement Agreement resolving the litigation. See Trial Exhibit 10 [R.4106, 3995]. Although the MEI Settlement Agreement resolved the issues regarding the quality of the full studies and the amount to be paid to MEI for those full studies, GBS's clients were not parties to the MEI Settlement Agreement. Id. If MEI believed GBS's clients had any obligation whatsoever to MEI, MEI would have been required to join GBS's clients as indispensable parties. MEI did not do so because GBS's clients did not have an agreement with, or any obligation to, MEI.

---

<sup>3</sup> MEI makes numerous arguments regarding the alleged lien agreements even though the Trial Court held testimony regarding the alleged lien agreements inadmissible. MEI Brief at pp. 9-10. These arguments should be stricken. Similarly, MEI relies on the Affidavit of Keith Barton, which the Trial Court refused to consider at the May 8, 2008, hearing, and which was not introduced at the June 2, 2009 hearing. These arguments should also be stricken.

The MEI Settlement Agreement provided that MEI would be paid \$601,000 and GBS would execute a promissory note in the amount of \$2,050,000 (the "MEI Note"). See Trial Exhibit 10 at p. 3, § 11 [R.4106, 3995]. The Texas Firms paid the \$601,000, and the MEI Settlement Agreement treated this \$601,000 payment as a nonrecoverable expense to be paid prior to any division of attorneys' fees between GBS and the Texas Firms. See Trial Exhibit 10 at p. 3, § 11 [R.4106, 3995] . The result of this payment to MEI was to reduce the amount that otherwise would have been paid to GBS, and, in turn, to DAT&K by 50% of this amount or \$300,500. See 2-6-09 Trans. at pp. 193 and 229.

The MEI Note also provided for quarterly payments to MEI, and the MEI Settlement Agreement provided a mechanism by which those payments would be made. The MEI Settlement Agreement provided for an "Echocardiogram Expense Holdback" under which the Texas Firms agreed to withhold \$1,420.65 from any settlement or payment of a final judgment in a case for which MEI prepared an echocardiogram and disburse these monies to MEI when the next quarterly payment became due. Section 15 of the MEI Settlement Agreement provides as follows:

Echocardiogram Expense Hold-Back. At the request of Barton and MEI and strictly as an accommodation to those parties, *the Texas Firms will withhold and set aside from the Barton Fen Phen Fees earned through the representation of the Barton/MEI Referral Cases as case expenses, the amount of \$1,420.65 per echocardiogram multiplied by the number of Barton/MEI Referral Cases resolved subsequent to the date of execution of this Settlement Agreement.* ...These monies will be held for the benefit of MEI to be disbursed by the Texas Firms to MEI when the next quarterly payment is due by Barton to MEI under the Note.

See Trial Exhibit 10 at pp. 5 and 6, § 15 [R.4106, 3995] (*emphasis added*). The MEI Settlement Agreement defined Barton Fen-Phen Fees as "[a]ll fees or other monies that shall become due to [GBS and Keith L. Barton] under the August 6/8, 2002 Fen-Phen Referral Agreement between [GBS and Keith L. Barton] and the Texas Firms." Id. at p. 4, § 12. Together, Section 15 and the definition of Barton Fen-Phen Fees constitute a clear and unambiguous acknowledgment that Barton Fen-Phen Fees, as defined in the MEI Settlement Agreement, include amounts withheld from clients' recoveries in connection with MEI's echocardiography services.

Pursuant to Section 15 of the MEI Settlement Agreement, the Texas Firms withheld \$87,974.16 from the clients' recoveries. See Trial Exhibit 10 at pp. 5 and 6, § 15 [R.4106, 3995]. However, the funds withheld were not sufficient to make the quarterly payments due MEI under the MEI Note. Id. The Texas Firms paid the additional \$284,536.06 required to make five (5) quarterly payments to MEI under MEI Note. Id. The MEI Settlement Agreement treated the \$284,536.06 as a nonrecoverable expense to be paid prior to any division of attorneys' fees between GBS and the Texas Firms. The result of the Texas Firms paying the additional \$284,536.06 to MEI was to reduce the amount that otherwise would have been paid to GBS and, in turn, to DAT&K by 50% of this amount or \$142,268.03. See Trial Exhibits 18 and 19 [3995]; 2-6-09 Trans. at pp. 176-80.

The payments made by the Texas Firms resulted in a reduction of the amounts GBS and, in turn, DAT&K was entitled to receive by \$442,768.03. See Trial Exhibits 18 and 19 [3995]; 2-6-09 Trans. at pp. 176-80. This is the same amount as the Disputed

Funds. These payments were made in direct violation of DAT&K's rights under its security interest, which entitled DAT&K to payment in full prior to any payment to MEI. See Trial Exhibits 1-5 [R.4106, 3995]. Indeed, the MEI Settlement Agreement expressly acknowledges that GBS was in default of its obligations to DAT&K's predecessor in interest, Advocate Capital, and that these payments are being made in violation of its rights as the senior secured creditor. See Trial Exhibit 10 at pp. 5-6 [R.4106, 3995].

**F. The MEI Security Agreement**

Pursuant to the MEI Settlement Agreement, GBS executed a Security Agreement in favor of MEI (the "MEI Security Agreement") granting MEI a security interest in the "Barton Fen-Phen Fees." See Trial Exhibit 9 [R.4106, 3995]. The MEI Security Agreement defined as Barton Fen-Phen Fees as follows:

[a]ll fees *or other monies* that shall become due to [GBS and Keith L. Barton] under the August 6/8, 2002 Fen-Phen Referral Agreement between [GBS and Keith L. Barton] and the Texas Firms, or any subsequent agreement between [GBS and Keith L. Barton] and the firms, the subject of which are the recoverable attorneys fees arising out of the Texas Firms' representation of certain Barton-MEI clients.

See Trial Exhibit 9 at pp. 2-3, § 1.1(j) [R.4106, 3995] (*emphasis added*). The definition of Barton Fen-Phen Fees contained in the MEI Security Agreement is identical to the definition of Barton Fen-Phen Fees contained in the MEI Settlement Agreement. As discussed above, GBS, Barton and MEI all acknowledged in the MEI Settlement Agreement that the term Barton Fen-Phen Fees included monies withheld from the clients' recoveries related to MEI's services.

The MEI Security Agreement expressly provides that MEI is not entitled to receive any of the Barton Fen-Phen Fees unless and until DAT&K has been paid in full.

The MEI Security Agreement provides as follows:

After an Event of Default has occurred, at the request of MEI, Barton shall receive, as the sole and exclusive property of MEI and as Trustee for MEI, subject to the Permitted Liens, all monies, checks, drafts and all other payments for and/or Proceeds of Collateral which come into the possession or control of Barton and immediately upon receipt thereof, Barton shall remit the same (or cause the same to be remitted), in kind, to MEI or at MEI's direction, except as required pursuant to the Permitted Liens. *In other words, once the obligations satisfied by the Permitted Liens are satisfied or otherwise resolved, then MEI is and shall be entitled to priority position against any and all other claim to the Barton Fen Phen Fees, and shall be entitled to execute upon the security interest granted by this Agreement upon an Event of Default.*

Trial Exhibit 9 at pp. 4 and 5, § 2.8 [R.4106, 3995] (*emphasis added*). The term "Permitted Liens" is defined to include "those particular liens already given and perfected in the Barton Fen-Phen Fees (as defined below), meaning those particular liens given and perfected as of August 24, 2004 at 7:51 a.m." *Id.* at p. 2, § 1.1(e). DAT&K's security interest was given and perfected prior to August 24, 2004. See Trial Exhibits 1-5 [R.4106, 3995]. The MEI Security Agreement expressly provides that *MEI has no rights whatsoever to any of the Barton Fen-Phen Fees and, therefore, no right to any portion of the monies withheld from the clients' recoveries, unless and until DAT&K is paid in full.*

**G. MEI's Receipt of All Amounts Withheld from Clients' Recoveries**

Assuming *arguendo* that MEI had an interest in the funds withheld from the clients' portion of the recoveries, the most that MEI could ever have conceivably been



paid prior to DAT&K being paid in full was the amount actually withheld from the clients' portion of the recoveries. It is undisputed that DAT&K held a security interest in all other monies owned to GBS and was entitled to be paid in full from those monies prior to MEI. The Texas Firms deducted a total of \$1,070,517.16 from the clients' portion of the recoveries in connection with MEI's services pursuant to the fee agreements between GBS, the Texas Firms and GBS's clients. See Trial Exhibits 18 and 19 [R. 3995]; 6-2-09 Trans. at 176-180. Without taking into account the Disputed Funds, the Texas Firms and GBS have paid MEI an amount equal to the \$1,070,517.16 deducted from the clients' portion of the recoveries. Id. The Texas Firms deducted a total of \$1,070,517.16 from the clients' portion of the recoveries related to MEI's services, and the Texas Firms paid MEI \$1,070,517.16. Id. Moreover, as discussed above, it is undisputed that the Texas Firms made payments to MEI that violated DAT&K's rights as a secured creditor and reduced the amount DAT&K would have received by the same amount as the Disputed Funds. Id. If MEI receives any of the Disputed Funds, MEI will receive more than it could have ever been entitled to receive prior to payment of DAT&K in full and would have effectively and impermissibly primed DAT&K's security interest.

#### **V. SUMMARY OF ARGUMENT**

The Trial Court's finding that GBS had rights in the Disputed Funds is not clearly erroneous. The documents and testimony discussed in the Statement of Facts above is more than a scintilla and more than sufficient to support the Trial Court's finding that GBS had rights in the Disputed Funds. MEI makes no attempt to marshal the evidence supporting the Trial Court's finding that GBS had rights in the Disputed Funds. Instead,

GBS ignores virtually all the documents and testimony discussed in the Statement of Facts above and reargues the factual case MEI presented at trial. Consequently, the Trial Court's decision must be affirmed.

## VI. ARGUMENT

### A. The Trial Court's Finding that GBS Had Rights in the Disputed Funds is Not Clearly Erroneous.

The documents and testimony discussed in the Statement of Facts above establish that GBS was entitled to receive payment from its clients for the costs and expenses GBS incurred, including the expenses GBS incurred for MEI's services and, therefore, GBS had rights in the Disputed Funds. First, as discussed more fully above, Section 4(b) of the Contingency Fee Agreement provides that GBS will incur costs and expenses on behalf of its clients and that its clients will pay GBS for costs and expenses "paid or advanced" by GBS from the clients' share of any recovery. Second, the Contingency Fee Agreement grants GBS a lien on the client's portion of the recovery to secure the client's obligation to pay GBS for any "**unpaid** costs" incurred by GBS. Even if the Contingency Fee Agreement had not expressly granted GBS a lien, GBS is entitled to such a lien by statute. See Utah Code Ann. § 38-2-7. Finally, GBS expressly represented to the Texas Firms in the Fen-Phen Referral Agreement that the Contingency Fee Agreement provided for a contingency fee of forty percent (40%) and payment of costs and expenses incurred by GBS.

MEI argues that, under the Contingency Fee Agreement, GBS could not have become entitled to payment from its clients for MEI's services until GBS had paid MEI.

First, MEI's argument ignores the plain language of the Contingency Fee Agreement which requires the client to pay GBS for expenses "paid or advanced" and for "unpaid" costs. The Contingency Fee Agreement does not require that expenses be paid prior to the clients paying GBS for expenses incurred. Second, MEI's argument ignores Mr. Fidler's testimony that MEI and GBS agreed GBS would pay MEI whenever GBS received payment from GBS's clients. This testimony is fatal to any argument that GBS had to pay MEI before it became entitled to payment from GBS's clients or that GBS's clients would pay MEI directly. Third, MEI's argument ignores Mr. Hashimoto's testimony that, under applicable accounting standards, GBS did not have to pay MEI to become entitled to payment from GBS's clients. According to Mr. Hashimoto, GBS's right to payment from clients arose when GBS incurred the obligation to MEI. Finally, MEI's argument ignores the fact that GBS accounted for its obligations to MEI as accounts payable when incurred and accounted for any payments from client recoveries for MEI's services as income when received.

MEI ignores the fact that MEI has already received payment in an amount equal to the amount withheld from the clients' recoveries for MEI's services. The Texas Firms deducted a total of \$1,070,517.16 from the clients' portion of the recoveries in connection with MEI's services and paid MEI \$1,070,517.16. MEI argues that the \$601,000 paid to MEI should not be considered because it was applied to the initial screens rather than the full studies. Even if this point is true, it is entirely irrelevant. Regardless of how the funds were applied, the effect was the same. If MEI receives any of the Disputed Funds, it will have received more than the amount withheld from the clients' recoveries and that

excess will have been paid from DAT&K's collateral. MEI will have effectively primed DAT&K's security interest in violation of the provisions of Article 9 of the UCC.

Further, the documents and testimony discussed in the Statement of Facts above establish that MEI had no right to payment from GBS's clients and never looked to GBS's clients or their recoveries for payment. MEI looked only to GBS for payment. First, MEI had no written agreement with GBS's clients. MEI's only agreement was with GBS. Second, MEI never gathered any billing information for GBS's clients and never sent an invoice to any GBS client. MEI sent its invoices to GBS. Third, GBS agreed to pay MEI regardless of whether GBS's clients obtained any recovery. Mr. Fidler admitted that it was irrelevant to MEI whether GBS's clients obtained any recovery or not. Fourth, when a dispute arose over the quality of MEI's services and the amount owed to MEI, MEI did not sue GBS's clients. MEI sued GBS. Finally, GBS's clients were not parties to the MEI Settlement Agreement resolving that litigation. There was no reason for MEI to join GBS's clients since, as MEI acknowledged in the MEI Settlement Agreement, MEI provided its services to GBS and GBS owed MEI for those services.

Finally, MEI and Mr. Barton expressly acknowledged and agreed in the MEI Settlement Agreement and the MEI Security Agreement that monies withheld from the clients' portion of the recoveries in connection with MEI's services are part of DAT&K's collateral. First, the MEI Settlement Agreement and the MEI Security Agreement granted MEI a security interest in the "Barton Fen-Phen Fees." The Barton Fen-Phen Fees are defined as fees and "other monies" due GBS under the Fen-Phen Referral Agreement. The fact is that the phrase "other monies" referred to monies withheld from

the clients' portion of the recoveries to pay GBS for the expenses it had incurred. Second, the MEI Settlement Agreement expressly provides that monies withheld from the clients' portion of the recoveries in connection with MEI's services were included within the definition of Barton Fen-Phen Fees. Finally, both the MEI Settlement Agreement and the MEI Security Agreement expressly acknowledge that DAT&K held a security interest in the Barton Fen Phen Fees and that DAT&K's security interest is senior to MEI's security interest.

**B. The Trial Court Was Not Bound to Accept Conclusory Statements of Subjective Intent From Witnesses that Were Not Credible.**

MEI argues that the Trial Court was bound to accept as true Mr. Fidler's and Mr. Barton's conclusory statements regarding their subjective intent. To the contrary, the Trial Court found that Mr. Barton and Mr. Fidler were not credible witnesses, that Mr. Fidler gave conflicting testimony regarding their intent and that their testimony was inconsistent with both the agreements and their conduct. The Trial Court's determination that Mr. Barton and Mr. Fidler were not credible is entitled to great deference from this Court. Visser, UT App. at ¶ 12, 31 P.2d at 586. Moreover, Utah courts have long recognized that in determining the intent of the parties to an agreement, courts may look to the language of the agreements and the conduct of the parties. See, e.g., Green River Canal Co. v. Thayn, 84 P.2d 1134, 1141 (Utah 2003); Plateau Mining Co. v. Utah Div. of State Lands and Forestry, 802 P.2d 720, 725 (Utah 1990). As the Trial Court found, the absence of any agreement between MEI and GBS's clients regarding payment, and the language of the other agreements evidence that GBS was entitled to receive, and held a

lien on, the clients' portion of the recoveries. Moreover, as the Trial Court found, the conduct of the parties evidences that GBS was entitled to be paid from, and held a lien on, the clients' portion of the recoveries and that MEI had no interest in, right to, or claim against GBS's clients or their recoveries. GBS treated as income the monies withheld from the clients' recoveries and paid to GBS for the obligations GBS had incurred to MEI. Moreover, when a dispute arose over the quality of MEI's services and the amount GBS owed MEI for those services, MEI did not join the clients as parties to the litigation or the settlement agreement resolving that litigation.

#### VII. CONCLUSION

Based on the facts and arguments set forth above, this Court should affirm the Trial Court's decision awarding the Disputed Funds to DAT&K.

DATED this 14 day of August, 2010.

**BRADLEY ARANT BOULT CUMMINGS LLP**

By: \_\_\_\_\_

Roger G. Jones  
Attorneys for Appellee DAT&K

## CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of Bradley Arant Boult Cummings LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing APPELLEE'S BRIEF was delivered to the following this 11 day of August, 2010 by:

- ☐ Hand Delivery
- ☒ Depositing the same in the U.S. Mail, postage prepaid
- ☐ Electronic Mail

James E. Magleby  
Magleby & Greenwood, P.C.  
170 South Main Street, Suite 350  
Salt Lake City, Utah 84101

  
\_\_\_\_\_  
**ROGER G. JONES**

## VIII. ADDENDUM



**C**West's Tennessee Code Annotated Currentness

Title 47. Commercial Instruments and Transactions

Chapter 9. Secured Transactions (Refs & Annos)Part 2. Effectiveness of Security Agreement; Attachment of Security Interest; Rights of Parties to Security Agreement (Refs & Annos)Subpart 1. . Effectiveness and Attachment**→ § 47-9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites**

- (a) ATTACHMENT. A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.
- (b) ENFORCEABILITY. Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:
- (1) value has been given;
  - (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
  - (3) one (1) of the following conditions is met:
    - (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
    - (B) the collateral is not a certificated security and is in the possession of the secured party under § 47-9-313 pursuant to the debtor's security agreement;
    - (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under § 47-8-301 pursuant to the debtor's security agreement; or
    - (D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, or electronic documents, and the secured party has control under § 47-7-106, § 47-9-104, § 47-9-105, § 47-9-106, or § 47-9-107 pursuant to the debtor's security agreement.
- (c) OTHER UCC PROVISIONS. Subsection (b) is subject to § 47-4-210 on the security interest of a collecting bank, § 47-5-118 on the security interest of a letter-of-credit issuer or nominated person, § 47-9-110 on a security interest arising under Chapter 2 or 2A, and § 47-9-206 on security interests in investment property.
- (d) WHEN PERSON BECOMES BOUND BY ANOTHER PERSON'S SECURITY AGREEMENT. A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this chapter or by contract:
- (1) the security agreement becomes effective to create a security interest in the person's property; or

(2) the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) EFFECT OF NEW DEBTOR BECOMING BOUND. If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) the agreement satisfies subsection (b)(3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) another agreement is not necessary to make a security interest in the property enforceable.

(f) PROCEEDS AND SUPPORTING OBLIGATIONS. The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by § 47-9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) LIEN SECURING RIGHT TO PAYMENT. The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) SECURITY ENTITLEMENT CARRIED IN SECURITIES ACCOUNT. The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) COMMODITY CONTRACTS CARRIED IN COMMODITY ACCOUNT. The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

CREDIT(S)

2000 Pub.Acts, c. 846, § 1, eff. July 1, 2001; 2008 Pub.Acts, c. 814, § 26, eff. July 1, 2008.

Current through end of 2010 First Ex. Sess. and with laws from 2010 Reg. Sess., eff. through June 9, 2010

(c) 2010 Thomson Reuters.

END OF DOCUMENT

**C**West's Utah Code Annotated CurrentnessTitle 70A Uniform Commercial Code (Refs & Annos)Chapter 9A Uniform Commercial Code--Secured Transactions (Refs & Annos)Part 2 Effectiveness of Security Agreement--Attachment of Security Interest--Rights of Parties to Security Agreement**→ § 70A-9a-203. Attachment and enforceability of security interest--Proceeds--Supporting obligations--Formal requisites**

- (1) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment
- (2) Except as otherwise provided in Subsections (3) through (9), a security interest is enforceable against the debtor and third parties with respect to the collateral only if
- (a) value has been given,
  - (b) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and
  - (c) one of the following conditions is met
    - (i) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned,
    - (ii) the collateral is not a certificated security and is in the possession of the secured party under Section 70A-9a-313 pursuant to the debtor's security agreement
    - (iii) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 70A-8-301 pursuant to the debtor's security agreement, or
    - (iv) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, or electronic documents, and the secured party has control under Section 70A-7a-106, 70A-9a-104, 70A-9a-105, 70A-9a-106, or 70A-9a-107 pursuant to the debtor's security agreement
- (3) Subsection (2) is subject to Section 70A-4-210 on the security interest of a collecting bank, Section 70A-5-118 on the security interest of a letter-of-credit issuer or nominated person, Section 70A-9a-110 on a security interest arising under Chapter 2 or 2a, and Section 70A-9a-206 on security interests in investment property
- (4) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this chapter or by contract
- (a) the security agreement becomes effective to create a security interest in the person's property, or
  - (b) the person becomes generally obligated for the obligations of the other person, including the obligation secured

under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(5) If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(a) the agreement satisfies Subsection (2)(c) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(b) another agreement is not necessary to make a security interest in the property enforceable.

(6) The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 70A-9a-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(7) The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(8) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(9) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

CREDIT(S)

Laws 2000, c. 252, § 53, eff. July 1, 2001; Laws 2006, c. 42, § 68, eff. May 1, 2006.

Current through 2010 General Session

Copr (c) 2010 Thomson Reuters/West. No claim to orig. U.S. govt.

END OF DOCUMENT