

2004

Lasalle Bank National Association, a national banking association, fka Lasalle National Bank, as Trustee for the Registered Holders of Merrill Lynch Mortgage Investors, Inc. Pass-Through Certificates, Series 197-C1 v. Qinn LTD., a Utah limited partnership : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS

STATE OF UTAH

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DOCKET NO. 2004 0896-CA

LASALLE BANK NATIONAL)
ASSOCIATION, a national banking)
association, fka LASALLE NATIONAL)
BANK, AS TRUSTEE FOR THE)
REGISTERED HOLDERS OF)
MERRILL LYNCH MORTGAGE)
INVESTORS, INC. PASS-THROUGH)
CERTIFICATES, SERIES 1997-C1,)
)
Plaintiff-Appellee,)
)
vs.)
)
QINN LTD., a Utah limited partnership;)
ET AL.,)
)
Defendant-Appellant.)

BRIEF OF APPELLEE
LASALLE BANK
NATIONAL ASSOCIATION

On Appeal from the
Third Judicial District Court
Judge Joseph C. Fratto, Jr.

Appellate Case No. 20040896-CA

Trial Case No.020905904

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UTAH APPELLATE COURTS
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JURISDICTION OF THE APPELLATE COURT

Appellee LaSalle Bank National Association, fka LaSalle National Bank, as Trustee for the registered holders of Merrill Lynch Mortgage Investors, Inc. Pass-Through Certificates, Series 1997-C1, concurs with the jurisdictional statement in the brief of Appellant GMAC Commercial Mortgage Corporation, to wit:

The Order and Judgment appealed from was signed on September 17, 2004, and entered on September 20, 2004. Defendant-appellant GMAC Commercial Mortgage Corporation filed its Notice of Appeal on October 14, 2004. The Utah Supreme Court has original appellate jurisdiction over this appeal pursuant to Utah Code §78-2-2(3)(j) because this appeal involves the review of an order of a trial court over which the Utah Court of Appeal does not have original jurisdiction. This Court has jurisdiction because this is a case transferred to this Court from the Supreme Court pursuant to Utah Code §78-2a-3(2)(j).

ISSUES PRESENTED

1. Did the filing of this litigation toll or excuse Appellant from the statutory requirement of filing a timely continuation statement to preserve its financing statement, perfection and priority? Or, did Appellant's financing statement lapse when no continuation statement was filed, resulting in lost perfection and priority? Utah Code §70A-9a-515(1) and (3); §70A-9a-322(1).

Standard of Review. The foregoing issue presents a question of law to be reviewed for correctness without deference to the trial court's ruling.

Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 844 P.2d 322 (Utah 1992).

Preservation of Issue in the Trial Court. The foregoing issue was presented to the trial court for decision by both parties (R.2003, Tr. 15:1-25:13; R.1393-1395; R.1621-1623; R.1674-1679) and the trial court explicitly ruled thereon (R.1758-1759; 1864-1868).

2. *If this Court reverses the trial court's ruling, then the following issue presents an alternate ground for affirming the judgment as to the fixtures portion of the collateral.* Did Appellant cite competent admissible prima facie evidence to support a triable allegation that its fixture filing was recorded within the limited time period required to claim purchase money super-priority over Appellee's earlier Trust Deed? Or, is Appellant's fixture filing (recorded December 29, 1997) junior to

Appellee's Trust Deed (recorded November 1, 1996) as a matter of law? Former Utah Code §70A-9-313(4)(a); current Utah Code §70A-9a-334(4).

Standard of Review. Whether Appellant cited competent admissible prima facie evidence sufficient to avoid summary judgment under the governing priority statutes is a question of law to be reviewed for correctness without deference to the trial court's ruling. *Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co.*, 844 P.2d 322 (Utah 1992).

Preservation of Issue in the Trial Court. The foregoing issue was presented to the trial court by both parties. (R.2003, Tr. 10:23-14:9; R.824, ¶20; R.827, ¶36(b); R.830, ¶51; R.837, ¶III.A; R.865-866; R.1254, ¶1; R.1255, ¶D(ii); R.1257-1259; R.1318, ¶¶6-7; R.1673, ¶n.1; and R.1674, ¶n.2). However, in light of the trial court's ruling (with respect to all collateral) that Appellant's UCC-1 had lapsed, it never reached this issue which is limited to the fixtures.

STATUTES DETERMINATIVE OR OF CENTRAL IMPORTANCE

Utah Code §70A-9a-322.¹ Priorities among conflicting security interests in and agricultural liens on same collateral.

(1) Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(a) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(b) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

. . .

Utah Code §70A-9a-334. Priority of security interests in fixtures and crops.

. . .

(4) ... a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(a) the security interest is a purchase-money security interest;

(b) the interest of the encumbrancer or owner arises before the goods become fixtures; and

(c) the security interest is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter.

. . .

¹ Section 70A-9a-322 became effective July 1, 2001. The same rules were in *former* Utah Code §70A-9-301(1)(a) and §70A-9-312(5), both repealed as of July 1, 2001.

Utah Code §70A-9a-515. Duration and effectiveness of financing statement --
Effect of lapsed financing statement.

(1) Except as otherwise provided in Subsections (2), (5), (6), and (7), a filed financing statement is effective for a period of five years after the date of filing.

. . .

(3) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to Subsection (4). Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

. . .

(7) A record of a mortgage that is effective as a financing statement filed as a fixture filing under Subsection 70A-9a-502(3) remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

Utah Code §70A-9a-702. Savings clause.

(1) Except as otherwise provided in this part, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this act takes effect [on July 1, 2001].

. . .

(3) This act does not affect an action, case, or proceeding commenced before this act takes effect [on July 1, 2001].

Utah Code 70A-9a-709. Priority.

(1) This act determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before this act takes effect [on July 1, 2001], former Chapter 9 determines priority.

. . .

Former Utah Code §70A-9-313 [repealed effective July 1, 2001]. Priority of security interests in fixtures.

. . .

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where:

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest or record in the real estate....

. . .

Former Utah Code §70A-9-403 [repealed effective July 1, 2001]. What constitutes filing – Required statement – Duration of filing – Effect of lapsed filing – Duties of filing officer.

. . .

(2) Except as provided in Subsection (6), a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period, whichever occurs later. Upon lapse, the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is considered to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

. . .

STATEMENT OF THE CASE

Plaintiff-appellee LaSalle Bank National Association, fka LaSalle National Bank, as Trustee for the registered holders of Merrill Lynch Mortgage Investors, Inc. Pass-Through Certificates, Series 1997-C1 (“**LaSalle**”) and defendant-appellant GMAC Commercial Mortgage Corporation (“**GMAC**”) are competing secured creditors of a common debtor, Qinn, Ltd. (“**Qinn**”). The trial court ruled, as a matter of law, that LaSalle’s security interest has priority over GMAC’s security interest in Qinn’s hotel furniture, fixtures and equipment (“**FF&E**”). GMAC appealed.

LaSalle brought this action to judicially foreclose on Qinn’s real and personal property.² Both GMAC and LaSalle had security interests perfected by UCC-1 financing statements. GMAC’s UCC-1 was filed December 23, 1997, and LaSalle’s UCC-1 was filed January 23, 2002.³ Thus, when LaSalle filed its complaint on July 1, 2002, GMAC’s UCC-1 had priority over LaSalle’s UCC-1.

On December 23, 2002, however, GMAC allowed its UCC-1 to lapse by failing to file a continuation statement. LaSalle sought summary judgment that its perfected security interest⁴ attained first priority when GMAC’s UCC-1 lapsed.

² This appeal only concerns the competing priorities in hotel personal property. LaSalle has already judicially foreclosed and purchased the hotel realty in this case, and all rights of redemption have expired.

³ LaSalle had a November 1, 1996 UCC-1, but it lapsed in 2001 and is not relied on.

⁴ LaSalle has been continuously perfected since filing its January 23, 2002 UCC-1.

Upon that lapse, GMAC's security interest became unperfected and therefore junior to LaSalle's perfected security interest.

GMAC argued by cross-motion for summary judgment that the pendency of LaSalle's complaint and litigation excused GMAC from the statutory requirement of filing a continuation statement and the statutory consequences of failing to do so.

On July 28, 2004 the trial court issued a Minute Entry, ruling that pendency of LaSalle's complaint and the litigation neither tolled nor excused GMAC from the statutory need to file a continuation statement to avoid lapse and loss of priority.

On September 20, 2004, the trial court entered its Order and Judgment, granting LaSalle summary judgment and decreeing that LaSalle's security interest has priority over GMAC's security interest.

On October 14, 2004, GMAC filed its Notice of Appeal of the trial court's September 20, 2004 Order and Judgment.

A separate issue was presented that the trial court did not reach in light of its broader Minute Entry, and Order and Judgment. Even if GMAC's 1997 UCC-1 never lapsed, LaSalle still claims priority as a matter of law in the *fixtures* portion of the FF&E by virtue of its 1996 Deed of Trust. GMAC argues that its 1997 UCC fixture filing is entitled to purchase money super-priority over the 1996 Deed of Trust. But LaSalle points out that GMAC failed to cite competent admissible evidence that its 1997 fixture filing was recorded within the narrow statutory time period that is required for establishing any claim of super priority.

STATEMENT OF FACTS

1. **November 1, 1996:** LaSalle's predecessor in interest ⁵ filed a UCC-1 financing statement (R.200-208; R.831, ¶54; R.863, ¶A) to perfect its blanket security interest in all of Qinn's hotel goods to secure a \$6,370,000 promissory note. (R.25-42). That promissory note was also secured by a first deed of trust on Qinn's hotel realty recorded on November 1, 1996 (the "Trust Deed"). (R.46-145; R.824, ¶20; R.863, ¶A; R.1410, ¶1). As to goods consisting of fixtures, LaSalle's security interest was also perfected by the Trust Deed serving as a fixture filing. (R.46; R.108-109, §11.1).

2. **December 23, 1997:** GMAC filed a UCC-1 to perfect a purchase money security interest in a portion of Qinn's FF&E. (R.864, ¶4; R.888-890). ⁶ GMAC also recorded a fixture filing in the county real estate records on **December 29, 1997**. (R.12, ¶59; R.283, ¶59).

3. **November 1, 2001:** LaSalle's November 1, 1996 UCC-1 lapsed for failure to file a continuation statement by its five-year anniversary. LaSalle's security interest then ceased to be perfected (R.1673, ¶3) except as to fixtures in which LaSalle

⁵ Hereinafter, both LaSalle Bank National Association (fka LaSalle National Bank) as Trustee, and its predecessor in interest Merrill Lynch Credit Corporation (R.146-149), are referred to simply as "LaSalle." LaSalle Bank National Association acts in the capacity of Trustee for the registered holders of Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates, Series 1997-C1.

⁶ LaSalle claims a blanket security interest in *all* of Qinn's goods. GMAC only claims a subset of specific FF&E items that it financed for Qinn.

remained continuously perfected under its November 1, 1996 Trust Deed. (R.1410, ¶1; R.1674, ¶n.2; R.2003, Tr. 10:23-14:9).

4. **January 23, 2002:** LaSalle re-perfected its blanket security interest by filing a new UCC-1 financing statement. (R.1263-1264). LaSalle again re-perfected by filing another (redundant) UCC-1 financing statement on March 19, 2003. (R.1263-1264).

5. **July 1, 2002:** LaSalle filed this action against the debtor Qinn (and against GMAC and other junior creditors) to *inter alia* have a receiver appointed and to foreclose upon Qinn's hotel assets. (R.1; R.6-17; R.21-24).

6. **December 23, 2002:** GMAC's December 1997 UCC-1 lapsed for failure to file a continuation statement by its five-year anniversary. (R.1263-1264; R.1389, ¶1). GMAC's security interest in Qinn's FF&E then ceased to be perfected.

7. **February 28, 2003:** LaSalle moved for partial summary judgment to foreclose both its Trust Deed on the hotel realty, and its security interest in the hotel personalty, and to appoint a receiver over Qinn's hotel property. (R.802-805).

8. **April 2, 2003:** GMAC filed a cross-motion for summary judgment, arguing that its 1997 UCC-1 perfected a purchase money security interest ("PMSI") in Qinn's FF&E, and that its PMSI had super-priority over LaSalle's security interest. (R.899-901). GMAC's memorandum omitted the fact that its 1997 UCC-1 had lapsed three months earlier. (R.861-867).

a. **April 3, 2003:** the official Certified Search Certificate of the Utah Department of Commerce, Division of Corporations and Commercial

Code reflected that only LaSalle (and no other creditor) had a valid effective UCC-1 financing statement against the debtor, Qinn. (R.1263-1288).

b. **April 22, 2003:** LaSalle's reply memorandum pointed out that GMAC's 1997 UCC-1 had lapsed on December 23, 2002, and argued that GMAC's security interest (even if a PMSI) became unperfected and junior to LaSalle's January 23, 2002 UCC-1. (R.1254-1257).

c. **May 27, 2003:** GMAC's reply argued that the December 23, 2002 lapse of its 1997 UCC-1 was legally immaterial because it occurred after LaSalle had filed its July 1, 2002 complaint. (R.1393-1395).

d. **July 28, 2003:** Qinn filed bankruptcy. (R.1400-1404). (As a result, a ruling on the cross-motions to determine priorities of GMAC's and LaSalle's conflicting security interests was delayed until July 28, 2004.)

9. **August 18, 2003:** GMAC re-perfected its security interest in Qinn's FF&E by filing new a UCC-1. (R.1674, ¶13).

10. **September 22, 2003:** the trial court entered its Judgment, Order for Appointment of Receiver, and Decree of Foreclosure and Order of Sale. (R.1408-1425). That judgment and order:⁷

a. Granted LaSalle judgment against Qinn in the amount of \$6,739,768.92. (R.1409).

⁷ Portions of the September 22, 2003 judgment and order did not take effect until after a subsequent order in Qinn's bankruptcy case. The Bankruptcy Court's order appears in the record at R.1493-1518.

b. Appointed a receiver to hold the hotel realty and personalty, and to operate the hotel business. The receiver was granted the usual powers of a receiver. The receiver was not directed to, or granted the power to, liquidate or rehabilitate the debtor Qinn, its estate or business. (R.1412-1424).

c. Ordered a sheriff's sale of Qinn's hotel realty, based on the determined lien priorities. (R.1410-1412).

11. February 17, 2004: the sheriff conducted a sale of the hotel realty, and LaSalle was the purchaser. (R.1815-1816). That foreclosure sale of the realty left LaSalle with a deficiency in excess of \$691,981. (R.1921, ¶22). The redemption period has expired. (LaSalle did not cause a sale of the FF&E because the cross-motions on GMAC's and LaSalle's competing priorities remained undecided.)

12. April 30, 2004 and May 26, 2004: after abstention by the bankruptcy court on the priority issue, GMAC and LaSalle filed sur-reply memoranda to reacquaint the trial court with their pending cross-motions. (R.1620-1624; R.1672-1680).

13. July 28, 2004: the trial court issued a Minute Entry ruling on LaSalle's and GMAC's pending cross-motions for summary judgment to determine the priority of their conflicting security interests in the FF&E. The trial court ruled that LaSalle's complaint and the litigation did not toll or relieve GMAC from the statutory requirement of filing a continuation statement to avoid lapse and loss of priority. (R.1758-1759).

14. **September 20, 2004:** the trial court filed its Order and Judgment, decreeing as a matter of law that LaSalle's security interest has priority over GMAC's security interest in the FF&E. (R.1864-1867).

15. **October 14, 2004:** GMAC filed its Notice of Appeal of the trial court's September 20, 2004 Order and Judgment. (R.1894-1895).

16. **December 21, 2004:** the trial court issued a Memorandum Decision (R.1997-2000), (i) granting a motion by LaSalle (opposed by GMAC) to terminate the receivership upon a sheriff sale of the FF&E, (ii) granting a motion by LaSalle (opposed by GMAC) for an order authorizing sale of the FF&E by writ of execution, and (iii) denying a motion by GMAC (opposed by LaSalle) to stay any sale of the FF&E.

SUMMARY OF ARGUMENTS

LaSalle's security interest has priority over GMAC's security interest in the FF&E because LaSalle's January 23, 2002 and March 19, 2003 financing statements predate GMAC's August 18, 2003 financing statement. By statute, security interests perfected by filing rank in priority by filing date. Utah Code §70A-9a-322(1).

Moreover, from December 23, 2002 (when GMAC's 1997 UCC-1 lapsed) until August 18, 2003 (when GMAC filed a new UCC-1), GMAC's security interest was wholly unperfected. By statute, LaSalle's perfected security interest had priority over GMAC's unperfected interest. *Id.*

Although GMAC enjoyed priority until December 23, 2002 based on its December 23, 1997 financing statement, that priority was lost when GMAC failed to file a continuation statement. By statute, that failure to file a continuation statement resulted in lapse, and retroactive loss of perfection and priority. Utah Code §70A-9a-515(1) and (3); Utah Code §70A-9a-322(1).

The trial court correctly decided that the statutory requirement for GMAC to file a continuation statement was neither tolled nor excused by the pendency of LaSalle's July 1, 2002 complaint. "Priority through timely filing is a statutory creature, and it is for the legislature to decide when its requirements are tolled." (R.1759). GMAC's plea for a judicial exception violates the unambiguous statutory filing system, particularly current §70A-9a-515(3) and former §70A-9-403(2) of Utah's Uniform Commercial Code.

If the trial court's ruling is reversed, LaSalle still claims priority as a matter of law in the *fixtures* portion of the FF&E by virtue of its 1996 Trust Deed. GMAC argues that its 1997 UCC fixture filing is entitled to purchase money super-priority over the 1996 Trust Deed. The record, however, establishes that GMAC failed to cite competent admissible evidence that its 1997 fixture filing was recorded within the time statutorily required for claiming super-priority. Utah Code §70A-9a-322(1)(a) and §70A-9a-334(4). Former §70A-9-312(5)(a) and Former §70A-9-313(4)(a).

ARGUMENT

The legal issue presented on appeal is very narrow. If the plain language of Article 9 is followed, then LaSalle's security interest in the FF&E has priority over GMAC's conflicting security interest. Although GMAC once had priority, that priority was lost when it allowed its UCC-1 to lapse by failing to file a continuation statement. GMAC's argument that its priority became forever fixed as of the date LaSalle filed its complaint is simply wrong. Article 9 priorities are always subject to subsequent legal events.

I. Priorities Under Article 9 Are Always Subject to Loss.

Just as LaSalle lost certain priorities when its 1996 UCC-1 lapsed on November 1, 2001, so too did GMAC lose the priority of its 1997 UCC-1 upon its lapse on December 23, 2002.

The plain statutory rule is set out in Utah Code §70A-9a-515(1) and (3):

(1) ... a filed financing statement is effective for a period of five years after the date of filing.

. . .

(3) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to Subsection (4). Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value. [Emphasis added].

Application of that plain statutory rule between two competing secured creditors is illustrated in UCC §9-515's Official Comment 3 (Addendum "A" hereto):

Example 1: SP-1 and SP-2 both hold security interests in the same collateral. Both security interests are perfected by filing. SP-1 filed first and has priority under Section 9-322(a)(1). The effectiveness of SP-1's filing lapses. As long as SP-2's security interest remains perfected thereafter, SP-2 is entitled to priority over SP-1's security interest, which is deemed never to have been perfected as against a purchaser for value (SP-2). See Section 9-322(a)(2). [*i.e.*, *Utah Code §70A-9a-322(1)(b).*]

II. No Judicial Exception Saved GMAC From Loss of Perfection and Priority.

Faced with that stark *statutory* rule of lapse, and lacking any applicable *statutory* exception, GMAC asked the trial court and now this Court to craft a *judicial* exception whereby a pending complaint would toll its financing statement from lapsing. In calling for a judicial exception, GMAC cited the trial court to three cases from other jurisdictions. As set forth below, GMAC's cases are easily distinguished, and the third (*Travelers*) is patently wrong under Article 9.

A. GMAC's Cases are Distinguishable and Unhelpful.

1. *Chrysler Credit Corp. v. U.S.*, unpublished, 1978 U.S. Dist. LEXIS 19263, 1978 WL 4487 (E.D. Va., March 3, 1978) is unenlightening for three reasons. First, it addresses the distinct issue of a *federal tax lien* vs. a lapsing UCC-1 (rather than the present case's issue of a perfected junior UCC-1 vs. a lapsing senior UCC-1). Second, it appears that the federal government did not actually contest the case, making it a rather one-sided proceeding.

Third, even if the tax lien scenario is analogous, *Chrysler* tolled the UCC-1's lapse based on a faulty legal premise: *i.e.*, that the UCC-1 no longer served any purpose because the pending litigation meant the parties were "well aware of

plaintiff's security interest." The *Chrysler* court erred in stating that a junior creditor's knowledge of a senior security interest has any legal bearing. It is well established that then-governing UCC §9-403(2):

... nowhere states that a junior secured party's knowledge of a prior security interest prevents that junior secured party from prevailing over the prior secured party once the prior party's filed financing statement lapses. Courts have wisely declined to read such language into the UCC.

In re Reda, Inc., 54 B.R. 871, 878 (Bank. N.D. Ill. 1985). See also, *Frank v. James Talcott, Inc.*, 692 F.2d 734, 739 (11th Cir. 1982) (knowledge "not relevant"). Thus, the unreported *Chrysler* federal tax lien opinion is flawed by its open reliance on the legally immaterial issue of knowledge,⁸ and provides no help in the current case.

2. *Avant Petroleum, Inc. v. Banque Paribas*, 853 F.2d 140 (2nd Cir. 1988) is materially distinguished because the disputed cash collateral was interpleaded with the court before the senior creditor's UCC-1 lapsed. The *Avant* court pointed out that the very nature of an interpleader (*i.e.*, the court taking "custody of the money for the benefit of the rightful owner, creating a trust for the purpose of preserving the funds and thereby securing the rightful owner's claim to them") is a functional substitute for filing a continuation statement. *Id.* at 145.⁹

⁸ GMAC's Brief of Appellant (p.17) makes the same error by focusing on LaSalle's knowledge of GMAC's security interest. That fact is immaterial under Article 9.

⁹ The "custody" and "trust" nature of an interpleader, as described by *Avant*, comfortably fits §70A-9a-515(3)'s provision that perfection is not lost if a security interest is "perfected otherwise" before its UCC-1 lapses. A judicial "trust" or judicial "custody" by interpleader functions like perfection through possession by a third person. *Cf.* Utah Code §70A-9a-313(3).

The *Avant* opinion was expressly grounded in the special nature of interpleader. But no interpleader occurred in the present case, and nothing in the proceedings below approached judicial “taking custody of” or “creating a trust for” Qinn’s FF&E. The single remote analogue in this case was the appointment of a receiver. But *even if* a receivership could save a UCC-1 from lapsing, it could not help GMAC in this particular case because the Qinn receivership was not ordered until September 2003 -- *i.e.*, more than 9 months after GMAC’s UCC-1 had already lapsed.

3. *Travelers Insurance Co. v. First National Bank of Blue Island*, 621 N.E.2d 209 (Ill. Ct. App. 1993) is GMAC’s other cite for a judicial exception to Article 9’s lapse statute. Because it addresses similar foreclosure facts (rather than an interpleader or federal tax lien), *Traveler’s* requires more careful attention. As detailed below, however, *Travelers* offers a flawed rule of decision for this case.

First, *Travelers’* statement that the priorities are fixed as of the complaint date, regardless of subsequent lapse of the senior UCC-1, is mere *dicta*. *Travelers* was explicitly decided under Illinois *real property law*, under which hotel receipts as collateral are “not governed by the Illinois UCC.” *See id.* at 213. *Travelers* barely mentions Article 9, and then only “*arguendo*.” *Id.* at 215.

Second, when *Travelers’ dicta* stated that litigation fixes priorities against any later lapse, it erred by relying on *Avant*. *Travelers* observed that *Avant* was an interpleader case, but then curtly declared that *Avant’s* rationale “applies to this mortgage foreclosure case.” *Id.* at 215. In doing so, *Travelers* ignored the significant

differences between an interpleader (with funds deposited into the “custody”/“trust” of the court), and a mere foreclosure complaint that by itself does nothing. An interpleader creates new legal custodies and relationships -- but a foreclosure complaint is just a complaint. For example, *Travelers* quotes *Avant*’s statement that an interpleader claimant is blocked from collecting the interpleaded property during the litigation. *Travelers*, 621 N.E.2d at 215. But, nothing in LaSalle’s complaint ever barred GMAC from renewing or even foreclosing its security interest.

So, while *Travelers*’ facts are similar to the present case, *Travelers* cannot be described as a carefully reasoned study of Article 9’s perfection and priority rules. In fact, as discussed below, *Travelers* UCC *dicta* concerning lapse was wrongly decided.

B. *Travelers* Violated (Then-Governing) UCC §9-403(2).

Travelers was decided in 1993 under the former version of UCC Article 9 (hereafter “Former Article 9”). Former Article 9 contained one (and only one) narrow statutory tolling provision against lapse of a UCC-1:

... The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. **If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until the termination of the insolvency proceedings and thereafter for a period of sixty days** or until expiration of the five year period, whichever occurs later. Upon lapse, the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is considered to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

Former UCC §9-403(2), emphasis added.

Travelers did not claim to be an insolvency proceeding under Former §9-403(2). Indeed, *Travelers* never discussed any of §9-403's statutory language, let alone its express tolling provision. Thus, *Travelers* never considered whether §9-403(2)'s express tolling provision was exclusive and thereby prevented the court from fashioning new common law exceptions.

Because Former §9-403(2)'s statutory framework stated an express exception that was limited to insolvency proceedings, it was improper for *Travelers* to create a new exception for something “less than” insolvency proceedings. In a related context, the Utah Bankruptcy Court wisely observed that the express tolling provisions in Article 9 should keep the courts from creating new ones:

The fact that Section 9-403 specifically deals with the tolling of the necessity of filing continuation statements in insolvency proceedings makes the absence of any mention of such an extension for the temporary grace period allowed in Section 9-103 further indicative of the Code's intent not to extend such periods in insolvency proceedings.

Borg-Warner Acceptance Corp. v. Twelves, (In re Utah Agricorp., Inc.), 12 B.R. 573, 578 (Bankr. Utah 1981). *Borg-Warner* opined, in the context of Former §9-103's requirement to file a new UCC-1 if collateral is moved to a new state, that “filing of a suit in reclamation is neither the statutory nor functional equivalent of a [UCC-1] filing within this state.” *Id.* See also, *id.* at 577.

C. Travelers Violates Revised §9-515(c) [Utah Code §70A-9a-515(3)].

Judicial tolling is even more repugnant to UCC Revised §9-515(c) which replaced Former §9-403(2). Effective July 1, 2001, Revised §9-515(c):

deletes the former tolling provision [in §9-403(2)] and thereby imposes a new burden on the secured party: to be sure that a financing statement does not lapse during the debtor's bankruptcy.

(Official Comment 4 to Revised §9-515, emphasis added). (Addendum "A" hereto).

Because creditors must now guard against lapse even during insolvency cases, they surely cannot be excused from lapse during mere foreclosure actions.

Travelers' effort to forever fix priorities as of the complaint date is also inconsistent with Article 9's statutory language that failure to file a continuation statement results in retroactive nonperfection. The statutory policy of retroactivity was clear enough in Former UCC §9-403(2): "If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected...." (Emphasis added). Revised §9-515(c) is even more emphatically retroactive: "If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected...." (Emphasis added). Article 9's explicit retroactive nonperfection upon failure to file a continuation statement precludes the *Travelers'* rule of forever fixing priorities against future lapse.

D. Utah Law is Hostile to Judicial Tolling of Lapse of Liens.

The judicial tolling called for by GMAC and *Travelers* contravenes analogous Utah decisions. As already cited above, the Utah Bankruptcy Court in *Borg-Warner*

stated that courts should not graft judicial exceptions onto the statutory system for perfection under Article 9. *Borg-Warner*, 12 B.R. at 578.

More significantly, the Utah Supreme Court rejected judicial tolling of *real* property liens in *Federal Farm Mortgage Corp. v. Walker*, 206 P.2d 146 (Utah 1949). In that case, a judgment creditor sued to foreclose its judgment lien. While the suit was pending, the underlying judgment's 8-year life expired. The Utah Supreme Court held that commencement and pendency of the foreclosure action did not save the judgment lien from expiring. The courts are powerless to extend a judgment lien's life beyond what the Legislature has enacted. *Id.* at 147. This Court should apply the same rule to the life of a UCC-1 as enacted in Utah Code §70A-9a-515(1) and (3).

E. The Loss of GMAC's Perfection and Priority is Not Unfair.

The only justification for judicially tolling the expiration of liens, as noted by the Utah Supreme Court in *Federal Farm Mortgage*, is serious wrongful conduct by a particular defendant that prevented the plaintiff from timely enforcing the lien. 206 P.2d at 147-48. In the present case, however, no allegation has been made that LaSalle (a) prevented GMAC from taking the simple step of filing a timely continuation statement to avoid lapse, or (b) prevented GMAC from foreclosing its security interest. There is simply no wrongful conduct to be remedied.

Nor has GMAC, a sophisticated commercial lender, suffered any surprise. For decades, Article 9's statutes have required creditors to file continuation statements on pain of losing perfection. GMAC argues that LaSalle will get a windfall, but Article 9

has always been solidly grounded in the principal that creditors who fail to make and keep proper filings will lose their priorities to creditors who comply with the system.

Article 9's requirements and consequences are applied equally in the creditor community -- as evidenced by the fact that LaSalle suffered its own priority loss when it let its 1996 UCC-1 lapse in 2001 and thereby allowed GMAC's 1997 UCC-1 to become the oldest financing statement then in effect.

GMAC has no excuse for letting its 1997 UCC-1 lapse, and GMAC can only blame itself for the consequences of that lapse.

F. Adopting *Travelers* Would Be Unwise Policy.

Article 9 establishes bright-line rules to achieve certainty and predictability in its filing system and in financial markets: who is perfected {persons who file the right information in the right filing office}; how long does perfection last {five years unless a continuation statement is filed}; who has priority over whom {the earliest unexpired filer}; and where must creditors search to identify adverse interests {in the applicable UCC filing office, and not the court dockets}. Article 9's detailed and comprehensive scheme should be left alone to operate under its own statutory rules, without judicially-crafted exemptions and exceptions.

Adopting *Travelers* would sacrifice the bright-line clarity of Article 9 and create a host of unanswered questions for future litigation. A few of those looming issues are illustrated below:

1. If LaSalle had limited its foreclosure complaint to Qinn's realty, and instead proceeded against the FF&E by Article 9 self-help, would *Travelers* still toll GMAC's lapse? Should GMAC's perfection and priority depend on how broadly LaSalle drafted its complaint?

2. Given that LaSalle did include the FF&E in its foreclosure complaint, could LaSalle escape tolling under *Travelers* by obtaining a dismissal without prejudice of its UCC claim?

3. Does *Travelers*' purported freezing of relative priorities occur immediately upon the filing of a complaint? Or, is the fixing of priorities delayed until service of the complaint on the defendants so they have actual notice of the soon to lapse UCC-1? Or, is the fixing of priorities delayed until the plaintiff can no longer amend as of right under U.R.C.P. 15(a), or voluntarily dismiss under U.R.C.P. 41(a)(1)?

4. Who will be bound by a *Travelers* rule that fixes priorities as of the complaint date? Are (i) only parties to the suit bound, or are (ii) non-party creditors bound as well? If non-party creditors are bound, are they expected to search all state and federal court records in addition to the UCC-1s at the Department of Commerce?

5. If non-party creditors are not bound by the *Travelers*' rule, then how will Utah courts resolve the resulting circularity of priority:

(i) Party Creditor A gets priority over Party Creditor B because, as of the complaint date, A's UCC-1 predates B's UCC-1. *Travelers* forever fixes that priority, even though A later forgets to file a continuation statement.

(ii) A new Non-Party Creditor X files a UCC-1. Party Creditor A and Party Creditor B both have priority over Non-Party Creditor X, because their respective UCC-1s predate X's UCC-1.

(iii) When Party Creditor A fails to file a continuation statement, A remains senior to Party Creditor B under the *Travelers* rule. But, Non-Party Creditor X (who is not bound by the litigation) gains new priority over the retroactively un-perfected interest of A.

In that example, *Travelers* causes the priorities to become circular when Party Creditor A forgets to file a continuation statement: **A keeps priority over B; B keeps priority over C; but C attains new priority over A.** ¹⁰

Again, Article 9 is a carefully-crafted, complex and delicately-balanced system. Devising exceptions to Article 9's plain statutory rules should be handled by the Legislature (with counsel from the National Conference of Commissioners on Uniform State Laws) rather than the courts. As shown above, grafting judicial exceptions onto that statutory framework poses very real threats to Article 9's principles of certainty, predictability, and balance.

¹⁰ Circularity of priority was argued to the trial court at (R.2003, Tr. at 22:5 - 23:11). Avoiding circularity of priority is a primary reason for the rule that lapse causes *retroactive* nonperfection. Official Comment 3 to Former UCC 9-403(2).

III. GMAC Cannot Claim the Statutory Tolling Rule in Former §9-403.

GMAC's Brief of Appellant (pp.18-19) contends that "the trial court's ruling fails to apply the plain language of Utah Code Ann. §70A-9-[403](2)(1997) which provides that GMACCM's PMSI is automatically continued during the pendency of these proceedings." GMAC quotes Former §70A-9-403(2)'s exception for insolvency proceedings, and then notes that "LaSalle sought and received the appointment of a receiver to take control of all of Qinn's property." (*Id.* at p.19). GMAC then argues, "With its request for, and appointment of, a receiver this lawsuit is an equitable insolvency proceeding at least in part." (*Id.*)

GMAC's request on appeal for relief under Former §9-403(2) is troublesome in at least four respects:

First, at the trial court level, GMAC never even mentioned Former §9-403(2)'s exception for insolvency proceedings, let alone ever argue for protection under that provision. (R.861-867; R.899-901; R1387-1395; R1620-1624; R.2003, Tr. 2:16-10:21 & 25:15-28:18). Only LaSalle ever addressed §9-403(2)'s insolvency exception: to show how *Travelers* violates Article 9's statutory framework, and to note in passing that the exception does not apply to this case. (R.1677-1678 & n.3, n.4; R.2003, Tr. 15:15-17:22.) GMAC cannot first claim refuge under Former §9-403(2) on appeal.

Second, Former §70A-9-403(2) was repealed and replaced by Revised §70A-9a-515(3) on July 1, 2001 – *i.e.*, 12 months before this suit was filed, and 18 months before GMAC's UCC-1 expired. Revised §70A-9-515(3) has no similar tolling

provision for insolvency cases. Put simply, the statutory exception no longer existed on the date that GMAC needed it. Current §70A-9a-515(3) governs this case.¹¹

Third, even if Former §70A-9-403(2) had not been repealed, GMAC's argument that this case was "an equitable insolvency proceeding at least in part" is expressly premised upon GMAC's observation that "LaSalle sought and received the appointment of a receiver." GMAC's argument fails because the receivership was not established until September 2003 (R.1412-1424) -- *i.e.*, 9 months *after* GMAC's UCC-1 had already lapsed in December 2002. Former §70A-9-403(2) required that the insolvency proceeding pre-date the UCC-1's five-year anniversary.

Fourth, the receivership in this case was not an "insolvency proceeding" within the meaning of Former §70A-9-403(2). "Insolvency proceeding" is defined to "include[] any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved." Utah Code §70A-1-201(22) (emphasis added). The receiver in this case was not authorized or empowered to

¹¹ Revised §70A-9a-702(1) provides that Revised Article 9 governs security interests created *before, as well as after*, July 1, 2001. Section 70A-9a-702(3) states the Revisions do not affect litigation pending on July 1, 2001, but this case was filed a year later in 2002. Section 70A-9a-709(1) states that Revised Article 9's taking effect does not by itself alter competing priorities that were already "established." Nevertheless, "relative priorities that are 'established' before the effective date do not necessarily remain unchanged following the effective date." Official Comment 1 to UCC Revised §9-709(a). (Addendum "B" hereto). Legally significant events occurring after July 1, 2001 will indeed change previously "established" priorities. *E.g.*, filing a financing statement after the effective date in order to perfect an interest that was unperfected on the effective date changes the previously "established" priorities. (*Id.* at official Example 3). Allowing its UCC-1 to lapse was also a legally significant event that altered GMAC's "established" priorities after July 1, 2001.

“liquidate” or “rehabilitate” the debtor, Qinn. (*See* order appointing receiver, R.1412-1424; *see* complaint requesting receiver, R.14, ¶75 - R.15, ¶76). Nor can this receiver administer the claims of Qinn’s various creditors. A foreclosure action, *even with a receiver*, is not a §9-403(2) “insolvency proceeding” when the receiver is not appointed to liquidate or rehabilitate the “entire estate of the debtor.” *E.g., In re Cimarron Nursing Center*, 143 B.R. 578, 580 (Bankr. W.D. Okl. 1992).

In short, GMAC’s argument under Former §9-403(2) is new on appeal, seeks to invoke a statute that was repealed before the suit was filed, is based on a receivership that was not created until after its UCC-1 lapsed, and is based on a receivership that does not qualify as a statutory “insolvency proceeding.”

IV. GMAC Cannot Now Recharacterize Its PMSI as a True Lease.

GMAC asserts another argument never made to the trial court: that its “Lease” with Qinn was a true lease, such that the FF&E is owned by GMAC free of LaSalle’s blanket security interest that only attaches to Qinn’s goods:

No type of blanket security interest claimed by LaSalle can be used to defeat GMACCM’s contractual right to have Qinn return the leased Equipment at the end of the lease’s term. It was error for the trial court to have ignored this contractual right, even if GMACCM’s PMSI was properly deemed to have become unperfected when it was not renewed.

Brief of Appellant (pp.19-20).

A PMSI and a true lease are mutually exclusive animals. If GMAC made a “purchase money loan” to Qinn (as it has always insisted), then the FF&E is owned by Qinn. But if GMAC made a “true lease” with Qinn, such that Qinn is required to

return the leased equipment to GMAC as owner at the end of the “term,” then GMAC never made a purchase money loan to Qinn and never obtained a PMSI. GMAC cannot claim it both ways.¹²

GMAC staked out the unequivocal position in the trial court that it was Qinn’s purchase money lender. For example, in its Cross-Motion for Summary Judgment (R.899-901), GMAC insisted that it was Qinn’s purchase money lender, and never raised any “true lease” argument.¹³ Although portions of GMAC’s court filings generally referred to its agreement with Qinn as a “lease” with a duty to return equipment, GMAC cannot point to any record wherein it *actually argued* to the trial court it should prevail *on grounds* that LaSalle’s security interest *couldn’t attach* to the FF&E (*i.e.*, that under a true lease GMAC and not Qinn owned the FF&E).

LaSalle pointed out to the trial court in the fact section of its memorandum opposing GMAC’s cross-motion that “GMAC has explicitly adopted the position that its ‘Lease’ actually creates a *security interest* (*i.e.*, is not a true lease of) in Qinn’s Equipment.” (R.1254, ¶A - R.1255, ¶B). Neither GMAC’s reply (R.1387-1395) nor its sur-reply (R.1620-1624) denied that patent election. And neither of GMAC’s

¹² The mutual exclusivity is only too obvious. If the FF&E was truly leased by GMAC to Qinn, then the PMSI that GMAC claims so adamantly must have attached to GMAC’s own property -- thereby making GMAC its own Article 9 pledgor.

¹³ See also GMAC’s supporting memorandum wherein GMAC unambiguously declares, “Both the undisputed, material facts and applicable Utah law establish that GMACCM’s interest in the Equipment is a purchase money security interest.” (R.863).

replies argued for a “true lease” as an alternative to its security interest. GMAC cannot first make a “true lease” argument in the last two pages of its appeal brief.

V. Even if GMAC Kept Priority in Qinn’s Furniture and Equipment, LaSalle Always Had Priority in Qinn’s Fixtures Pursuant to its Trust Deed.

A. Introduction. This Part V is unnecessary if this Court upholds the trial court’s ruling that GMAC’s 1997 UCC-1 lapsed. Any ruling that GMAC’s UCC-1 lapsed establishes LaSalle’s priority as to *all* of the FF&E -- *i.e.*, the fixtures, furniture and equipment.

If, however, this Court reverses and rules that GMAC’s 1997 UCC-1 never lapsed, then a distinction must be drawn between (i) the furniture and equipment, and (ii) the fixtures.

- If GMAC remained perfected, then it has priority in the furniture and equipment for the simple reason that its 1997 UCC-1 predates LaSalle’s 2002 UCC-1. That ends the inquiry for those “F&E” goods.
- In fixtures, however, LaSalle has been continuously perfected in fixtures since recording its November 1, 1996 Trust Deed which is effective as a fixture filing. (R.46; R.108-109; R.1410, ¶1). Utah Code §§70A-9a-502(3) and 9a-515(7). Former Utah Code §§70A-9-402(6) and 9-403(6).

Because the trial court held that GMAC’s 1997 UCC-1 lapsed, and was therefore junior to LaSalle’s 2002 UCC-1 against to all the FF&E, its ruling never reached the separate conflict between LaSalle’s Trust Deed and GMAC’s UCC-1

against the fixtures. This Part V addresses the separate fixtures conflict in the unlikely event that this Court reverses the trial court's more general ruling.

B. LaSalle Has Initial Priority In Fixtures. The starting point for assessing priorities in fixtures is that LaSalle perfected by recording its Trust Deed on November 1, 1996 (R.1410, ¶1), while GMAC perfected by filing with the Department of Commerce on December 23, 1997 (R.888-890) and by recording a fixture filing with Salt Lake County on December 29, 1997 (R.12, ¶59; R.283, ¶59). Initial priority is accorded to LaSalle because it was first to perfect. Utah Code §70A-9a-322(1)(a); Former Utah Code §70A-9-312(5)(a).

C. GMAC Must Prove PMSI Super-Priority. Although LaSalle perfected first, GMAC might receive PMSI super-priority, but only if GMAC proves that it met all the statutory requirements of Utah Code §70A-9a-334(4) (emphasis added):

... a perfected security interest [by GMAC] in fixtures has priority over a conflicting interest of an encumbrancer¹⁴ or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

- (a) the security interest is a purchase-money security interest;
- (b) the interest of the encumbrancer or owner arises before the goods become fixtures; and
- (c) the security interest is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter.

See also §70A-9a-324(1). *See also* Former §70A-9-313(4)(a) and §70A-9-312(4).

LaSalle acknowledges that all of the above elements are met, including the PMSI nature of GMAC's loan, except that LaSalle denies GMAC has established any

¹⁴ Under its Trust Deed, LaSalle is an "encumbrancer." Utah Code §70A-9a-102(32).

record that its fixture filing was recorded “before the goods became fixtures or within 20 days thereafter.”

Because GMAC’s fixture filing was recorded December 29, 1997, it can only claim super-priority in goods that became fixtures on or after December 9, 1997. GMAC, however, has never established when any particular goods became fixtures. On the record it created, GMAC cannot receive super-priority because it offered no *competent* evidence that it perfected within the 20-day rule. Alternatively, if the Court rules that GMAC’s affidavits were adequate, then the total evidence creates a genuine issue of material fact on whether §70A-9a-334(4)(c)’s 20-day window was satisfied.

D. GMAC Lacks PMSI Super-Priority Because It Cannot Prove That It Satisfied the 20-Day Filing Window.

PMSI status (which LaSalle admits) is not enough. GMAC must also prove that it perfected within the 20-day filing window. The trial court’s record on the 20-day window issue evolved as follows:

1. GMAC’s opening memorandum for its cross-motion for summary judgment asserted perfection by filing within 20 days of Qinn taking possession of the goods. (R.864, ¶6; R.865, ¶A). GMAC cited the Affidavit of L. Bivona, ¶8.

2. Ms. Bivona’s Affidavit, ¶8 (R.893, ¶8), stated, in full:

GMACCM filed the financing statement within 20 days after Qinn took possession of the Equipment. This Affidavit is based upon my own personal knowledge and the language contained in the Lease and all accompanying documents, which I have reviewed and of which I am familiar. Further Affiant Sayeth Not.

3. LaSalle's memorandum in opposition pointed out that "Ms. Bivona's conclusory testimony is inadmissible because it is wholly lacking in foundation."

(R.1258). Specifically:

GMAC's sole testimony parrots the 20-day rule in §70A-9a-324(1), but provides no foundation for its bare conclusion that the deadline was met. Ms. Bivona never actually says when Qinn received possession of the Equipment. Nor does she offer any the [sic] basis by which she calculates that Qinn obtained possession less than 20 days before the UCC-1 filing. Worst of all, she admits that her testimony is not based solely on personal knowledge, but also on unspecified hearsay statements in unspecified documents and an unspecified portion of the Lease.

In short, there is no foundation for what Ms. Bivona personally knows; there is no disclosure of which portions of her critical conclusion is based on personal knowledge and which portions are based on her reading of unidentified hearsay. Her affidavit is inadmissible on the 20-day issue.

GMAC has the burden of establishing its super-priority. Apparently, it cannot testify with specificity exactly when Qinn obtained possession of the Equipment. As a matter of law, GMAC is not entitled to PMSI super-priority because it is unable to proffer prima facie admissible evidence for the rather simple but critical element of its priority claim...

(R.1258-1259. *See also* R.1255, ¶D(ii)).

4. LaSalle's memorandum in opposition also pointed out that the documents attached to GMAC's memorandum actually evidenced Qinn's receipt of the goods *more than* 20 days before GMAC's UCC-1 filing. (R.1259, ¶2. *See also* R.1255, ¶D(ii)). First, GMAC's "Lease" is dated December 1, 1997. (R.869). Second, attached to the Lease is a signed "Delivery and Acceptance Certificate" dated December 1, 1997 that represents the goods were delivered on an unspecified *earlier*

date. (R.887). And third, GMAC's UCC-1 attaches a property list with a November 10, 1997 fax date across the top. (R.888-890).

5. GMAC attempted to cure the defect in its evidentiary record by submitting a new Affidavit from John Hopkins (R.1316-1319) with its reply memorandum. Mr. Hopkins' relevant testimony was as follows:

6. On or about December 18, 1997 and January 22, 1998, I received from Qinn Delivery and Acceptance Certificates, indicating that Qinn received delivery of the furniture, fixtures and equipment as of those dates. True and correct copies of the Delivery and Acceptance Certificates are attached hereto as Exhibit "B." ¹⁵

7. Between December 1997 and January 1998, I also received from Qinn copies of purchase orders indicating that Qinn received delivery or would receive delivery of the furniture, fixtures, and equipment from various vendors on or after the following dates: December 18, 1997, January 12, 1998, January 13, 1998, January 16, 1998, and January 28, 1998. True and correct copies of the purchase orders are attached hereto as Exhibit "C."

(R.1318, ¶¶6-7).

6. Again, Mr. Hopkins' testimony failed to establish an admissible evidentiary record that GMAC ever met the 20-day filing deadline. Mr. Hopkins satisfactorily authenticated the Delivery Certificates and Purchase Orders attached to his affidavit (R.1339-1383), but his attempt to testify to what those documents say (and in fact grossly overstate) was inadmissible hearsay.

7. Thus, the only admissible evidence are the documents actually attached to Mr. Hopkins' and Ms. Bivona's Affidavits. Unfortunately for GMAC, those

¹⁵ Mr. Hopkins' Affidavit omitted a third Delivery and Acceptance Certificate that was dated December 1, 1997-- *i.e.* outside the 20-day window. (R.887).

document do not actually disclose any delivery or installation dates. Worse, the Delivery Certificates (R.887; R.1339-1340) actually represent that delivery and installation happened on unspecified dates *before* the documents' facial dates of December 1, 1997, December 18, 1997 and January 22, 1998. They state the property "has been delivered," that Qinn has already "examined and/or tested" each item, and most significantly that "all installation or other work necessary prior to the use thereof by lessee has been completed" to satisfaction. Without showing actual delivery and installation dates, GMAC failed to offer prima facie evidence of having satisfied the 20-day filing window.

Moreover, the Delivery Certificates do not contain lists of which goods they refer to. Thus, there is no way of knowing which goods were delivered before December 1, 1997 (definitely outside the 20-day window), as opposed to some unknown date before January 22, 1998 (possibly outside the 20-day window).

The Purchase Orders are of no greater help to GMAC. Despite Mr. Hopkins' inadmissible effort to restate the documents' facial content, the purchase orders do not say that "Qinn received delivery or would receive delivery ... from various vendors on or after the following dates: December 18, 1997, January 12, 1998, January 13, 1998, January 16, 1998, and January 28, 1998." (R.1318, ¶7). Rather they have two sets of dates: (i) those identified by Mr. Hopkins in the "approved by" signature blocks, and (ii) another set of much earlier "P.O. Dates" including December, November, October and even September 1997. The only logical reading of those documents is that the

purchase orders were placed before the Lease was signed, and were then later “approved” for payment. In any event, the purchase orders simply do not disclose actual delivery dates.¹⁶

Therefore, GMAC never offered admissible prima facie evidence that it complied with the 20-day window requirement in §70A-9a-334(4)(c). As a matter of law, GMAC’s December 23, 1997 UCC-1 cannot establish PMSI super-priority over LaSalle’s November 1, 1996 Trust Deed in fixtures. This Court should affirm the trial court’s ruling as to fixtures, even if it reverses as to furniture and equipment.

Alternatively, if GMAC’s claim to PMSI super-priority in fixtures is not denied as a matter of law, then GMAC’s compliance with the 20-day filing window is a genuine issue of material fact that should be remanded to the trial court.

Again, however, this issue of PMSI super-priority does not arise if this Court affirms the trial court’s ruling that GMAC’s December 23, 1997 UCC-1 lapsed on December 23, 2002.

E. The Applicable Window is Actually Only 10 days, Not 20.

The foregoing arguments all referred to a 20-day PMSI filing window because that is how the issue was briefed to the trial court by both parties. That mutual mindset began when GMAC filed its cross-motion, asserting PMSI super-priority in

¹⁶ LaSalle concedes that of the 42 purchase orders, 10 have “P.O. Dates” within the 20-day window, and thus delivery would not have been made before that window. (R.1356-1357; R.1359; R.1365; R.1371-1373; R.1380-1382). The items listed in those purchase orders (to the extent they are fixtures) are the only items for which GMAC could have super-priority over LaSalle’s Trust Deed.

all of the FF&E. The *general* rule for PMSI filings is indeed 20 days, and that is what the parties briefed. (See current Utah Code §70A-9a-324(1); and see Former Utah Code §70-9-312(4) which replaced the UCC's 10-day period with a 20-day period).

By the end of the parties' briefings, however, PMSI super-priority was no longer relevant to the *furniture and equipment* -- *i.e.*, if GMAC's 1997 UCC-1 never lapsed, then GMAC has priority over LaSalle's 2002 UCC-1 without having to invoke PMSI status. At this stage, PMSI status is material only to the *fixtures* -- *i.e.*, whether GMAC's 1997 fixture filing gets super-priority over LaSalle's 1996 Trust Deed.¹⁷

The general rule for PMSI filings against most collateral is superseded by a specific rule for fixtures. The current rule for PMSI fixture filings is 20 days. Utah Code §70A-9a-334(4)(c). When GMAC filed its fixture filing in 1997, however, Utah law granted only a *10-day window* for PMSI fixture filings. Former Utah Code §70A-9-313(4)(a)(emphasis added) provided:

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer ... of the real estate where: (a) the security interest is a purchase money security interest ... [and] the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter....

GMAC's claim to super-priority in fixtures is governed by Former §70A-9-313(4)(a). That was the statute in place when GMAC had to act in a timely fashion.

¹⁷ This narrowing of the relevance of the PMSI issue was pointed out to the trial court in LaSalle's sur-reply (R.1673, ¶n1; R.1674, ¶1(a), ¶1(b) & ¶n.2) and at the hearing, R.2003, Tr. 14:4-21. Neither party, however, redirected the court's attention to Former §70A-9-313(4)(a) (10 days for fixture PMSI) instead of Former §70A-9-312(4) (20 days for PMSI in general).

At the expiration of that 10-day window, GMAC's and LaSalle's priorities became "established" and were thereafter unaffected by the longer window when Revised Article 9 took. Current Utah Code §70A-9-709(1). Moreover, unlike when GMAC let its 1997 UCC-1 lapse by failing to file a continuation statement, there has been no post-effective date event of legal significance to affect the "established" priority of LaSalle's 1996 Trust Deed.

Because GMAC's fixture filing was recorded with the county on December 29, 1997 (R.12, ¶59; R.283, ¶59), GMAC must prove that the goods first became fixtures on or after December 19, 1997.

Other than correcting applicable statutory window from 20-days to 10-days, LaSalle's argument on how GMAC failed to cite competent admissible evidence of timely filing to support its claim of super-priority remains unaffected.

CONCLUSION

Appellee LaSalle Bank National Association, as Trustee, respectfully requests this Court to affirm the trial court's September 20, 2004 Order and Judgment.

DATED this 23rd day of March, 2005.

A handwritten signature in black ink, appearing to read "Robert Palmer Rees", is written over a horizontal line.

Daniel W. Anderson

Robert Palmer Rees

FABIAN & CLENDENIN

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LaSalle Bank National Association, as Trustee

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2005, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE LASALLE BANK NATIONAL ASSOCIATION** to be mailed, first class postage pre-paid, to the following:

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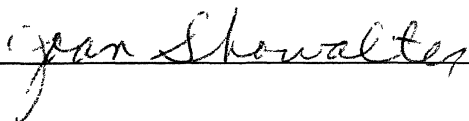
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Tab A

§ 9-515. Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement.

OFFICIAL COMMENT

1. **Source.** Former Section 9-403(2), (3), (6).

2. **Period of Financing Statement's Effectiveness.** Subsection (a) states the general rule: a financing statement is effective for a five-year period unless its effectiveness is continued under this section or terminated under Section 9-513. Subsection (b) provides that if the financing statement relates to a public-finance transaction or a manufactured-home transaction and so indicates, the financing statement is effective for 30 years. These financings typically extend well beyond the standard, five-year period. Under subsection (f), a financing statement filed against a transmitting utility remains effective indefinitely, until a termination statement is filed. Likewise, under subsection (g), a mortgage effective as a fixture filing remains effective until its effectiveness terminates under real-property law.

3. **Lapse.** When the period of effectiveness under subsection (a) or (b) expires, the effectiveness of the financing statement lapses. The last sentence of subsection (c) addresses the effect of lapse. The deemed retroactive unperfection applies only with respect to purchasers for value; unlike former Section 9-403(2), it does not apply with respect to lien creditors.

EXAMPLE 1: SP-1 and SP-2 both hold security interests in the same collateral. Both security interests are perfected by filing. SP-1 filed first and has priority under Section 9-322(a)(1). The effectiveness of SP-1's filing lapses. As long as SP-2's security interest remains perfected thereafter, SP-2 is entitled to priority over SP-1's security interest, which is deemed never to have been perfected as against a purchaser for value (SP-2). See Section 9-322(a)(2).

EXAMPLE 2: SP holds a security interest perfected by filing. On July 1, LC acquires a judicial lien on the collateral. Two weeks later, the effectiveness of the financing statement lapses. Although the security interest becomes unperfected upon lapse, it was perfected when LC acquired its lien. Accordingly, notwithstanding the lapse, the perfected security interest has priority over the rights of LC, who is not a purchaser. See Section 9-317(a)(2).

4. **Effect of Debtor's Bankruptcy.** Under former Section 9-403(2), lapse was tolled if the debtor entered bankruptcy or another insolvency proceeding. Nevertheless, being unaware that insolvency proceedings had been commenced, filing offices routinely removed records from the files as if lapse had not been tolled. Subsection (c) deletes the former tolling provision and thereby imposes a new burden on the secured party: to be sure that a financing statement does not lapse during the debtor's bankruptcy. The secured party can prevent lapse by filing a continuation statement, even without first obtaining relief from the automatic stay. See Bankruptcy Code Section 362(b)(3). Of course, if the debtor enters bankruptcy before lapse, the provisions of this Article with respect to lapse would be of no effect to the extent that federal bankruptcy law dictates a contrary result (e.g., to the extent that the Bankruptcy Code determines rights as of the date of the filing of the bankruptcy petition).

5. **Continuation Statements.** Subsection (d) explains when a continuation statement may be filed. A continuation statement filed at a time other than that prescribed by subsection (d) is ineffective, see Section 9-510(c), and the filing office may not accept it. See Sections 9-520(a), 9-516(b). Subsection (e) specifies the effect of a continuation statement and provides for successive continuation statements.

Tab B

§ 9-709. Priority.*

OFFICIAL COMMENT

1. Law Governing Priority. Ordinarily, this Article determines the priority of conflicting claims to collateral. However, when the relative priorities of the claims were established before this Article takes effect, former Article 9 governs.

EXAMPLE 1: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ("account"). SP-1 fails to file a financing statement. This Article takes effect on July 1, 2001. Thereafter, on August 1, 2001, D creates a security interest in the same account in

favor of SP-2, who files a financing statement. This Article determines the relative priorities of the claims. SP-2's security interest has priority under Section 9-322(a)(1).

EXAMPLE 2: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ("account"). SP-1 fails to file a financing statement. In 2000, D creates a security interest in the same account in favor of SP-2, who likewise fails to file a financing statement. This Article takes effect on July 1, 2001. Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 governs priority, and SP-1's security interest has priority under former Section 9-312(5)(b).

EXAMPLE 3: The facts are as in Example 2, except that, on August 1, 2001, SP-2 files a proper financing statement under this Article. Until August 1, 2001, the relative priorities of the security interests were established before the effective date of this Article, as in Example 2. However, by taking the affirmative step of filing a financing statement, SP-2 established anew the relative priority of the conflicting claims after the effective date. Thus, this Article determines priority. SP-2's security interest has priority under Section 9-322(a)(1).

As Example 3 illustrates, relative priorities that are "established" before the effective date do not necessarily remain unchanged following the effective date. Of course, unlike priority contests among unperfected security interests, some priorities are established permanently, e.g., the rights of a buyer of property who took free of a security interest under former Article 9.

One consequence of the rule in subsection (a) is that the mere taking effect of this Article does not of itself adversely affect the priority of conflicting claims to collateral.

EXAMPLE 4: In 1999, SP-1 obtains a security interest in a right to payment for lottery winnings (a "general intangible" as defined in former Article 9 but an "account" as defined in this Article). SP-1's security interest is unperfected because its filed financing statement covers only "accounts." In 2000, D creates a security interest in the same right to payment in favor of SP-2, who files a financing statement covering "accounts and general intangibles." Before this Article takes effect on July 1, 2001, SP-2's perfected security interest has priority over SP-1's unperfected security interest under former 9-312(5). Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 continues to govern priority after this Article takes effect. Thus, SP-2's priority is not adversely affected by this Article's having taken effect.

Note that were this Article to govern priority, SP-2 would become subordinated to SP-1 under Section 9-322(a)(1), even though nothing changes other than this Article's having taken effect. Under Section 9-704, SP-1's security interest would become perfected; the financing statement covering "accounts" adequately covers the lottery winnings and complies with the other perfection requirements of this Article, e.g., it is filed in the proper office.

EXAMPLE 5: In 1999, SP-1 obtains a security interest in a right to payment for lottery winnings—a "general intangible" (as defined under former Article 9). SP-1's security interest is unperfected because its filed financing statement covers only "accounts." In 2000, D creates a security interest in the same right to payment in favor of SP-2, who makes the same mistake and also files a financing statement covering only "accounts." Before this Article takes effect on July 1, 2001, SP-1's unperfected security interest has priority over SP-2's unperfected security interest, because SP-1's security interest was the first to attach. See former Section 9-312(5)(b). Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 continues to govern priority after this Article takes effect. Although Section 9-704 makes both security interests perfected for purposes of this Article, both are unperfected under former Article 9, which determines their relative priorities.

2. Financing Statements Ineffective under Former Article 9 but Effective under This Article. If this Article determines priority, subsection (b) may apply. It deals with the case in which a filing that occurs before the effective date of this Article would be ineffective to perfect a security interest under former Article 9 but effective under this Article. For purposes of Section 9-322(a), the priority of a security interest that attaches after this Article takes effect and is perfected in this manner dates from the time this Article takes effect.

EXAMPLE 6: In 1999, SP-1 obtains a security interest in D's existing and after-acquired instruments and files a financing statement covering "instruments." In 2000, D grants a security interest in its existing and after-acquired accounts in favor of SP-2, who files a financing statement covering "accounts." After this Article takes effect on July 1, 2001, one of D's account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in Section 9-322(a), SP-1 would have priority in the instrument, which constitutes SP-2's proceeds. SP-1's filing in 1999 was earlier than SP-2's in 2000. However, subsection (b) provides that, for purposes of Section 9-322(a), SP-1's priority dates from the time this Article takes effect (July 1, 2001). Under Section 9-322(b), SP-2's priority with respect to the proceeds (instrument) dates from its filing as to the original collateral (accounts). Accordingly, SP-2's security interest would be senior.

Subsection (b) does not apply to conflicting security interests each of which is perfected by a pre-effective-date filing that was not effective under former Article 9 but is effective under this Article.

EXAMPLE 7: In 1999, SP-1 obtains a security interest in D's existing and after-acquired instruments and files a financing statement covering "instruments." In 2000, D grants a security interest in its existing and after-acquired instruments in favor of SP-2, who files a financing statement covering "instruments." After this Article takes effect on July 1, 2001, one of D's account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in Section 9-322(a), SP-1 would have priority in the instrument. Both filings are effective under this Article, see Section 9-705(b), and SP-1's filing in 1999 was earlier than SP-2's in 2000. Subsection (b) does not change this result.