13-2187

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: MOTORS LIQUIDATION COMPANY, et al.,

Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY,

Plaintiff-Appellant,

- v.-

JP MORGAN CHASE BANK, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF OF COMMERCIAL FINANCE ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE JPMORGAN CHASE BANK, N.A.'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, the Commercial Finance Association certifies that it is a tax exempt organization that has no parent corporation and that there is no publicly traded corporation that owns ten percent (10%) or more of its stock.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY OF AMICUS CURIAE[1]

This amicus curiae brief is filed by Commercial Finance Association ("CFA") in support of the Petition for Rehearing En Banc ("Petition") of Defendant-Appellee JPMorgan Chase Bank, N.A., individually and as Administrative Agent for various lenders party to a Term Loan Agreement ("JPMorgan").

CFA is the principal U.S. trade association for financial institutions that provide asset-based financing and factoring services to commercial borrowers. Its nearly 300 members include substantially all of the major money-center banks, regional banks, and other large and small commercial lenders engaged in asset-based lending. Financing by CFA members comprises a substantial portion of the United States credit market, approaching $620 billion in outstanding loans. Much of this financing goes to U.S. small- and medium-sized businesses that are the backbone of the U.S. economy, providing them with vital working capital to run their businesses, create jobs and grow. For many of these borrowers, asset-based lending is the only form of financing available to them.[2]

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[1] Pursuant to Second Circuit Local Rule 29.1, it is hereby confirmed that (i) no party's counsel has authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (iii) no person or entity, other than the Commercial Finance Association, as amicus curiae, made a monetary contribution to the preparation or submission of this brief. JPMorgan Chase Bank, N.A. is a member of CFA.

[2] Additional information about CFA may be found at www.cfa.com.

In an asset-based loan, a lender extends credit to a borrower based on the value of, and secured by, the borrower's assets, principally receivables and inventory. Although asset-based lending exists to some extent in countries other than the U.S., it thrives in the U.S. because the U.S. has a legal regime, embodied in Article 9 of the Uniform Commercial Code (the "UCC"), that allows for the efficient creation and perfection of security interests in receivables, inventory and other personal property. The UCC is at the heart of this case, and CFA's members utilize and rely upon the UCC every day.

For these reasons, CFA respectfully submits that its views will assist the Court. As set forth below, rehearing is warranted because it involves matters of exceptional commercial importance. See F.R.A.P. 35(a)(2).

STATEMENT OF THE CASE

The facts of this case are not in dispute and are sufficiently set forth in the parties' briefs. In essence, although the transaction underlying this dispute only involved the Synthetic Lease and its repayment by GM, a UCC-3 termination statement for the unrelated $1.5 billion Term Loan was also erroneously filed by JPMorgan's third-party service providers, along with the UCC-3 termination statements that related to the Synthetic Lease, even though that additional filing was clearly outside the authority granted to JPMorgan in its role as agent under the credit agreement governing the Term Loan. This error went unnoticed until GM's bankruptcy. At that point, the error was discovered and seized upon by Plaintiff-

Appellant Official Committee of Unsecured Creditors of Motors Liquidation Company (the "Committee"). If the panel's decision stands, the Committee will reap a $1.5 billion windfall at the expense of JPMorgan (which was relying on its third-party service providers), even though there is no evidence that any of the Committee's members, or any other individual or entity for that matter, relied upon the erroneous UCC-3 filing in making decisions relating to the extension of credit to, or conducting any other business with, GM. Since one of the primary purposes of the UCC is to provide for the efficient extension of credit and perfection of security interests, these policies are endangered by the novel decision of this Court.

REASONS FOR GRANTING PETITION FOR REHEARING

JPMorgan's Petition for Rehearing should be granted because the panel's decision has profound public policy ramifications that will affect the cost and availability of commercial credit to U.S. companies.

A. The Protections Afforded to Secured Creditors by the UCC

The panel's decision endangers the reliability and dependability of the UCC regime by eroding the protection that the UCC affords to secured creditors against unauthorized terminations of their financing statements. This protection is grounded in a policy decision that, as between an existing secured creditor who has already extended credit, and a prospective secured creditor who has not yet extended credit, protection should be afforded to the former.

The UCC implements this policy by placing the risk on the prospective creditor as to whether a termination statement revealed by a UCC search was "authorized by the secured party." Consistent with the essence of the UCC as a notice-filing system, a prospective creditor cannot rely on the fact that a filed termination statement effectively terminated the financing statement to which it relates without conducting diligence (such as contacting the secured party).

Rather, the relevant UCC provisions are intended to ensure that the existence of a filed termination statement merely puts a prospective new creditor on notice that the UCC-1 financing statement to which it relates may have been terminated. While the prospective creditor has no duty to inquire if the filing of the termination was authorized by the secured party of record, prior to the panel's decision, the prospective new creditor was the only party that bore the risk that the filing was unauthorized. A prospective creditor who failed, prior to extending its own credit, to verify that the termination statement was authorized, did so at its peril.

Thus, an existing secured creditor is relieved of the burden (and the attendant cost and effort) of continually conducting UCC searches to assure itself that third-parties have not, either intentionally or inadvertently, filed termination statements with respect to its security interests.

B. <u>The Impact of the Panel's Decision</u>

The panel's decision does not relieve a diligent prospective creditor from the risk of lending in the face of termination statements that it has not investigated. To

be safe, the prospective new creditor should inquire whether the termination statements were authorized. Unlike a mortgage on real property in which the mortgage itself is the evidence of the interest in real property, a UCC filing statement only relates to perfection of an interest granted in another, unfiled, document. Therefore, the original lender will either respond to a diligent prospective new lender that, in the case of a termination statement, the termination statement: (i) was authorized and the original lender was repaid; (ii) was unknown to the original lender and the original lender was not repaid; or (iii) is known to the original lender, but was unauthorized and the original lender was not repaid.

Practically speaking, if a diligent prospective secured creditor makes the foregoing inquiry and is told the loan is still outstanding, it will not fund the new loan even if it is aware of circumstances indicating that the erroneously filed termination statement was "authorized" under the Delaware Supreme Court's new standard. By lending in the face of what is claimed to be an unauthorized UCC termination statement, the prospective lender would invite certain litigation, and no reasonable secured lender would act in that manner.

While the panel's decision does nothing to reward the diligent new lender for its efforts as envisioned by the UCC's structure as a notice-filing statute, the decision (i) increases costs to the original lender (by imposing upon it the cost of monitoring its service providers, and to U.S. borrowers, to whom this cost will ultimately be shifted in the form of increased interest costs or decreased credit

availability), and (ii) rewards prospective creditors who choose not to conduct diligence with respect to the authorization of filed termination statements (by insulating the prospective creditors from the risk that an inadvertently filed termination statement would be deemed unauthorized).

Under the panel's decision, in order to protect itself against the risk that third-party service providers will inadvertently file unauthorized termination statements, a lender must constantly search the filing office records to verify the priority of its security interests in every jurisdiction in which it lends money and to double-check that none of its third-party service providers have inadvertently filed a termination statement relating to a totally unrelated transaction. That represents a reversal from the clear intent of the UCC, under which the risk rests exclusively with a prospective lender to ensure that any termination statements ahead of it are authorized before it extends any of its own credit.

Although the panel's decision presumably has left this protection intact with respect to third-parties who have willfully and fraudulently filed unauthorized termination statements, it has eliminated this protection with respect to a large class of third-parties: lawyers and other third-party service providers engaged by a secured party with respect to other, totally unrelated, transactions.

Banks and other lenders routinely engage lawyers and other service providers to assist in connection with financing transactions. In the case of large lenders such as JPMorgan, this could be the case with respect to hundreds of

transactions or more at any given point in time. As in the case at hand, it is typical for the service provider to be engaged in connection with only one or more specific transactions, in which event the service provider would have no actual authority to represent the lender in any other transactions. Moreover, because (as is the case here) no party to the transaction assumes that the service provider has any authority as to any other transaction (typically no one would even be thinking about any other transaction), issues of apparent or implied authority are irrelevant.

Yet, under the panel's ruling, an existing secured lender now bears the risk that one or more of these service providers may have inadvertently filed a termination statement relating to a totally unrelated transaction, even if no prospective lender or other creditor has relied to its detriment on the mistake. To address this new risk, secured creditors will be required to constantly monitor their third-party service providers to double-check their work, or to conduct frequent UCC searches, to assure themselves that none of these service providers have inadvertently filed a termination statement with respect to a completely unrelated transaction. The additional risk to secured parties flowing from the panel's decision, and the attendant costs incurred in mitigating that additional risk, will drive up the cost or reduce the availability of credit, or both, for U.S. companies.

C. The Panel's Decision Provides a Windfall for Prospective Creditors Who Are Not Diligent Prior to Lending

The panel's decision provides a windfall for prospective creditors who fail to conduct the diligence mandated by the UCC and unsecured creditors who agree to extend credit without security. In so doing, the decision contravenes the provisions of the UCC and the policy that underlies it, with severe adverse commercial consequences for U.S. lenders and U.S. borrowers alike.

CONCLUSION

For the reasons set forth herein, JPMorgan's Petition for Rehearing should be granted because it presents a question of exceptional commercial importance and a change in law, which warrants review en banc.

Dated: February 11, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on February 11, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 11, 2015

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