

CHECK TWICE, FILE ONCE

The Billion Dollar Mistake

By: Shawn J. Sefret

Imagine the scene. You are a loan officer for the lead bank in a series of nine figure syndicated loans. Each loan facility has a large portfolio of properties. The Collateral in the portfolio changes seemingly every day, and always under a tight deadline. Just yesterday the CFO called at five o'clock. "Hey Jim, what's the status of the releases for our sale of the Springfield property?" "What sale?" you ask. "You know. The Springfield property. We're closing at nine tomorrow. Didn't I tell you?" You immediately call bank counsel, whose night you are about to ruin. Counsel says they will pull the file and get you the documents as soon as they can. You arrive at the office at seven the next morning and check your e-mail. There it is, with a time stamp of 12:38 a.m. -- the message from counsel with the partial release and UCC-3 termination statement. No obvious mistakes, so you print them out, sign the release, and have the package messengered to settlement. The CFO calls later that day and thanks you profusely. All is good. Or is it? You wake up that night with a feeling of dread. Did that release say Springfield (the \$10,000,000 property) or Summerfield (the \$60,000,000 property)? You convince yourself that it was probably right and, if it wasn't, it was a simple mistake and can be fixed. Before you can call counsel, you check the online version of your local paper and see the headline. Your customer filed for bankruptcy. This can't be good.

A little melodramatic? Perhaps. No mistake is fatal, right? Not necessarily, according to the recent decision in *In re: Motors Liquidation Co.*, No. 13-2187 (2d Cir. Jan. 21, 2015). In that case, one of the largest U.S. banks was the administrative agent for two syndicated loan facilities advanced to General Motors, the first in 2001 for a \$350,000,000 synthetic lease facility and the second in 2006 for a \$1,500,000,000 term loan. Each facility was secured by numerous properties. In 2008, General Motors notified its counsel, a large New York firm, that the synthetic lease facility would be paid off, and requested that counsel draft the necessary release documents. As with any good legal thriller, a black comedy of errors ensued. The thorough paralegal assigned the task of conducting the lien search identified three financing statements, not realizing that one of the financing statements perfected the lien for the later term loan facility. General Motors' counsel prepared UCC-3 termination statements for all three liens and circulated them for review. Despite review by General Motors, its counsel, the administrative agent, and the administrative agent's counsel, the term loan termination statement was recorded and no one noticed the error until the General Motors bankruptcy was in full swing. In the bankruptcy proceedings, the unsecured creditors argued that the term loan syndication was now unsecured, stripping the syndication of its status as a secured creditor. The administrative agent argued that it had not intended to release the lien in connection with the term loan and, therefore, the inadvertent release was a nullity. On appeal, the Second Circuit disagreed, holding that the administrative agent's intention was irrelevant. Since the administrative agent and its counsel explicitly instructed General Motors' counsel to file the termination statement, the court ruled that such filing was authorized by the secured party regardless of the unintended effect.

What can we learn from this cautionary tale? It cannot simply be the obvious need to take great care in any loan transaction. Representatives of major U.S. corporations and their sophisticated New York counsel were all involved in the unfortunate chain of events described in *Motors Liquidation*. Each was no doubt accomplished in their profession and cautious by nature, yet a billion dollar mistake still

occurred. What could have been done to minimize the possibility of the mistake? The answer may lie in the UCC-1 financing statement. For all of the power it yields, the standardized form UCC-1 financing statement adopted for use in most jurisdictions is surprisingly plain. There is, however, a field entitled "Optional Filer Reference Data." While the opinion in *Motors Liquidation* does not describe the substance of the financing statement inadvertently terminated, perhaps if this field contained information as basic as "\$1,500,000,000 Term Loan," the fact that it had no relation to the synthetic loan facility would have been noticed by one of the many people who presumably played a role in the unfortunate drama. Even in billion dollar transactions, common sense and simple organizational practice has its place.

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