New York Commercial Lending Law

Leonard Lee Podair
Hahn & Hessen LLP
New York, New York

Contents

New York Commercial Lending Law

Leonard Lee Podair
Hahn & Hessen LLP
New York, New York

Introduction

This chapter is intended to provide commercial lenders contemplating the extension of credit to New York borrowers with an overview of the various provisions of New York law that affect commercial lending in New York. This chapter does not address New York law governing consumer lending transactions or federal law. Given the breadth and complexity of the topics covered, this chapter does not deal comprehensively with every issue that may arise in the context of a commercial lending transaction, and lenders should not rely solely on this chapter for answers to questions involving the application of New York law to a specific set of facts. Should a lender have a particular question about New York lending law, please contact any of our New York attorneys for additional advice.

I. Basic Legal Structure

A. Administrative Law

New York administrative agencies are created by the state legislature and also by the legislative bodies of cities, counties, towns, and villages. The New York Secretary of State has the duty to prepare a master compilation of all codes, rules, and regulations known as the Official Compilation of Codes, Rules, and Regulations of the State of New York (N.Y. Comp. Codes R. & Regs.).

New York Civil Practice Law and Rules (N.Y. C.P.L.R.) article 78 is the principal vehicle in New York for judicial review of administrative action. The State Administrative Procedure Act authorizes a person to submit a petition under N.Y. C.P.L.R. article 78 for judicial review of a declaratory ruling by an agency with respect to the applicability of any rule or statute enforceable by the agency.

B. Arbitration

The legality of arbitration agreements has long been recognized under the substantive law of New York. The enforceability of arbitration agreements is

addressed in N.Y. C.P.L.R. § 7501. This statute limits enforceability to written agreements to arbitrate. Parties to a commercial transaction will not be held to have chosen arbitration as the mode of resolving their disputes absent an express, unequivocal agreement. A New York court may not, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law. A valid and enforceable agreement to arbitrate is an agreement to "binding" arbitration because the decision of the arbitrator is final and is generally not subject to appellate or other judicial review even when errors of law are committed. Schine Enterprises v. Real Estate Portfolio, 26 N.Y.2d 799 (1970).

Questions can arise concerning the enforceability of arbitration clauses in bankruptcy proceedings. While the Federal Arbitration Act provides that written agreements to arbitrate are "valid, irrevocable, and enforceable," the Supreme Court has acknowledged that the act may be overridden where there is "inherent conflict" between arbitration and the purposes of the Bankruptcy Code. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

Some bankruptcy courts addressing arbitrability characterize proceedings, based on the jurisdictional provisions of 28 U.S.C. section 157, as "core" or "noncore." Courts do not have discretion to decline enforcement of arbitration agreements relating to noncore proceedings. However, if the proceeding is labeled core and would conflict with the underlying purposes of the Bankruptcy Code, the court has discretion not to send the case to arbitration. *See In re* Electric Machinery Enterprises, Inc., 479 F.3d 791 (11th Cir. 2007). Other courts have rejected the core/non-core distinction, focusing instead on whether the cause of action being asserted derives from the debtor or derives from the Bankruptcy Code. *See In re* National Gypsum Co., 118 F.3d 1056 (5th Cir. 1997); *In re* Mintze, 434 F.3d 222 (3d Cir. 2006). In National Gypsum, debtor sought to invoke a discharge injunction pursuant to section 524(a) of the code. The court held that the proceeding was Bankruptcy Code derived and refused to send the dispute to arbitration. The Second Circuit appears to follow the core/noncore framework. *See* MBNA America, N.A. v. Hill, 436 F.3d 104 (2d Cir. 2006); Pacific Employers Ins. Co. v. Agway, 2008 U.S. Dist. LEXIS 8433.

The sole grounds for challenging an arbitration award, codified in N.Y. C.P.L.R. section 7511, include corruption, fraud, or misconduct of the arbitrator; partiality of an arbitrator chosen as neutral; exceeding the powers granted to the arbitrator; and failure to follow the procedural rules of N.Y. C.P.L.R. article 75. An application to vacate or modify an award must be made by a party within ninety days after the award's delivery to the party seeking vacatur or modification. Under N.Y. C.P.L.R. section 7511, a court will only modify the award if (1) there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; (2) the arbitrators awarded on a matter not submitted to them and the award may be corrected without affecting the merits; or (3) the award is imperfect in a matter of form not affecting the merits of the controversy.

The filing of a notice of intention to arbitrate with the arbitrator following the service of notice on the other party in the controversy will initiate arbitration. The notice of intention specifies the controversy, the arbitrator, and the written arbitration agreement giving rise to the remedy, and notifies the adversary that any objection to the matter proceeding to arbitration must be made within twenty days after receipt of the notice. N.Y. C.P.L.R. § 7503(c). If the party receiving the notice believes that the matter is not arbitrable, it may within twenty days of the receipt of the notice institute a special proceeding to stay arbitration under N.Y. C.P.L.R. section 7503(c).

In New York, even though a matter is arbitrable, the provisional remedies of attachment and preliminary injunction are available while arbitration proceedings are pending on application to the Supreme Court, but only upon the ground that the arbitration award may be rendered ineffectual without the provisional relief. N.Y. C.P.L.R. § 7502(c).

II. Choice of Law

A. Generally

In place of traditional conflict of law rules, such as those based solely on the place of contracting or place of performance, New York courts adhere to the governmental interest approach. *See* Babcock v. Jackson, 12 N.Y. 2d 473 (1963). This approach departs from the traditional analysis by asking which state has the greatest interest in the outcome of the litigation. The state with the greatest interest will be the state whose law is applied. New York considers five significant contacts from the Restatement (Second) of the Law, Conflict of Laws, including the place of contracting, place of negotiation, place of performance, location of the subject matter of the contract, and domicile of the contracting parties. In making a choice of law determination, the place of contracting and place of performance are given the heaviest weight.

B. Covenants in Contracts

A contractual provision that the law of a particular state will govern all disputes between the parties will be honored, subject to certain exceptions including where the law chosen has no reasonable relationship or sufficient contacts with the transaction or subject matter of the contract or where the most significant contracts of the matter in dispute are in another state. In New York, a contractual choice of law clause in a contract will not be enforced where to do so would violate a fundamental or public policy of the forum state.

C. UCC

The New York Uniform Commercial Code (UCC) provides for express choice of law but only if the transaction bears a reasonable relation to the chosen state.

Under UCC section 1-105(2), where one of the provisions of the UCC specifies the applicable law, that provision governs and a contrary agreement by the parties is effective only to the extent permitted by law.

D. General Obligations Law

The express choice of provision under UCC section 1-105(1) has been largely supplanted, in the case of monetarily large contracts, by New York General Obligations Law section 5-1401(1). This section stipulates that the parties to any contract for $250,000 or more, including those within the UCC, may agree that New York law shall govern their rights and duties regardless of whether the agreement is reasonably related to New York. Statutory exceptions include contracts for labor or personal services and certain contracts under the UCC that are governed by other UCC provisions. UCC § 1-105(2). New York General Obligations Law section 5-1402 further specifies that foreign or nonresident parties to a contract involving not less than one million dollars, who have designated New York law to be applied, may choose to submit to the jurisdiction of New York courts.

III. Comparative Negligence

New York's comparative negligence rules are codified in article 14-A of the N.Y. C.P.L.R. Both the text of the statute and its legislative history suggest that N.Y. C.P.L.R. section 1411 applies with equal force to all tortfeasors, whether negligent or intentional. Case authority, however, is divided about whether the affirmative defenses of comparative negligence may be asserted in response to intentional tort claims including those asserted in commercial and other kinds of nonpersonal injury claims. Many New York courts have invoked the express terms of N.Y. C.P.L.R. article 14-A to apply comparative negligence to intentional tort actions. Yet other courts have adopted the view that an intentional tortfeasor should not be allowed to use N.Y. C.P.L.R. section 1411 as a shield from liability given that intentional misconduct is worse than mere negligence and is typically the direct, primary cause of the plaintiff's damages. No definitive ruling by New York's highest court (the New York State Court of Appeals) has been rendered to date on whether a lender's damages in a commercial tort action will be reduced in proportion to its negligent conduct. However, a recent trend in New York case law, endorsing a broad reading of N.Y. C.P.L.R. section 1411, suggests that comparative fault is available as a defense to intentional tort claims in commercial lending cases. In *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 2000 U.S. Dist. LEXIS 13466 (S.D.N.Y. 2000), the court held that plaintiff's claims of (1) conversion, (2) aiding and abetting conversion, and (3) fraud, aiding and abetting fraud, and conspiracy to commit fraud were subject to comparative negligence defenses under section 1411 and judgment reduction rules for settlement under N.Y.

General Obligations Law section 15-108. *See also* Bank of Brussels Lambert v. Chase Manhattan Bank, N.A., 1999 U.S. Dist. LEXIS 14259 (S.D.N.Y. 1999). What does appear certain, however, from the Lambert and other cases is that comparative negligence will not be allowed as a defense to an intentional tort if plaintiff's negligence bears no causal nexus to the damages alleged.

IV. Contract Law

In New York, common law principles guide basic contract law. New York follows the UCC in the areas of the sale and leasing of goods and secured transactions. All of the UCC articles, except article 6, are in force in New York and are codified in the UCC. New York adopted the UCC's revised article 9 on July 1, 2001.

V. The New York Court System

The Court of Appeals is New York's highest court, composed of a chief judge and six associate judges, each appointed by the Governor to a fourteen-year term. In general, the Court of Appeals hears civil and criminal cases on appeal from other appellate courts. New York's intermediate level appellate court is the Appellate Division of the Supreme Court, which is geographically divided into four departments. It hears appeals from trial courts and has power to review both law and facts in civil and criminal cases. In the First and Second Departments, Appellate Terms were created to hear cases on appeal from the civil and criminal courts of the City of New York.

Often confused by out-of-state practitioners accustomed to the appellation referring to the highest state court, New York's state Supreme Court is a trial court of statewide general jurisdiction, which hears cases that are outside the jurisdiction of other trial courts of limited jurisdiction (such as the Family Courts or Surrogate's Courts). The Supreme Court hears both civil and criminal trials. County Courts are trial courts with jurisdiction over civil law and equity. These courts have original criminal jurisdiction, except in New York City. In New York City, a civil court has jurisdiction of civil matters and equity up to $25,000, and a criminal court has jurisdiction over misdemeanors and violations. Claims for $5000 or less can be brought by individuals in the Small Claims Part of the Civil Court of the City of New York, District Court of Nassau County, or District Court of Suffolk County. While corporations, partnerships, associations, and assignees cannot bring suit in Small Claims Court, they can be sued there. A corporation may authorize an attorney, officer, director, or employee to appear on its behalf to defend the claim. If a judgment debtor fails to pay three or more recorded judgments despite having resources to satisfy them, treble damages may be sought. At the federal level, New York (along with Connecticut and Vermont) is part of the Second Circuit.

VI. Default—Enforcement Remedies

In New York, based on UCC section 9-609, a secured party may take possession by self-help without judicial process if it can be done without a breach of the peace. The secured party may always take possession by replevying the collateral pursuant to judicial process. After default, the secured party may also sell, lease or license collateral either in its condition when taken or after commercially reasonable preparation or processing. Disposition may be either a public auction or private sale. Under article 9 of the UCC, a sale must be made in a commercially reasonable manner. Unless the collateral is perishable or threatens to decline rapidly in value or is of a kind ordinarily sold in a recognized market, notice must be given to the debtor and any sureties on the debt. However, after default, the debtor or surety may waive the right to notice. This notice must be sent within a reasonable time before the sale. The secured party can bring the judicial action and seize the property at the same time. Because all rights and remedies under article 9 are cumulative, the secured creditor is authorized to pursue any remedy until the debt obligation is paid in full.

VII. Disposition of Collateral

The UCC's article 9, adopted by New York, divides collateral into three broad classifications: tangible collateral or goods, intangible or semi-intangible collateral, and proceeds. The characterization of collateral is important because certain rules (such as those for perfecting collateral) depend on the type of collateral involved. The category into which tangible collateral is placed does not depend on the nature of the collateral, but rather on the debtor's primary use of the collateral at the time the security interest attaches.

A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. The well-settled law of New York is that if the repossession and resale are not in compliance with the law of the forum where the deficiency is sought, no suit for any claimed deficiency will lie. UCC section 9-610 provides that the sale or disposition of collateral by a secured party after default may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. The phrase "commercially reasonable," under UCC section 9-610, means that the qualifying disposition of the collateral must be made in a good faith attempt to accomplish disposition to the parties' mutual best advantage. To succeed in a suit for a deficiency judgment, the secured party must carry its burden of establishing the commercial reasonableness of every aspect of the disposition of the collateral.

VIII. Diversity of Citizenship (Relating to Banking Institutions)

Under 28 U.S.C. section 1348, a national bank is deemed a citizen, for jurisdictional purposes, of the state in which it is "located." In a recent decision, the U.S. Supreme Court unanimously held that for purposes of section 1348, the location of a national bank's citizenship is determined solely by the location of its main office, as set forth in the bank's articles of association, not of every state in which the bank maintains a branch office. *See* Wachovia Bank, N.A. v. Schmidt, III, *et al.*, 546 U.S. 303 (2006); Excelsior Funds, Inc. v. JPMorgan Chase Bank, N.A., 470 F. Supp. 2d, 312 (S.D.N.Y. 2006).

IX. Electronic Signatures

Under the Electronic Signatures and Records Act, New York recognizes the validity and enforceability of electronic signatures. The act, codified under article III of the N.Y. State Tech. Law, permits the use of electronic signatures and electronic records in lieu of handwritten signatures and paper documents. *See* N.Y. State Tech. Law § 304. This act does not apply to wills, trusts, health care proxies, or recording instruments affecting real property under article 9 of New York's Real Property Law.

X. Enforcement of Commitments to Pay Attorneys' Fees

New York courts generally enforce contractual clauses for the payment of percentage attorneys' fees in commercial contracts as long as these fees are reasonable. Under New York Banking Law section 108(4)(c)(iii), upon default, a defendant is liable only for reasonable fees necessarily incurred in obtaining judgment for the plaintiff bank. The term "reasonable" attorneys' fees includes "fees for necessary court process" as set forth in New York Banking Law section 108. Before determining whether a fee is reasonable, the court must initially inquire as to whether it was necessary for the bank and its counsel to institute and thereafter pursue court process. This inquiry must be made in each individual case and will often depend on the particulars of that case. In determining what constitutes "reasonable fees," many relevant factors are to be considered such as the time expended, the nature of the services performed, the expertise of the lawyers and the benefits achieved for the client.

In New York, an attorney seeking recovery of attorney's fees pursuant to a contractual provision in a commercial contract may not estimate future collection costs. The value of the services is determined based upon work already

performed. However, this determination is without prejudice to a subsequent action to recover reasonable compensation for work actually performed by counsel in enforcing the judgments.

XI. Fraudulent Conveyances

New York State has adopted the Uniform Fraudulent Conveyance Act without material variation. The New York uniform fraudulent conveyance act is set forth in New York Debtor and Creditor Law sections 270 through 281 (2008). Two minor additions to New York's uniform fraudulent conveyance act can be found in section 273-a, which addresses fraudulent conveyances by defendants to an action and in section 276-a, which provides for the award of attorneys' fees in actions to set aside a conveyance made with actual intent to defraud.

XII. Guarantees

Under New York law, guarantees are governed by the rules of contracts. In New York, a guaranty may consist of a separate written instrument, which refers to another contract or transaction. A valid guaranty must be a written instrument guaranteeing payment of another's debt, describing with precision the obligation to which the person is bound. Consideration for the guaranty must be expressly or impliedly stated in the instrument, and the instrument must be delivered to, and accepted by, the guarantor.

New York courts have repeatedly enforced waiver of defense clauses contained in guarantees where the guaranty is absolute and unconditional. *See* Citibank N.A. v. Plapinger, 495 N.Y.S.2d 309 (1985). These waiver of defense provisions are enforceable absent fraud, novation, or modification. The unpublished New York Supreme Court case from December 2004, *Wells Fargo Bank Minnesota N.A. v. Cohn*, is an example of the strength of these waiver of defense clauses (although, as an unpublished decision, it may not have precedential authority). In *Wells Fargo*, the court granted summary judgment in favor of the lender and dismissed the guarantors' affirmative defenses, in part based on enforcement of a waiver of defenses clause.

XIII. Local Law

New York State law provides for four types of municipal general purpose governments: counties, cities, towns, and villages. Originally, the differences between each related to the services each provided, though the differences between cities and towns have become of less importance over time. New York State is a home rule state. That is, article 9 and various other provisions of the

New York constitution grant the powers of local administration and legislation to counties and municipalities.

New York State, outside of New York City, is divided into fifty-seven counties. The five boroughs of City of New York function as counties for certain purposes, although they are not organized as such nor do they operate as county governments.

XIV. Pre-Judgment Remedies

The provisional remedies recognized in New York, found in N.Y. C.P.L.R. section 6001 are attachment, injunction, receivership and notice of pendency.

N.Y. C.P.L.R. section 6201 provides that attachment is obtainable in any action, other than a matrimonial one, where the plaintiff demands money judgment "in whole or in part". The property sought to be attached must be present in New York. Any property that may be levied upon to satisfy a judgment under N.Y. C.P.L.R. section 5201 is subject to attachment. Wages earned by the defendant are also attachable subject to the limitations set out in N.Y. C.P.L.R. section 5231. The motion for an order of attachment may be made either ex parte, supported by an affidavit, or on notice before or after service of the summons. Incident to the notice motion, the plaintiff may seek a temporary restraining order prohibiting the garnishee from transferring the defendant's assets.

A preliminary injunction is operative from the date of service of the order granting a preliminary injunction until termination of the lawsuit. Jurisdiction of the court to grant a preliminary injunction in an action is purely statutory. *See* Bachman v. Harrington, 184 N.Y. 458 (1906). A preliminary injunction to restrain the defendant from transferring assets is not available in a legal action that seeks solely money damages. When a preliminary injunction is issued it is operative against all parties to the suit against whom it is directed. If circumstances change after the granting of a preliminary injunction, the party enjoined may move to vacate or modify the injunction in accordance with N.Y. C.P.L.R. section 6314.

The remedy of receivership, set out in N.Y. C.P.L.R. section 6401, is limited to suits having a specific subject matter, thus excluding actions that seek solely to recover a sum of money, including most actions at law. A temporary receiver is made upon motion of person having apparent interest in property at any time prior to judgment or during pendency of appeal where there is danger that property will be removed from state or lost, materially injured or destroyed. A notice of pendency can be filed only in an action affecting title to or use or possession of real property. *See* N.Y. C.P.L.R. § 6501. The main function of this remedy is the placing of a record impediment on the title to the realty involved in the action, therefore preventing acquisition of a title free and clear of the claim being asserted in a lawsuit.

The remedy of replevin is not listed in N.Y. C.P.L.R. section 6001 but the procedures relating to prejudgment seizure of a chattel in a replevin action attempt to accomplish the same purpose as the other remedies. Under N.Y.

C.P.L.R. section 7102, the plaintiff who is moving for possession of a chattel may proceed either on an ex parte motion or a motion on notice. If proceeding ex parte, the plaintiff must show that if notice were given, the chattel would probably become unavailable for seizure by being concealed or removed from New York or would become substantially impaired in value. After seizure, the sheriff will hold the chattel for ten days, during which time the defendant may move to reclaim the chattel or to have the chattel impounded. *See* N.Y. C.P.L.R. § 7103.

XV. Post-Judgment Remedies

Under N.Y. C.P.L.R. section 5230 a judgment or order awarding possession of real property or a chattel can be enforced by an execution. At any time, before a judgment is satisfied or vacated, an execution may be issued by the clerk of the court or the judgment creditor's attorney directing the sheriff to satisfy judgment out of the real and personal property of the judgment debtor and debts due, with the usual methods of notice applicable. The execution must normally be returned within sixty days. When the debtor is receiving more than eighty-five dollars per week, an income execution for installments from the source may be issued to the sheriff for service on the debtor. However, if the debtor defaults or is unavailable, the source of income can be served. For a nonresident's New York income, the execution may be made by the sheriff by sending the papers to the debtor by certified mail, return receipt requested, and by sending the papers by regular mail to the debtor and debtor's last known employer. *See* N.Y. C.P.L.R. §§ 5231(b)–(c).

The appointment of a receiver is authorized by N.Y. C.P.L.R. section 5228. Upon motion of a judgment creditor and notice as required by the court, the court may appoint a receiver to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment. The property to be received, the duties of the receiver and the manner in which they are to be performed will be set out in the order of appointment.

N.Y. C.P.L.R. section 5232 allows for a levy upon personal property to enforce a judgment. The sheriff can levy upon any interest of the judgment debtor in personal property not capable of delivery, or upon any debt owed to the judgment debtor by serving a copy of the execution upon the garnishee, in the same manner as a summons. However, under New York Debtor and Creditor Law section 151, the garnishee may set off any personal claims against the property of the debtor. Aspen Industries v. Marine Midland, 52 N.Y.2d 575 (1981).

XVI. Procedural Law

In New York, the N.Y. C.P.L.R. contains the rules governing procedure in all courts of the state except where the procedure is regulated by inconsistent

statutes. The statutes relating to all courts, except the supreme courts and county courts, contain some inconsistent provisions. Therefore, the N.Y. C.P.L.R. is applicable in its entirety in the supreme courts and the county courts.

XVII. Promissory Notes

In New York, the law applicable to negotiable promissory notes is found in article 3 of the New York UCC. Article 3 requires that the note be signed by the maker, contain an unconditional promise to pay a sum certain, and be payable to order or bearer, to be a negotiable instrument. *See* UCC § 3-104. Article 3 also requires the note to be payable on demand or at a definite time to be negotiable. If the note, however, does not designate a time of payment or indicate that it is payable on demand, such note is presumed to be payable on demand unless there is some indication that a date of payment was intended and therefore mistakenly omitted. *See* UCC § 3-108; comment 3, UCC § 3-115; Nuri Farhadi, Inc. v. Anavian, 58 A.D.2d 546, 396 N.Y.S.2d 26 (1st Dept. 1977). Notes providing for interest in excess of the maximum rate prescribed by statute are void. *See* N.Y. General Obligations Law §§ 5-501(1), 5-501(2), and 5-511.

XVIII. Property Exempt from Claims of General Creditors

In New York, N.Y. C.P.L.R. section 5205 governs personal property exempt from application to the satisfaction of money judgments. The householder's exemption includes household items such as stoves, sewing machines, refrigerators, and pictures and school books. Other exemptions under N.Y. C.P.L.R. section 5205 include property held in trust for the judgment debtor where the fund proceeded from a third person and income exemptions. The ordinary limits on income exemptions are ninety percent of income or other payments from a trust whose principal is itself exempt and ninety percent of the earnings of the judgment debtor for personal services rendered within sixty days before or after an income execution are delivered to the sheriff. Exemption from execution under N.Y. C.P.L.R. section 5202 does not prevent household goods from becoming subject to execution as part of the security for a loan made to the judgment debtor. *See* State v. Avco Financial Service, 50 N.Y.2d 383 (1980).

The homestead exemption, set out in N.Y. C.P.L.R. section 5206(b), exempts a lot of land with a dwelling (or the equivalent as a condominium or cooperative apartment), not exceeding $50,000 in value, owned and occupied as a principal residence unless the judgment was recovered wholly for the purchase price.

New York also provides for certain property exemptions in bankruptcy by statute. New York has opted out of the federal exemption scheme under

11 U.S.C. section 522, as amended, so that only New York exemptions may be asserted. N.Y. Debtor & Creditor Law § 284. The property of an individual debtor in bankruptcy is exempt pursuant to those exemptions in N.Y. C.P.L.R. sections 5205 and 5206, however, the aggregate dollar value of a bankruptcy debtor's exemptions on personal property and certain annuity contracts is limited to $5,000. N.Y. Debtor & Creditor Law §§ 282 and 283. The $5,000 aggregate limit also includes a motor vehicle worth no more than $2,400. The bankrupt debtor is entitled to some additional categories of property to be exempt such as any unemployment or social security benefits due the debtor and payment on account of personal bodily injury, not to exceed $7,500. N.Y. Debtor & Creditor Law § 282.

XIX. Recognition of Foreign Country Judgments

Foreign country judgments are not entitled to full faith and credit. In New York, whether or not to recognize a foreign judgment under the principles of comity is discretionary with the enforcing court. Considerations the courts take into account include whether the foreign court had jurisdiction and whether fair procedures were used in adjudicating the case. If recognition is granted, the judgment is enforceable by an action based on the judgment; a motion for summary judgment in lieu of a complaint; or as a counterclaim, cross-claim or defense in a pending action. New York has enacted the Uniform Foreign Money-Judgment Recognition Act. N.Y. C.P.L.R. art. 53. It encompasses any foreign judgment granting or denying recovery of a sum of money, other than a judgment for taxes, penal judgments, or judgments for alimony and child support. N.Y. C.P.L.R. § 5301. This act applies to any foreign judgment that is final and conclusive. The act sets up a number of defenses to recognition where the judgment is "inconclusive". N.Y. C.P.L.R. § 5304.

XX. Registration of Sister State and Federal Judgments

In 1970, to provide a simple and efficient means to enforce judgments entered in sister states which are entitled to full faith and credit, New York adopted article 54 of the N.Y. C.P.L.R., which is a judgment registration procedure analogous to that used in the federal system. 28 U.S.C. § 1963. Article 54 is based on the Uniform Enforcement of Foreign Judgments Act and provides a streamlined procedure in New York for enforcing a judgment entitled to full faith and credit (judgments of federal and sister state courts). The procedures of this article do not apply if the judgment is one obtained by default in appear-

ance or by confession of judgment. (Default and confession judgments are enforceable, but a plenary action must be brought, or a motion for summary judgment in lieu of a complaint made. N.Y. C.P.L.R. § 3213).

In New York, a sister state judgment that qualifies for treatment under article 54 of the N.Y. C.P.L.R. may be filed with the office of the clerk of any county in New York. An affidavit must also be filed stating that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, and that its enforcement has not been stayed, and setting forth the name and last known address of the judgment debtor. N.Y. C.P.L.R. § 5402(b). Once filed, the judgment becomes enforceable subject to the same terms and conditions as a judgment of a New York supreme court. Under N.Y. C.P.L.R. section 5402 when a foreign judgment is filed in New York that filing is vacated when the foreign judgment is reversed on intermediate appeal. A new filing is made if and when the foreign judgment is reinstated on further appeal and the lien of the judgment creditor in New York dates from the date of the new filing.

XXI. Statute of Frauds

New York has enacted several statutes of frauds, each with its own particular language and requirements. These include the New York General Obligations Law sections 5-701 and 15-501(2) and UCC section 2-201. New York General Obligations Law section 5-701, for example, provides in general terms that certain enumerated agreements are void unless "some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith." Under this provision, the writings must contain all the essential terms of the purported agreement. To contrast, the statute of frauds applicable to the sale of goods provides that the agreement is binding even if the writing omits or incorrectly states a term of the agreement. Even the price need not be specified. See UCC § 2-201. It is sufficient that the writing affords a basis for believing the offered oral evidence rests on a real transaction. If it does, the finder of fact may set a reasonable price. Thus, the statutes may require more or less particularity in the writings depending upon the type of transaction.

Other Statute of Frauds provisions of New York's General Obligations Law deal with assignments of life, health, or accident insurance policies, assumptions of mortgages and executory accords. Also, covered in New York's General Obligations Law are those provisions governing the effect of a writing on the requirement of consideration, treating specifically agreements relating to securities, written agreements for modification or discharge, written promises expressing past consideration, written assignments, and written irrevocable offers, as well as the requirement of written authorization by agents executing real property transactions. *See* N.Y. General Obligations Law § 5-701 (2008). In New York, a writing is required with respect to interest on demand loans

made upon collateral security, although a contract for the payment of interest does not generally need to be in writing.

XXII. Statute of Limitations

In New York, the statutes of limitations are found principally in article 2 of the N.Y. C.P.L.R., although other periods of limitation appear throughout New York's Consolidated Laws. If a defendant fails to assert the statute of limitations as a bar either (1) by way of a pre-answer motion to dismiss (N.Y. C.P.L.R. § 3211(a)(5)), or (2) as an affirmative defense (N.Y. C.P.L.R. § 3018(b)), the protection of the statute is waived. An agreement not to raise the statute of limitations, made before the accrual of a cause of action is void. *See* Kassner & Co. v. City of New York, 46 N.Y.2d 544 (1979). After the accrual of a cause of action, the parties may, by written agreement, signed by the party to be charged, agree to extend the time for bringing the action.

The following are various specific New York statutes of limitations:

- Actions to enforce judgments—twenty years (N.Y. C.P.L.R. section 211(b) creates a presumption of payment if twenty years have elapsed from the time the judgment was first docketed.)
- Actions to recover real property (N.Y. C.P.L.R. § 212)—ten years
- Any action for which there is no other specific statute of limitations (also called the "equity" statute of limitations) (N.Y. C.P.L.R. § 2139(1))—six years
- Actions on express or implied contractual obligations, except those governed by article 2 of the UCC (N.Y. C.P.L.R. § 213(2))—six years
- Actions based on fraud (N.Y. C.P.L.R. § 213(8))—six years (*But see also* N.Y. C.P.L.R. § 203(g))
- Actions for breach of any contract of sale governed by the UCC (UCC § 2-725)—four years
- Professional malpractice (N.Y. C.P.L.R. § 214(b))—three years (Three-year statutes of limitations cannot be avoided by framing the malpractice claim in terms of a breach of a contract.)

XXIII. Subpoena

In New York, a subpoena requiring attendance or subpoena duces tecum is served in the same manner as a summons. Pursuant to a 2004 amendment to N.Y. C.P.L.R. section 2303(a), a copy of any subpoena duces tecum served in a pending civil judicial proceeding must be served on each party appearing in the action.

XXIV. Warrants of Attorney to Confess Judgment

In New York, even though a judgment is entered in a sister state under a warrant of attorney to confess judgment, the presumption that the foreign court has jurisdiction over the subject matter and the parties applies. Such a judgment must be accorded full faith and credit if valid under the law of the state where it was rendered, without inquiry into the merits of the controversy, or as to whether New York's courts would or could have rendered such a judgment on such a cause of action, or whether the judgment would have been valid under New York law. However, a foreign judgment entered by warrant of attorney purporting to authorize entry of judgment by any attorney of any court of record without notice and waiving procedural defects in the entry of such judgment is not enforceable in New York because this would violate due process and deprive the rendering court of jurisdiction. *See* Mallan v. Samowich, 94 A.D.2d 249, 464 N.Y.S.2d 122 (1st Dept. 1983).

XXV. Authority

A. Required Qualifications to Do Business—New York Law Respecting Foreign Entities

Lenders and businesses that are not organized under the laws of New York generally do not need to be authorized to do business in New York to

- sell goods to New York customers through the mails and other means of interstate commerce;
- make loans or extensions of credit to New York debtors or create or acquire security interests in real or personal property, as long as the lender or business is not carrying on and transacting through them business in New York that is permanent, continuous, and regular;
- collect debts owed by New York debtors or enforce mortgages and security interests in property located in New York;
- maintain, defend, or settle any action or proceeding, whether judicial, administrative, arbitrative, or otherwise;
- maintain bank accounts; or
- own real or personal property in New York, when not coupled with other activities.

Wm. G. Roe & Co. v. State, 43 Misc. 2d 688, 251 N.Y.S.2d 151 (1964). *See* N.Y. Business Corporation Law § 1301 *et seq.*, with respect to foreign corporations, N.Y. Not-For-Profit Corporation Law, § 1301 *et seq.*, with respect to foreign not-for-profit corporations, N.Y. Limited Liability Company Law § 801 *et seq.*, with respect to foreign limited liability companies (LLCs), N.Y.

Business Corporation Law §§ 1525–1533 with respect to foreign professional service corporations, N.Y. Limited Liability Company Law §§ 1301–1309 with respect to foreign professional service LLCs, New York Revised Limited Partnership Act §§ 121-902–121-908 with respect to foreign limited partnerships (LPs) and New York Revised Limited Partnership Act § 121-1502 with respect to foreign limited liability partnerships (LLPs). *See also* White on New York Corporations, Part II, article 13, B1301.01–B1301.03.

The test as to whether a foreign entity is "doing business" in New York is a fact-oriented inquiry that the New York courts have interpreted to hinge upon whether the foreign entities' activities in New York are (1) permanent, (2) continuous, and (3) regular. *See e.g.*, Netherlands Ship Mortgage Corp. v. Madias, 717 F.2d 731 (2d Cir. 1983); Invacare Corp. v. John Nageldinger & Son, Inc., 576 F. Supp. 1542 (E.D.N.Y. 1984); Airline Exch., Inc. v. Bag, 266 A.D.2d 414, 698 N.Y.S.2d 694, 1999 N.Y. App. Div. LEXIS 12015 (2d Dep't 1999).

Foreign legal entities doing business in New York must file a signed application with the New York Department of State; such application includes a designation of the New York Secretary of State as agent for service of process and also provides optionally for designation of a registered agent in New York for service of process as well. An out-of-state lender or business that does business in New York without authority may not maintain any action, suit or proceeding (including counterclaims) in New York until it has been authorized and has paid all fees and taxes, as well as penalties and interest charges related to obtaining authorization. The failure to obtain authority does not, however, impair the validity of any contract entered into by, or any act of, the nonqualified foreign entity. N.Y. Business Corporation Law § 1312.

XXVI. Types of Borrowers

A. Corporations

New York corporations are subject to the New York Business Corporation Law, while New York not-for-profit corporations are treated by a separate body of law, the New York Not-For-Profit Corporation Law. N.Y. Business Corporation Law § 101 *et seq.*; (N.Y. Not-For-Profit Corporation Law § 101 *et seq.*

New York profit and not-for-profit corporations must file signed certificates of incorporation with the New York Department of State.

Lenders customarily obtain a certificate of good standing (officially referred to in New York as a "Certificate Under Seal") and a certified copy of the certificate of incorporation from the Department of State before making a loan to a corporation organized under New York law. The New York Department of State does not maintain copies of corporate bylaws. Lenders also customarily obtain a resolution of the board of directors, certified by the secretary of the corporation, authorizing the corporation to borrow the funds.

If a borrower is incorporated under the laws of another state, lenders customarily obtain from the New York Department of State a certificate of good standing from the New York Department of State, as well as formation documents and a certificate of good standing from the state of the borrower's formation.

B. Partnerships

New York recognizes three types of partnerships: (1) ordinary business partnerships, (2) LPs, and (3) registered LLPs. The New York Partnership Law covers all three types of partnerships. § 121-901 to § 121-908 of the New York Partnership Law govern the procedures under which foreign LPs apply for authority to do business in New York, and section 121-1502 of the New York Partnership Law governs the procedures under which foreign LLPs file a notice of registration in New York.

Lenders to a partnership customarily obtain a copy of the partnership agreement, if any. If fewer than all of the general partners execute a loan document or an instrument, lenders customarily obtain the consent of all of the partners to the loan.

When lending to a New York LP or registered LLP, lenders customarily obtain from the New York Department of State a certificate of good standing and a certified copy of the LP's certificate of LP or the registered LLP's registration, as filed. In the case of a foreign LP or a foreign registered LLP, lenders customarily obtain from the Department of State certified copies of the foreign LP's application for authority to do business in New York, or the foreign LLP's notice of registration in New York, as well as appropriate certificates from the partnership's home state.

In general, a partnership may not transact business in the name of a partner not interested in the firm and may not use "and company" or "and co." unless it represents an actual partner. N.Y. Partnership Law § 82. In the case of an existing partnership, however, any of the partners and any of their assignees, appointees or successors in interest may continue on the business of the partnership once the original or former partners have left the partnership or died. N.Y. Partnership Law § 80. If a partnership seeks to transact business under a fictitious name or under a name that excludes the names of some partners, it must file a certificate with the office of the clerk of each of the New York counties in which the partnership's business is transacted. N.Y. General Business Law § 130. The certificate lists the name or designation under which, and the address within the county at which, the business is transacted and the names and residence addresses of all of the partners; a lender to such a partnership should be able to obtain certified copies of such filings from the appropriate county recorder. If the partnership is a LP, the certificate must instead be filed at the office of the New York Secretary of State and need not list the names and addresses of each limited and general partner. For partnerships required to file that have not so filed, the county recorder will not record conveyances of real estate, including mortgages, to or from the partnership, and the partnership will generally be prohibited from maintaining any action or proceeding in a

New York court based on a transaction entered into other than in the partners' real names. However, the failure to so file does not, in and of itself, impact the general contractual rights of other parties vis-à-vis such a partnership. N.Y. General Business Law § 130(8).

The general partners in a partnership, except for a registered LLP, are jointly and severally obligated for everything chargeable to the partnership for loss to a third person caused by a partner's breach of trust or for injury or loss to a third person caused by a partner's wrongful act. N.Y. Partnership Law §§ 26(a) and 121-403. The general partners are jointly liable for all other debts of the partnership that are contracted while they are general partners, but any partner may enter into a separate obligation to perform a partnership contract. N.Y. Partnership Law § 26(a)(2). Lenders looking to individual partners for full repayment of a partnership loan customarily require the individual partners to obligate themselves individually with respect to the loan.

C. Limited Liability Companies

New York law authorizes the use of LLCs to carry on a business in New York. LLCs are subject to the provisions of the New York Limited Liability Company Law. A New York LLC must designate the New York Secretary of State as its agent for service of process, and may, in addition, designate a registered agent for service of process.

Lenders customarily obtain a certified copy of the LLC's articles of organization and a certificate of good standing from the New York Department of State. The New York Department of State does not maintain copies of New York LLC operating agreements. Lenders must obtain them from the company.

New York LLCs can be managed either by their members or by one or more managers, who may or may not be members. Under either structure, management can take many forms, including election of a board of directors and election of officers. The LLC's operating agreement should explain the manner in which the company is managed. Lenders customarily require a LLC to provide a resolution authorizing the borrowing, signed by all of the members (if the LLC is managed by the members) or signed by all of the managers (if the LLC is managed by one or more managers).

Individual members of a LLC are not liable for company debts. N.Y. Limited Liability Company Law § 609. Lenders looking to individual members for full repayment of a LLC loan must have the members separately obligate themselves with respect to the loan.

A LLC organized under the laws of another state is required to apply for authority to do business in New York with the New York Department of State. N.Y. Limited Liability Company Law § 802. Lenders customarily obtain a certified copy of the foreign LLC's application for authority and a certificate of good standing from the New York Department of State, as well as a copy of the company's formative documents and, if available, a good standing certificate or certificate of existence from the state in which it is organized.

D. Proprietorships and Individuals

New York law treats loans to proprietorships in the same manner as loans to individuals. A New York proprietorship that operates under a trade name or fictitious business name must file a certificate with the office of the clerk of each New York county in which the proprietorship's business is transacted. The certificate lists the name or designation under which, and the address within the county at which, the business is transacted by the proprietorship, and the name and residence address of each proprietor. N.Y. General Business Law § 130. Lenders may obtain certified copies of trade or fictitious name filings from the county clerk offices in which such filings are made.

XXVII. Licensing Requirements

No general New York State licensing provisions exist for out-of-state commercial lenders and equipment lessors doing business in New York. Licenses from the Superintendent of Banks are required, however, for the following:

- foreign banking corporations, defined as "any banking institution organized under the laws of any jurisdiction other than the United States, any state of the United States or Puerto Rico" (N.Y. Banking Law § 200);
- small business investment companies (N.Y. Banking Law § 228-a);
- lenders of less than $25,000 if for personal use and less than $50,000 if for commercial use (N.Y. Banking Law § 340-342);
- cashiers of checks (N.Y. Banking Law §§ 367 and 369);
- sales finance companies (N.Y. Banking Law § 492);
- insurance premium finance agencies (N.Y. Banking Law § 555);
- budget planners (only permitted for Type B not-for-profit corporations, that is, those formed for charitable, educational, and so on, purposes as listed in New York Not-For-Profit Corporation Law § 201);
- mortgage bankers and mortgage brokers (N.Y. Banking Law § 590); and
- transmitters of money (N.Y. Banking Law § 641);

Authorization certificates from the Superintendent of Banks are required for each of the following:

- private (individual or partnership) bankers (N.Y. Banking Law § 161);
- savings banks (N.Y. Banking Law § 233);
- savings and loan associations (N.Y. Banking Law § 377);
- credit unions (N.Y. Banking Law § 450);
- investment companies (N.Y. Banking Law § 507(2)); and
- mutual trust investment companies (N.Y. Banking Law § 550).

For a mutual savings and loan association to do business as a stock savings and loan association subsidiary of a mutual holding company, the Superintendent of Banks must approve the plan of reorganization. N.Y. Banking Law § 447-447-a.

The Superintendent of Banks and Banking Board may only license a foreign banking corporation if they determine that the operation of the corporation is in accord with the public interest. N.Y. Banking Law § 26. Moreover, foreign banking corporations and foreign building and loan associations are exempt from the New York State license fee otherwise due for the licensing of a foreign corporation to do business in New York. N.Y. Tax Law § 181(1)(b). Lastly, towns or villages in the State of New York may require collateral loan brokers to be licensed.

XXVIII. New York Guaranty and Suretyship Law

General principles of the common law of suretyship and guarantees apply in New York. The UCC abolishes the distinction between a surety and guarantor (UCC § 1-201(40)), and New York courts often use the terms "guarantor" and "surety" interchangeably. 63 N.Y. Jur. Guaranty and Suretyship, § 73. One notable authority also refers to "guaranty" as a synonym for "suretyship." Restatement, Security § 82, Comment G.

New York does retain the distinction between the conditional guaranty of collection and unconditional guaranty of payment, see generally *New York City Department of Finance and the City of New York v. Twin Rivers, Inc.*, 920 F.Supp. 50 (S.D.N.Y. 1996), while the New York General Obligations Law clearly states that a surety remains liable on its obligations irrespective of a creditor's refusal to seek collection of its debt by legal action against the principal debtor. N.Y. General Obligations Law § 15-701.

In New York, a surety and guaranty company must obtain a Certificate of Qualification from the Superintendent of Insurance to do business. N.Y. Insurance Law § 1111. A foreign surety and guaranty company must also file a certified copy of its charter, bylaws and statement of financial condition with the Superintendent of Insurance to operate in New York. N.Y. Insurance Law § 1106.

XXIX. Interest and Usury

A. General Rule for Noncorporate Borrowers

The maximum rate of interest chargeable per annum on a loan or forbearance of money, goods or things in action is sixteen percent (N.Y. General Obligations Law § 5-501 and N.Y. Banking Law § 14-a(1)), subject to the following exceptions:

- on a loan or forbearance of $250,000 or more, the maximum rate of interest is twenty-five percent per annum (N.Y. General Obligations Law § 5-501(6)(a); N.Y. Penal Law §§ 190.40 and 190.42);

- on a loan or forbearance of $2,500,000 or more, no maximum rate of interest applies (N.Y. General Obligations Law § 5-501(6)(b); N.Y. Penal Law §§ 190.40 and 190.42);
- on demand loans of $5000 or more secured by documents of title or negotiable instruments, the maximum rate of interest is twenty-five percent (N.Y. General Obligations Law § 5-523; N.Y. Penal Law § 190.40);
- on business or agricultural loans of $25,000 or more advanced by a bank or trust company, the maximum rate of interest is not more than five percent above the discount rate on ninety-day commercial paper effective at the Federal Reserve Bank of New York (N.Y. Banking Law § 108(9)); and
- if the loan is insured by the Federal Housing Commissioner, or there is a commitment to insure, or the loan is insured or guaranteed pursuant to the "Servicemen's Readjustment Act of 1944," no maximum rate of interest applies (N.Y. General Obligations Law § 5-501(5)).

The exceptions under New York General Obligations Law sections 5-501(6)(a) and (b) apply to loans made in installments where, pursuant to a written agreement, the aggregate amount which the lender(s) agree to advance satisfies the value limit. N.Y. General Obligations Law §§ 5-501(6)(a) and (b). However, in a revolving credit agreement, the applicability of New York General Obligations Law section 5-501(6)(b) is measured by the amount of the outstanding debt at any one time, not by the total advances made under the agreement. *In re* Rosner, 48 B.R. 538 (Bankr. E.D.N.Y. 1985). A violation of these provisions entitles a borrower to assert the defense of usury or, if appropriate, criminal usury, as discussed infra, in an action for payment by a creditor. N.Y. General Obligations Law §§ 5-501 and 5-511; N.Y. Penal Law §§ 190.40 and 190.42.

B. General Rule for Corporate Borrowers

Corporate borrowers cannot interpose the defense of usury under the General Obligations Law (N.Y. General Obligations Law § 5-521(1)), but, in an action for payment by a creditor, they may interpose the defense of criminal usury as set forth in New York Penal Law section 190.40 if the interest charged exceeds the amount permitted under applicable law (see immediately succeeding paragraph. N.Y. General Obligations Law § 5-521(3). In addition, LLC borrowers cannot interpose the defense of usury, though, like corporations, they may assert the defense of criminal usury. N.Y. Limited Liability Company Law § 1104. The law remains unsettled, however, with respect to the ability of LPs, LLPs, and other "hybrid" entities to interpose the defense of usury. *See* Federal Home Loan Mortgage Corporation v. 333 Neptune Avenue Limited Partnership, et al., 1999 U.S. App. LEXIS 32056 (failing to reach appellants' argument that usury cannot be asserted as a defense in a transaction involving sophisticated business entities because the argument involves

"knotty and undecided questions of New York state law that are best avoided by federal courts").

The maximum rate of interest chargeable per annum on a loan or forbearance to a corporate borrower is twenty-five percent (N.Y. General Obligations Law § 5-521(3); N.Y. Penal Law §§ 190.40 and 190.42). However, the foregoing is subject to (1) the exception set forth in New York General Obligations Law section 5-501(6)(b), as discussed supra, and (2) the provision in the New York General Obligations Law section 5-526, which permits a rate of interest of up to eight percent above the prime rate, as "prime rate" is defined in New York General Obligations Law section 5-526(4), on loans or forbearances of $100,000 or more to a corporation for business or commercial purposes where the loan transaction creates either a security interest under article 9 of the UCC, which is perfected pursuant to article 9 of the UCC or a security interest under article 2 or 2-A of the UCC. N.Y. General Obligations Law § 5-526. Unlike New York General Obligations Law section 5-501(6)(b), the exception set forth in clause (2) of the foregoing sentence permits the loan agreement to provide for discretionary advances. N.Y. General Obligations Law § 5-526. Moreover, a fully secured loan is not required; the collateral must be of only substantial value and of the type permitted under the relevant statute. Leumi Financial Corporation v. Richter, 17 N.Y. 2d 166 (1966). In New York State, a lender can require an individual to incorporate to secure more favorable interest treatment on a potential loan transaction. Federal Deposit Insurance Corp. v. Julius Richman, Inc., 666 F. 2d 780 (2d Cir. 1981).

C. General Rule for Individual Guarantor of Corporate Borrower

If the corporate borrower may not plead a case for usury, then likewise, the individual guarantor may not plead a case for usury. *See* Schneider v. Phelps, 41 N.Y.2d 238 (1977) and Tower Funding, Ltd. v. David Berry Realty, Inc., 302 A.D.2d 513 (2 Dept. 2003). However, if the guarantor serves as the true borrower, that is, the actual recipient of the loan, and the loan funds failed to reach the corporate account or be used for corporate purposes, then the individual guarantor may plead a case for usury if he or she believes the interest charged exceeds the amount permitted under applicable law. *See* Am-Elm Realty, Inc. v. Stivers, 390 N.Y.S. 2d 732 (4th Dept. 1977); and see also Buoninfante v. Hoffman, 367 N.Y.S. 2d 984 (2d Dept. 1975).

XXX. Statute of Limitations

A one-year statute of limitations applies for an action to recover an overcharge of interest already paid. N.Y. C.P.L.R. §§ 215(6) and 215.15.

XXXI. Civil Penalties Applicable to Usurer Before Borrower's Repayment of Loan

The usurious lender, other than a savings bank, savings and loan association or a federal savings and loan association (which forfeits only the interest due under the usurious loan), forfeits all principal and interest because the loan transaction is deemed void. N.Y. General Obligations Law § 5-511(1).

If the usurious interest due a savings bank, savings and loan association or federal savings and loan association has already been paid, the borrower may recover from the usurer twice the entire amount of interest paid. N.Y. General Obligations Law § 5-511(1).

A borrower need not pay or offer to pay any principal or interest on a usurious loan when that borrower brings an action to recover any money, goods or things in action taken in connection with such loan. N.Y. General Obligations Law § 5-515.

XXXII. Remedies Available to Borrower After Repayment of Usurious Loan

The borrower, or his personal representatives, may recover the usurious excess of interest (not principal) paid by commencing suit within one year after payment. N.Y. General Obligations Law § 5-513; N.Y. C.P.L.R. §§ 215(6) and 215.15. *See e.g.*, Pisano v. Rand, 291 N.Y.S.2d 82 (2d Dept. 1968).

XXXIII. Criminal Provisions Applicable to Usurers

Several statutes set forth the criminal penalties a lender may suffer for undertaking certain restricted activities.

- It is a misdemeanor to secure a usurious loan with "any household furniture, sewing machines, plate or silverware in actual use, tools, or implements of trade, wearing apparel or jewelry." N.Y. General Obligations Law § 5-524.
- It is a class E felony to commit criminal usury in the second degree; that is, knowingly charging or taking interest at a usurious rate. N.Y. Penal Law § 190.40.).
- It is class C felony to commit criminal usury in the first degree, that is, knowingly charging or taking interest at a usurious rate and either (1) having been previously convicted of such an act (or the attempt to commit such an act), or (2) being engaged in such conduct as part of a

scheme or business of making or collecting usurious loans. N.Y. Penal Law § 190.42.

- It is a class A misdemeanor to possess records reflecting criminally usurious transactions prohibited by New York Penal Law section 190.40, if the individual possessing the records has knowledge of the contents thereof. N.Y. Penal Law § 190.45.

A valid estoppel certificate (one that is not executed under duress) executed by a mortgagor and relied upon in good faith by an assignee of a mortgage will preclude assertion of civil or criminal usury as a complete defense. Hammelburger v. Foursome Corp., 54 N.Y.2d 580 (1981).

XXXIV. Capitalization of Interest

New York State law permits compounding of interest pursuant to a loan or other agreement, except for loans of $250,000 or less and loans or other financing agreements secured primarily by a one or two family residence occupied by the owner. N.Y. General Obligations Law §§ 5-527(1)–(2).

XXXV. Foreign Entity

A foreign banking corporation may charge the same rate of interest on a loan as any bank or trust company is permitted to charge under the laws of New York State or the United States with respect to the same class or classes of loans or transactions to which the rate would be applicable. N.Y. Banking Law § 202.

XXXVI. Post-Judgment Interest

Except where otherwise provided by statute or set forth in an applicable contract, interest on all judgments, verdicts, reports and decisions shall accrue at a rate of nine percent per annum. McKinney's N.Y. C.P.L.R. 5004 and 72 N.Y. Jur. Interest and Usury § 27.

XXXVII. Real Estate Lending

A. Property Rights

Property rights in New York are primarily governed by the Real Property Law (RPL), the Real Property Actions and Proceedings Law (RPAPL) and various

other related sections from other statutes. New York law recognizes, inter alia, life estates (but not estates in tail), tenancies in common, joint tenancies, tenancies by entirety, and condominium ownership.

B. Leases

Commercial real property leases are contracts. To create a valid real property lease, all of the essential elements of contracts must be present, but there is no special form or words required. A real property lease for a term in excess of one year is unenforceable unless it is in writing. A real property lease for a term in excess of three years is a "conveyance" of property interest within the meaning of RPL section 290(3) and may be recorded in the county in which real property is located. New York law allows for the recording of a lease in its entirety or in a form of memorandum of lease containing key lease provisions, such as a reference to the lease with the date of its execution, names and addresses of the parties, a description of the demised premises, the lease term, the renewal or extension options, including the dates to which the lease may be extended or renewed and the dates on which such rights of extension or renewal are exercisable. Unrecorded leases will be void as against any subsequent bona fide purchasers or a lien encumbering the same real property arising from a contract with the same landlord, if such contract is made in good faith and first recorded. RPL § 291.

C. Mortgages

In New York a mortgage will create a lien in real property used as security for the payment of debt or the performance of other obligations. A mortgage will only create a lien even though a mortgage is considered to be a "conveyance" of an interest in real property within the meaning of RPL section290(3). Even where a conveyance appears to be absolute, if such conveyance has been given as, or is intended to be, security only, then such conveyance will be construed as a lien on the real property and not as a conveyance of title.

Mortgages in New York do not vest title in a mortgagee. Title in the real property remains in the mortgagor until a lien is foreclosed. Foreclosure occurs when there is a sale under a judgment of foreclosure or a sale pursuant to a nonjudicial foreclosure.

D. Formalities of Mortgages

In New York there is no requirement that a mortgage be drafted in any particular form. However, for a mortgage to be valid and enforceable, a mortgage must be (1) in writing, (2) delivered to mortgagee and be accepted (which acceptance may be inferred or presumed), (3) in a form containing an accurate description of real property, (4) executed and acknowledged by the party granting the mortgage, and (5) recorded in the appropriate recording office. A mortgage is not required to contain any particular language. As a matter of

contract a mortgage will be construed in accordance with the intentions of the parties expressed by the language they chose to employ.

To reduce and simplify the language contained in the instruments, the RPL provides for certain statutory short forms of mortgages and sets forth the construction to be given to certain covenants and clauses commonly contained in the mortgages. RPL § 254. These common covenants and clauses include, without limitation, the identity of the parties; a covenant to pay the indebtedness evidenced by the note (A mortgage does not imply a covenant for the payment of the indebtedness as this covenant must be expressly stated in the mortgage or in a bond or other separate instrument to secure such payment, otherwise the lender's remedies are restricted to the property mentioned in the mortgage. RPL § 249.); the covenant that the whole sum shall become due at the option of the mortgagee; a covenant that the mortgagor shall keep the buildings on the property insured; a provision that the mortgagor shall maintain the premises and all improvements thereon in good condition or repair; a covenant that the mortgagor warrants title to the property; a covenant that the mortgagor will pay all taxes, assessments, etc.; a covenant that the mortgagor shall furnish a written statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt; a provision that notice and demand may be made in writing and may be personally served or mailed; and a covenant providing that the holder of the mortgage shall be entitled to appoint a receiver in any action to foreclose the mortgage. RPL § 254. Absent express language to the contrary, if the language of a clause or covenant used in the mortgage is the same as or similar to a clause or covenant which has been construed in the statute, statutory construction will apply. However, the RPL does not prevent or invalidate the use of other forms of mortgages. RPL § 258.

For recording purposes, a mortgage must contain a valid form of certificate of acknowledgment. RPL §§ 309-a and 309-b. A mortgage does not have to be witnessed or be made under a corporate seal and does not have to be recorded or acknowledged to be valid as between the parties. However, unless the mortgage is properly recorded and all recording taxes due thereon are paid, it will not be valid as against other mortgages or liens.

E. Recordation of Mortgages

New York has adopted the "race-notice" statute regarding the recording of conveyances, including mortgages. RPL § 291. This means that as to a claim for priority between two mortgages from a common mortgagor, the mortgagee who first delivers its properly executed mortgage for recording will prevail, provided such mortgagee receives such conveyance in good faith, for valuable consideration and without constructive or actual notice of a prior conveyance. Any mortgage, being duly executed and acknowledged, may be recorded in the office of the clerk or register office of the county in which real property is situated. RPL § 291. The statue does not require or impose a duty to record the mortgage immediately.

F. Cancellation of Mortgages

Generally, when a mortgage is paid in full, the lien of the mortgage automatically terminates. There can be no mortgage without a debt or some other obligation securing such mortgage. RPL section 275 requires that on the payment by the mortgagor of all principal, interest and any other amounts due under the mortgage or by law, or with respect to a credit line mortgage on written request after such payment of all principal, interest and other amounts, a certificate of discharge of mortgage must be signed by a mortgagee or a person specified under RPL section 321 and, within thirty days after full discharge, the mortgagee or such person must present a certificate of discharge for recording in the county where the mortgage was recorded. Failure by a mortgagee to present a certificate of discharge of mortgage for recording within thirty days after full discharge may result in the mortgagee being liable to the mortgagor in the amount of $500 or more. RPAPL § 1921 and RPL § 275. Such liability is not imposed on a mortgagee who makes less than five mortgage loans in any calendar year.

G. Mortgage Recording Taxes

In New York, in addition to any recording fees, a mortgage recording tax is required to be paid to the county recording officer upon recordation of a mortgage. Until such mortgage recording tax is paid, a mortgage may not be recorded, offered in evidence, enforced by action or foreclosed. Mortgage recording taxes are calculated, depending on the location, the amount of mortgage and the nature of real property, at rates from 1 to 2.8% of the principal amount of the mortgage. N.Y. Tax Law § 11-253 *et seq.* Generally, protective advances under properly drafted mortgage provisions will not require the payment of mortgage recording taxes. If a mortgage is reduced and subsequently increased, the increase will be considered a new debt and re-advance under the mortgage and will require the payment of additional mortgage recording taxes on the amount of such increase.

H. Exemptions from Mortgage Recording Tax

Mortgages made by certain state agencies and certain private organizations (i.e., a nonprofit voluntary hospital corporation) are exempt from mortgage recording taxes. Also, under Tax Law section 255, mortgage recording taxes are not required to be paid (1) on a supplemental instrument or mortgage recorded subsequent to the mortgage on which all recording taxes have been paid if such supplemental instrument or mortgage is recorded for the purpose of correcting the previously recorded mortgage (e.g., correcting a name of one of the parties or correcting a description of the mortgaged property), (2) on a supplemental instrument or mortgage which is recorded pursuant to the provisions or covenants contained in the previously recorded mortgage, (3) on instruments modifying the original mortgage without increasing its principal

amount, (4) on instruments imposing a lien securing the same indebtedness on the same real property, and (5) on assignments of mortgages as specified by RPL section 275(2).

I. Credit Line Mortgages

Under Tax Law section 253-b, provided all mortgage recording taxes were paid on the maximum principal amount specified in the mortgage, no further taxes are payable on new advances and re-advances to the original obligor specified in the mortgage, (1) if such mortgage is a credit line mortgage covering real property improved or to be improved by a one to six family owner-occupied residence or dwelling, or (2) if such mortgage is a commercial credit line mortgage in the principal amount of less than three million dollars. To benefit from Tax Law section 253-b, a mortgage must be a credit line mortgage which secures indebtedness under a note, credit agreement or other financing agreement (other than a building loan mortgage) that reflects the fact that the parties reasonably contemplate entering into a series of advances, and limits the aggregate amount outstanding at any time to a maximum amount specified in such mortgage. Any credit line mortgage may, if expressly stated therein, secure not only the original indebtedness but also future advances made within twenty years from the date the credit line mortgage was first recorded.

For the purpose of determining the amount of mortgage recording tax due, pursuant to Tax Law section 253-a(2)(a), mortgages offered for recording within a period of less than one year by the same or related mortgagor will be presumed to be a part of a related transaction and treated as a single mortgage, and the amounts of the maximum principal debts secured by such mortgages will be aggregated and the tax will be calculated on such higher aggregated amount. For the purposes of section 253-a(a), the term *related mortgagor* includes, but is not limited to (1) members of a family (e.g., spouses, ancestors, lineal descendants, and brother and sisters); (2) a shareholder and a corporation more than fifty percent of the value of the outstanding stock of which is owned or is controlled directly or indirectly by such shareholder; (3) a partner or a partnership more than fifty percent of the capital or profits interest in which is owned or controlled directly or indirectly by such partner; or (4) two or more corporations, partnerships, associations, or trusts or any combination thereof, which are owned or controlled, either directly or indirectly, by the same person, corporation, or other entity, or interests.

J. Assignment of Mortgage

An instrument assigning a mortgage is a conveyance within the meaning of RPL section 290(3) and may be recorded provided it complies with the recording requirements. To transfer the whole or any part of a mortgage, lease, other lien, or charge on registered property, the holder of such mortgage, lease, other lien, or charge must execute an assignment of the whole or any part thereof, and file such instrument for recording in the county where the real property is

located. RPL § 418. To be recordable, the assignment must sufficiently identify the mortgage so that the mortgage may be found by an examination of the records. In New York, it is customary usage and practice, as reflected by example in schedules O and P of RPL section 258, to include the names of the original parties to the mortgage. Where a mortgage is given as collateral security for bond or note, lien follows bond or note, and if a mortgage is assigned without a bond or note, then it is considered a nullity. Although an assignment of mortgage may be recorded, the existence of the assignment on the public record does not constitute notice of the assignment to the mortgagor. Therefore, any payments made by the mortgagor to the original holder of the mortgage after the assignment are binding on an assignee, unless the actual notice of the assignment is delivered to the mortgagor.

Pursuant to RPL section 275, whenever the principal, interest and other amounts due on a mortgage is paid in full, a certificate of discharge of mortgage must be issued as such mortgage does not continue to secure a bona fide debt. Notwithstanding such payment in full, RPL section 275(2) allows a mortgage to be deemed to continue to secure a bona fide debt if such payment occurred in connection with (1) the assignment and transfer of mortgages between lenders on the secondary market, (2) the assignment made in connection with the replacement of a construction loan with a permanent loan, (3) the assignment made in connection with the refinancing of an existing loan with a new lender, (4) the modification of the terms of the loan to avoid foreclosure, or (5) an assignment made in connection with a refinancing that occurs in connection with the sale of real property. Therefore, there are no mortgage recording taxes due upon recordation of such assignment or any subsequent modification of the assigned mortgage, provided the outstanding principal amount of the assigned mortgage is not increased and the assignment contains, or is accompanied by an affidavit which contains, the statement required by RPL section 275 that the assignee is not acting as a nominee of the mortgagor and that the mortgage continues to secure a bona fide obligation. Assignments of mortgages within the secondary mortgage market must contain a statement that such assignment is not subject to the requirements of RPL section 275 because it is made within the secondary mortgage market.

K. Assignments of Leases and Rents

In New York, an assignment of leases and rents may be accomplished within the mortgage or by separate instrument. If by a separate instrument, an assignment must be executed and recorded with the same formalities as a mortgage, including the appropriate execution and acknowledgment requirements. The security interest containing an adequate description of the property is perfected by recording the assignment in the county in which real property is situated. RPL § 294. If the assignment of leases and rents is granted in connection with the mortgage and secures the same debt as such mortgage, it is exempt from the payment of the mortgage recording taxes. An unrecorded assignment is void as against a subsequent bona fide purchaser for valuable consideration from the

same vendor or assignor, if such subsequent conveyance, contract or assignment is first duly recorded.

L. Default and Foreclosure Remedies

Upon default of the payment of debt evidenced by a note or a bond, the mortgage-secured creditor has a choice of two remedies: (1) a legal action to proceed at law to recover a judgment for the debt, or (2) an equitable action to foreclose on the mortgage and obtain the real property secured by it for the payment of the debt. The mortgagee must make an election of the two remedies and may not prosecute the two actions concurrently without first obtaining leave of the court. RPAPL § 1301. The intent behind such requirement is to confine the proceeding to collect the mortgage debt to one court and one action and avoid multiple litigations to recover the same debt.

A plaintiff may not maintain an action to foreclose the mortgage after recovering a judgment for the mortgage debt, unless an execution against the property of the defendant has been returned wholly or partly unsatisfied. Conversely, pursuant to RPAPL section 1301(3), a plaintiff may not sue on the mortgage debt while the action to foreclose is pending or after final judgment for the plaintiff without leave of the court. However, a mortgage-secured creditor may seek a deficiency judgment or, with leave of the court, may sue at law, in a separate action, to recover a deficiency in the event a sale of the property in a foreclosure action leaves such creditor with a deficiency. RPAPL § 1371.

M. Instances Where the Mortgage-Secured Creditor Is Limited to Recovery of Debt

If the holder of a note or bond secured by a mortgage becomes the title owner in fee of the real property, then assuming there is no merger of the mortgage lien and the fee, the only remedy available is to sue on the bond or note secured by the mortgage. Where the mortgage-secured creditor's lien is cut off by foreclosure of a senior mortgage and there are no surplus monies available for the junior mortgagee, then the only available remedy is as against the debt.

N. Instances Where the Mortgage-Secured Creditor Is Limited to a Foreclosure Action

If an action at law on the debt is barred by statute of limitations, the only remedy the mortgagee may proceed with is to foreclose on the mortgage. Pursuant to RPL section 249 a mortgage of real property does not imply a covenant for the payment of the sum intended to be secured unless it is expressly stated in the mortgage, bond, note or a separate instrument secured thereby. If a covenant for the payment of the debt secured by the mortgage is not expressly stated in the foregoing documents, then the mortgage-secured creditor is confined to foreclosing on the property identified in the mortgage.

O. Partial Foreclosure

RPAPL section 1351(2) directs that when the mortgage debt is not due in full and the mortgage property can be sold in parcels without injury to the interests of any party in interest, a final judgment may direct that no more of the property be sold than is sufficient to satisfy the sum then due, together with the costs of the action and sale. Similarly, if it appears that a sale of the whole will be the most beneficial to the parties, than the final judgment may direct that the whole property be sold and discharged from the entire mortgage debt and the proceeds of the sale, after deducting the cost of action and expenses of the sale, be applied to the satisfaction of the whole sum secured by the mortgage.

P. Deficiency Rights

In an action for a judicial foreclosure of a mortgage, a person who (1) is personally liable for an obligation secured by the mortgage foreclosed, (2) is made a defendant in the action, and (3) has appeared or has been personally served with the summons, may be made liable by the final judgment for the whole, or a part thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied after the sale of the mortgaged property. RPAPL § 1371(1). The motion for a deficiency judgment must be made within ninety of the sale of the mortgaged property. RPAPL § 1371(2). The deficiency may only be obtained if there is an express obligation to pay the debt stated in the mortgage or a bond or note secured thereby and the market value as determined by the court or the sale price of the foreclosed property, whichever is higher, is less than the amount of the total debt due.

If no motion for a deficiency judgment is made within ninety days after the foreclosure sale, the sale proceeds from such foreclosure sale, regardless of their amount, will be deemed obtained in full satisfaction of the mortgage debt, with no further right to recover any deficiency in any action or proceeding. RPAPL § 1371(3).

Q. Transfers in Lieu of Foreclosure

In the event that a mortgagor defaults, the parties may consider a transfer of the mortgaged property by a "deed in lieu of foreclosure." Here, the mortgagor conveys the mortgaged property to the lender by delivering a deed conveying title to the lender. Such transfer must be made in good faith, for adequate consideration and be fair in all respects. The requirements for a deed in lieu of foreclosure are the same as for any other deed. Identity of the parties, consideration, and the deed must be subscribed by the proper parties and acknowledged by a notary to be in recordable form. To preserve the priority of the mortgage over any intervening liens between the date of recording of the mortgage and the deed, the parties should avoid a merger of the mortgage into the fee estate by either making the deed to a designee or including in the deed a clear statement of the parties' intent that the two estates should not merge. The rights

of junior encumbrances are generally not affected by the transfer of the deed in lieu of foreclosure and they have to be satisfied either at the time of conveyance or thereafter to transfer good title.

R. Power of Sale

Foreclosure is normally by judicial means and, if uncontested, usually requires at least several months to complete. Under article 14 of RPAPL, New York offers a power of sale mechanism as an alternative to judicial foreclosure which was intended to expedite the foreclosure process. Article 14 of RPAPL was enacted in July 1998, and presently remains in force through July 1, 2009, at which point it will be repealed unless again extended. To be enforceable, the mortgagee's right to conduct a foreclosure by power of sale under article 14 of RPAPL must be contained in the mortgage. However, it should be noted that for any mortgage executed prior to July 1, 1998, the mortgagor has the absolute right to require the foreclosing mortgagee to pursue judicial foreclosure. There are also certain properties which must be foreclosed by judicial foreclosure as opposed to foreclosure by power of sale. For example, foreclosure by power of sale cannot be used if the mortgaged property is improved solely by (1) a residential building containing less than six dwelling units, (2) a residential condominium unit, (3) a residential building owned by a qualified cooperative apartment corporation, or (4) a building located in a city with a population of one million or more where the number of units occupied by residential tenants is equal to or greater than sixty-five precent of the total number of units in the building.

To benefit from article 14 of RPAPL, the mortgagee must commence the nonjudicial foreclosure proceeding by filing a notice of pendency in the clerk's office in each county where the mortgaged property is situated and notify the mortgagor, the obligor(s) on the note, bond or other obligations if other than the mortgagor, the owner of the mortgaged property if other than the mortgagor, and any other parties having an interest in the mortgaged property of its intention to foreclose by power of sale by sending a copy of such notice of pendency, together with a notice of intention to foreclose in writing, within ten days of commencing the nonjudicial foreclosure proceeding in strict compliance with RPAPL sections 1402 and 1403. The mortgagee's preference to proceed with a nonjudicial foreclosure, however, does not force the mortgagor to accept the nonjudicial action as it may compel judicial foreclosure by making a judicial application for an order to show cause directing a judicial foreclosure to be conducted based upon a reason set forth in the statute. RPAPL § 1421(2). Such application must be made not later than forty days after the date the mortgagor receives the notice to foreclose pursuant to article 14 of the RPAPL. If such application is granted, the foreclosure will proceed in accordance with the provisions for judicial foreclosure under article 13 of RPAPL. If such application is denied, the sale may proceed pursuant to article 14 of RPAPL.

In an action for a nonjudicial foreclosure of a mortgage, unless otherwise agreed in the mortgage, a person who or entity which owes payment of an obligation secured by the mortgage foreclosed is liable for the entire deficiency.

RPAPL § 1419(1). Similar to a judicial foreclosure, a motion for a deficiency judgment must be made within ninety days of the sale of the mortgaged property and, if such motion is not made within the prescribed time, the sale proceeds from such sale, regardless of the amount, will be deemed to be obtained in full satisfaction of the mortgage debt, with no further right to recover any deficiency in any action or proceeding. RPAPL § 1419(2)–(3).

S. Mechanics' Liens and Lien Law Covenant

A notice of mechanic's lien may be filed no later than eight months after the completion of the contract or other obligation of the lienor, provided, however, if the property is a single-family residence, the notice of lien must be filed within four months. The notice of lien must be filed in the clerk's office in the county in which real property is located. Within thirty days after filing the notice of lien, service must be made upon the owner in accordance with the applicable New York laws. Failure to file proof of service of process with the county clerk within thirty-five days after the notice of lien is filed will terminate the notice as a lien. As a general rule, the lienor must commence an action to foreclose the mechanic's lien within one year from the filing of the notice of lien, unless the lien is extended by court order, or a lis pendens is filed to foreclose a mortgage or another mechanic's lien on the same property and the mechanic's lienor is named as a party, in which case the lien will be extended during the time the notice of pendency is effective.

In New York, to protect the priority of the mortgage against inchoate mechanics' liens, it is advisable to include a specific covenant in the mortgage indicating that the mortgagor will receive and hold the loan proceeds as a trust fund to be applied first to paying the costs of any improvements before using any part of the loan proceeds for any other purpose. N.Y. Lien Law § 13. If the mortgage contains such covenant and is recorded subsequent to the commencement of the improvements but before the expiration of the statutory period for filing of notice of lien after the completion of the improvements, such mortgage will be superior to any notice of mechanic's lien filed within a corresponding period of time measured from the recording of such mortgage.

T. Title Insurance

Loan policies of title insurance are the customary title evidence in commercial lending transactions and the American Land Title Association (ALTA) forms of title insurance and endorsements are generally in use. The New York State Insurance Department regulates the basic coverage premiums and approves the standard ALTA forms and endorsements for use in a lender's policy.

U. Environmental Issues

General supervision of environmental conservation, pollution and related problems is vested in New York Department of Environmental Conservation

(NYDEC). The NYDEC is responsible for administering such remedial programs as the State Superfund Program for hazardous wastes (ECL art. 27, tit.13; Public Health Law § 1389-a *et seq.*), the Spill Response Program for petroleum contamination (N.Y. Navigation Law art. 12), and the Brownfield Cleanup Program. ECL art. 27, tit. 14.

Under ECL section 27-1309, the NYDEC is allowed access to and has the right to copy all books, papers, documents and records related to current and past generation, transportation and disposal of hazardous waste and to enter any inactive hazardous waste site and areas near such sites to collect and take samples of waste, soil, water and other. The NYDEC may issue a subpoena or take depositions regarding current and past hazardous waste activities. If the NYDEC determines that the site is a "significant threat" to the environment, it may order the owner of the site and any other person responsible for the disposal of the hazardous wastes to develop and implement a remedial program acceptable to the NYDEC, or it may develop and implement such remedial program using funds from the State Superfund and later seek recovery from the responsible party. ECL §§ 27-1313(3)–(5).

Under the New York State Superfund Law, the NYDEC may require a cleanup and impose liability for the cleanup cost regarding the inactive hazardous waste disposal sites and past contamination at such sites. While the statute does not define "responsible parties," 6 N.Y.C.R.R. section 375-1.3(a) identifies certain persons who can be held responsible in an administrative proceedings brought by the NYDEC, including, without limitation, the current owner and operator of the site, an owner or operator of the site at the time any hazardous waste was generated at the site, any person who generated any hazardous waste that was disposed at the site, any person who transported or disposed any hazardous waste to the site, any person who by contract, agreement or otherwise arranged for the transportation of any hazardous waste to the site or the disposal of any hazardous waste at the site, and any other person determined to be responsible according to applicable principles of statutory or common law liability. The law does not expressly provide for strict and joint liability but this kind of liability may be imposed under the common law. ECL section 27-1313(4) allows "statutory or common law defenses." Also, ECL section 23-1323, added in 2003, provides for certain defenses, including defenses for acts of God or war, acts of third parties, an innocent purchasers, and exemptions for lenders, fiduciaries, and municipalities that involuntarily acquired ownership or control, and did not participate in development unless such party caused or contributed to the release.

Other environmental liens may also arise for properties located in New York City. For example, Environmental Control Board (ECB) liens may be enforced by the ECB against real property for, among other things, the cost of cleaning up air and water pollution, cleaning streets, and constructing and maintaining sewers. ECB liens are enforceable as money judgments for a period of eight years from the date the judgment is docketed in civil courts. In addition, pursuant to the New York City Hazardous Substances Emergency Response Law (NYCHSERL), a NYCHSERL lien may be imposed on real property of a "responsible person" for the amount incurred by the City of New York in cleaning up hazardous

matter. The NYCHSERL lien is to be filed in the office of the City Collector. Protection is afforded to existing mortgagees (including mortgagees under revolving line of credit mortgages) if their interest as a mortgagee is perfected before notice of the ECB judgment or the NYCHSERL lien has been filed in civil court or the City Collector's Office as the case may be.

There are no environmental preclearance requirements to sell a commercial property in New York. The purchaser of real estate or corporate assets may take on environmental liabilities. Consequently, it is important to conduct environmental due diligence prior to closing on the purchase of real property to avoid potential environmental liabilities. The defense of "innocent purchaser" and other defenses may not be available unless an owner exercises due diligence prior to acquisition, which due diligence should include performing a Phase I environmental study of the site as an initial study. Depending on what the Phase I report shows, additional due diligence may be required. Lenders need to be especially careful with regards to environmental issues. Therefore, it is advisable that lenders require a Phase I study prior to making the loan and prior to bringing a foreclosure action. Note, however, that conducting the study may trigger the obligation to report an environmental hazard to an environmental agency under federal and/or state law.

XXXVIII. Personal Property Lending

A. Revised Article 9 of the UCC

Article 9 of the UCC governs consensual security interests and certain nonconsensual security interests and liens in personal property and fixtures (hereinafter referred to as "collateral"). On July 1, 2001, revised article 9 of the UCC (revised article 9) became effective in the State of New York. Revised article 9 represents the first comprehensive revision to article 9 since 1972. For purposes of this discussion, former article 9 refers to article 9 as in effect in the State of New York prior to July 1, 2001. Revised article 9 retains the basic structure of former article 9, but also has, among other things, expanded its scope to cover additional types of collateral and produced significant changes in how a secured party may perfect its security interest in various types of collateral. The following discussion is intended to present a broad overview of the law governing consensual security interests and certain non-consensual security interests and liens in collateral as in effect in the State of New York as of July 31, 2008. Any capitalized terms not defined herein shall have the meanings given to such terms in revised article 9.

B. Types of Collateral and Transactions Subject to Revised Article 9

Under former article 9, the types of collateral subject thereto were classified into various categories. Revised article 9 largely retains such categories but in

certain instances such categories have been expanded or otherwise modified. For example, the definition of accounts has been expanded to include, among other things, rights to payment for credit card receivables, lottery winnings, licenses and assigned property. UCC § 9-102(a)(2). The definition of goods has been revised to include any computer programs embedded in such goods, provided the computer programs meet certain additional requirements. UCC § 9-102(a)(44). The category of chattel paper has also been expanded to include not only records that evidence a monetary obligation and a security interest in specific goods but also any software used in such goods. UCC § 9-102(a)(ll).

Furthermore, revised article 9 has created a number of new categories of collateral that were not subject to former article 9, including, without limitation, commercial tort claims (UCC § 9-102(a)(13)), deposit accounts (UCC § 9-102(a)(29)), certain letter-of-credit-rights (UCC § 9-102(a)(51)) and health care insurance receivables (UCC § 9-102(a)(46)).

C. Creation of Security Interests Under Revised Article 9

Revised article 9 requires three formalities for the creation of a security interest enforceable against a debtor: (1) value must have been given; (2) the debtor must have rights in the collateral; and (3) depending on the specific category of collateral, the collateral must be (a) subject to an authenticated security agreement which contains a sufficient description of the collateral; (b) controlled by the secured party pursuant to the debtor's security agreement; or (c) in the possession of the secured party pursuant to the debtor's security agreement. UCC §§ 9-203(a)–(b). Only when all three of these requirements have been met does the security interest "attach" to the collateral and become enforceable against the debtor.

D. Methods of Perfecting Security Interests Under Revised Article 9

While UCC section 9-203 governs creation of a security interest, revised article 9 requires that a secured party "perfect" its security interest to ensure its priority vis-à-vis other creditors of the debtor. Perfecting a security interest in collateral under revised article 9 can be accomplished through a variety of methods, such as filing a financing statement against the debtor, automatic perfection and/or possession or control. The specific category of collateral determines the proper method(s) of perfection. As described in "Priority of Security Interests," the priority of a perfected security interest may be affected by the method of perfection.

UCC section 9-310 sets forth the general rule that a security interest in collateral must be perfected by filing a financing statement against the debtor. However, certain categories of collateral (such as deposit accounts) can only be perfected by control (UCC §§ 9-104, 9-312(b), and 9-314), while other categories of collateral including, without limitation, investment property (UCC §§ 9-106, 9-312(a), and 9-314) and electronic chattel paper (UCC §§ 9-105,

9-312(a), and 9-314) may be perfected by either filing a financing statement or taking control of such collateral.

Revised article 9 also permits a security interest in certain types of collateral to be perfected by possession. Examples of categories of collateral that may be perfected by possession include money (UCC §§ 9-312(b)(3) and 9-313(a)) (possession is the sole method of perfection), instruments (instruments may also be perfected by filing), tangible chattel paper (tangible chattel paper may also be perfected by filing), certificated securities (certificated securities may also be perfected by filing or control) and negotiable documents (negotiable documents may also be perfected by filing). UCC § 9-313(a).

Finally, in certain circumstances, security interests are automatically perfected. A security interest that arises upon the true sale of a payment intangible or a promissory note is automatically perfected. UCC § 9-309(3)–(4). In addition, a security interest in collateral automatically attaches and is perfected in the proceeds of such collateral. UCC § 9-315(c). This automatic perfection in proceeds is subject to lapse as described in UCC sections 9-315(d) and 9-315(e).

E. Priority of Security Interests

Multiple secured and unsecured creditors may have claims on the same collateral. Therefore, revised article 9 has established an elaborate and complex set of rules that determine whether a certain party's security interest has priority over the interests of other parties with claims against the same collateral. Because of the depth of this topic, this discussion will highlight the general priority rules and some of the most notable exceptions to those rules.

As between secured parties and unsecured parties, the secured party will prevail with respect to collateral in which the secured party has a perfected security interest. UCC §§ 9-201(a), 9-317(a), and 9-322(a). Furthermore, even if a secured party fails to perfect its security interest, it will still prevail against unsecured creditors with respect to the collateral in which the secured party has an unperfected security interest, at least if the debtor is not in bankruptcy proceedings. UCC §§ 9-201(a) and 9-322(a).

As a general proposition, a perfected secured party's security interest will prevail over a lien creditor's lien on the same collateral, provided the secured party's security interest in such collateral was perfected at or before the time the lien creditor's lien arises. UCC § 9-317(a)(2). A "lien creditor" is a creditor who has acquired a lien on the debtor's property by judicial process, and includes a trustee in bankruptcy. UCC § 9-102(a)(52). For a lien creditor to prevail over an unperfected secured party, the lien must arise before the secured party has filed a financing statement covering the collateral. UCC § 9-317(a)(2). It is important to note that future advances by the secured party on collateral in which the secured party's security interest is superior will also be secured by the collateral, with priority over the lien creditor's lien with respect to future advances as long as the future advances are made within the later of forty-five days after the lien arose and the time that the secured party obtained knowledge

of the lien (unless future advances are made pursuant to a commitment entered into without knowledge of the lien). UCC § 9-323(b).

The basic rule governing priority between two secured parties which each have a perfected security interest in the same collateral is that the first to properly file a financing statement against debtor or otherwise perfect its security interest in the collateral has priority. UCC § 9-322(a)(1). In other words, the priority date of a security interest is the earlier of the dates on which the secured party properly filed a financing statement with respect to the collateral or otherwise perfected its security interest in it. As between two security interests, the one with the earlier priority date has priority. The secured party who achieves priority by first filing or perfecting retains it so long as the holder remains continuously filed or perfected. UCC § 9-322(a)(1).

As previously discussed, revised article 9 permits certain types of collateral to be perfected through a variety of different methods. Therefore, revised article 9 has established a priority scheme to deal with secured parties who have perfected their security interests through different (yet permitted) means. As a general proposition, if a type of collateral may be perfected by either filing a financing statement or taking control of the collateral, the secured party taking control of the collateral usually would have priority. For example, a secured party that perfects its security interest in investment property only by filing a financing statement will be subordinate to the secured party that later perfects by taking control (or possession in the case of certificated securities) of such collateral. UCC § 9-328. This rule holds true even if the secured party taking control has knowledge of the other secured party's prior perfected security interest. Official Comment 3, UCC § 9-328.

In the case of security interests in certain types of collateral that may be perfected by either filing a financing statement or taking possession, possession, as a general rule, trumps simply filing a financing statement. As previously discussed, instruments are one such category of collateral that may be perfected by filing or possession, however, unlike the control versus filing concept as it relates to investment property, if the secured party that perfects its security interest in an instrument by possession, takes possession with knowledge of a prior security interest which was perfected by filing, such secured party's interest would be subordinate to the security interest that was perfected by filing. UCC § 9-330(d).

Under revised article 9, a possessory lien on goods has priority over a security interest in such goods unless the lien is created by a statute that expressly provides otherwise. UCC § 9-333(b). A "possessory lien" is an interest, other than a security interest or agricultural lien, that is created by statute or rule of law, that secures the payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of such person's business and whose effectiveness depends on possession of the goods. UCC § 9-333(a). In New York there are a number of such possessory liens. For example, Lien Law section 180 states that a lien attaches to any article of collateral which has been made, altered, repaired or in any way enhanced by a person while the property is in the lawful possession of such person.

Finally, a purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected not later than twenty days after the debtor receives possession of the collateral. UCC § 9-324(a). UCC section 9-324(b) sets forth the purchase money security interest rule with respect to inventory. The requirements to achieve purchase money status in inventory are more numerous than the general purchase money security interest priority rule in UCC section 9-324(a).

F. Collateral Excluded from Revised Article 9

The execution, perfection and enforcement of security interests in certain types of assets and properties fall outside the scope of revised article 9. Two such types of assets and properties are motor vehicles (except for motor vehicles held as inventory for sale by a dealer) and insurance claims (excluding (1) insurance claims to the extent they constitute proceeds [UCC § 9-109(d)(8)] and (2) health care insurance receivables [UCC §§ 9-102(a)(46) and 9-109(d)(8)]).

Security Interests in motor vehicles in the State of New York are governed by the Uniform Vehicle Certificate of Title Act, which states that to perfect a security interest in a motor vehicle of a type for which a certificate of title is required, the secured party's name and address must be noted on the original certificate of title (N.Y. Veh. & Tr. § 2118). In the case of an assignment of the cash surrender value and/or proceeds of a life insurance policy, secured parties typically obtain a written assignment executed by the insured and the beneficiary and have such assignment acknowledged and recorded by the insurer.

G. Filing Locations

UCC section 9-301 states that while a debtor is "located" in a jurisdiction, the local law of that jurisdiction governs perfection in most types of collateral covered by revised article 9 of the UCC. UCC section 9-307 provides that (1) a debtor who is an individual is located at its principal residence, (2) a debtor that is an organization and only has one place of business is located at its place of business, (3) a debtor that is an organization that has more than one place of business is located at its chief executive office, and (4) if a debtor is an entity that registers under state law to come into existence (e.g., a corporation, a LLC or LP), then the debtor is "located" in its state of organization. If it is applicable, the rule set forth in the foregoing clause (4) supersedes clauses (1) through and including (3).

Once it is determined that a debtor is located in New York State, UCC section 9-501(a) provides that where New York law

> governs the perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is
>
> (1) the office designated for the filing or recording of a record of a mortgage on the related real property, if (a) the collateral

is as-extracted collateral or timber to be cut; (b) the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or (c) the collateral is a cooperative interest; or

(2) the office of the secretary of state, in all other cases, including a case in which the collateral is goods that are to become fixtures and the financing statement is not filed as a fixture filing.

UCC section 9-501(b) provides that to perfect a security interest in collateral, including fixtures, of a transmitting utility the appropriate filing office is the office of the secretary of state. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

H. Financing Statement Formalities

UCC section 9-502(a) provides that a financing statement is sufficient only if it provides the name of the debtor, the name of the secured party or a representative of the secured party, and indicates the collateral covered by the financing statement (and in the case of a cooperative interest, indicates the number or other designation and the street address of the cooperative unit). A mortgage may serve as a fixture filing provided it contains the requisites of a financing statement. UCC § 9-502(c).

The collateral description in a financing statement can be broader than the collateral description in a security agreement on the theory that the financing statement puts a person on notice of a security interest and the security agreement defines the actual collateral covered. Also, generic collateral descriptions are permitted in financing statements, such as "all assets." UCC § 9-504(2). However, under UCC section 9-509(b), a financing statement collateral description that is broader than the actual collateral grant in the security agreement would be unauthorized and would be ineffective to the extent that it exceeds the collateral grant in the security agreement.

It is important that the financing statement provide the exact legal name of the debtor as financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name. Official Comment 2, UCC § 9-503. If the debtor is a registered organization, the name must appear exactly as indicated on the public record of the debtor's jurisdiction of organization. UCC § 9-503(a)(1). However, UCC section 9-506 provides that minor errors and omissions would not cause a financing statement to be ineffective unless the error or omission made the financing statement seriously misleading. A financing statement is seriously misleading if a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would not disclose the financing statement.

The debtor's signature on a financing statement is not required for filing. Official Comment 3, UCC § 9-502. UCC section 9-509(b) provides for auto-

matic authorization to file a financing statement consistent with the security interest granted by the debtor in the security agreement. However, express authorization is required to prefile a financing statement if the debtor has not yet authenticated a security agreement.

I. Duration of Financing Statements

UCC section 9-515(a) provides that a filed financing statement remains effective for five years after the date of filing. There are exceptions to this rule for public-financed or manufactured home transactions and cooperative interest transactions, in which case there is a thirty-year and fifty-year duration, respectively, for a filed financing statement. UCC § 9-515(b), (h). If the debtor is a transmitting utility, the financing statement will remain effective until a termination statement is filed. UCC § 9-515(f).

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. UCC § 9-515(c). UCC section 9-515(d) provides that a continuation statement may be filed only within six months before the expiration of the five-year period specified in UCC section 9-515(a), the thirty-year period specified in UCC § 9-515(b), or the fifty-year period specified in UCC section 9-515(h). Upon filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of a continuation statement filing. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement. UCC § 9-515(e).

A record of a mortgage that is effective as a financing statement filed as a fixture filing pursuant to UCC section 9-502(c) remains effective until the mortgage is released or satisfied. UCC § 9-515(g).

J. Termination Statements

A secured party must cause the secured party of record for a financing statement to file a termination statement within one month if the financing statement covers consumer goods and (1) there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation or otherwise give value, or (2) the debtor did not authorize the initial filing. UCC § 9-513(a).

In cases not governed by UCC section 9-513(a), within twenty days after a secured party receives an authenticated demand from a debtor, the secured party must cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if (1) there is no remaining secured obligation (except for accounts or chattel paper that are sold or goods that are consigned) and no commitment on the part of the secured party; (2) the financing statement covers accounts or chattel paper that have been sold, but the

underlying obligation has been discharged; (3) the financing statement covers goods that were the subject of a consignment to the debtor, but are not in the debtor's possession; or (4) the debtor did not authorize the filing of the initial financing statement. UCC § 9-513(c).

UCC section 9-513(e) provides that upon an authenticated demand with sufficient notice by a debtor, the secured party must deliver upon a Cooperative Interest Settlement a termination statement or partial release and any component of the cooperative record of which it took possession, which shall be released to the debtor upon payment of the debt secured by the cooperative interest and the discharge of any obligation of the secured party to make further advances. Upon payment of the debt secured by a cooperative interest other than at a Cooperative Interest Settlement and the discharge of any obligation of he secured party to make further advances, the secured party shall arrange for a termination statement or partial release to be filed within one month of receipt of the payment or discharge of the obligation to make further advances, whichever is later, and shall send to the debtor any component of the cooperative record of which it took possession.

"Cooperative Interest Settlement" means the time and place at which an owner of a cooperative interest transfers the cooperative interest, or refinances or pays off the debt secured by the cooperative interest.

K. Filing and Other Fees

The fee for filing, recording, or registering of certificates, notices or other papers required to be filed, recorded or registered under the UCC is determined pursuant to New York Executive Law section 96-a.

The cost of processing electronic records is less than those with respect to written records. There is an additional charge for multiple debtors only with respect to written records. Official Comment 2, UCC § 9-525.

L. Surplus or Deficiency; Debtor's Right of Redemption and the Rebuttable Presumption Rule

Unless otherwise agreed, the secured party must account to the debtor for any surplus in the collection or disposition of collateral, and the debtor is liable to secured party for any deficiency. UCC § 9-608(a). In a secured transaction that is a sale of accounts, chattel paper, payment intangibles or promissory notes, unless otherwise agreed, the debtor is not entitled to a surplus, and the obligor is not liable for a deficiency. UCC § 9-615(e). The debtor has a right of redemption at any time before the secured party has collected collateral or disposed or contractually committed to dispose of the collateral, or has retained the collateral in satisfaction of the secured debt. UCC § 9-623. The debtor may waive its right of redemption in a commercial transaction, but only after default. UCC § 9-624(c).

UCC section 9-626(a) establishes a rebuttable presumption rule for transactions other than consumer transactions where the amount of deficiency or

surplus is in issue. A secured party need not prove compliance with part 6 of revised article 9 relating to collection, enforcement, disposition and acceptance unless the debtor or secondary obligor places the secured party's compliance in issue. UCC § 9-626(a)(1). The secured party then bears the burden of proving that its activities complied with part 6 of revised article 9. UCC § 9-626(a)(2). If the secured party fails to meet this burden, the liability of a debtor or secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses and attorneys' fees exceeds the greater of (x) the actual proceeds of disposition and (y) the amount that would have been realized had the secured party so complied. UCC § 9-626(a)(3). The amount described in clause (y) is presumed to be equal to the sum of the secured obligation, expenses and attorney's fees, unless the secured party proves otherwise.

XXXIX. Transition Rules Generally

A. Pre-Effective Date Security Interests Perfected Under Former Article 9

Revised article 9 took effect in New York State on July 1, 2001 (effective date). Part 7 of revised article 9 contains provisions to assist in the transition from former article 9 to revised article 9.

Revised article 9 applies to transactions, security interests, and other liens within its scope, even if the transaction or lien was entered into or created before the effective date. UCC § 9-702(a). Thus, secured transactions entered into under former article 9 must be terminated, completed, consummated, and enforced under revised article 9. Official Comment 1, UCC § 9-702. However, revised article 9 does not affect an action, case or proceeding commenced before revised article 9 took effect. UCC § 9-702(c).

As a matter of customary contract interpretation, former article 9 terms used in a collateral description in a security agreement executed prior to the effective date should not be interpreted as requiring, after the effective date, that the terms be interpreted as if defined in revised article 9. Instead, the terms should be interpreted as they were defined in former article 9 when the security agreement was executed. Official Comment 3, UCC § 9-703.

B. Requirements Met Under Revised Article 9

UCC section 9-703(a) provides that a security interest that was enforceable and perfected under former article 9 or other law remains perfected if the acts of perfection would also perfect the security interest under revised article 9. Where the filing office under former article 9 is the same as the filing office under revised article 9, a financing statement filed prior to the effective date continues to be effective (to the extent that a financing statement would perfect the underlying security interest under revised article 9) and can be continued by

filing a continuation statement. Such continuation statements, when taken together with the financing statements to which they relate, must satisfy all of the requirements of revised article 9 for an initial financing statement.

C. Requirements Not Met Under Revised Article 9

UCC section 9-703(b) provides that if a security interest was enforceable and perfected under former article 9 or other law, but the requirements for enforceability or perfection were not met under revised article 9, the security interest remained enforceable and perfected (except as will be described for security interests perfected by filing) until June 30, 2002.

If a security interest in a cooperative interest was perfected under former article 9 but did not satisfy the requirement for enforceability or perfection under revised article 9, the security interest remained perfected for five years after the effective date and remained perfected thereafter only if the applicable requirements for perfection under revised article 9 were satisfied before the five years expire. UCC § 9-703(c).

D. Perfection by Pre-Effective Date Filing

The filing of a financing statement that was effective to perfect a security interest in collateral under former article 9 may or may not be effective to perfect a security interest in that collateral under revised article 9. Where the filing office under former article 9 is the same as the filing office under revised article 9, a financing statement filed prior to the effective date continues to be effective. UCC § 9-705(b). However, UCC section 9-705(c) provides that if the filing office under revised article 9 is different from that required under former article 9, a financing statement properly filed before the effective date remained effective until the earlier of its lapse date or June 30, 2006. Such financing statements could not be continued in the old filing jurisdiction. Instead, the secured party was required to continue the effectiveness of the financing statement by filing an initial financing statement (often called an "in-lieu" initial filing statement), in the proper filing office under revised article 9. Such "in-lieu" financing statement had to satisfy the filing requirements in part 5 of revised article 9. In addition, to put a subsequent searcher on notice that the "in-lieu" was intended to continue the original financing statement filed in a different jurisdiction and office, the "in-lieu" had to identify the original filing by filing office, date of filing, and filing number (both for original filing and the most recent continuation statement, if any, of the original filing) and had to indicate that the original filing remained effective. UCC § 9-706(c). On and after the effective date, the secured party was authorized by debtor to file any "in-lieu" necessary to continue the perfection of the secured party's security interest. Such "in-lieu" financing statement could continue more than one original financing statement filed before the effective date. Official Comment 2, UCC § 9-706. The "in-lieu" could be filed at any time before the lapse of the original filing, even before the six month period prior lapse referred to in UCC

section 9-515(d). Because of the possible continued effectiveness of pre–effective date financing statements until June 30, 2006, UCC searches conducted prior to June 30, 2006, generally included the relevant filing offices under former article 9, as well as the filing offices under revised article 9. Official Comment 4, UCC § 9-705. Subject to certain exceptions (e.g., fixture filings), searches conducted for UCC-1s in filing offices under former article 9 are no longer necessary post June 30, 2006.

E. Continuation Where Revised Article 9 Changes the Meaning of Collateral

Whether or not the financing statement filed before the effective date was filed in the appropriate jurisdiction and office under revised article 9, the secured party should consider whether the continuation statement or "in-lieu" statement should include an amendment to the collateral description if the meaning of the collateral description on the financing statement has changed under revised article 9.

F. Priority of Perfected Security Interests Under Former Article 9 and Revised Article 9

UCC section 9-709(a) provides that the priority of conflicting claims to collateral is determined by revised article 9. However, if the relative priorities of the claims were established before the effective date, former article 9 determines priority.

If a security interest is perfected under revised article 9 by the filing of a financing statement before the effective date and the filing of such financing statement would not have been effective to perfect the security interest under former article 9, then UCC section 9-709(b) provides that the priority of the security interest under revised article 9 dates from the effective date.