

PUBLICATIONS

Buyer Beware: Purchasers of Assets in UCC Article 9 Foreclosure Sale May Be Subject to Claims of Debtor's Unsecured Creditors

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Secured lenders often consider an out-of-court foreclosure as a faster and more efficient alternative to a credit bid sale under Chapter 11. The Second Circuit Court of Appeals has thrown a monkey wrench into the foreclosure alternative, especially for those secured lenders that foreclose on collateral with the goal of preserving value by operating the business until a strategic buyer can be located. The court held that a secured creditor that purchases a debtor's assets in an out-of-court foreclosure sale under the Uniform Commercial Code ("UCC") and continues to operate the debtor's business may be liable for the debtor's debts. *Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Publishing Corporation, Interline Travel & Tour, Inc.*, Docket No. 09-1224 (2d Cir. Mar. 11, 2011) ("*Interline*"). The Second Circuit reversed the lower court's grant of summary judgment in favor of the foreclosing lender because the issue of successor liability is fact-specific and the lower court erred by granting judgment as a matter of law. *Id.* At 1. A foreclosure conducted in accordance with the UCC will not automatically insulate the purchaser, as a matter of law, from a state law successor liability claim, even though under Section 9-617 of the UCC, a sale of collateral after default discharges the security interest of the foreclosing creditor and "any subordinate security interest or other subordinate lien." UCC Section 9-617(a)(3). This decision means that a potential asset purchaser in an out-of-court foreclosure sale (whether it be the secured creditor through a credit bid or other independent party) must consider whether an

unsecured creditor may seek to collect unpaid liabilities of the debtor from the purchaser, on the grounds that “the purchaser is a ‘mere continuation’ of the seller.”

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