Comment to "The ABCs of Being Reasonable"

From: Geoffrey L. Berman

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Your article provides a good review of the recent decision in *MF Financial Bank, as Successor in interest to American Chartered Bank v. Clayton D. Jacobs and Dwyer Products Corp*[2]. What is missing however is a broader discussion of how an assignee for the benefit of creditors is acting as a fiduciary for all creditors and not just secured creditors.

You write that the "Assignee's duties were to sell and dispose of *secured creditors' collateral,* pay the unsecured creditors off with the funds not subject to any valid liens, and "to do and perform any and all other acts necessary and proper for the orderly liquidation or other distribution*** and the distribution of the proceeds therefrom to the creditors of the Borrower" (emphasis added).[3] The assignee's fiduciary duty is to liquidate the assets of the assignor, no matter whether they are collateral for a lender, lessor or unencumbered. The assignee also has the duty to validate the claims by any creditor claiming to have liens against the assignor's assets, so your comment is overly simple and does not fully describe the assignee's obligations.

The board of directors resolution and consent by shareholders to approve the making of the ABC is something not written about often enough. In the *MF Financial* case, the board and shareholder action was (a properly) important factor. However, in my experience, an assignee needs to do more when dealing with assets subject to a lender's lien rights (*e.g.* collateral) to be able to liquidate the lender's collateral. Assuming the lender's lien is validated by the assignee's counsel, an assignee should obtain the *consent* of the lender to take possession of and liquidate the lender's collateral. An assignee has the right of a lien creditor upon the making of an ABC.[4] That right is not however superior to a properly perfected secured creditor lien. Therefore, taking possession of a properly perfected lien creditor's collateral, without that lender's *consent,* can expose the assignee to liability to the lender. Yes, effectively the lender can control the choice of the assignee by withholding its consent to the use of the lender's collateral. But if the choice of assignee is ratified by the assignor's board and shareholders, the independence of the assignee should not be in question.

Your article also does not address how a secured lender, or in this instance *MF Financial* could have avoided the guarantor's claim about the liquidation of the assets upon the execution of the ABC and the resulting deficiency claim. Lenders who hold guarantees of third parties to guaranty payment of any deficiency upon the liquidation of the borrower's assets typically will

[1] I am the author of the American Bankruptcy Institute's publication on general assignments, "General Assignments For The Benefit of Creditors, The ABCs of ABCs", now in its third edition and a former President of the ABI.

[2] 2018 IL App (1st) 171939-U, August 23, 2018

[3] The asterisks refer to quotes from the MF Financial Bank decision

[4] *See* the applicable state Commercial Code, Section 9-309(12) or as enacted by each state.

ask the guarantor to reaffirm the guaranty as part of the process of the lender consenting to the making of the ABC. With the guaranty reaffirmed, the question of commercial reasonableness of the sale of assets and any resulting deficiency claim becomes almost moot.[5]

Your reference to the commercial code for a definition of commercially reasonable is well taken. Section 9-627(c)(4), wherein "[A] collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved (4) by an assignee for the benefit of creditors" provides support for an assignee's actions to liquidate collateral. A note of caution however is appropriate. Mere reliance on Section 9-627(c)(4) does not protect an assignee from breach of fiduciary duty claims if the assignee does not take the appropriate steps to seek a fair value for the assets.

Quoting from the *MF Financial* decision

> Commercially reasonable means the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. *Whether a sale is commercially reasonable is a question of fact* (emphasis added). [6]

For example, if an assignee sells assets of an assignor to the principal of the assignor (through a newly formed entity) without making any effort to see if there was a better market based value, a claim that the assignee's sale was not commercially reasonable and that UCC 9-627(c)(4) should not apply, would I believe, be well founded. This is even if a secured lender "consented" to the sale. Why – because the assignee failed to see if he/it was getting the best value for the assets. Merely using an ABC to wash asserts from creditor claims, while legal, may still not be in the best interests of creditors generally and therefore make the assignee subject to breach of fiduciary duty claims.

Regarding your "takeaways from the case", *generally* yes, a secured lender with a validated and properly perfected lien on assets will not be liable for the disposition of its collateral if that disposition is by an assignee for the benefit of creditors through a properly authorized ABC. The assignee is not, and unless *facts* show otherwise, an "agent" of the secured lender. But the statement "a sale by an assignee in an ABC is a commercially reasonable sale" is too broad a generalization. As noted above, the facts of a sale by an assignee will dictate whether the assignee acted in a commercially reasonable manner and whether they properly fulfilled their fiduciary duty to all creditors by the manner in which their sale was conducted.

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[5] I am not trying to pre-judge cases where the facts of each case may change the result.

[6] Supra, *MF Financial Bank, as Successor in interest to American Chartered Bank v. Clayton D. Jacobs and Dwyer Products Corp*