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COUNSELLORS AT LAW

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Aircraft Liens

Cars, boats and planes! As the lifestyle of the higher income borrowers expands, it is not unusual to have a lender approached to finance a company or an individual private jet. Airplane financing is similar to financing a motor vehicle/registered vehicle with a national registration system for ownership of airplanes through the Federal Aviation Administration (“FAA”), but lenders need to understand the potential priority risk.

In aviation financing transactions, a lender which takes an aircraft, aircraft engine or other parts that are registered with the FAA as collateral must comply with the federal filing requirements for the perfection of its liens. A lien will not be perfected by a UCC-1 financing statement filing. Under the Federal Aviation Act of 1958 (the “FAA Act”), the holders of security interests in aircrafts and certain aircraft parts are required to register such interests with the FAA Aircraft Registry. This was affirmed by the U.S. Supreme Court case of Philko Aviation, Inc. v. Shacket, 462 U.S. 406 (1983), where the Court held that federal registration is required to perfect a consensual security interest. “[T]he primary congressional purpose for the enactment of §503(c) [of the FAA Act] was to create a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal interests in an aircraft.” Id. at 411.

Although the Philko Court attempted to clarify issues concerning federal registration of aircraft titles and liens, a lack of clarity still exists with respect to consensual aircraft liens. In part, this is due to language found in Philko itself in which the Court concluded that, while federal registration perfects the security interest, it does not determine the priority of the interest. The priority of lien claims remains a matter of the differing state laws.

In addition, since the Philko ruling, exceptions to the federal registration requirement have emerged concerning certain nonconsensual aircraft liens, which may exist under state law but may not be filed in the FAA Aircraft Registry. Philko did not address the issue of whether statutory possessory liens were required to be federally filed, which left the door open for the competing interpretations that now exist.

In New Jersey, a statutory possessory lien exists under N.J.S.A. 2A:44-1, et seq. (“**Aircraft Artisan’s Lien Statute**”) in favor of operators of airports and hangars for “the sum due as the fees for... landings and take-offs, or for ...storing, maintaining, keeping or repairing of... aircraft or for furnishing gasoline, accessories, material or other supplies therefor....” Under the Aircraft

Artisan’s Lien Statute, operators of New Jersey airports and hangars, and the providers of materials and services, are expressly permitted to detain aircraft without process at any time that the aircraft is in the claimant’s possession. As long as the claimant files a verified statement of amount owed in the county recording office within 90 days from the date the fees were incurred, the lien shall be superior to all other liens, except any lien for taxes. The Aircraft Artisan’s Lien Statute does not contain a requirement that the lien be federally filed.

New Jersey's further recognition of possessory lienholder super-priority exists in its codification of the Uniform Commercial Code at N.J.S.A. 12A:9-333 with respect to mechanics' liens (the Mechanics' Lien Statute). Where a lienor is in possession of goods for which the lienor provided services or furnished materials in the ordinary course of his business, the lien held by the possessory lienholder has priority over a lender's security interest.

In Southern Jersey Airways, Inc. v. Nat'l Bank of Secaucus, 108 N.J. Super. 369 (App. Div. 1970), New Jersey's Appellate Division analyzed the competing interests of the holder of a consensual lien which had been recorded in the FAA Aircraft Registry and the holder of an unrecorded possessory lien for services and materials furnished to the owner of the aircraft. The Southern Jersey Airways Court considered the applicability of the Aircraft Artisan's Lien Statute, the Mechanics' Lien Statute and the earlier decision in Smith v. Eastern Airmotive Corp., 99 N.J. Super 340 (Ch. Div. 1968) in which a lower court found that the FAA Act is preemptive, not only as to federal recording requirements, but also as to the priority of competing interests in aircraft.

The Southern Jersey Airways Court referenced the Aircraft Artisan's Lien Statute and the Mechanic's Lien Statute, finding that the super-priority provisions of either statute were sufficient to grant the unrecorded possessory lien priority over the consensual lien filed in the FAA Aircraft Registry. In making that determination under state law, and in overruling Eastern Airmotive, the Southern Jersey Airways Court found that the FAA Act is preemptive only as a recording system and not as to questions concerning the priority of liens.

The holding in Southern Jersey Airways remains the law of the State of New Jersey. New Jersey remains among the slight majority of jurisdictions in which statutory possessory liens have been granted priority over consensual liens filed in the FAA Aircraft Registry. For lenders engaged in aviation financing in the State of New Jersey, a review of the FAA Aircraft Registry may not disclose all of the liens that encumber an aircraft, some of which could have super-priority. Appropriate due diligence with the borrower concerning the use, storage, maintenance and repair of the aircraft is required, so that any necessary escrows can be established and, in appropriate circumstances, title to the aircraft can be properly insured against possessory lien claims.

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