The Wrath of Khan[gress]

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Commentary: The Wrath of Khan[gress]
By Alvin C. Harrell

I. Introduction

Students of government and banking policy were treated to a fascinating spectacle during the summer of 1990. Working together, the popular media and Congress created a kind of public hysteria over losses in the thrift industry, and then became swept up in the public clamor for retribution. As a result both the Senate and the House of Representatives voted overwhelmingly for bills that must rank among the most incredible pieces of legislation in modern history.

The genesis of these bills was a public misconception, fueled by politicians and media commentators everywhere, that fraud and corruption are the root causes of recent losses in the financial industry. This is patently untrue, but with help from the popular media Congress has fostered a myth of huge fraud losses. This charade reached new heights of absurdity during the summer of 1990, when both houses of Congress reacted to an outpouring of public emotion by passing separate bills apparently designed to criminalize misjudgments by bank and thrift managers, directors, and attorneys.

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limitation, a certificate or certificates of occupancy, materials to establish that the zoning and/or subdivision approval is based on no real property, or rights appurtenant thereto, other than the Real Property, and an opinion of Borrower's counsel regarding such compliance.

Hazardous Waste. Neither the Real Property nor any portion thereof shall have been used for the disposal of storage of hazardous wastes or materials. Borrower shall have an engineer satisfactory to the Lender perform a site investigation of the Real Property to determine the existence and levels of hazardous substances on the Real Property. The engineer shall issue a report certifying that the Real Property contains no hazardous or toxic waste, substance or material, or any oil or pesticides. In addition to such report, Borrower shall represent that it and any tenant of space in the Real Property will not generate, store, handle or otherwise deal with hazardous or toxic waste, substance or material, or any oil or pesticides on the Real Property.

Appendix "I"
Sample Hazardous Waste Provision

The Mortgagor or any tenant or occupant of the Mortgaged Premises shall not have, use, utilize, maintain or store on, or around the Mortgaged Premises any "Hazardous Substances" as such term is hereinafter defined during the term of this Mortgage. The Mortgagor hereby agrees to indemnify and hold Mortgagee harmless from and against and to reimburse Mortgagee with respect to any and all claims, demands, causes of action, loss, damage, liabilities, costs and expenses of any kind or character, including, but not limited to, all court costs, Mortgagor attorney fees, and all costs and expenses of environmental engineers and experts employed by Mortgagor, known or unknown, fixed or contingent, asserted against or incurred by Mortgagee at any time and from time to time by reason of or arising out of any violation of any Environmental Law in effect and any and all matters arising out of any act, omission, event or circumstance existing or occurring for which any party may claim Mortgagee has liability, including, but not limited to, the presence on the Mortgaged Premises of Hazardous Substances or solid waste disposed of or otherwise Released from the Mortgaged Premises, regardless of whether the act, omission, event or circumstance constituted a violation of any Environmental Law at the time of its existence or occurrence; provided, however, such indemnity shall not apply with respect to matters directly caused by or arising out of the gross negligence or willful misconduct of Mortgagee. The provisions of this paragraph shall survive the release of this Mortgage or any foreclosures of the Mortgage and shall continue thereafter in full force and effect. As used herein, the term "Hazardous Substances" means and includes, without limitation: (i) those substances included within the definitions of "hazardous substance," "hazardous materials," "toxic substances," or "solid waste" in Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 United States Code Sections 9601, et seq., the Resources Conservation and Recovery Act of 1976, 42 United States Code Sections 6901, et seq., and the Hazardous Materials Transportation Act, 49 United States Code Sections 1801, et seq., and in the regulations promulgated pursuant to said laws; (ii) those substances listed in the United States Department of Transportation Table, 49 Code of Federal Regulations Section 172.101 and amendments thereto, or by the Environmental Protection Agency (or any successor agency) as hazardous substances, 40 Code of Federal Regulations Part 302 and amendments thereto; (iii) any material, waste or substance which is petroleum, asbestos, polychlorinated biphenyls, flammable explosives, radioactive materials, radon, or materials designated as a "hazardous substance" pursuant to Section 311 of the Clean Water Act, 33 United States Code Sections 1321, et seq. and 1321, or listed pursuant to Section 307 of the Clean Water Act, 33 United States Code Section 1317, and (iv) such other substances, materials and wastes which are or become regulated by or under the United States Government, the State of Oklahoma, the County of Oklahoma, the City of Oklahoma City and all regulatory bodies and agencies thereof, or which are classified as hazardous or toxic under federal, state or local laws or regulations. As used herein, the term "Release" shall have the meanings specified in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the terms "solid waste" and "disposed" shall have the meanings specified in the Resource Conservation and Recovery Act of 1976. As used herein, the term "Environmental Law" shall collectively mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 United States Code Sections 9601, et seq., the Resources Conservation and Recovery Act of 1976, 42 United States Code Sections 6901, et seq., the Hazardous Materials Transportation Act, 49 United States Code Sections 1801, et seq., the Toxic Substances Control Act, 15 United States Code Sections 2601, et seq., the Clean Water Act, 33 United States Code Sections 1251, et seq., the of the Clean Air Act, 42 United States Code Sections 7401, et seq., and such other laws enacted by the United States Government, the State of Oklahoma, the County of Oklahoma, the City of Oklahoma City and all regulatory bodies and agencies thereof, and all regulations promulgated pursuant thereunder, and in the event any Environmental Law is amended so as to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment.

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Just over a year ago FIRREA dramatically increased the risks for lenders who err, escalating the criminal penalties for regulatory violations and providing for 20 year prison terms. Now, with the ink on its implementing regulations barely dry and in the face of concerns that a credit crunch has resulted, Congress has raced to embrace yet another gigantic increase in regulatory and criminal penalties. The result would fundamentally alter the basic legal rights of bankers, their lawyers, and their customers.

It should be noted that, despite the rhetoric, current enactments will not be effective retroactively and therefore will have no application to whatever real fraud contributed to the insolvency of the FSLIC. The American people are being misled by claims that this legislation is directed at the "crooks" who supposedly looted the thrift industry during the 1980s. Nothing could be farther from the truth. The 1990 bills will victimize the survivors in the financial industry, who must rank among the most honest and prudent bankers in history, having survived the increased regulatory scrutiny, volatile interest rates, and fluctuating collateral values that drove so many institutions into insolvency. It is no accident that our financial institutions seem to be in jeopardy on a wholesale basis, and now the innocent survivors are to be further penalized for the failure of the deposit insurance system. As "institution affiliated parties," attorneys who represent such lenders are also increasingly at risk under this new regime.

While this is not the time for a detailed analysis of the new law, discussion of a few sample provisions from the 1990 bills will serve to make the point. At this writing

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adviseable to charge a higher yield up-front in an amount that has been carefully calculated to cover the average increased cost and expense attributable to defaults.

While limiting the availability of certain loan products or charging increased points up-front could be challenged under the Act as the imposition of different terms and conditions for the purchase of loans, such a practice would be less drastic alternative to an outright exclusion of purchases from a designated area. It would be important to document the internal analysis that an investor undertakes in order to determine the business necessity for the imposition of different terms and conditions. Furthermore, as this article went to press, such “two-tier” pricing was about to be prohibited for FHA-insured loans. In any event, such differences should not be based on general notions of a problem but rather should be based on a careful, reasoned review of a perceived business risk.

Book Review: The Law of Distressed Real Estate

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states: California, Florida, Illinois, Michigan, New York, and Texas.4

This set is completely up-to-date. For example, there is a new Chapter 24A, covering the latest developments in consumer bankruptcy. This includes a thorough discussion of the Gaglia and Houghland cases, which your reviewer found both insightful and helpful (see, e.g., Forum Conveniens, in this issue). It is refreshing to find a treatise that is at the same time thorough, up-to-date, and reflective of state law variations.

Of course any product with the scope of this set may suffer in comparison to other, more specialized works as to specific, narrow issues. For example, The Law of Distressed Real Estate provides extensive coverage of hazardous waste problems, FIFREA, Chapter 11 bankruptcy, and lender liability, but cannot hope to compete as to every issue with separate multi-volume treatises devoted exclusively to such areas.

What Professor Dunaway has done in a unique manner, however, is to bring together in convenient form a comprehensive compendium and explanation of the law of distressed real estate. For anyone dealing with this area of the law, especially on a multi-state basis, this set should be invaluable.

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Congress has just enacted legislation based on these bills, and, the overwhelming size of the votes in both houses of Congress suggests that this new approach to bankruptcy regulation has a political momentum that may be unstoppable.9 The final version of this new law will be discussed in a forthcoming issue of the Quarterly Report, for now this article will describe three proposals from which the final bill was derived.

II. The Banking Law Enforcement Act of 1990 (H.R. 5401 — The Schumer Bill)

Section 101 of H.R. 5401 would require a fine and prison term of up to five years for anyone who “knowingly conceals or endeavors to conceal” any asset or property from, or who endeavors to place an asset beyond the reach of, the Federal Deposit Insurance Corporation (FDIC), Resolution Trust Corporation (RTC), or the National Credit Union Administration (NCUA), or who “knowingly impedes or endeavors to impede the functions of” those agencies. This is a broad prohibition, and one can only speculate whether it would be interpreted to cover routine efforts to resist regulatory pressures, to assert defenses during negotiations, or to protect the personal assets of insiders in otherwise legitimate ways.11 Additional dis

9. In the final days of the session, the 101st Congress passed The Comprehensive Consumer Bankruptcy and Fraud Prevention and Taxpayer Recovery Act of 1990, incorporating many of the provisions of the Schumer Bill. This Act was then vetoed by the President on the floor of the House, though the Schumer Bill did not pass.

10. As discussed in note 5, this is more than a reference to individual bills, none of the proposed legislation is in the House registry more than four votes from"passage."

11. (Continued from previous column)

The judge's high anger was all the more remarkable because he had a little difficulty with the actions of the lawyer. He ruling dismissed a suit brought by Mr. Kating against the defendant for $4.5 million. The lawyer denied that he had done anything wrong.

Judge Sipes in a statement, said the lawyer should be precluded from continuing to represent the plaintiff in the matter. He said that the evidence in the case was "too speculative" to support the claims made by the plaintiff. The lawyer denied the charges, saying that they were "false and defamatory."
rate and the payment schedule assuming the prevailing rate on the date the commitment is issued, prefaced by a statement that:

The figures set forth below are for illustrative purposes only. They reflect the rate now in effect, NOT necessarily the rate you will pay at closing, which will be established as indicated in this commitment.

The authors have been advised by the Department that compliance with this disclosure may be achieved by the lender providing a prevailing rate Truth-in-Lending Disclosure Statement at the time of commitment, and modifying the required disclosure to incorporate by reference the "attached Truth in Lending Statement" in lieu of the word "below."

Where the interest rate, discount points or fees set forth in the commitment are subject to change before closing, the regulations require that those terms be fixed no later than three business days before the loan closes. The regulations further mandate that, upon demand by the borrower, the lender advise the borrower, either orally or in writing, of such terms once they are so fixed. Finally, a commitment fee must be refundable where (a) the commitment is contingent upon approval by parties to whom the lender seeks to sell the loan, and (b) the loan purchaser's requirements are not met, and (c) the borrower is willing but unable to attain compliance with those requirements.

VI. Expiration of Lock-in or Commitment

The regulations provide the borrower with specific rights in the event that the lock-in agreement or commitment expires before the closing date through "no substantial fault of the borrower."

In the case where a lock-in agreement has been executed, but the loan does not close before the lock-in or commitment expiration date, the borrower may either (a) withdraw the application or reject or terminate any commitment, whereupon the lender is required to promptly refund to the borrower any lock-in fee or any commitment fee paid by the borrower, or (b) elect to have the lock-in agreement extended for no more than 14 days following the expiration of the lock-in (where no commitment is issued) or 14 days following the issuance of the commitment or the expiration of the commitment so that the loan is closed at a rate and points which are no higher than that which would provide a current market yield but no gross profit or spread to the lender. Where the loan is closed above the rate specified in the lock-in, the borrower is not responsible for the lock-in fee.

Where no lock-in agreement has been executed and a commitment has been issued, and the loan does not close before the expiration date of the commitment, the borrower may terminate the commitment and receive a refund of the commitment fee, or elect to have the commitment extended for a reasonable period of time to permit closing, not to exceed 14 days.

VII. Special Broker Rules

Special rules for brokers, as defined broadly in the Mortgage Bankers and Brokers Act, cover a variety of brokerage practices and supposed abuses, including limitations upon the types of allowable fees; disclosure of the types and amounts of fees; a listing of broker's services to be afforded; and representations as to the broker's limited authority.

VIII. Federal Law and Private Rights of Action

Importantly, the regulations provide that any disclosure required pursuant to the regulations which is also required by any federal law or regulation will be deemed complied with where the lender complies with the applicable federal law or regulation.

Perhaps of equal importance is section 16.9 of the regulations, titled "No private right of action," which provides that a failure to comply with the regulations "shall not be deemed to provide a party to the transaction with any legal rights or remedies he or she would not otherwise enjoy pursuant to the contractual relationship between the parties."

The Department has opted to rely upon "effective enforcement and penalty provisions already existing in the statutes governing the various categories of mortgage lenders..." While the diverse groups of "lenders" may applaud the Department's evident reluctance to impose sanctions by way of uprooting contractual rights bargaining for by the lenders, this portion of the regulations is uncharacteristically mild, by comparison with consumer protection law in general. Given the broad prophylactic purposes of the regulations and the questionable "legislative" and enforcement jurisdiction of the Department over foreign "lenders," one would not expect the borrower's remedy to be limited to a complaint to the Department, with the hope that the Department will bring its weight to bear and/or bring an administrative action against the lender.

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Section 103 of H.R. 5401 would require a fine and prison term of up to five years for anyone who "corruptly obstructs or attempts to obstruct any examination of a financial institution ...." While the word "corruptly" is not defined, and one can only guess at how it might be interpreted in an administrative proceeding or by a hostile court, once again there is obvious potential for its use against defense efforts in regulatory enforcement actions. Conceivably this could be interpreted to make it a felony for a banker or his attorney to assert an unsuccessful defense in any regulatory negotiation or enforcement action.

Section 104 would raise the potential prison term for a wide variety of regulatory violations, from 20 years under FIRREA to 30 years under H.R. 5401. Many of these violations carried a maximum prison term of two years or less prior to FIRREA; in the space of two years these prison terms would be increased from two years (prior to FIRREA) to 30 years (under H.R. 5401), a dramatic increase in such a short period of time; in addition the scope would be extended to cover many new violations.

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Commissioner. A copy of this notice must be mailed to the mortgagor.

If the servicer does not resolve the delinquency within 30 days of the tax sale notice discussed above, the mortgagor may pay the tax, send a copy of the paid bill to the servicer, notify the servicer that it will stop making payments into the escrow account, and make arrangements to make all future payments of taxes, insurance and other charges by itself. This effectively terminates the escrow account, leaving the mortgagor responsible for only principal and interest payments.

Furthermore, a servicer can be liable for the mortgagor’s name appearing in a newspaper tax sale notice. The mortgagor may sue the servicer for damages, court costs and attorneys’ fees, including the cost of printing a correction in the same newspaper in which the notice of tax delinquency appeared.

VI. Escrow Payment Adjustments

By the end of the second loan year, the servicer must establish a system to undertake an analysis of the escrow account. After such analysis, the mortgagor’s scheduled escrow account payments must be adjusted to provide a sufficient accumulation of funds to make the anticipated disbursements during the year, subject to the maximums set forth above. A mortgagor must be given 10 days advance notice of any adjustment in its scheduled payments along with a full explanation of reasons for any change. Any surplus or shortage must be refunded to or collected from the mortgagor as provided by the mortgage document. A surplus can be applied to delinquent payments.

Also, the Escrow Act repeals a 1977 New Jersey law which prohibited mortgage lenders from increasing the mortgagor’s monthly payments to an escrow account until the lender received official notification of an increase in taxes. This change seems consistent with earlier parts of the bill allowing lenders or servicers to rely on reasonable estimates of future escrow expenditures. Servicers thus have greater flexibility to make escrow account payment changes.

VII. Annual Account Statements

Within 45 days after the end of each calendar year, a servicer must provide a written statement listing the escrow account’s beginning balance, the total payments to the account during the year, the interest credited, if any, an itemization of all expenditures from the account, and the ending balance. A mortgagor is entitled to receive at least one such statement each year without charge. However, the annual statement is not required if the mortgagor receives a monthly statement or passbook which provides an itemized record of disbursements and the escrow account balance.

A servicing organization managing an escrow account must also provide the mortgagor with “written instructions” concerning its procedures for responding to requests for information. This disclosure presumably should be provided at the inception of the escrow account, although the Escrow Act offers no timing requirement.

VIII. Immediate Compliance

As with any new legislation, different readers can provide varying interpretations, and there are many details that could not be included in this article. The Commissioner’s staff is developing a comprehensive regulation, but it will not be finalized until 1991. Also, penalties for noncompliance with the Escrow Act are unclear, except for those limited penalties mentioned above. Since most of the Escrow Act is now effective, all servicers covered by the Escrow Act and their counsel should immediately review the new law and adjust their procedures accordingly. With increasingly vigilant compliance enforcement by regulators, and renewed scrutiny of residential mortgage transactions by judges, there is no time to lose.

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Section 106 is one of the most important and most dangerous provisions of H.R. 5401. It would include as predicate offenses at Title 18, section 1956(c)(7)(D) of the United States Code a wide variety of potential regulatory violations relating to such things as “fraudulent bank entries,” FDIC transactions, credit applications, interstate communications, and wire fraud. The significance of this is that section 1956 contains the most draconian criminal penalties, sanctions, and prosecutorial powers ever devised under American law. It was designed to permit prosecutors to deal with organized crime syndicates and international narcotics cartels. Section 106 of H.R. 5401 would trigger application of our most extreme criminal penalties in the context of many ordinary bank regulatory violations. It would represent a virtual declaration of war against everyone associated with the American depository financial system, directly analogous to the war on drugs.

Section 107 of H.R. 5401 would require application of the mandatory sentencing guidelines to banking violations where the defendant has received more than $1 million in “gross receipts.” Apparently this could be interpreted to include any transaction where a borrower received loan proceeds of $1 million or more even if that loan had been repaid in full. If the “gross receipts” exceeded $5 million, section 110 would require a fine up to $10 million per individual or $20 million per organization, plus a prison term of at least ten years. Again this apparently could be triggered by a violation related to the receipt of loan proceeds, even if the loan has been repaid in full.

Section 201 of H.R. 5401 would permit pre-trial freezing of the personal assets of financial institution insiders, attorneys, and borrowers and would prohibit any transfer or use of such property. In effect the government could prevent such persons from using their own assets to defend themselves against government enforcement actions. As discussed infra, other bills would likewise preclude use of institution indemnity agreements or directors and officers liability

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If the borrower is to receive new funds as part of a refinancing, the transaction can be documented as an extension or renewal of the existing loan together with a separate new loan. Even the most extreme of the transformation rule and novation theory cases seem to acknowledge that this will protect the lender. In Georgia, where state law provides that novation occurs regardless of the parties’ intent, it may be the only way that the lender can maintain its purchase money position.

If the lender documents the transaction as an extension and characterizes any advance as a separate new loan, it may be possible to provide in the documents that payments will be allocated first to the new loan and that no payments will be applied to the old purchase money loan until the balance of the new loan is paid in full. On the other hand, a court might see this as overreaching and hold that the lender had somehow waived its purchase money rights.

The expense of separate documentation probably precludes its use as a standard procedure, but it is an alternative that should at least be kept in mind for potential use in particularly sensitive circumstances.

VI. Conclusion
Loss of purchase money status continues to be a problem for consumer and other lenders. There is no single solution for the problem. Favorable judicial decisions have alleviated creditor concerns in some jurisdictions, but in others the problem remains undiminished. Recognition of the problem, and some minor additions to the lender’s standard forms, practices, and procedures can reduce the risk significantly, but in large volume transactions the documentation necessary to eliminate the problem totally is probably not practical at this time.

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Insurance proceeds for purposes of funding a legal defense. This should help clear up court dockets all over America by depriving bankers of any hope for a legal defense.

H.R. 5401 passed the U.S. House of Representatives on July 31, 1990, without significant debate, by a vote of 424 to 4, with 4 abstentions.

III. The Financial Crimes Prosecution and Recovery Act of 1990 (H.R. 5050)

H.R. 5050 contains a number of “feel good” provisions that enable everyone involved to feel good about what they are doing without having much effect or causing too much real harm. These include such things as the establishment of a National Commission on Financial Crime (sections 201, 202), more funding for Treasury and Justice Department investigations (sections 207, 208), and a variety of other similar and miscellaneous provisions. While many of these provisions would merely expand the country’s financial self-flagellation there are other provisions in H.R. 5050 that promise more lasting damage.

Among the latter are provisions that would allow the FDIC and RTC to avoid transfers of or to any institution-affiliated party or debtor within the preceding five year period (section 306), and other provisions that would permit seizure of the personal assets of such persons before trial at the request of the FDIC or RTC (section 307). Prejudgment seizure also would be permitted as a means to enforce regulatory enforcement orders, and courts could issue ex parte orders prohibiting withdrawal, transfer, use, or disposition of any funds or assets, by means of injunctions, restraining orders, or appointment of a receiver. These provisions and others reflect an amazing contempt for the basic constitutional protections long accorded to even the most degenerate and violent criminal.

Section 308 of H.R. 5050 would create a felony and provide for fines of up to $1 million and imprisonment for up to five years for “concealment” of property from the banking regulators. Section 312 would extend the drug forfeiture statutes to various banking violations, and section 315 would extend bank criminal law provisions to holding company officers, directors, employees and agents. Section 316 would expand the government’s wiretap authority with regard to bank-related offenses. Section 309 would require bank and thrift directors to attend courses, in order to educate them as to their new obligations and liabilities. It is not clear why any person who becomes educated as to these matters would thereafter want to remain as a bank director, and it seems likely that the result would be to encourage a continued flight of qualified people from the industry.

Section 318 of H.R. 5050 would prohibit a troubled institution from paying or reimagining

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have invalidated their choice. In that event, the normal choice of law rules, including section 1-105(1), would apply.\footnote{107}

Second, the parties are not free to contract around section 9-103. With respect to nonpossession security interests in chattel paper, that section provides that "[t]he law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest."\footnote{108} In other words, section 9-103 refers us to Oklahoma law.\footnote{109}

Section 9-103 does not, however, dictate that Oklahoma law governs every issue related to the transaction. Oklahoma law governs only "perfection or the effect of perfection and non-perfection."\footnote{110} At issue in the example is not perfection (i.e., giving public notice of the security interest) but attachment. Although a security interest is not a "perfected security interest" until it has attached, the "applicable steps required for perfection" include only the public notice requirements of Part 3 of Article 9 (e.g., filing a financing statement or taking possession of the collateral) and not the attachment requirements of Part 2.\footnote{111} Thus section 1-105, and not section 9-103, determines the law governing attachment issues. In the example, the prohibition on transfer would be ineffective and the security interest would be valid under California law.

Now suppose that the lessor files a bankruptcy petition. The bankruptcy trustee argues that an error in the financing statement, e.g., a misspelling of the debtor/lessor’s name, makes the filing ineffective to perfect the security interest. Here the issue is perfection, and Oklahoma law will determine whether the financing statement nevertheless complies with the requirements of section 9-402. Because Oklahoma law governs the effect of perfection or nonperfection of the security interest, the Oklahoma enactment of section 2A-307 also will resolve a priority dispute between the lessee and a secured party who had taken a security interest in the goods before they were leased.

IV. Conclusion

For the most part, the codification of the law governing personal property leases is a vast improvement over the conflicting and sometimes incoherent body of case law that preceded it. In particular, Revised Section 1-201(37) should provide both planners and judges with a sounder basis upon which to make decisions. The policy decisions reflected in the Official Text's treatment of the lessor's secured party are open to some question, as is the language adopted to embody those policies. For the most part, however, a secured party can prevent potentially deleterious results at some cost with proper planning. The California revisions are not without their rough spots. Nevertheless, they are likely to facilitate financing of lessors by removing the need to incur some of the costs attendant to transactions conducted under the Official Text. These costs include not only those of risk prevention but also, in some situations, the cost of litigating whether a purported lease creates a security interest. Even though the California version is less favorable to some non-ordinary course lessees, the reduction in the costs of financing may redound to the benefit of lessees as a group.

Much to its credit, NCCUSL is now considering seriously a number of possible amendments to the Official Text, including amendments designed to address the issues discussed in this article. The adoption of a single, uniform text—building upon the extensive analyses already undertaken by the California revisions and the Official Text and improving upon both will be an important step forward in commercial law.

Bursing any person for legal expenses with respect to a regulatory allegation that the person contributed to any unsafe or unsound practice or condition of the institution or with respect to any civil money penalty, removal, prohibition or other administrative sanction. This would also prohibit use of any proceeds from a commercial insurance policy (e.g., a directors and officers liability bond) covering expenses associated with defending such an action. Thus institution-related parties, having been deprived of their own resources for purposes of mounting a legal defense, would also be deprived of the benefit of any liability insurance or indemnification agreements for that purpose.

In other words, financial institution-affiliated parties are to be left without any means to finance or assert a legal defense, regardless of the merits of their position.

Finally, sections 314 and 401-404 of H.R. 5050 would revise the Bankruptcy Code in order to prevent financial institution insurers from discharging liability for debts arising from financial institution insolencies. Congress, which has made it so easy for borrowers to discharge liability for bank debt, has now voted to deprive bankers of the same rights when the bank fails as a result and the banker is blamed for the losses.

Among other things, a person could not be discharged in bankruptcy from an obligation to pay restitution resulting from any act that caused loss to a financial institution. In addition a person could not be discharged from a debt for any damages, penalty, fine, forfeiture, restitution, reimbursement, indemnification, or guarantee arising from fraud or defalcation while acting in a fiduciary capacity with regard to a financial institution. In this regard, institution-affiliated persons automatically would be deemed to be acting in a fiduciary capacity as to all decisions relating to the financial institution, thereby excempting any resulting liability from discharge in bankruptcy. Furthermore any banking regulator asserting a

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