

Articles

"District Court Recognizes Texas Legislation in Overturning *Clark Contracting* Decision,"

Michael D. Jewesson

LJN's Equipment Leasing Newsletter

July 2010

As reported in the September 2009 edition of *LJN's Equipment Leasing Newsletter* ("Texas Legislature Passes Certificate of Title Bill Negating Effect of *Clark Contracting* Decision," Michael D. Jewesson), Senate Bill 1592, S.B.1592, 81st Leg., Reg. Sess. (Tex. 2009) ("SB1592") was signed into law by Texas Gov. Rick Perry on June 19, 2009, thereby negating a decision handed down by a bankruptcy court in the Western District of Texas in late 2008 relating to the perfected status of an assignee lender on a loan purportedly secured by six equipment trucks. *Clark Contracting Serv., Inc. v. Wells Fargo Equip. Fin. (In re Clark Contracting Serv., Inc.)* 399 B.R. 789 (Bankr. W.D. Tex. 2008).

In *Clark Contracting*, the lender, Wells Fargo, in accordance with standard industry practice, did not apply for new certificates of title to reflect itself as the new lienholder after CIT (the original lender) assigned the loan and the related lien in the trucks to Wells Fargo. Instead, Wells Fargo relied on permissive language in the Texas Certificate of Title Act ("TCTA") (TEX. TRANSP. CODE ANN. §§ 501.001-501.159 (2007)) and commentary to Chapter 9 of the Texas Uniform Commercial Code that indicated that re-titling in such circumstances was not necessary to transfer the perfected status of the assignor lienholder to its assignee. The implications of the bankruptcy court's decision to render Wells Fargo unperfected extended far beyond the parties to the *Clark Contracting* case to cast doubt upon the perfected status of other secured parties in Texas motor vehicles and other titled assets that did not customarily re-title upon assignment.

Fortunately, the Texas legislature was in session when the *Clark Contracting* decision became known to leasing and securitization participants and SB1592 was quickly drafted, debated, and passed. In the year since SB1592 was under consideration by the Texas legislature, copycat cases challenging statutes governing perfection in motor vehicles were heard in both Arkansas and Indiana. See *In re Johnson*, 2009 WL 1863219 (Bankr. E.D. Ark. 2009) and *In re Scott*, 2010 WL 933896 (Bankr. S.D. Ind. 2010). In each case, the conclusions reached by the Texas bankruptcy court were unequivocally rejected, resulting in judicial recognition of standard industry practice in those states and assuring assignee lienholders that their perfected status was not affected by opting not to re-title.

A Clarification of Existing Law

While SB1592 clearly had the prospective effect of giving comfort to assignees of liens that took their assignments after the effective date of that legislation, it was not until the original *Clark Contracting* decision was reviewed by a federal district court on appeal that assignee lienholders taking assignment of liens prior to the effective date of SB1592 could be assured that the perfected status of their liens would be recognized by Texas courts. On April 14, 2010, the federal district court reviewing the *Clark Contracting* decision overturned the bankruptcy court and gave effect to the language in SB1592 that indicated that the legislation was a clarification of existing law rather than a change to the law. *Clark Contracting Serv., Inc. v. Wells Fargo Equip. Fin. (In re Clark Contracting Serv., Inc.)*, Ch. 7 Case No. 08-50046-LMC, Adv. No. 09-726-FB (W.D. Tex. Apr. 14, 2010). The intended effect of the clarification language in SB1592 was to avoid the possibility that a Texas court (such as the district court reviewing the *Clark Contracting* decision) would view any application of SB1592 to pre-effective-date assignments as a retroactive application of the law, which is generally not permitted under Texas and most other states' laws.

The district court found grounds for overturning the *Clark Contracting* decision, thereby reinstating Wells Fargo's perfected status, solely as a result of the enactment of SB1592 into law, but went on to assail the bankruptcy court's reasoning in the original opinion. The district court's reasoning was similar to that of the Indiana and Arkansas courts and what industry practitioners have opined upon for years; if the certificate of title law does not address the perfected status of assignee lienholders, the principles of § 9-310(c) of the Uniform Commercial Code, that an assignee of a perfected security interest need not file an assignment of the assignor's financing statement to enjoy the perfected status of the assignor as against

Articles

creditors of and transferees from the original debtor, should apply. It remains to be seen whether three defeats in three attempts by debtors to upset this long-settled practice will be enough to dissuade additional challenges in other states that don't have certificate of title statutes that clearly protect the perfected status of assignees.