

EQUIPMENT LEASING AND FINANCE ASSOCIATION

Support of H.B. No. 077 and S.B. No. 1592 Relating to Assignment of Security Interests in Certain Collateral

H.B. No. 077 and S.B. No. 1592 are intended to clarify and confirm the existing meaning of certain Texas statutes regarding the assignment of security interests in certain collateral, including Section 501.114 of the Texas Transportation Code (“Texas COTA”) which relates to the assignment of security interests in motor vehicles titled under the Texas COTA. Specifically, the Bills are intended to confirm the clear language of the Texas Uniform Commercial Code (the “UCC”) and the standard interpretations of the Texas COTA that (i) an assignee of a security interest in a titled vehicle may, but is not required to, file an assignment of the lien with the state and (ii) the failure to file an assignment of a lien on a titled vehicle has no impact on the validity or perfection of the lien which was previously noted on the title by the assignor.

The Bills are important because the recent decision of the Bankruptcy Court for the Western District of Texas in In re Clark Contracting Services, Inc. held, contrary to the UCC and current practices, that in order for an assigned security interest in a titled vehicle to remain perfected the assignee must apply for a new certificate of title reflecting the assignee as lienholder on the title. Prior to the court’s decision, companies that financed receivables secured by titled vehicles and who purchased loans secured by titled vehicles in Texas generally did not file assignments of those liens because they relied on the clear language to the contrary in Section 9.310(c) of the UCC along with the Officials Comments to that Section, and the language in Section 501.114 of the Texas COTA. The Clark Contracting decision has now cast an unwarranted shadow of uncertainty on the perfected status of thousands, if not millions, of assigned liens secured by motor vehicles and other titled assets in Texas. In addition, the bill will now cause future financiers of receivables and purchasers of loans secured by Texas titled vehicles to incur additional expenses of processing and paying for these assignments with the state. These costs will likely be passed onto Texas consumers and businesses and such time and expense could significantly curtail lending activity in Texas and will make the cost of credit more expensive to Texas consumers and businesses. This could further harm sales in the already depressed motor vehicle industry as recently evidenced by the fact that a vehicle financier has recently excluded Texas loans from its securitization as a direct result of the case.

Section 9.310(c) of the UCC already makes it very clear that if a secured party assigns a perfected security interest in any collateral, that a filing under the UCC is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor. In addition, the Official Comments to Section 9.310 expressly state that Section 9.310(c) applies to the assignment of a security interest perfected pursuant to a certificate of title statute such as the Texas COTA and that “unless the [certificate of title] statute expressly provides to the contrary, the security interest will remain perfected against creditors and transferees of the original debtor, even if the assignee takes no action to cause the certificate of title to reflect the assignment or to cause its name to appear on the certificate of title”.

Section 501.114 of the Texas COTA provides that a lienholder may assign a lien by applying for an assignment of the lien. Not only does the Texas COTA say that the filing of such an assignment is permissive, there is nothing in the Texas COTA that states or even implies that such filing is required in order to continue the perfected status of the lien. Therefore, since nothing in the Texas COTA expressly requires that the filing of a notice or an application of the assignment of a lien on a titled vehicle is required to perfect or continue to perfect such lien, then such lien remains perfected regardless of whether or not the assignment of the lien is filed or the assignee’s name is noted on the title. This interpretation is also supported by the Professional Editorial Board of the UCC which clearly reached the same conclusion on this same issue in its PEB Commentary No. 12 publication.

Although the language and intent of the Texas COTA and the UCC are fully consistent with standard industry practices and legal interpretations, the decision in the Clark Contracting case has now created serious problems for companies which finance motor vehicles in Texas. These problems are particularly acute during the current economic downturn and threaten to further seriously harm the sale and financing of vehicles in Texas. These are problems which require immediate relief. The Bills would provide that relief and thereby aid Texas consumers and businesses which rely on vehicle financing by confirming that the Texas statutes continue to have the same meaning assumed by financiers and legal practitioners in Texas over all these years. The failure to pass the Bills will put consumers and businesses in Texas at a competitive disadvantage to other states, increase financing costs and could curtail the amount of financing activity of titled vehicles in Texas.