The dissenters. Led by Justice Souter, the dissenters claim that the Court characterized its task as one of choosing between two different bright-line rules that Congress might have enacted but did not. Other interpretive alternatives, they suggest, are available. The dissent begins by observing that 1984 amendments to the Bankruptcy Code, although not addressing the precise issue before the Court, did squarely place foreclosure sales within the scope of fraudulent-conveyance analysis. The dissenters then complain that the approach adopted by the majority essentially immunizes such transfers from this analysis as long as they have been properly conducted.

The Court's response to this criticism is that fraudulent-conveyance analysis will still have vitality with regard to collusive or procedurally defective real property foreclosures and to transfers other than foreclosures. According to the dissenters, this simply illustrates one of the problems with the Court's holding. Given the fact that the Court suggests that the fair market value standard, or something very much like it, might continue to apply in other contexts, the Court's holding creates the anomalous result of having the phrase "reasonably equivalent value" mean one thing in the context of a properly conducted real estate foreclosure sale and something else in other contexts.

The dissenters argue that the phrase "reasonably equivalent value" suggests a simple process in which the court must determine the value of the property and ascertain whether the price paid was less than reasonable under the circumstances. Bankruptcy courts can continue to give content to this phrase as they consider its applicability in particular circumstances brought before them. The dissenters felt the fact that foreclosure sales might not be set aside under state law for inadequacy of price is essentially irrelevant. Avoidance of transfers of property for which the debtor has received inadequate consideration comports with bankruptcy policy, and bankruptcy statutes frequently alter the results that would prevail under state law or disrupt the expectations of parties who have relied on state law in structuring their transactions. In these situations, the bankruptcy law should preempt applicable state law.

The dissenters maintain that the ruling is at odds with the plain meaning of the statute and that the adoption of a preemptive rule is not only not necessary to prevent a result at odds with the intentions of the drafters, but creates a judicial exception to the fraudulent-conveyance provision.

Big victory for secured lenders. Clearly, the *BFP* decision represents a major victory for secured creditors and substantially alleviates fraudulent-transfer concerns for real estate lenders foreclosing on collateral in the shadow of bankruptcy. It does not, however, completely eliminate the specter of the fraudulent-conveyance action. Section 544(b) of the Bankruptcy Code gives trustees and debtors in possession the power to use other state statutes to avoid transactions, including applicable fraudulent-conveyance laws. Accordingly, actions could still conceivably be brought challenging foreclosure sales pursuant to state fraudulent-conveyance laws. This threat will not exist, however, in jurisdictions that have adopted the Uniform Fraudulent Transfer Act. Section 3(b) of the UFTA adopts the rule embraced by the Supreme Court in BFP for dispositions of property under a mortgage, deed of trust, or security agreement.

Applying *BFP* to UCC foreclosures. Does the rationale of *BFP* apply to foreclosures of personal property under Article 9? In footnote 3 of the majority opinion, the Court states that its opinion applies only to mortgage foreclosures of real estate. To the extent that the opinion is predicated upon the very specific procedures states have adopted for real property foreclosures and what the Court describes as the essential interest of the states in matters relating to real property titles, it may be difficult to apply to personal property foreclosures. As a rule, no similar set of specific procedures is established for foreclosure of personal property. The UCC merely requires that they be done in a commercially reasonable fashion and gives secured creditors a number of options.

On the other hand, there are certain features of personal property foreclosures under the UCC that parallel those cited by the Court in supporting its holding in BFP. For example, the Court notes that real property foreclosure sales are generally not subject to being set aside for inadequacy of price. The UCC contains a similar provision, stating that a sale does not necessarily fail to satisfy the test of commercial reasonableness merely as a result of an inadequate price. UCC 9-627(a). In any situation in which specific procedures are established for the conduct of foreclosure sales of personal property, the federalism concerns expressed in *BFP* may be applicable and a secured creditor should urge the holding as a bar to scrutiny of the sale under the fraudulent-transfer provisions of the Bankruptcy Code.

Bottom line. Will secured lenders fare as well before the Supreme Court in the upcoming debt collection case as they did in the fraudulent transfer case? Stay tuned.

DON'T FORGET CONTINUATION STATEMENTS FOR MORTGAGES ACTING AS FINANCING STATEMENTS ON AS-EXTRACTED COLLATERAL AND TIMBER TO BE CUT

In the oil and gas industry, a lender will typically record a mortgage that describes both the mineral interests in the ground as well as those same interests "as extracted," i.e., the mineral interests the moment they are removed from the ground at the wellhead or minehead. The "as extracted collateral" then becomes subject to Article 9 and its continuation statement requirements. The fact that the lender recorded a mortgage and not a UCC-1A financing statement does not excuse the lender from recording a continuation statement. The same holds true for timber to be cut.

As-extracted collateral and timber to be cut as Article 9 collateral. It's no surprise to most practitioners that "as-extracted collateral" and timber to be cut are both within the scope of Article 9. "As-extracted collateral" is defined as oil, gas or other minerals that are subject to a security interest that is created by a debtor having an interest in the minerals before extraction and attaches to such minerals as extracted, together with accounts arising from the sale at the wellhead or mine head of such oil, gas, or other minerals, in which the debtor had an interest before extraction. UCC 9-102(a)(6). The definition of "goods" found at UCC 9-102(a)(44) includes "standing timber that is to be cut and removed under a conveyance or contract for sale." Minerals in the ground, *i.e.*, before extraction, are real property interests outside of the scope of Article 9 and governed by real property law.

Perfection by local recording. The rules for perfecting a security interest in "as extracted collateral" and timber to be cut are almost the same as the perfection requirements for fixtures. For fixtures, as-extracted collateral, and timber to be cut, UCC 9-501(a)(1) requires that a UCC-1A financing statement be recorded in the office designated for the recording of mortgages on real property. Secured creditors perfecting a security interest in fixtures may also centrally file with the state under UCC 9-501(a)(2), but most record a fixture filing locally, so as to qualify for the enhanced protections of UCC 9-334(d) and (e)(1).

Mortgages effective as UCC-1A financing statements. A mortgage is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut, provided the mortgage satisfies the requirements of UCC 9-502(c), which includes the UCC-1A requirements of UCC 9-502(b). These standards set a relatively "low bar," and most mortgages can easily be drafted to meet the requirements. As a result, it is common for a lender to record a mortgage describing as-extracted collateral and timber to be cut.

What about continuation statements for mortgages effective as financing statements? Here's the problem: A mortgage effective as a financing statement for as-extracted collateral and timber to be cut does *not* have the indefinite life of a mortgage covering real property or fixtures. A lender may overlook the need because, after all, the mortgage looks like a mortgage, and not a UCC-1A financing statement.

As most practitioners know, UCC 9-515 sets, as a general rule, a five-year effectiveness for a "filed financing statement." UCC 9-515(a). UCC 9-515(g) provides an exception, stating that a mortgage that is effective as a financing statement filed as a *fixture filing* under 9-502(c) remains effective as a financing statement filed as a *fixture filing* until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

UCC 9-515(g) is limited to *fixture filings*! The recording of a mortgage as a financing statement filed on as-extracted collateral and timber to be cut is *not* effective indefinitely. It is subject to the five-year requirement, except in a couple of states adopting a non-uniform version of UCC 9-515(g).

If a secured creditor records a mortgage instead of a UCC-1A financing statement on as-extracted collateral or timber to be cut and then fails to timely record a continuation within the six-month period before the fifth anniversary of the recording of the mortgage (and within the same six-month period every five years thereafter), the security interest in as-extracted collateral and timber to be cut will lapse, with disastrous results. UCC 9-515(c) states that, "upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, *it is deemed never to have been perfected as against a purchaser of the collateral for value.*" A "purchaser" includes another mortgagee or secured creditor under UCC 1-201(b)(29) and (30). Thus, the secured creditor whose perfected status lapses will lose a priority battle with another mortgagee or secured creditor.

Does the phrase "unless the security interest is perfected otherwise" in UCC 9-515(c) save the secured creditor recording a mortgage on "as extracted collateral" or timber to be cut from lapse? Your adversary will make two arguments. First, if mortgages covering "as extracted collateral" and timber to be cut were to have an indefinite life, UCC 9-515(g) could have plainly so stated. Second, UCC 9-502(c) authorizes the recording of a mortgage on such collateral "as a financing statement." The "unless perfected otherwise" language in UCC 9-515(c) relates to statutory agricultural liens.

Bottom line: The big takeaway for secured lenders is the need to record a separate UCC-1A financing statement for as-extracted collateral or timber to be cut, even if that collateral is described in the mortgage. The lender agents or employees who are assigned the task to calendar the appropriate date(s) to record continuation statements may not know that a continuation statement is required for the mortgage, either because they are not familiar with the terms of the deal and won't review the mortgage to determine if it includes as-extracted collateral or timber to be cut, or because they don't understand the need for a continuation statement. By contrast, if they see a UCC-1A financing statement, they will think "continuation needed," and calendar the appropriate continuation filing date.

The preceding article was written by Daniel Kubiak, a member of the Mika Meyers firm of Grand Rapids, Michigan. dkubiak@mikameyers.com. Mr. Kubiak represents lenders in all aspects of commercial lending.

GARNISHMENT OF DEPOSIT ACCOUNTS: OPERATIONAL HEADACHES

Next to employers, depository institutions probably garner more incoming garnishment notices than any other group. Two of the most recurrent issues deal with joint accounts and name discrepancies. Let's take a brief ride through this landscape.

Joint accounts. What happens when the deposit account is titled in the joint names of husband and wife, but the garnishing creditor is going after only one of the joint depositors? This is a constant headache for depository institutions, and the rules vary somewhat from state to state. Interestingly enough, even though neither joint depositor "owns" the funds in the account, the courts have generally allowed garnishment only to the extent of the debtor's "equitable ownership," which is usually determined by the amount contributed.

In states that recognize tenancies by the entirety in personal property, a joint deposit account titled in the name of husband and wife cannot be garnished for the individual debt of either husband or wife, at least if the account was not established as a fraud on creditors. In states that don't recognize tenancies by the entirety, the courts generally agree that a joint deposit account is garnishable by a creditor of only one of the joint depositors. In a few states, the entire joint account is vulnerable to garnishment by a judgment creditor of one of the depositors. However, the general rule is that the creditor's rights are limited to the amount of funds in the account "equitably owned" by the debtor depositor.

In many states, there is a rebuttable presumption of equal ownership between debtor and non-debtor depositors. For example, in *Walnut Valley State Bank v. Stovall*, 566 P.2d 33 (Kan. Ct. App.), *aff'd in part and rev'd in part*, 574 P.2d 1382 (Kan. 1977), the court held that the garnishment transformed the joint tenancy into a tenancy in common, with a presumption of equal ownership. The burden was on the non-debtor depositor to prove that she had contributed more than one half to the account. The bank was allowed to answer the garnishment notice on the basis of that presumption.

In other states, there is a rebuttable presumption that the debtor owns all the account. And a few courts take the position that the burden of proving that the debtor owns all or part of the joint bank account is on the garnishing creditor. In any case, since it must respond to the garnishment immediately, the depository institution should be protected if it handles the garnishment in accordance with the appropriate presumption. When in doubt, it can always interplead the funds. Another possibility is to handle the matter in the joint deposit agreement.

Name discrepancies. Suppose there is a slight discrepancy between the name of the debtor on the garnishment writ and the name on the deposit account. Most states have no clear guidelines on this matter, and there is little case law on the point. In such situations, the depository institution should use a "rule of reason." If the discrepancy is obviously a matter of style, or a typo, the garnishment should be honored. Even in cases where the discrepancy is larger, the garnishment should be honored if the bank officer in charge knows that the two are identical.

On the other hand, mutuality plays a role in garnishment just as it does in bank exercise of setoff. If the depository institution receives a garnishment in the name of an individual, it is improper to garnish a partnership account where the debtor is a partner (unless the partner incurred the debt for partnership purposes) or a corporate account (where the debtor is a shareholder). On the other hand, if a garnishment is received in the individual's name, and the individual has a "doing business as" or "trading as" business account, the business account is generally garnishable.

If the deposit account is a "special account," garnishment is generally not proper. Examples include custodial accounts, trust accounts, agency accounts, IRA accounts, deposits maintained as collateral for the depositor's debt to the bank, deposits for the purpose of paying the depositor's debt to particular creditors, or deposits to be used for other particular purposes.

When a bank receives a writ of garnishment that is not drawn with precision, it has a problem. If it honors the writ, it could feel the wrath of its customer; if it dishonors the writ, it could get sued by the garnishing creditor. This is a variation of the "adverse-claim" dilemma frequently faced by banks and other depository institutions. A decision from Maryland offers some protection to the bank by penalizing the garnishing creditor for its lack of precision.

The Maryland case. In *Maryland Nat'l Bank v. Parkville Fed. Sav. Bank*, 660 A.2d 1043 (Md. Ct. Spec. App. 1995), *aff'd* 681 A.2d 521 (Md. Ct. App. 1996), Parkville Federal obtained final judgments on March 22 against four separate defendants—People's Transportation, Quality Plus, Peter