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## CONCLUSION

The decision of the county court is affirmed.

AFFIRMED.

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# STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, APPELLEE, V. AMWEST SURETY INSURANCE COMPANY, APPELLEE, AND FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR NETBANK, F.S.B., CLAIMANT, APPELLANT.

790 N.W.2d 866

Filed October 29, 2010. No. S-09-1128.

1. **Insurance: Equity: Appeal and Error.** An insurer liquidation proceeding lies in equity, and an appellate court reviews a liquidation court's determination of claims disputes de novo on the record.
2. **Contracts: Time.** In the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances.
3. **Uniform Commercial Code: Security Interests: Notice.** The Uniform Commercial Code is a "pure race" statute in which a subsequent creditor's notice of prior creditors is irrelevant.
4. **Security Interests.** As to priority, conflicting perfected security interests rank in the order in which they are filed or perfected.
5. **Security Interests: Time.** Delays in perfecting a security interest measured in months or years are unreasonable.
6. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
7. **Waiver: Estoppel.** To establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.
8. **Waiver.** A waiver requires that the waiving party have full knowledge of all the material facts.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded.

Robert B. Bernstein, of Vandenberg & Feliu, L.L.P., James G. Powers and Michael T. Eversden, of McGrath, North, Mullin & Kratz, P.C., L.L.O., and William V. Custer, LeeAnn

Jones, and Jennifer B. Dempsey, of Bryan Cave, L.L.P., for appellant.

Robert L. Nefsky, John H. Binning, and Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee Director of Insurance.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

## SUMMARY

During 1999 and 2000, NetBank, a federal savings bank; Commercial Money Center (CMC); and Amwest Surety Insurance Company (Amwest) entered into seven agreements. Under these agreements, Amwest undertook the duty to perfect NetBank's security interests in the underlying collateral so that NetBank would be protected from subsequent creditors or a CMC bankruptcy. Amwest never perfected the security interests, and CMC later filed for bankruptcy, leaving NetBank an unsecured creditor in CMC's bankruptcy. NetBank filed claims in the Amwest liquidation proceedings for Amwest's alleged breach of contract. We are asked to decide whether a reasonable time to perfect NetBank's security interests had elapsed before a subsequent surety replaced Amwest.

## BACKGROUND

In 1999 and 2000, CMC sold, transferred, and assigned to NetBank the income streams in 641 leases. These transactions were evidenced in seven sales and servicing agreements entered into by CMC, NetBank, and Amwest. CMC brought in Amwest as a surety to guarantee the income streams to make the deal more attractive to institutional investors such as NetBank. Although Amwest issued surety bonds as part of this transaction, the Federal Deposit Insurance Corporation (FDIC) is not asserting any claims on those bonds. FDIC is a party to this case in its capacity as the receiver for NetBank, which encountered its own insolvency problems in 2007. FDIC is not asserting any type of government priority; its rights under the agreements are exactly those that NetBank would have had.

Included within the agreements were representations regarding Uniform Commercial Code (U.C.C.) filings. In each

agreement, CMC represented that all necessary filings had been made to grant NetBank a first priority perfected lien or ownership interest in the leases and transferred assets and a first priority perfected security interest in the equipment. In reality, no such filings had been made.

Other clauses in the agreements required that CMC and Amwest take all actions necessary to obtain and maintain a first priority protected security interest in the lease assets. Article X, section 10.2(a), of each agreement states that the "Servicer [Amwest], in all events, shall cause Seller [CMC] to take . . . actions as to protect the Purchaser's [NetBank's] title to and first priority security interest in the Transferred Assets." Thus, some tension exists in the agreements as article X, section 2.4, states that all filings have been made, but section 10.2 states that they will be made.

The agreements did not specify a time in which to perfect the security interests. It is undisputed that Amwest never made any U.C.C. filings to establish NetBank's priority in the collateral.

Also in the agreements, CMC represented to NetBank that the surety guaranteeing the income streams would have a credit rating of A– or better. Amwest eventually fell below this mark. Because of this, at NetBank's request, a surety with the necessary credit rating was brought in to issue additional bonds. On January 2, 2001, the new surety, Royal Indemnity Company (Royal) issued an additional 641 bonds.

Later, on June 7, 2001, the district court entered a liquidation order regarding Amwest.

NetBank continued to receive its payments under the agreements until December 2001. Around May 29, 2002, CMC filed bankruptcy. The bankruptcy court determined that because NetBank did not have a perfected first priority security interest in the lease agreements, the leases were a general asset in the bankruptcy estate. This determination left NetBank with little recourse against CMC.

## The Referee's Findings

A few days after the CMC bankruptcy, NetBank filed its claims with the Amwest liquidator. The liquidator overseeing

Amwest's estate denied NetBank's claims. After NetBank objected to the liquidator's denial, a referee heard the matter and denied the claims. The referee concluded that Amwest's obligation to perfect security interests in the lease agreements had merged into its obligation to provide indemnity to NetBank under the Amwest surety bonds. Further, the referee stated that claims must be valued on the date of the liquidation order and that no one had yet defaulted on the payments under the leases on that date. The referee concluded that NetBank's claims under the bonds were not "absolute" on the liquidation order date, stating: "On that date, the claims of NetBank may have been 'incurred' because of the failure to perfect the security interest of NetBank, but they were not known and therefore were unreportable." The referee stated that only claims known on the date of the liquidation order are valid in the liquidation proceedings.

### The District Court's Findings

Both parties objected to the referee's report. The district court affirmed the referee's denial of the claims, but for different reasons. The court determined that because the agreements did not provide a time for the perfection to occur, it had to occur within a reasonable time. The court ruled that the duty to "'obtain *and maintain*'" the first priority of NetBank was a continuing obligation. The court stated that the interests could have been perfected at any time before CMC's bankruptcy preference period, which began on or around February 27, 2002, about 18 months after the last agreement. Further, because the court found that the contracts were still executory at the time of the liquidation order, the liquidator, under Neb. Rev. Stat. § 44-4821(1)(m) (Reissue 2001), could affirm or disavow the contracts. The court found that the liquidator had, in fact, disavowed the contracts. Finally, the court found that NetBank had effectively waived any claims against Amwest under the agreements.

## ASSIGNMENTS OF ERROR

FDIC assigns that the district court erred in (1) affirming the denial of FDIC's claims under the agreements, (2) finding that a reasonable time to perfect the security interests had not

expired, (3) finding that Amwest was terminated as servicer on January 2, 2001, (4) finding that NetBank had waived its claims, and (5) concluding that the liquidator had effectively disavowed the agreements.

## STANDARD OF REVIEW

[1] An insurer liquidation proceeding lies in equity, and we review a liquidation court's determination of claims disputes de novo on the record.[1]

## ANALYSIS

### A Reasonable Time to Perform Had Elapsed

As noted, the district court found that the duty to perfect NetBank's security interests was a "continuing obligation" under the agreements. It stated that the financing statements could have been filed at any time up to February 27, 2002, when CMC's bankruptcy preference period began. The last agreement was entered into in early September 2000. So, according to the district court's order, a reasonable time for performance had not elapsed despite the passing of nearly 18 months.

FDIC argues that Amwest breached the agreements by not perfecting the security interests in the income streams. It argues that this should have occurred, at the latest, shortly after the closing. It is undisputed that the agreements imposed a duty to perfect upon Amwest. And it is undisputed that no perfection ever occurred. The question is whether Amwest was in breach of the contract before its defenses of waiver or disavowal became applicable.

[2] The agreements do not state a time within which Amwest had to perfect the security interests. The parties agree that "in the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances."[2]

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[1] *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 274 Neb. 110, 738 N.W.2d 805 (2007).

[2] *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 199, 252 N.W.2d 142, 147 (1977).

[3,4] In analyzing what is a "reasonable time" to perfect a security interest, we begin by noting that the U.C.C. is a "pure race" statute in which a subsequent creditor's notice of prior creditors is irrelevant.[3] As to priority, conflicting perfected security interests rank in the order in which they are filed or perfected.[4] "Filing" refers to the filing of an effective financing statement; "perfection" refers to the acquisition of a perfected security interest.[5] Depending on the collateral secured, perfection can occur in different ways. For example, some interests are perfected automatically upon attachment.[6] Others require a filing.[7] Still others require that the secured party control the collateral to perfect its interest.[8] Perfection by any means, however, requires that the security interest attach to the collateral.[9] Attachment is governed by Neb. U.C.C. § 9-203 (Reissue 2001). And the parties do not appear to dispute that the interests had attached.

Under the U.C.C., a creditor can file its financing statement before he has extended any credit to the debtor.[10] In other words, a party can file a financing statement before the security interest attaches. If a filing predates the attachment, perfection will relate back to the filing.[11] This effectively eliminates any risk of subsequent creditors arising between the time that credit was extended and later perfection. Commentators have referred to the ability to file a financing statement before a party extends credit as "[o]ne of the greatest boons to the secured creditor under Article 9 . . . ."[12]

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[3] See *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982).

[4] Neb. U.C.C. § 9-322 (Reissue 2001).

[5] *Id.*, comment 4.

[6] Neb. U.C.C. § 9-309 (Reissue 2001).

[7] Neb. U.C.C. § 9-310 (Reissue 2001).

[8] Neb. U.C.C. § 9-314 (Reissue 2001).

[9] Neb. U.C.C. § 9-308 (Reissue 2001).

[10] 1 Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code ¶ 2.13[1] (rev. ed. 2000).

[11] *Id.*

[12] *Id.* at 2-208.

Several sections of the U.C.C. provide guidance on what constitutes a reasonable time. Neb. U.C.C. § 9-312(e), (f), and (g) (Reissue 2001) provide for either automatic perfection or continuing perfection for a short period before the lender needs to perfect by other means. This period of automatic perfection lasts for 20 days, during which time the lender must perfect in another way to maintain his priority after the 20-day period. Similarly, Neb. U.C.C. § 9-315(d) (Reissue 2001) provides that a perfected security interest in proceeds expires after 20 days unless certain conditions are met. Comment 8 to § 9-312 states that 20 days "is the time period generally applicable in this article." From these "grace periods," we infer that the drafters of the U.C.C. considered 20 days to be a sufficient time within which to perfect a security interest.

Other sections in the U.C.C. provide for periods longer than 20 days.[13] These longer periods, however, are only applicable in situations different from what is at issue in this appeal.

[5] Case law also aids us in determining what constitutes a reasonable time. Courts that have considered this issue and others like it have concluded that perfection should follow shortly after the closing. In *Waldrop v. Hurd*,[14] former clients of an attorney brought a malpractice action for an attorney's failure to perfect the clients' security interests. The court dismissed the suit as untimely. But in discussing at what point the statute of limitations began running, the court noted that the filing "should have coincided close in time to the closing of the sale."[15] The Appellate Court of Connecticut held that 8 days was an unreasonable delay in recording a real estate mortgage.[16] The court noted that in other decisions, delays of a day or two had been held to be reasonable, but that "delays measured in months and years [are] unreasonable."[17]

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[13] *E.g.*, Neb. U.C.C. § 9-316 (Reissue 2001).

[14] *Waldrop v. Hurd*, 907 So. 2d 890 (La. App. 2005).

[15] *Id.* at 894.

[16] *Cottiero v. Ifkovic*, 35 Conn. App. 682, 647 A.2d 9 (1994).

[17] *Id.* at 690, 647 A.2d at 13.

Commentators and practice guides also support the view that several months is an unreasonable time to wait to perfect. Commentators are adamant that filing should occur quickly. One commentator warns that a delay in filing can be "painful" or even "fatal" if subsequent creditors arise or if the debtor declares bankruptcy.[18] Most authorities suggest filing before the interest attaches. "In most cases, financing statements are filed at the close of a secured transaction. However, it is advisable to file financing statements . . . before the loan closing."[19] Still others maintain "it is a good habit to engage in the pre-filing of financing statements."[20]

As mentioned, the district court concluded that a reasonable time had not yet passed until the CMC bankruptcy period began, which was about 18 months after the parties entered into the last agreement. Perfection grants a level of protection against subsequent creditors and the possibility that the debtor might go bankrupt. Either could occur moments after the loan is made or not for decades. The failure to perfect a security interest within a reasonable time creates a ticking timebomb. Because of the unpredictable nature of the risk and what is at stake—millions of dollars—we conclude that waiting months to perfect a security interest is unreasonable. The district court erred in finding that a reasonable time had not elapsed.

### Even if NetBank Waived Further Performance, It Did Not Waive Its Claim for the Breach

[6-8] The liquidator argues that NetBank waived Amwest's future performance of the agreements when it accepted surety bonds from Royal and replaced Amwest with Royal as surety. "A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by

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[18] 1 Clark, *supra* note 10, ¶ 2.13[1] at 2-209.

[19] Texas Secretary of State, Information on the Texas Business and Commerce Code, http://www.sos.state.tx.us/ucc/tbc-code.shtml (last visited Sept. 9, 2010).

[20] C. Grice McMullan & Kimberly A. Taylor, The New UCC Article 9: A Primer on Attachment and Perfection Under the 2001 Revised Law of Secured Transactions for Real Estate Lawyers, http://state.vipnet.org/vsbar/sections/rp/articles/mcmullan.html (last visited Sept. 28, 2010).

or inferred from a person's conduct."[21] "[T]o establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part."[22] A waiver requires that the waiving party have "full knowledge of all the material facts."[23]

The liquidator argues that a waiver occurred in early January 2001. The liquidator points to a document signed by NetBank's chief financial officer that states Amwest was relieved as servicer and Royal was appointed as servicer. But the liquidator's argument hinges upon a conclusion that a breach had not yet occurred. As we discussed earlier, Amwest was already in breach by this time; whether Amwest was released from future performance is irrelevant.

So, the relevant question is not whether NetBank waived further performance, but rather, whether it waived its cause of action for breach of contract. To show waiver, the liquidator would have to establish that NetBank knew of Amwest's failure to perfect the security interests. The liquidator does not point to anything in the record that shows that NetBank was aware of Amwest's failure to perfect the security interests before CMC's bankruptcy proceedings. Nor has our review of the record uncovered anything showing NetBank's awareness of that failure. Further, nothing exists in the record, before or after the CMC bankruptcy proceedings, that we interpret as a "clear, unequivocal, and decisive" act by which NetBank waived its claims. The liquidator has failed to show that NetBank waived or abandoned its claims for breach of contract.

### The Liquidator Could Not Disavow the Agreements Because Amwest Was Already in Breach

The liquidator also argues that he effectively disavowed Amwest's contract with NetBank. Because we have already determined that Amwest had breached the agreements before the liquidation order was entered, Amwest had no duty of

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[21] *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 675, 624 N.W.2d 636, 640-41 (2001).

[22] *Id.* at 675, 624 N.W.2d at 641.

[23] 17B C.J.S. *Contracts* § 423 at 43 (1999).

further performance. There was no contract at that point for the liquidator to disavow. In fact, during oral argument before this court, counsel for the liquidator conceded that if the contracts were breached before the liquidation order, "disavowal would not become an issue."

## CONCLUSION

We conclude that Amwest breached its obligation to perfect NetBank's interests in the collateral. We also conclude that Amwest does not have any meritorious defenses. We reverse, and remand to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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STATE OF NEBRASKA, APPELLEE, V.
JEFFREY A. LAMB, APPELLANT.
789 N.W.2d 918

Filed October 29, 2010. No. S-09-1201.

1. **Courts: Appeal and Error.** Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.
2. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
3. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the lower courts.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Criminal Law: Sentences: Judgments.** In a criminal case, entry of judgment occurs with the imposition of a sentence.
6. **Sentences: Probation and Parole: Appeal and Error.** The imposition of the sentence, absent the pendency of an appeal, concludes the "proceedings" referred to in Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008).
7. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.