

Ohio TMA Corporate Sponsors

McDonald Hopkins LLC

Inglewood Associates LLC

Thompson Hine LLP

Baker & Hostetler

Brouse McDowell

Centrus Group, Inc.

First Business Capital Corp.

Ice Miller LLP

Phoenix Management Services

MelCap Partners, LLC

Taft Stettinius & Hollister LLP

A note from this month's
Featured Sponsor



Planes, Claims, and Mechanic's Liens

By Alan M. Koschik and Suzana K. Koch
Brouse McDowell, LPA

Lenny "Nails" Dykstra. Major League Baseball centerfielder for the New York Mets. The 1986 World Series champion, beating the Red Sox with the assistance of his teammates (and Bill Buckner's error) in seven dramatic games. Helped take the Phillies to the World Series in 1993. Retired from baseball to manage a stock portfolio. Hailed as a financial genius by Jim Cramer. Owner of Players Club, Inc. – a charter jet company with a magazine touting a highflying lifestyle to professional athletes. Purchased Wayne Gretsky's \$17-million Los Angeles mansion and a \$4-million Gulfstream private jet for his Players Club business.

Time, however, passes. Prison. Bankruptcy. Fraud. Three counts of grand theft auto. Allegations of assaulting county jail officials, possession and use of cocaine and other drugs, and sexual misconduct. Reports on TMZ that he just wants his "d—n plane back."

In the midst of this chaos and media frenzy, Dykstra's Gulfstream jet ended up in a hangar at Hopkins Airport. The company hired to refurbish the jet's interior had not been paid. Another company hired to do mechanical work on the jet was not paid, either. Each filed mechanic's liens with the Federal Aviation Administration. Then, one of them filed a foreclosure complaint in the Cuyahoga County Court of Common Pleas.

Foreclosing on an aircraft, even in a straightforward foreclosure proceeding, has its own unique set of challenges. Add to that the complexity of the relationship among the parties, the senior lender's own Federal Deposit Insurance Company receivership, and complex behind-the-scenes negotiations, and you begin to see what went into selling Dykstra's jet. Among the issues peculiar to aircraft foreclosure:

Aircraft liens are governed by both federal law regarding perfection by FAA filing and also non-Uniform Commercial Code state law regarding priority.

- Ohio's statute governing relative priority of aircraft liens and consensual security interests in aircraft held by lenders is fraught with ambiguity.
- Mechanic's liens on aircraft must follow strict requirements regarding timing measured from date of completion and/or date of surrendering possession.
- An aircraft's records are critical to its sale and registration, and therefore value, and are frequently held by third parties who might assert possessory liens if not paid.
- Secured party sales under the UCC do not foreclose aircraft liens, which are governed by non-UCC law, requiring judicial foreclosure absent settlement and release.
- Clear aircraft title is difficult to obtain without express releases filed with the FAA, placing a premium on explicit foreclosure decrees and sale orders.
- Sheriff sales cause delays that increase cost of storage and maintenance that are severe in the case of aircraft and limit the ability of the secured creditor to maximize the sale price in a specialized market.
- Judgment and tax liens filed against an aircraft after commencement of a foreclosure action impose additional obstacles to clean title following a sale.

Continues...(Feature Article, p.3)

Brouse McDowell is a full-service business law firm based in Northeast Ohio. From offices in Akron, Cleveland and Avon, its 70 attorneys serve clients across the region and far beyond. Founded in 1919, it is a mid-size firm with the talent, diverse experience and national reach of a large firm and the unwavering service ethic and personal touch of a small firm.

Ohio TMA Officers

President
Scott Opincar

Vice President
Sally Barton

Secretary
Mark Kozel

Treasurer
Mark Kutylowski

Past President
John Lane

Ohio TMA Board Members:

Scott Opincar
Mark Seryak

Mark Kutylowski

Bryan Farkas

David Wehrle

Kelly Burgan

Dan DeMarco

Rick Szekelyi

Robert Folland

Sally Barton

Mark Kozel

John Lalley

Suzana Koch

Al Melchiorre

Rob Stefancin

Chapter Administrator
Louise Walsh

To subscribe, visit the TMA website:

www.turnaround.org

Feature Article (continued)

Mr. Dykstra's own bankruptcy activities created further complications in the case of his aircraft:

- Dykstra, as an individual Chapter 7 debtor in California, attempted to block the judicial foreclosure sale of the aircraft despite the fact that the aircraft was owned by a non-debtor LLC.
- Dykstra filed a bankruptcy petition for the LLC that owned the aircraft on the eve of sale without an attorney and without the consent of his Chapter 7 trustee

Overcoming these obstacles, the lender reached confidential settlements with the two mechanic's lienholders and sought both a decree foreclosing all junior liens and interests and a judicial sale of the aircraft. Only with a judicial sale could the lender foreclose the junior aircraft liens under the UCC; only with a court-approved secured party sale could the lender maintain control to market the aircraft and be assured to sell it promptly.

While closely analogous, a judicial sale and an execution sale are not the same remedy to a creditor upon a default. While the term "judicial sale" has frequently been used to refer to an execution sale, there is a real distinction between an execution sale--such as a Sheriff's sale, made under a writ of process--and a judicial sale conducted pursuant to a judgment, decree or order of court. Rules governing execution sales, such as appraisals and publication of sale notices, should generally be followed in judicial sales, unless justice requires a different approach under the facts of the case. However, judicial sales permit the court to direct the means and method of sale, provided due process has been accorded to lienholders and the method of sale is commercially reasonable. In this way, a state court judicial sale can be similar to bankruptcy sales under Bankruptcy Code Section 363.

In the Dykstra jet foreclosure, the secured lender was confronted with the need to sell the aircraft promptly because of the looming winter season, the cost of storage, and the threat of further deterioration and depreciation of the aircraft, not to mention the threat of further possible bankruptcy-related delays caused by the mischievous Mr. Dykstra. It also needed to foreclose a series of non-UCC aircraft liens held by junior lienholders and convince a title company that specifically identified liens recorded with the FAA could be foreclosed by a judicial decree recorded with the FAA without affirmative lien releases being recorded. Finally, it needed to foreclose the liens of creditors who had filed their liens with the FAA after the foreclosure action had been commenced and who were not even named parties to the action.

The lender succeeded by seeking not only a foreclosure decree, but also a judicial sale order in lieu of a writ of execution. This order foreclosed each lien specifically and expressly, including the liens of non-party lienholders under the doctrine of *lis pendens*. It provided for the auction of the aircraft starting with a minimum bid equal to two-thirds of the appraised value following publication of the auction, with rules for qualified bidders and bid procedures similar to a Section 363 bankruptcy sale, and further found that the sale was commercially reasonable. Finally, the sales order allowed the lender to sell the aircraft directly under its power of sale contained in its security agreement. This hybrid secured party sale/judicial sale resulted in a prompt sale with lender control, while obtaining clear title for the buyer.

The WARN Dilemma

By Richard Szekelyi, Phoenix Management

While working with a financially distressed client, it is not unusual to find ourselves managing multiple paths to resolution. For example, the owner's desire may be to achieve a turnaround of the company, fall back into the good graces of the incumbent lender, or refinance with a friendlier lender. While the lender is usually fine with being paid off, it tends to be agnostic as to whether repayment comes from a refinancing of the debt, a sale or liquidation of the debtor, as long as it maximizes recovery.

As you manage down these various paths, the impact of the Worker Adjustment and Retraining Notification Act, or WARN, can raise some interesting considerations.

Continues...(Feature Article, p.4)