



# COMMERCIAL BANKING, COLLECTIONS & BANKRUPTCY LAW

The newsletter of the Illinois State Bar Association's Section on Commercial Banking, Collections & Bankruptcy Law

## Lender's use of SBA in Illinois

By James P. Kelly and Lewis F. Matuszewich

Lenders in Illinois continue to use the United States Small Business Administration on commercial loan activities. In the fiscal year ending September 30, 2010, 213 different banks utilized an SBA guaranty on 1,975 loans for a total of \$504,968,498.

By number of loans, the most active were JPMorgan Chase Bank, N.A. (426 loans), Superior Financial Group, LLC (115 loans), Ridgestone Bank (99 loans), First Mid-Illinois Bank & Trust, N.A. (73 loans), The Foster Bank (61 loans) and U.S. Bank, N.A. (59 loans). In total, 36 lenders utilized the program for 10 or more loans.

In terms of total loan amount, Ridgestone Bank used the programs for \$73,285,400, followed by JPMorgan Chase Bank, N.A. with

\$39,982,600 and First Colorado National Bank for \$21,799,000. Ninety-two lenders utilized the SBA guaranty for a single loan during the year, ranging from State Bank and the First National Bank & Trust Co. of Iron Mountain, both of whose one loan was for \$2,000,000 to First National Bank in Amboy, whose single loan was for \$7,600.

The lending activity in Illinois in the fiscal year ending September 30, 2010 increased over the prior year by 43.6% in 7(a) loans, which is their basic lender guaranty program.

The new legislation signed in September, 2010 included raising the 7(a) loan limit from \$2,000,000 to \$5,000,000, the 504 loan limit from

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## Red Flags Rule enforcement begins

By J. Joseph McCoy; [jmccoy@holmstromlaw.com](mailto:jmccoy@holmstromlaw.com)

After more than two years of delays, the Federal Trade Commission ("FTC") began enforcing the Red Flags Rule ("Rule") on January 1, 2011. This article discusses the basic principles of the Rule and how it may affect your clients.

### Background

The Rule is found in Sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003, which Congress passed partly in response to the growing threat of identity theft. Briefly put, the Rule requires financial institutions and "creditors" with consumer accounts to develop and implement an identity theft prevention program. The program must include reasonable procedures to identify, detect, and respond to "red flags"—suspicious circumstances that indicate

the risk of identity theft.

The definition of financial institutions, as you would expect, includes banks, credit unions, and savings and loan associations. The scope of the term "creditors," however, has long been disputed and has caused considerable confusion, delay, and litigation leading up to the enforcement of the Rule.

### New law clarifies "creditor"

On December 18, 2010, the Red Flag Program Clarification Act of 2010 ("Clarification Act") was signed into law. The Clarification Act defines "creditor" as one who regularly and in the ordinary course of business:

(1) obtains or uses consumer reports, directly or

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## Lender's use of SBA in Illinois

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\$2,000,000 to \$5,000,000 for standard borrowers and from \$4,000,000 to \$5,500,000 for manufacturers and from \$35,000 to \$50,000 in their Microloan program. In addition, the maximum guaranty level for Export Working Capital Program loans and International Trade loans was permanently raised to 90%, providing a guaranty cap of \$4,500,000 on a \$5,000,000 loan. Further, the maximum guaranty level for Export Express loans was permanently raised to 90% for loans of \$350,000 or less and the guaranty level remains at 75% for loans between \$350,000 and \$500,000.

The 504 loan program allows the business owner and its lender to work with a good party, referred to as a certified development company to finance land building and other fixed assets financing. In the fiscal

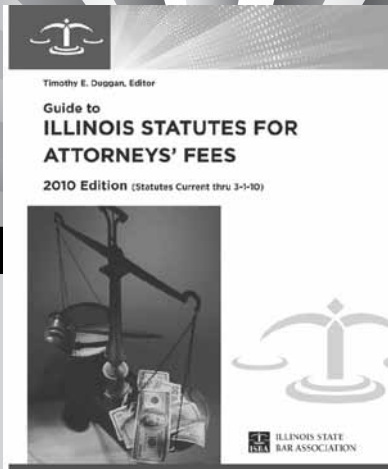
year ending September 30, 2010, 8 certified development companies participated in projects within Illinois. The Small Business Growth Corporation structured 176 loans for \$100,164,000 and Sumercor504, Inc. put together 134 loans for \$75,472,000. The remaining development companies were the Rockford Local Development Corporation (16 loans for a total of \$7,282,000), Illinois Business Financial Services (15 loans for a total of \$10,255,000), Lake County Partnership for Economic Development, Inc. (6 loans for a total of \$5,963,000), Centerpoint 504, Inc. (2 loans for a total of \$1,916,000), Michigan Certified Development Corporation (1 loan for \$1,463,000) and Wisconsin Business Development Finance Corporation (1 loan for \$922,000).

More information concerning the U.S. Small Business Administration programs can be obtained by contacting the Illinois District Office at 500 W. Madison, Chicago, Illinois, Phone: 312-353-4285, ask for Robert Esquivel, Supervisory Lender Relations Specialist. The SBA also has an office at 3330 Ginger Creek Road, Springfield, Illinois 62711, Phone: 217-793-5020. ■

James P. Kelly and Lewis F. Matuszewich are both Partners of Matuszewich, Kelly & McKeever, LLP, a law firm with offices in Crystal Lake, Chicago and Grosse Pointe Park, Michigan. Before entering the private practice of law, Matuszewich served as Deputy Regional Director for the U.S. Small Business Administration covering Illinois, Wisconsin, Minnesota, Indiana, Ohio and Michigan.

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## Red Flags Rule enforcement begins

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- indirectly, in connection with a credit transaction;
- (2) furnishes information to consumer reporting agencies in connection with a credit transaction; or
  - (3) advances funds to or on behalf of a person, based on an obligation of repayment (but not including funds for expenses incidental to the service).

Previously, the FTC had interpreted the term "creditor" very broadly to include any business that allowed deferred payment for its products or services. The Clarification Act will exempt many of those businesses from complying with the Rule, as long as they do not meet one of the three listed conditions.

Nevertheless, there is still some uncertainty as to the current application of the Rule. The Clarification Act does not grant an outright exemption to any industry. Therefore, any business could still be covered if its practices cause it to fall under the new definition of creditor.

In addition, credit transactions could still be interpreted broadly by the FTC to include common invoice billing arrangements. Businesses that defer payment for goods or services may be covered if, for example, they use credit reports to determine whether to allow the deferred payment, or report past due accounts to a credit agency. It should be noted that merely accepting credit cards as a form of payment does not make a business a creditor under the Rule.

### How to comply with the Rule

An identity theft prevention program must contain certain elements to comply with the Rule. Each program must include policies and procedures to (1) identify the red flags of identity theft that that particular entity may come across in its business; (2) detect those red flags in its day-to-day operations; (3) respond appropriately to detected red flags in order to prevent or mitigate identity theft; and (4) periodically update the program to account for new and changing risks.

The first step should be to conduct an internal risk assessment with your clients to determine where they may be vulnerable to identity theft. Consider the kind of identity theft red flags they are most likely to encounter. Certainly any experience a client

has had with identity theft is a good place to start. For additional guidance, Appendix J of the agency guidelines lists 26 examples of possible red flags, such as the receipt of suspicious documents that appear to be altered or forged.

Consideration should also be given to the kind of response to make when a red flag pops. The FTC has indicated that little or no response may be necessary in certain cases. In other cases, an aggressive response, such as contacting law enforcement or immediately closing an account, may be the only reasonable option for a red flag. Making a record of each detected red flag and the corresponding response is sound practice.

A low-risk entity can have a simple and straightforward program. The FTC has even published a model template that can be used as a guide. However, a satisfactory written program that has been adopted by the board of directors, a designated committee, or an authorized senior employee must be in place for a business to be in compliance with the Rule.

Once adopted, it is then the business' responsibility to effectively administer the program. This includes training employees to follow the procedures set forth in the program as well as exercising appropriate oversight over third party service providers that may have access to account information. The program should also be reviewed periodically to assess its effectiveness at detecting, handling, and mitigating risks of identity theft.

### Penalties for noncompliance

The FTC may impose a fine of \$3,500 for each violation of the Rule. For a financial institution or creditor with many covered accounts, this fine could be significant. In addition, the FTC can sue for injunctive relief requiring the business to establish that it is in compliance in the future. The penalties for noncompliance almost certainly outweigh any costs up front.

Clients may need to be brought up to speed on recent developments to the Rule. Even as now limited by the Clarification Act, any business with an account with, or that otherwise sends information to, a credit-reporting agency may be subject to the Rule. These businesses should promptly take steps to ensure they are in compliance. ■

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## Does my security agreement cover future advances?

By Carson D. Maricle; Mathis, Marifian & Richter Ltd.

Under Revised Article 9 of the Illinois UCC, "a security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to a commitment." 810 ILCS 5/9-204(c). Therefore, collateral may secure future advances, as well as past or present advances, if the security agreement so provides. OFFICIAL COMMENT 5 to 810 ILCS 5/9-204. In fact, the UCC allows parties to agree that a security interest secures any obligation whatsoever. OFFICIAL COMMENT 5 to 810 ILCS 5/9-204.

Deciding what obligations are secured by collateral is solely a matter of construing the parties' agreement under applicable law. OFFICIAL COMMENT 5 to 810 ILCS 5/9-204. Revised Article 9 has rejected the holdings of cases decided under former Article 9 that applied other tests, such as whether a future advance or other subsequently incurred obligation was the same or a similar type or class as earlier advances and obligations secured by the collateral. OFFICIAL COMMENT 5 to 810 ILCS 5/9-204.

Ultimately, the intention of the parties controls whether a security agreement covers future advances. For example, a security agreement was interpreted to cover future advances when it stated that collateral was security "for the payment of any amount for which [the debtor] may be indebted to [the creditor]." *Arco Petroleum Products Co., a Div. of Atlantic Richfield Co. v. R & D Automotive, Inc.*, 455 N.E.2d 227 (1st Dist. 1983). Further, there is no need to refer to future advances in a financing statement. Official Comment 7 to 810 ILCS 5/9-204.

Section 9-204 also authorizes "dragnet" or "cross-collateral" clauses. Official Comment 2 to 810 ILCS 5/9-204. Dragnet clauses act as both after-acquired property and future advances clauses by providing that collateral, acquired at any time, secures all advances, regardless of when they are made. Official Comment 2 to 810 ILCS 5/9-204. While dragnet clauses are not favored under Illinois law, such clauses will be upheld where there is no ambiguity and are interpreted according to the language used. *Stannish v. Community Bank of Homewood-Flossmoor*, 24 B.R. 761

(Bankr. N.D. Ill. 1982) (applying Illinois law); *Metropolitan Life Ins. Co. v. American Nat. Bank and Trust Co.*, 682 N.E.2d 72 (1st Dist. 1997). If, however, a dragnet clause is too general or vague, it will be found insufficient. *In re Swanson*, 104 B.R. 1 (Bankr. C.D. Ill. 1989) (applying Illinois law). Overall, "antecedent debts may be secured by a mortgage containing a dragnet clause 'only if the antecedent debts are clearly identified in the mortgage.'" *In re Octagon Roofing*, 124 B.R. 522, 528 (Bankr. N.D. Ill. 1991) (applying Illinois law), citing *First Natl. Bank & Trust Co. v. Lygrisse*, 647 P.2d 1268, 1271 (Kan. 1982). If an ambiguity exists between a dragnet clause and another provision regarding the same subject matter, such ambiguity could be construed against the application of the dragnet clause. *See, Farmers & Mechanics Bank v. Davies*, 422 N.E.2d 864 (3d Dist. 1981).

735 ILCS 5/15-1302 controls whether a future advances clause in a real estate mortgage is valid and enforceable. All future advances incurred by the mortgagee within the first 18 months after a mortgage is recorded are considered part of the mortgage lien. 735 ILCS 5/15-1302. Future advances made after 18 months are inferior to the claims of subsequent purchasers, mortgagees, or judgment creditors, subject to exceptions established in the statute.

If a future advance is mandatory (i.e. the lender is contractually bound by the mortgage or an instrument executed contemporaneously with the mortgage, and has no discretion in making the advance), then the advance will relate back to the date the mortgage is recorded. 735 ILCS 5/15-1302(b). In addition, advances made under a reverse mortgage or a revolving credit arrangement secured by a mortgage will be included in the mortgage lien. 735 ILCS 5/15-1302(b)(2) and (3). Further, all interest that is accrued or added to the principal amount in accordance with the terms of the mortgage constitutes a lien from the time the mortgage is recorded. 735 ILCS 5/15-1302(b)(4). Finally, funds advanced by the mortgagee in accordance with the terms of the mortgage to preserve or restore the mortgaged real estate, to preserve the lien of the mortgage or the priority thereof, or to enforce the mortgage will also be a lien from the time the mortgage is re-

corded. 735 ILCS 5/15-1302(b)(5). If a future advance fails to meet one of the statutory exceptions, and the advance is made more than 18 months after the date of recording, it is effective as of the date of the advance and does not relate back to the date the mortgage is recorded. 735 ILCS 5/15-1302.

Please note that future advance clauses are regulated by Regulation Z. For example, Regulation Z requires a creditor to disclose the existence of a future advances clause. 12 C.F.R. §226.6(c). Regulation Z should always be examined when working with future advance clauses. ■



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**Tuesday, 8/30/11- Teleseminar**—Buying, Selling & Exchanging LLC and Partnership Interests. Presented by the Illinois State

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### September

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**Tuesday, 9/13/11- Teleseminar**—Joint Venture Agreements in Business, Part 1. Presented by the Illinois State Bar Association. 12-1.

**Wednesday, 9/14/11- Teleseminar**—Joint Venture Agreements in Business, Part 2. Presented by the Illinois State Bar Association. 12-1.

**Friday, 9/16/11- Webcast**—ThaIP 101: An Intellectual Property Primer for In-House Attorneys. Presented by the ISBA Corporate Law Section. 12-2.

**Friday, 9/16/11- Galena, Eagle Ridge Resort and Spa**—Hot Topics in Consumer Collection. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section; co-sponsored by the ISBA Young Lawyers Division. 8:45-4:30.

**Tuesday, 9/20/11- Teleseminar**—Franchise Law: What You Need to Know Before Your Client Buys. Presented by the Illinois State Bar Association. 12-1.

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**Friday, 10/14/11- Chicago, ISBA Chicago Regional Office**—Family Law Nuts and Bolts Chicago 2011. Presented by the ISBA Family Law Section. 8-5.

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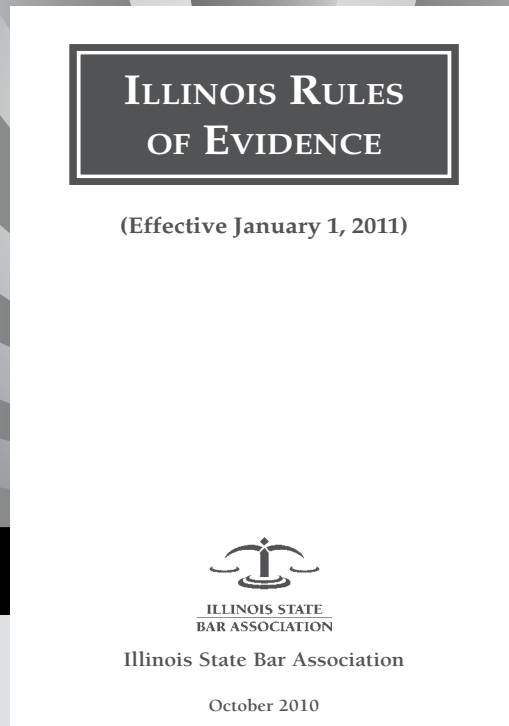
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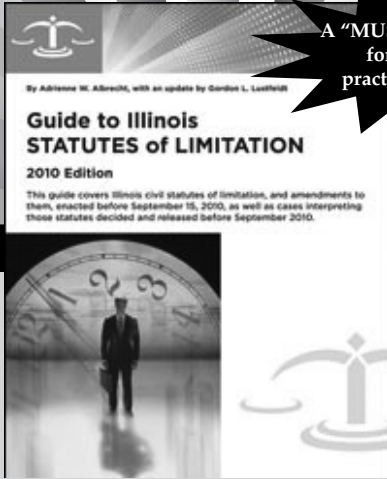
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