

## Mistaken Date Reference in Security Agreement Costs Bank its Lien Priority

It's a common occurrence – a mortgagor or grantor signs the security instrument a day or two in advance of the loan, or perhaps a note is re-signed a couple of days after closing to correct an error in the original note. Either way, it's easy to end up with a security instrument that references a "note dated as of" an incorrect date. It shouldn't matter, some would argue, since the borrower and the lender would certainly understand that the security instrument is meant to relate to the note. But one bank found out the hard way that dates do matter.

In *In re Duckworth*, a case recently decided by the U.S. Court of Appeals for the 7th Circuit, the court held that a bankruptcy trustee could defeat a prior perfected security interest held by a bank because the security agreement referenced a note dated "December 13, 2008," while the actual promissory note was dated "December 15, 2008." The court held that the bankruptcy trustee is "entitled to rely on the text of a security agreement." Since there was no promissory note dated December 13, 2008, the security agreement didn't secure anything at all as far as the bankruptcy trustee was concerned. Thus, the bank lost its priority position on the collateral for a \$1,100,000 loan. The court, which reversed lower court rulings in the bank's favor, reached this result even though the borrower admitted that the date discrepancy was a mistake.

While the court recognized that a borrower, as opposed to a bankruptcy trustee, cannot necessarily avoid a security agreement because of this type of mistake, it's in bankruptcy that perfection really gets put to the test. Cautious lenders may want to review their closing practices to assure conformity of date and other references to notes in their security instruments.