

**Unusual Collateral in Real Estate Finance—
Cars and Boats and Planes, Oh My!
And More**

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It is 4:30pm on Friday afternoon. Your client, a banker who has asked you to represent the bank in a real estate finance transaction, calls and says: “I forgot to tell you, but on that loan that is to close on Monday, I want to get additional collateral of the borrower’s boat, car, yacht, airplane, etc....”

And we are off into the issues of what kinds of additional collateral lenders want to better secure their loans which are primarily real estate finance loans. Sometimes, the additional collateral is not so much additional security for the loan as an effort by the lending officer to feel more secure about the loan. That has been expressed to me in the past in terms of “I want to keep his attention” You might think a Guaranty would be the tool to use for that purpose, but bankers can be creative.

Or sometimes, the banker just has given thought (finally) to the particular (and maybe peculiar) things or intangibles which are needed for the primary collateral to have full function and value if the lender has to foreclose and realize on the resale of the collateral to recover the loaned money. Things like the lease files, contracts with the security service, contracts with the dumpster service, the furniture in the manager’s office, or benefits of payments to be received from a city or other governmental agency, etc. These kinds of collateral, while fitting the classification of “additional collateral” are not really unusual. But there are tangibles and intangibles which, while related to the real estate collateral, are not ordinary or customary.

This paper is something of a collection of stories and things learned (or which should have been learned) in my own experience in dealing with real estate finance matters over the years, or which I have heard about from lawyer friends at a bar (the professional kind or the kind serving appropriate beverages). Some of these fit the old Texas way of beginning a story: “You ain’t gonna believe this one, but...”. The line between those kinds of collateral which are additional but not unusual and those which are unusual has been drawn arbitrarily and with maybe an eye to entertainment value.

For the lawyer representing the banker, there are always two issues (at least). The first is how to create a security interest, lien or other right to have, control and sell the additional collateral. The second is how to perfect that interest, lien or right so as to protect it against claims of other creditors. And there well may be a third issue which is how to obtain the cooperation or agreement of third parties who must consent to or cooperate in any rights in the additional collateral or in its transfer. I will try to address these issues with respect to each of the kinds of collateral addressed below.

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CARS AND TRUCKS, TRAILERS AND RECREATIONAL VEHICLES

If the lender wants as additional security the borrower's car, truck or other kinds of vehicle, the first inquiry needs to be for the original or a copy of the document which evidences ownership by the borrower of the thing to be encumbered. Once that is in hand and can be examined, the method for creating a lien or security interest can be determined and the method of perfection can be determined.

The Security Interest. The security interest is created by a security agreement for which forms are readily available. Be careful to include "proceeds" so that if there is a wreck and some insurance policy may provide payment, that money is covered by the security agreement.

Perfecting the Security Interest. The security interest in many (but not all) kinds of motor vehicles are perfected by having the lien created by the security agreement recorded on the title document issued by the Texas Department of Motor Vehicles. This does not apply to cars and trucks held as inventory by a dealer, but we are not thinking of deals when we talk about additional collateral to a real estate loan. Some kinds of the borrower's "toys" which are engine driven vehicles but not ones intended to be used on normal roads, may not be subject to titles issued by the DMV and so are goods or equipment under the UCC and the security interest subject to perfection by filing UCC financing statements.

The statutory reference for this area of law is Transportation Code Chapter 501. That is the Texas Certificate of Title Act. That statute provides the sole method of perfection for liens on motor vehicles (definition to follow) unless there is a conflicting provision of Article 9 of the Texas Business & Commerce Code, in which case the Business & Commerce Code prevails. There is a most helpful manual, called the "Motor Vehicle Title Manual" on line for the matters of vehicle titles and liens thereon at the web site for the Department of Motor Vehicles (www.txdmv.gov). Chapter 12 of that Manual deals with liens and perfection of liens.

Chapter 501 defines what kinds of vehicles are able to be titled by DMV and which then are subject to lien perfection by notation on the title document. As defined in that statute, the term "motor vehicle" includes:

- a. The usual and expected kinds of motor driven vehicles registered with the DMV—that is cars and trucks which are to be driven on roads and highways;
- b. A trailer (other than a mobile home or manufactured housing). This might include the construction site office trailer on the borrower's job site, which may be titled as a "commercial trailer".
- c. A "travel trailer" (a trailer designed for human habitation but not a mobile home designed for longer term habitation).
- d. A "camper trailer" (pop-up kinds of camping trailers)

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