

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
: Case No. 91-2344-C H
FIRST CONTINENTAL :
COMMUNICATIONS, INC., :
: Chapter 11
Debtor. :
: :
- - - - - :
: :
DES MOINES AREA COMMUNITY : Adv. No. 91-91222
COLLEGE, :
: :
Plaintiff, :
: :
v. :
: :
FIRST CONTINENTAL :
COMMUNICATIONS, INC.; :
FIRST STATE BANK OF WEBSTER :
CITY, IOWA; CENTRAL LIFE :
ASSURANCE COMPANY; PARK :
LEASING COMPANY; WESTERN :
STATES FINANCIAL GROUP, INC.; :
WINEGARD REALTY COMPANY; :
FBL LEASING SERVICES, INC.; :
BEAR CREEK INVESTMENT :
COMPANY; FARM BUREAU MUTUAL :
INSURANCE COMPANY; and :
BRUCE BOLAND, :
Defendants. :

- - - - -
RECOMMENDATION ON WITHDRAWAL OF REFERENCE AND
CERTIFICATION OF STATE LAW QUESTIONS
PURSUANT TO IOWA CODE CHAPTER 684A

This proceeding involves the application of Iowa Code § 280B.3(5) and a challenge to its constitutionality under the Constitutions of Iowa and the United States. Because resolution of the issues raised will require the construction of a new, previously unconstued state statute, this Court

recommends the certification of these issues to the Supreme Court of the State of Iowa pursuant to Iowa Code Chapter 684A.

This issue arises in the context of an adversary proceeding related to a Chapter 7 bankruptcy case concerning Debtor First Continental Communications, Incorporated (hereinafter FCCI). Plaintiff Des Moines Area Community College (hereinafter DMACC) has filed a motion for summary judgment in its action to determine the nature, extent, validity and priority of liens and interests in certain personal property. Defendant First State Bank of Webster City (hereinafter FSB) has filed an objection to the motion for summary judgment. Pursuant to this court's April 7, 1992 order, the parties have submitted the issue on written briefs and arguments.

This court has jurisdiction over this case pursuant to 28 U.S.C. § 1334(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) to determine the validity, extent, or priority of liens.

Previously, FSB moved to withdraw the District Court's reference of this adversary proceeding to the Bankruptcy Court. The United States District Court for the Southern District of Iowa, the Honorable Harold D. Vietor, Chief Judge, presiding, denied FSB's motion and asked the Bankruptcy Court to make an initial determination on whether certification of the state constitutional question pursuant to Iowa Code

Chapter 684A would be appropriate. The District Court also directed the Bankruptcy Court's attention to 28 U.S.C. § 2403(b) in light of FSB's challenge to the constitutionality of Iowa Code § 280B.3(5) under the federal Constitution. Des Moines Area Community College v. Flynn, Trustee for First Continental Communications, et al., Civ. No. 4-91-CV-70798 (S.D. Iowa Febr. 12, 1992) (order denying motion for withdrawal).

Upon review of the briefs submitted by DMACC, FSB, and Amicus Curiae Iowa Bankers Association, the proposed findings and recommendation on withdrawal of reference and certification of state law questions is now entered.

PROPOSED FINDINGS OF FACT

1. Plaintiff DMACC is a community college established under Iowa Code Chapter 280A. DMACC claims to be a creditor of FCCI by virtue of an Industrial New Jobs Training Agreement (the Agreement) dated August 24, 1987. The Agreement was twice amended by an Addendum dated April 8, 1988 and a First Addendum dated May 2, 1988.

2. The execution of the Agreement followed the execution of a Preliminary Industrial Jobs Training Agreement dated July 16, 1987. Section 2.2 of the Preliminary Agreement provides:

The Area School agrees that the sources of

payment described in Section 1.4 hereof shall be pledged for payment of the principal of and premium, if any, and interest on the Certificates. To the extent required by the Act, the Payments required to be made by the Employer hereunder are a lien upon the Employer's business property in the State of Iowa until paid and have equal precedence with ordinary taxes and shall not be divested by a judicial sale. Property subject to this lien may be sold for sums due and delinquent at a tax sale, with the same forfeitures, penalties and consequences as for the nonpayment of ordinary taxes. The purchaser at any such tax sale shall obtain the property subject to the remaining payments.

3. The Agreement at section 3.4 provides:

To secure the payment by the Employer of the payments and compliance by the Employer with all the terms, provisions and conditions hereof, Employer agrees that the new jobs credit from withholding, as defined and described in Section 5 of the Act, and the incremental property taxes, as defined and described in Section 4 of the Act, shall be pledged for payment of the principal of and premium, if any, and interest on the Certificates. To the extent required by the Act, the Employer further agrees that the payments required to be made by it hereunder are a lien upon the Employer's business property in the State of Iowa until paid and have equal precedence with ordinary taxes and shall not be divested by a judicial sale. Property subject to this lien may be sold for sums due and delinquent at a tax sale, with the same forfeitures, penalties and consequences as for the nonpayment of ordinary taxes. The purchaser at any such tax sale shall obtain the property subject to the remaining payments.

4. DMACC claims Debtor FCCI is indebted to it in the amount of \$62,270 together with interest and that it is entitled to a lien upon all of FCCI's business property until its indebtedness is paid, which lien has equal precedence with ordinary taxes. DMACC claims this lien by virtue of Iowa Code 280B.3(5) and the Industrial Jobs Training Agreement referred

to above.

5. FSB claims the Debtor FCCI owes FSB the principal amount of \$448,000.00 plus accrued interest through July 31, 1991 in the amount of approximately \$8,484.79 pursuant to a certain promissory note dated July 28, 1989. FSB alleges this note was secured by a security agreement dated July 28, 1989, which security agreement was perfected by the filing of a finance statement with the Secretary of State of Iowa on June 26, 1987. FSB further alleges this security agreement granted FSB a first lien in, among other things, all of Debtor FCCI's inventory, equipment, accounts and other rights to payment, and general intangibles.

6. On August 1, 1991, FCCI filed a voluntary petition in bankruptcy under Chapter 11 of Title 11 of the United States Code. On November 15, 1991 the Chapter 11 case was converted to a case under Chapter 7 of the Bankruptcy Code.

7. Debtor FCCI has listed its interest, in personal property including inventory, equipment, furniture, fixtures, and other tangible personal property (hereinafter, Subject Property) on bankruptcy Schedule B-2 filed August 16, 1991, in the bankruptcy case file.

8. Defendant Ankeny State Bank also claims a security interest in some or all of the Subject Property.

9. Defendants Western States Financial Group, Inc., Winegard Realty Company, and Bear Creek Investment Company

also claim a security interest in some or all of the Subject Property.

10. Defendant Central Life Assurance Company was named as a party Defendant but has disclaimed any and all interest whatsoever in the Subject Property.

11. Defendant Park Leasing Company also claims a leasehold or other interest in some or all of the Subject Property.

12. Defendant FBL Leasing Services, Inc. also claims a security interest in some or all of the Subject Property.

13. Defendant Farm Bureau Mutual Insurance Company also claims a security interest in some or all of the Subject Property.

14. Defendant Bruce Boland also claims a security interest in some or all of the Subject Property.

15. Pursuant to a Stipulated Order filed January 2, 1992 granting FSB's Motion for Relief from Automatic Stay and Directing Turnover of Collateral, Debtor FCCI has turned over to FSB all secured assets. DMACC and other creditors agreed to the stipulated order, which expressly reserved their rights to challenge FSB's claimed interest in the secured assets. The order further provided that its provisions would not prevent or restrict FSB from selling the assets, and FSB has subsequently entered a sale of assets agreement.

16. FSB has agreed to pay DMACC the amount of \$62,270

plus interest, if it is determined that the alleged lien of DMACC upon the property is prior and superior to the lien of FSB.

17. FSB filed a brief on April 10, 1992 in support of its objection to motion for summary judgment. A brief in support of motion for summary judgment was filed by DMACC on April 13, 1992. FSB filed a reply brief in support of its objection to motion for summary judgment on April 24, 1992. Also on April 24, 1992 Amicus Curiae Iowa Bankers Association filed a response to DMACC's brief. DMACC declined to file a responsive brief.

DISCUSSION

Plaintiff DMACC claims a lien equal in precedence with ordinary taxes and prior and superior in right to all other creditors by virtue of Iowa Code § 280B.3(5) and the Industrial New Jobs Training Agreement by and between DMACC and FCCI. FSB argues that the agreement between DMACC and FCCI does not create a lien; that DMACC does not have a lien against the property properly secured by FSB; and that Iowa Code § 280B.3(5) is unconstitutional under both the United States and Iowa constitutions as a denial of due process, as an unlawful taking, an impairment of contracts; and furthermore that § 280B.3(5) is void for vagueness, that it

violates the eminent domain clause, and that the statute fails to raise the lien provision in the title to the Act.

Plaintiff DMACC has moved for summary judgment arguing that the Agreement at section 3.4 provides DMACC is entitled to a lien upon all of FCCI's business property until its indebtedness to DMACC is paid. This indebtedness represents "payments required to be made by an employer" within the meaning of Iowa Code § 280B.3(5) and the lien securing the debt has equal precedence with ordinary taxes. In response to FSB's opposition to the motion, DMACC argues more specifically that the terms "business property" and "ordinary taxes" as used in § 280B.3(5) are not vague but shall be construed, pursuant to Iowa Code § 4.1(2), according to the context and approved usage of the language. DMACC further responds that § 280B.3(5) is not unconstitutional in its application in that it is not violative of due process nor equal protection; that it is not an impairment of contracts; that it is not void for vagueness; nor that it is an unlawful taking of property; nor a violation of the "eminent domain" clause.

The application of Iowa Code § 280B.3(5) is a question of law and public policy of particular interest to the people of Iowa. In the absence of controlling precedent in the decisions of the Iowa Supreme Court, which would enable this court to reach a sound decision without indulging in speculation or conjecture, this court recommends that a definitive

interpretation of these state law issues be sought from the Iowa Supreme Court.

Accordingly, this court recommends certification of the following questions for decision to the Iowa Supreme Court.

(1) Whether the agreements between DMACC and FCCI in conjunction with Iowa Code § 280B.3(5) as applied in this case form a valid, perfected lien upon FCCI's property under Iowa law.

(2) If a valid lien was formed, what is its extent and priority with respect to all other encumbrances under Iowa law?

(3) Whether Iowa Code Chapter 280B so applied violates the Iowa Constitution.

Further, this court recommends that the entire record in this case, including this proposed order and the briefs of the parties and amicus curiae be transmitted to the Iowa Supreme Court.

The particular phrasing of the certified questions should not be interpreted as restricting the Supreme Court's consideration of the problems and issues involved. See Kaiser v. Memorial Blood Center, 938 F.2d 90, 94 n.2 (8th Cir. 1991).

Federal constitutional issues and whether the Iowa Attorney General should be included pursuant to 28 U.S.C. § 2403(b) need not be addressed at this time pending the decision of the Iowa Supreme Court.

Dated this 7th day of December, 1992.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE