The Lender's Source

MOORE CLARKE DUVALL & RODGERS
ATTORNEYS AT LAW

Save the Date: MCDR Banking Law Seminars July 20th, August 3rd, and August 24th

Moore, Clarke, DuVall & Rodgers, P.C. will offer its annual banking law seminar on Thursday, July 20th in Albany, Thursday, August 3rd in Valdosta, and Thursday, August 24th in Savannah.

Each event is free of charge to all banking and lending professionals, with all welcome and encouraged to attend. Lunch will be provided along with written materials addressing the various topics discussed by the firm's attorneys during the seminar.

Each event will begin at 12:30 p.m. with lunch, followed by presentation and discussion of multiple topics of interest from 1 p.m. until 3:30 p.m. Information sheets featuring additional details for the three events will soon be distributed.

Those having questions regarding the seminars, or wishing to confirm attendance, may contact Kim Shirley via email at kshirley@mcdr-law.com, via telephone at (229) 888-3338, or via facsimile at (229) 888-1191. We hope you will make plans to attend one of these informative events.

Supreme Court Gives New Guidance on Post-Foreclosure Confirmation Waiver

In the April 2017 opinion of *York v. RES-GA LJY*, the Supreme Court of Georgia again confirmed a guarantor's ability to waive the protections of Georgia's post-foreclosure confirmation requirements and further provided valuable new guidance on effectiveness of a commonly-used term in guaranty waiver language.

The case involved a lender's attempts to obtain deficiency judgments against guarantors following real property foreclosures and a trial court's refusal to confirm the foreclosure sales. On appeal from the trial court, the Court of Appeals held deficiency judgments were permissible because, by virtue of a clause waiving "all defenses based on suretyship," the guarantors had each waived the protections of Georgia confirmation law in their guaranty agreements. The guarantors then asked the Supreme Court to review the Court of Appeals' decision on the basis that it was incorrect. The Supreme Court chose to exercise its discretion to review the case.

The guarantors argued that Georgia confirmation law was not a defense "based on suretyship," and thus the guaranty waiver language did not apply. They argued that defenses *based on suretyship* only include a small class of defenses only available to guarantors and not primary borrowers. Because the confirmation law applies to both guarantors and primary borrowers, they reasoned, it was not a defense *based on suretyship* as waived by the guaranty.

The Supreme Court disagreed with the guarantors' arguments. It held the phrase *defenses based on suretyship* was not limited to defenses *exclusively* available to guarantors, but instead included any defenses available because of the person's status as guarantor. As confirmation protection was only available as a defense because the individuals were guarantors, the defense was in fact a "defense based on suretyship" within the reach of the guaranty waiver.

The Court noted further that the waiver clauses in the guaranties expressly included any "anti-deficiency" laws or other laws that may prevent the lender from asserting a claim for deficiency after foreclosure. Importantly, the Court held—for the first time—that Georgia confirmation law is in fact an *anti-deficiency law* as it bars the lender from obtaining a deficiency unless certain actions and ruling occur after the foreclosure. The guaranty language waiving any "anti-deficiency laws" thus directly waived the confirmation requirement.

This new decision is quite valuable in its ruling that confirmation is an *anti-deficiency law* with respect to guaranty waiver language. Many commonly used guaranty forms feature exactly that term among the defenses waived. Lenders will thus have more certain footing in claiming waiver language is effective as to confirmation when suing on these guaranties. In light of the decision, lenders should review their guaranty forms to assure *anti-deficiency laws* are expressly included among defenses waived.

Appeals Court: Release Language in Mortgage Loan Modification Protects Lender from Fraud and Fee Claims

In its May 23 opinion titled *Tisdale v. Westmoore Group*, the Court of Appeals of Georgia held a borrower's claims against a lender for fraud and excessive fees charged in loan origination were barred due to release language in a loan modification agreement signed by the borrower.

The borrower obtained a mortgage loan from the lender for purposes of purchasing a home in Covington. Shortly after obtaining the loan, the borrower became delinquent in payment. When confronted with the delinquency, the borrower alleged that the lender's calculation of the loan balance was incorrect, that improper fees had been charged by the lender in connection with the loan, and that the loan documents did not accurately reflect the loan terms she had agreed to.

The lender and borrower then entered into a loan modification agreement in hopes of avoiding further delinquency. As part of the modification, the borrower signed a document stating that "all aspects of the loan were proper and correct and in full compliance with applicable state and federal laws," and that the borrower released the lender and its employees and agents from all claims the borrower may have had at or prior to signing the loan modification agreement.

The borrower continued to miss additional payments and, after receiving notice from the lender, failed to cure her default. The parties entered into a foreclosure postponement agreement, but borrower's default continued and the lender eventually commenced foreclosure proceedings against the home. In response, the borrower sued the lender and two of its officers for fraud and for violation of the Georgia Fair Lending Act in connection with loan fees charged to the borrower. The borrower's claims were dismissed by the trial court, and the borrower appealed the decision.

On appeal, the Court of Appeals held that the release language in the borrower's loan modification agreement protected the lender from all of the borrower's claims in the lawsuit. More specifically, the borrower's fraud claims, and claims for excessive fees in loan origination and closing, related to the lender's actions at or prior to the closing of the loan. Yet, the modification agreement, signed by the borrower well after the closing, unambiguously acknowledged that all aspects of the loan were in compliance with applicable law, and further released the lender and its employees from any and all claims the borrower then had. The modification agreement, including the release provisions, was a binding contract enforceable against the borrower just like any other written agreement. The borrower's claims had thus properly been dismissed by the trial court, as the borrower had agreed by written contract to release them. To the extent the borrower's fee claims related to post-closing conduct of the lender, they were also properly dismissed as the lender had charged no impermissible fees in violation of the Georgia Fair Lending Act after closing had occurred (whether in connection with the modification agreement, foreclosure postponement, or otherwise).

The Court's opinion in this case provides a useful example of the valuable protections and assurance a lender can obtain in a loan modification or workout arrangement, particularly where the borrower has raised some dispute in relation to the loan prior to finalizing the arrangement. While a workable payment arrangement to avoid further delinquency may be the underlying goal of the parties, a loan modification agreement or other document signed by the parties can (and should) be drafted to directly resolve any disputes raised by the borrower (or any guarantor or grantor of collateral) prior to execution of the modification documents.

Understanding the UCC-1: Correct Debtor Names for Partnerships and Trade Names

Determining the correct debtor name for inclusion in a UCC-1 financing statement can be tricky when the debtor is a general partnership or is doing business under a trade name (often referred to as a "dba"). The lender must be careful to follow UCC name determination rules to be sure that perfection is achieved by filing.

When dealing with a limited liability partnership or similar entity that is created by registration with a state authority, the rule is much like that used for corporations: the correct name is that shown on the state authority's document creating the entity (as amended, if any amendment has been filed). But general partnerships are not created by filing with any state (or local) authority. In fact, they can be created solely by a verbal agreement. A different rule must be used for name determination.

The UCC rule for general partnerships is this: if the partnership has a name, then that name *must* be included in the UCC-1 financing statement for perfection. It is not sufficient to file only under the individual names of the partners themselves. On the other hand, if the partnership does not have a name, the financing statement must show the individual names of each and every partner in the partnership in order to perfect.

Though the rule seems clear, it will sometimes leave uncertainty because, unlike when dealing with corporations or limited liability companies, there is no defined governmental source to examine to find the partnership's name. Because general partnerships can be verbal arrangements, the partners may not be in full agreement as to the name of the partnership. In these instances, the lender should require the partners to execute a basic written partnership agreement, which at minimum states the name of the partnership and the names of all partners, before extending credit.

Though it is not strictly required if the partnership's name is clear, lenders should consider filing a UCC-1 that includes both the partnership name *and* the individual names of each and all partners to minimize the risks of unperfection. But again, if the partnership does have a name, a lender cannot perfect as to partnership property by filing only under the individual partners' names.

For sole proprietors (individuals) doing business under a trade name, the financing statement will be sufficient for perfection only if it includes the correct name of the individual. Filing solely under the trade name will not be sufficient to perfect.

As with partnerships, lenders should consider a belt-and-suspenders approach of filing both under the correct individual name and under the trade name itself. This will provide additional notice to other lenders that may errantly focus on the trade name, and will also provide some additional perfection protection in the event the business arrangement turns out to be a partnership, rather than a sole proprietorship.

Federal Court Finds New Uncertainty in Georgia Garnishment Law: Collecting from Financial Institution Employees

Many in the banking industry are familiar with the large-scale overhaul of Georgia garnishment law in 2016. Under the new law, there are specific mandatory forms (summonses) that must be served on the bank or other garnishee. The specific form to be used depends on the circumstances of the garnishment. If the incorrect form is used, the garnishment is invalid.

By law, if the garnishment is to be served on a *financial institution* then the form required for use instructs the institution to hold all moneys on hand at or within five days after service, and then to pay these sums into court between five and 15 days after service. Funds received more than five days after service are not subject to the garnishment. By comparison, forms used for other types of garnishments feature much longer garnishment hold periods (varying between 29 and 179 days, as compared to only five).

The curious facts giving rise to the April 2017 decision of *Blach v. AFLAC*, issued by the federal court for the Middle District of Georgia, were a judgment creditor seeking to collect from a former employee of a financial institution. The creditor arranged for an ordinary summons of garnishment—featuring a 29-day hold period—to be served on the institution in hopes of obtaining certain benefit payments owing to the former employee during the month. The institution complied, withholding all sums payable within the 29 day period and then paying these amounts into court. The employee challenged this action, arguing that because the garnishee was in fact a financial institution, use of the financial institution summons (with a five-day hold period) was required—even though the garnishor was not seeking to reach a deposit account or safe deposit box.

The judge found that the law was unclear as to which summons should be used. While the intent of the law is probably to permit ordinary and continuing garnishment forms to be served on an institution when wages or similar payments owing to institution employees, rather than deposits owing to customers, are sought for garnishment, an error in drafting the law means the requirement to use the financial institution form has no exceptions when employee wages or similar amounts are sought. As the employee had argued, if the entity to be garnished is a financial institution, the law seems to require the five-day hold period form to be used.

Rather than ruling for the employee based on a literal reading of the law, or ruling for the creditor based on the apparent intent of the law, the federal court referred the issue to the Supreme Court of Georgia for decision. This means that over the next several months the state's highest court will be deciding whether the five-day hold period summons must be used for all garnishments against financial institutions, regardless of the other circumstances of the garnishment. Of course, the legislature may (and should) cure the problem by amending the garnishment law; but the amendment may or may not be completed prior to the Supreme Court's eventual ruling.

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