The Lender's Source

MOORE CLARKE DUVALL & RODGERS
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Save the Date for MCDR Banking Law Seminars on July 26th, August 9th, and September 13th

Moore, Clarke, DuVall & Rodgers, P.C. will offer its 2018 banking law seminar on July 26th at the Hilton Garden Inn in downtown Albany; on August 9th at the James H. Rainwater Conference Center in Valdosta; and on September 13th at the Hilton Garden Inn in downtown Savannah.

Each seminar is free of charge to banking and lending professionals. Lunch will be provided, as well as written materials addressing the various topics discussed by the firm's attorneys during the seminar. Each event begins at 12:30 p.m. and continues until 3:30 p.m. Information sheets featuring further details on the topics of discussion will soon be distributed.

If you wish to confirm your attendance, or if you have any questions regarding the seminars, please contact Kim Shirley via telephone at 229-888-3338 or via email at kshirley@mcdr-law.com. We hope you will make plans to attend your choice of one of these informative events.

Georgia Supreme Court Sets New Precedent for Enforcement of Guaranties

The Supreme Court of Georgia's opinion in *Colonial Oil Industries v. Lynchar, Inc.*, decided on June 18, 2018, sets important new precedent in upholding guaranty agreements despite errors or misnomers in identifying the principal debtor whose obligations are guarantied.

As addressed in a prior edition of this newsletter, in 2017 the Georgia Court of Appeals held a guaranty agreement was unenforceable because it identified the principal debtor only by its trade name (T&W Oil) rather than its true corporate name (Lynchar, Inc.). The defect was said to render the guaranty wholly ineffective despite evidence that T&W Oil was the tradename of Lynchar, Inc. and despite the fact the guarantors admitted signing the guaranty agreement with intent to guaranty Lynchar's debts. The Court reasoned that as a guaranty agreement must be strictly limited to its own terms, permitting a guaranty to reach debts of an entity not specifically named would be an impermissible expansion of the guaranty.

At the lender's request, the Supreme Court reviewed and reversed the Court of Appeals' decision. The Supreme Court noted that a tradename is merely an alternative name used by an existing legal person or entity. Use of the alternative name does not shield the user from liability for any obligations it incurs under either its true name or the tradename. Regardless of the name used, the obligation is that of the user.

With these principles in mind, the Court held the guaranty adequately identified the entity whose obligations were guarantied (Lynchar, Inc.), though this identification was done by use of Lynchar's tradename rather than its true corporate name. Again, "T&W Oil," as a tradename, was merely an alternative name for the Lynchar entity. There was no dispute that Lynchar was indebted to the lender, and that Lynchar's debts were intended to be covered by the guaranty.

The Court went on to suggest that even where the principal debtor's identity is ambiguous due to clerical error or misnomer in a guaranty, courts should be free to review evidence beyond the guaranty document itself to determine who the parties intended as the principal debtor. To do so would not be expanding the guaranty beyond its terms, but instead would merely be defining what the parties truly intended by the guaranty's terms.

This decision by the Georgia Supreme Court is a welcome one, but it should not change future practices in preparation of guaranty agreements. To assure protection, lenders should take great care in properly identifying all parties in and to the guaranty. The ability to offer the court piecemeal evidence of the parties' intentions is better than a certain loss, but it will be much more risky—and expensive—than properly completing the guaranty agreement in the first instance.

Appellate Court Reinstates Borrower's Claim for Breach of Regulation X Loss Mitigation Requirements

In the recent case of *Ho v. Wells Fargo Bank*, a federal appeals court held that a claim against a loan servicer for violation of the loss mitigation requirements of Regulation X (the federal regulations implementing RESPA) had been improperly dismissed by the district court. Because the servicer failed to follow the regulatory notice, evaluation, and foreclosure prohibition requirements relating to the borrower's loss mitigation application, the borrower had a viable claim against the servicer even though the servicer never agreed to accept the application or to otherwise modify the mortgage loan.

After defaulting on her mortgage loan and after commencement of foreclosure proceedings against her home, borrower Karen Ho received an unsolicited loan modification offer from her mortgage loan servicer (Wells Fargo). Ho completed and signed the form modification agreement provided to her, and mailed the agreement to Wells Fargo in December of 2013.

Eleven months later, without having issued any subsequent written notice to Ho of receipt or rejection of the modification agreement, Wells Fargo conducted a foreclosure sale of Ho's residence. Weeks after completion of the foreclosure sale, Wells Fargo first mailed written notice to Ho that her proposed modification agreement had been rejected by Wells Fargo as incomplete because Ho's husband had not signed the modification agreement. There was some evidence that prior to foreclosure Wells Fargo attempted to contact Ho by telephone regarding the application defect, but there was no dispute that Wells Fargo issued no written notice of the defect before foreclosure.

Ho filed suit in federal court after the foreclosure, claiming that Wells Fargo violated the loss mitigation requirements of Regulation X by failing to timely evaluate the modification agreement, by failing to give timely notice that the agreement was incomplete, and by foreclosing on her residence without first giving written notice that the agreement was incomplete. At Wells Fargo's request, the federal district court dismissed the claim because Ho could not prove that Wells Fargo ever agreed to modify her mortgage loan.

On appeal of the dismissal, the U.S. Court of Appeals for the Eleventh Circuit (which handles federal cases arising within Georgia, Florida, and Alabama) held that a valid modification agreement was not a prerequisite for the borrower's claim. The notification, evaluation, and foreclosure prohibition requirements that Wells Fargo allegedly violated apply in favor of a borrower regardless of whether a loss mitigation agreement is ever eventually reached between the borrower and servicer.

More specifically to the case, Regulation X requires a servicer to notify a borrower whether a loss mitigation application is complete within five days of receiving the application. If the application is incomplete, the servicer must inform the borrower of what additional information is needed to complete the application. Within 30 days of receiving the application, the servicer must evaluate the application and notify the borrower in writing of whether the application is accepted by the servicer. If the servicer fails to meet these notice and evaluation requirements as to a loss mitigation application received after foreclosure proceedings have been commenced, the court held, conduct of the foreclosure sale is also a violation of Regulation X.

The parties did not dispute that Ho's proposed modification agreement was a loss mitigation application for purposes of Regulation X. As Ho's lawsuit alleged that Wells Fargo did not notify her in writing of any defects in or rejection of the application for more than one year after receiving the application, Ho stated a viable claim for violation of Regulation X's notice and evaluation requirements. Further, as the foreclosure sale was held without first meeting notice and evaluation requirements, Ho stated a viable claim for violation of Regulation X's foreclosure prohibition. The court thus returned the case to the district court to allow the claims against Wells Fargo to proceed.

This decision is a valuable reminder that the specific loss mitigation procedures imposed by Regulation X cannot be ignored for covered loans. The servicer will face potential liability to the borrower for violation even where the mitigation terms proposed by the borrower are not accepted.

Understanding the UCC-1: Common Errors with Continuation

Continuing the effectiveness of a UCC-1 financing statement is usually a straightforward process, but problems sometimes arise due to two common errors. First, lenders sometimes misunderstand the effect (or lack of effect) that a name change or similar amendment has on the lifespan of the financing statement. Second, lenders sometimes miscalculate the permissible six-month continuation window for filing second or subsequent continuation statements.

A UCC-1 financing statement is ordinarily effective for a period of five years commencing on its date of filing. If this five-year period expires and no continuation statement has been properly filed, the lender becomes unperfected. Further, as against competing secured lenders and buyers of the collateral, the lender will be treated as though it had never been perfected at all. The drastic effects of lapse make proper continuation filing crucial for lenders with long-term interests in collateral.

UCC Amendment forms filed for any purpose other than continuation (changes in collateral or debtor name, for example) will not in any way extend or continue the duration of the financing statement. This is true even when new collateral or a new debtor is added by amendment. In other words, filing an amendment to add a debtor or collateral does not give rise to a "new" five-year period as to that debtor or collateral. Duration of the underlying financing statement is entirely unaffected. This must be remembered when analyzing and calendaring deadlines for continuation.

Even if in proper form, a continuation statement must be filed within the applicable six-month window to be effective. This window opens six months prior to expiration of the five year effectiveness period, and closes once the five year period expires. A continuation statement filed too late will not revive a lapsed financing statement; and a continuation statement filed too early has no effect.

If a proper continuation statement is filed within the six-month window, the financing statement's effectiveness continues for another five years commencing on the expiration date of the prior five-year period. To reiterate, the new five-year period commences on the lapse date of the prior five--year period, *not* on the date the continuation was filed. This is frequently misunderstood.

If only one five-year continuation period is needed, misunderstanding the continuation period dates is of little consequence. However, if multiple continuations are needed, misunderstanding can be fatal to perfection. If scheduling is (wrongly) based on the concept that the additional period commences on the date of continuation statement filing, the six-month continuation window will appear to open earlier than it actually does. And again, if a continuation is filed before the six-month window opens, it will be entirely ineffective.

Assume for example a financing statement is filed on July 1, 2015. A continuation can be timely filed between January 1and July 1 of 2020. If a continuation is timely filed, a subsequent continuation can be filed between January 1 and July 1 of 2025. Here, lender files its first continuation on February 1, 2020. It wrongly calendars that the effectiveness period will lapse on February 1, 2025 and that the continuation window will open on August 1, 2024. On this basis, lender files its second continuation on September 1, 2024 and files no further continuation. The result is that lender is unperfected as of July 1, 2015. Because its second continuation was filed before January 1, 2025, it was ineffective.

To avoid scheduling errors it may help to view continuation deadlines as anniversaries of the initial filing date, which can be calendared infinitely based on only the initial UCC-1 filing date. This may decrease likelihood that new deadlines are scheduled on the basis of actual continuation filing date.

Have questions? Need help?

Moore, Clarke, DuVall & Rodgers, P.C. has attorneys available to provide representation throughout a broad range of concerns an institution may face. Our practice includes document preparation for complex loans and workout arrangements, bankruptcy and collection litigation, foreclosures, real estate transactions, taxation, estate planning, and employer representation in wage, hour, and discrimination disputes. The firm has attorneys licensed in Georgia, Florida, Alabama, South Carolina, and Tennessee. Please contact us to see how we can help.

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