The Lender's Source

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Reminder: Integrated Mortgage Disclosure Rule Takes Effect October 3, 2015

The Consumer Financial Protection Bureau's "Integrated Mortgage Disclosure" rule takes effect on October 3, 2015. The rule will require use of new, agency-specified disclosure forms in most closed-end consumer credit transactions secured by real property. For covered transactions where a borrower's loan application is received on or after October 3, the lender must provide the borrower a properly completed "Loan Estimate" no later than the third business day after the application is received. Generally speaking, the Loan Estimate takes the place of the Good Faith Estimate and Initial Truth-in-Lending forms previously used.

The rule also requires the lender to provide the borrower with a properly completed "Closing Disclosure" no later than three business days before consummation of the loan. The Closing Disclosure generally takes the place of the HUD-1 and Final Truth-in-Lending forms previously used.

It is important to remember that not all real estate secured loans are affected by the new rule. Open-ended credit (e.g., HELOCs) and commercial loans (among others) are not covered by the rule. Lenders should take care to assure that the proper disclosures are used for the type of loan at issue.

Secured Lending: Dragnet Clauses in Security Deeds with Multiple Grantors

Court of Appeals Finds Lender Wrongfully Foreclosed in Reliance on Dragnet Clause

Georgia law permits use of "dragnet" clauses (clauses purporting to secure any and all debts of a borrower to a lender) in security deeds, but the effects of such clauses can be severely limited where a security deed features multiple grantors. The recent Georgia Court of Appeals decision of *Clark v. AgGeorgia Farm Credit* provides a valuable example of how a lender can face severe consequences from over-reliance on a dragnet clause.

The *Clark* case involved two brothers, Donald and Edwin, who jointly owned a farm in Wilcox County. In 2004, Donald (individually) had two separate outstanding loans to the lender. While the loans were outstanding, both Donald and Edwin signed a security deed in favor of the lender. The deed identified Donald as the sole "Borrower," and referenced one of Donald's two outstanding loans to the lender. The deed also featured a dragnet clause stating that the farm would secure "all other indebtedness of Borrower to Lender, now due or to become due."

Donald later fully repaid the loan specifically referenced in the security deed, but defaulted on the other loan. In reliance on the dragnet clause, the lender foreclosed on the farm. Donald later sued the lender for wrongful foreclosure, arguing that the defaulted loan was not secured by the terms of the security deed. After his claim was dismissed in the trial court, Donald appealed to the Georgia Court of Appeals.

Addressing Donald's claim, the Court of Appeals recited the applicable rule under Georgia law: unless the security deed specifically provides for joint and several liability (i.e., that the deed secures all debts of either grantor, whether owed individually or jointly), a dragnet clause will only be effective to include debts as to which all of the deed's grantors are parties.

The deed before the court did not specifically state that it would include all joint or individual debts of either brother; and Edwin was not a party to the 2004 loan that was used as the basis for foreclosure. Thus, the court held, the loan was not secured by the farm (despite the dragnet clause that purported to include "all other indebtedness of Borrower") and the lender's foreclosure was wrongful. The Court of Appeals reversed the decision of the trial court, and directed that the trial court should have found the lender liable on Donald's wrongful foreclosure claim.

As the *Clark* opinion illustrates, a lender must always carefully review its loan documents in light of applicable law to assure that the lender's contemplated collection activities are authorized. The fact that a particular deed, note, or security agreement format is regularly used by the lender does not mean that the format contains sufficient language to accommodate all collection situations that the lender may encounter. Failure to use due care can be very costly.

We Card: The UCC Driver's License Rule Requires Caution in Continuing Pre-2013 Financing Statements

By now, most lenders are well aware of the so-called "driver's license rule" invoked by the 2013 Georgia Uniform Commercial Code amendments. The rule, which became effective July 1, 2013, states that if an individual debtor has a valid Georgia driver's license then the name of the individual as shown on a financing statement must exactly match the name shown on the driver's license—middle name (or middle initial) and all. As a result, a name that was appropriate prior to 2013 may no longer be sufficient.

For example, if a debtor's full name is Mary Erin Chaney, a financing statement using the name "Mary E. Chaney" would likely have been sufficient under pre-amendment law. If the debtor has a valid Georgia license using the full name Mary Erin Chaney, however, that same financing statement will be deficient under post-amendment law. Again, the driver's license and financing statement must exactly match.

The amendments include special transition provisions designed to lessen the harsh effect of the new rule. Under these provisions, if a financing statement was effective to perfect the lender's interest prior to July 1, 2013 then the financing statement will remain effective until it would have expired absent the amendment. However, where the name shown in a pre-amendment financing statement becomes improper because of the amendment (i.e., the name as shown in the financing statement does not exactly match the debtor's driver's license), that financing statement cannot be continued beyond its initial lapse date unless the lender files a financing statement amendment correcting the name shown for the debtor. In other words, the lender will need to determine whether there is an exact match between the financing statement and driver's license names when continuing financing statements filed prior to the 2013 amendments.

If the debtor's name as stated in the pre-amendment financing statement is different from that individual's valid Georgia driver's license, the lender will need to file an amendment showing the correct name for the debtor before a continuation statement is filed. Otherwise the pre-amendment financing statement may become ineffective due to incorrect name at the scheduled lapse date, even if a continuation statement is timely filed and accepted by the clerk.

Separate UCC-3 forms should be filed for the name change amendment and the subsequent continuation statement. The Georgia Superior Court Clerks Cooperative Authority has instructed that a single UCC-3 document should not be used for both name change and continuation purposes. While some clerks may allow use of a single document in disregard of instructions, others may reject the document and return it to the creditor—meaning nothing gets filed, and deadlines can be missed. The safe practice is to submit two separate UCC-3 documents (a name change amendment, and a continuation statement) where a name change is required before continuation.

Have questions? Need help?

Moore, Clarke, DuVall & Rodgers, P.C. has experienced attorneys available to provide guidance and representation throughout a broad range of concerns a financial institution may face. The firm's practice includes document preparation for complex loans, lender representation in bankruptcy and collection litigation, foreclosure, real estate transactions, taxation, estate planning, and employer representation in employment disputes. Contact us to see how we can help.

Post-Judgment Garnishment Procedures Remain Unsettled Following Recent Federal Court Declaration

On September 8, the U.S. District Court for the Northern District of Georgia issued an order finding Georgia's post-judgment garnishment laws unconstitutional. Per the court, Georgia's laws are deficient in that they do not require the debtor to be given notice of potential exemption of account funds from garnishment; do not inform the debtor as to how to claim applicable exemptions; and do not provide an expedited process for court determination as to whether the debtor's claimed exemptions are valid.

Following the September 8 order, many courts within the State, as well as the State's Attorney General, have express disagreement with the order. The Attorney General has asked the federal court to reconsider its order, and may ultimately appeal the order to a higher federal court.

While attempts to directly alter the September 8 order are underway, in the interim local courts and litigants are uncertain as to how to address the potentially deficient laws. Many courts have issued "standing orders," affecting all garnishments throughout the court or county, modifying the procedures and documents previously used for garnishments. Some others have refused to proceed with future garnishments, or to pay out garnished funds already received.

Absent a statewide mandatory approach, such as an amendment of the law or a uniform order, garnishments will face a patchwork of uncertainty. Unfortunately, statewide relief may well be weeks, or even months, away.

Garnishment Answers and Related Documents Must be Redacted Before Filing

Financial institutions that prepare and file garnishment answers or similar documents without assistance of an attorney should remember that all documents to be filed with the court must be properly redacted before filing.

Where social security numbers, taxpayer identification numbers, or financial account numbers are shown on documents to be filed, all but the last four digits must be redacted. Where a person's birth date is shown, the day and month of the date must be redacted, leaving only the year of birth visible.

Redaction requirements apply to the answer document itself and to all attachments or other documents submitted along with the answer for filing. So, for example, if an account report or "screenshot" is to be submitted for filing along with the answer, the screenshot itself must properly be redacted before filing.

Redaction is the responsibility of the party filing the document with the court. Most court filings are available for public viewing, and the court itself will not ordinarily undertake any redaction absent a cumbersome request process. To safeguard customer information, and to avoid potential liability (which can include not only monetary costs but also potential misdemeanor criminal punishment), redaction must be carefully and thoroughly performed before filing with the court.

For the H.R. Professional

By
C. Jason Willcox

Employment Files: What You Must Keep, and What You Should Keep

Every employer needs to create and maintain files that document when an individual was hired, the process the individual went through to become an employee, what the employee was hired to do, how the individual performed, and otherwise document the employee's tenure with the company. Because of a variety of state and federal laws and regulations, employers must maintain employee files in different record filing systems and every employer should consider how these files are maintained, who has access to the various files, and when those files can be discarded. The key to all files related to employment is to be consistent with all employees.

Personnel Files

An employee's personnel file should include everything related to the employee's performance of his or her position. This should include, but is not limited to, an application, job advertisement, list of qualifications, job description for each position held, date of hire and promotion/demotion, rates of pay and changes in compensation, tax documentation, documents related to completed training or continuing education, performance evaluations, disciplinary actions, documentation of warnings, reasons for separation of employment, and any separation notices issued.

The personnel file must also (read Must!) include written acknowledgments of policies and procedures executed by the employee. When the employer changes policies or procedures necessitating a new acknowledgment, both the new and old acknowledgment must be kept in the file. It is particularly important to have an acknowledgment for the employer's Equal Employment Opportunity policy which confirms the employee reviewed the policy, was provided the opportunity to ask questions regarding the policy, understands the policy, and agrees to comply with the policy.

While the list of items that an employer might consider maintaining in a personnel file is rather long, there are certain documents that an employer cannot keep in a personnel file: employee medical records or records related to medical absences, Form I-9, FMLA paperwork, and workers' compensation paperwork. As noted below, these require special attention and can result in penalties if an employer fails to properly separate.

Personnel files must be maintained in a secure, lockable cabinet and should be maintained for a minimum of four years after the separation of employment. Access to personnel files should be limited to those designated as "need to know" by the company to make employment based decisions. Moreover, some of the information in an employee's personnel file is confidential and every employer should stress the importance of maintaining that confidentiality.

If an employee makes a claim with the EEOC, a Department of Labor, or files a lawsuit against the company, the personnel file will most likely be one of the first pieces of evidence sought. If the EEOC is involved in an investigation and performs an onsite interview, the investigator will ask to see the secure location personnel files are maintained.

Medical File

An employer is required to maintain a separate file for each employee to maintain medically related information. This would include any information addressing or relating to a medical condition, medical issues,

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or absence related to a medical condition, as well as information regarding health benefits. The medical file should also include information related to absences caused by an employee's dependent, all correspondence from a medical practice or medical provider, and the results of drug or alcohol tests. Requests for leaves of absence under the FMLA (and supporting documentation), any information related to a disability or a request for accommodation, and the process an employer underwent to determine if an accommodation was necessary, should be maintained in the medical file and NOT in the personnel file.

Access to medical files should be strictly limited. Supervisors should not generally have access to an employee's medical file, but access may be permitted under certain limited circumstances. Further, providing medically related information to those outside of a strict need-to-know basis requires consideration of a variety of laws, including but not limited to the ADA, GINA, and HIPAA. Medical files should be maintained for a minimum of three years after the employee's employment with the company ends.

Some employers elect to maintain an overall medical file, which contains general medical information, disability information, FMLA information, and workers' compensation information, while other elect to separate workers' compensation information into a separate file. Where an employer maintains a single medical file and an employee files a workers' compensation claim and requests the file, all information in that file may need to be disclosed.

I-9 Form

An employee's I-9 Form should be maintained in a separate notebook or folder with all other I-9 Forms for all current company employees.

An employer should utilize a separate notebook or folder with past employees' I-9 Forms. When an individual leaves the company's employment, that individual's I-9 Form should be transferred to that particular folder to be kept for three years after the date of hire or one year from the date of separation, whichever is later.

C. Jason Willcox, a partner in the firm's Albany office, regularly represents and advises banks, medical providers, and other businesses in employment matters.