The Lender's Source

MOORE CLARKE DUVALL & RODGERS

ATTORNEYS AT LAW

Failed Banks and Fraudulent Transfers: Court Says Fraudulent Transfer Claim Cannot be Asserted by Loan Purchaser

In a blow to purchasers of failed bank assets, the Georgia Court of Appeals held in its recent *RES-GA Hightower, LLC v. Golshani* decision that an assignee of the FDIC, acting as receiver for a failed bank, could not assert a fraudulent transfer claim that arose in favor of the failed bank prior to the receiver's appointment. The decision will have a reach beyond failed bank scenarios, as its underlying legal principle is that fraudulent transfer claims are not assignable and will not follow a transfer of the related loan or other obligation.

The facts of the *Golshani* case were that in 2006 Omni National Bank made a loan to Rockdale Investment Partners, LLC. Nasser Golshani personally guarantied the borrower's obligations on the loan. In 2008, the borrower defaulted and Golshani failed to honor the guaranty. In April of 2009, Golshani transferred certain real property to his relatives at little or no cost.

The bank later failed, and the FDIC was appointed as receiver. The loan and related guaranty of Golshani were transferred to RES-GA Hightower, LLC, which filed suit and obtained a judgment against Golshani for the balance of the loan.

After obtaining the judgment and learning of Golshani's gratuitous conveyances, RES-GA filed a separate suit to set aside the conveyances as fraudulent transfers. Golshani responded by arguing that fraudulent transfer claims are not assignable, and as RES-GA was not Golshani's creditor when the claims arose (when the conveyances were made), RES-GA had no right to recover on the claims. The lower court agreed with Golshani, dismissing the claims against him. RES-GA appealed the decision.

On appeal, the Court of Appeals found that while Georgia's fraudulent transfer laws (as to transfers made before July 1, 2015) were silent as to assignability of claims, a separate Georgia law declared generally that claims "for injuries arising from fraud to the assignor" are not assignable. Further, a rarely-cited 1958 Georgia Supreme Court decision had held that an assignee of a creditor could not sue to set aside a gratuitous transfer made prior to the assignment, as the suit would be for injuries arising from the debtor's fraud to the assignor. Based on these authorities, the court held the fraudulent transfer claims against Golshani could not be asserted by RES-GA as they arose from alleged fraud to another: Omni National Bank.

The effect of the *Golshani* decision, until the new Voidable Transactions Act (discussed below) is called into play, is to restrict any loan purchaser or assignee from pursuing fraudulent transfer claims for conveyances made prior to the assignment. The effect is not limited to those taking assignment of loans following the FDIC's appointment as receiver.

Those who fit the mold of the assignee in *Golshani*—purchasers of failed bank loans following FDIC receivership—face greater uncertainty than other assignees. This is because, for procedural reasons, the Court of Appeals refused to consider any impact the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) might have on assignability of a failed bank's fraudulent transfer claims. FIRREA grants broad authority and numerous special powers to the FDIC when acting as receiver, and lenders should expect Georgia's courts to be forced to confront FIRREA's effects on state law assignment restrictions in the coming months and years.

Georgia's New Uniform Voidable Transactions Act Provides Automatic Assignability of Fraudulent Transfer Claims

The *Golshani* decision may impact lenders for the next few years, but the new *Uniform Voidable Transactions Act* ("UVTA") will eventually render *Golshani* all but meaningless.

The UVTA, which became effective on July 1, 2015, is a minor overhaul of the former Uniform Fraudulent Transfers Act. Most changes are minor, but the UVTA offers a benefit to creditors in that it assures fraudulent transfer claims are assignable to subsequent purchasers or assignees of the underlying debt.

The UVTA effects this change in two ways. First, it modifies the previous definition of *creditor* to include any successors or assigns of a creditor. Second, it provides that if a transfer is voidable (fraudulent) as to a creditor, a claim to recover the transfer will be automatically transferred to any successor or assignee of that creditor. Thus, where the UVTA applies, a claim will be assertable by an assignee regardless of the *Golshani* decision.

The UVTA only applies to transfers made after July 1, 2015. *Golshani* and prior fraudulent transfer laws will continue to apply to transfers made before that date. As a result, *Golshani* will impact many fraudulent transfers that a lender may wish to pursue in the coming few years.

Avoid Confusion in Recording Affidavits for Loan Renewals and Extensions

Georgia real property law allows a lender to extend the lifespan of a security deed after loan renewal by recording an appropriate affidavit of the lender in the real property records. Georgia tax law allows a lender to record an affidavit in the real property records for purposes of documenting intangibles taxes owing as a result of a loan renewal. These two types of affidavits are sometimes confused, with unfortunate results. An affidavit filed for intangibles tax purposes will almost never be sufficient to extend the life of a security deed.

The requirements for an intangibles tax affidavit are fairly basic: the affidavit must reference the prior security deed, state the new maturity date following the loan renewal or modification, and state the amount (if any) of new principal extended.

In contrast, the requirements for an affidavit extending the life of a security deed are more substantial. The affidavit must, among other things, state the total amount of the debt owing, state the date the last payment was made prior to the affidavit, and contain a legal description of the real property securing the loan. These requirements (especially the latter) are almost never present in an intangibles tax affidavit, and are necessary to extend the life of the deed. If a lender renews or extends maturity of a loan and only files an intangibles tax affidavit, the lender risks lapse of the security deed prior to full satisfaction of the secured debt.

Even aside from potential confusion between affidavit types, lenders should consider recording a renewal or modification agreement signed by the debtor, rather than merely the affidavit of the lender, when seeking to extend the life of a security deed. While Georgia law allows a lender to use either method, some title insurance companies have become wary of relying upon affidavits or other documents recorded for renewal purposes that have not been signed by the debtor. Part of the concern may result from the numerous (and somewhat ambiguous) requirements for an effective renewal affidavit, and part may result from a desire to have the borrower's agreement to the renewal shown by the property records themselves. Regardless of the reasons for the insurers' concerns, given the importance of insurability of title, lenders should consider utilizing renewal documents signed by the borrower rather than affidavits signed only by an employee or officer of the lender.

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.

Deeds to Secure Debt: Appeals Court Construes Revolving Line-of-Credit Provision as Perpetual Language Extending Lapse Date

A recent Georgia Court of Appeals decision applied a surprisingly lenient standard for "perpetual language" affording a longer lifespan for a security deed, finding that a deed provision addressing a revolving line of credit was sufficient to allow the deed to remain valid twenty years from the date of its issuance.

The general rule under Georgia law is that a security deed lapses seven years from the maturity date of the secured debt as stated in the deed, unless the debt is earlier satisfied. The borrower and lender can provide a potentially longer lifespan for the deed by including a statement of intent to create an indefinite or perpetual security interest. This statement, which is commonly referred to as *perpetual language*, must be included in the deed or in a recorded addendum attached to the deed. If sufficient perpetual language is used, the deed will not lapse until the later of seven years from the maturity date of the debt, or twenty years from the date of the deed. For short-term loans, inclusion of perpetual language can thus provide a substantial advantage to the lender.

Georgia law does not feature detailed criteria for deciding whether a provision in a security deed will suffice as effective perpetual language. The law merely mandates that the deed must feature an "affirmative statement" of intent to create an indefinite or perpetual security interest. Drafters have tended to follow the law literally when preparing deeds, parroting the law's language. An example of a perpetual language provision one might commonly encounter is "the parties by this affirmative statement intend to create an indefinite or perpetual security interest."

In prior years, Georgia's appellate courts have given minimal guidance regarding the criteria for effective perpetual language. The little guidance that had been given tended to reinforce the view that a close repetition of the statutory language was required. The recent Court of Appeals decision of *Stearns Bank v. Mullins* veered sharply from this view, finding that a provision intended to address a revolving line of credit was a sufficient indication of the parties' intent to create a perpetual security interest.

continued on following page

The security deed at issue in the *Stearns Bank* case was dated June 2, 1995, and described the secured debt as a revolving line of credit that would mature on June 2, 1996. The lender continued to extend credit to the borrower periodically up until 2010, expecting the credit to be secured by the deed. Despite requesting and receiving these extensions of credit, the borrower eventually filed a motion asking that the local court cancel the security deed on the basis that it lapsed in 2003 (seven years from the 1996 maturity date). The lender resisted the borrower's efforts, arguing that a dragnet clause in the deed was sufficient "perpetual language" that gave the deed a twenty-year lifespan. The local court complied with the borrower's request to set aside the deed, and the lender appealed.

On appeal, the Court of Appeals largely ignored the lender's argument regarding the dragnet clause. The court focused instead on two deed terms designed to address the secured line of credit. One provision of the deed, buried in a paragraph addressing collection costs, stated that the security interest would remain in effect until cancelled in writing. Another provision, which was the primary focus of the court's attention, stated that "the secured debt includes a revolving line of credit provision. Although the secured debt may be reduced to a zero balance, this security instrument will remain in effect until released."

The Court of Appeals explained that a revolving line of credit is unique in that repayment of any outstanding balance does not, alone, terminate the line of credit or any security interest that may secure it. Instead, termination occurs only as provided in the line of credit agreement—usually by lapse of time or notice of termination. As the deed at issue affirmatively stated it secured a revolving line of credit and would remain effective until released, the court reasoned, the deed sufficiently expressed the intent to create an indefinite security interest as required for the longer twenty-year lifespan. The deed resultantly remained valid until twenty years from its date.

Importantly, the Court of Appeals warned lenders that it is "certainly" preferable to use clear, direct perpetual language rather than relying on line of credit provisions, and recited a perpetual language provision similar to the example provided above. This signals that the best practice for drafters is to continue to use provisions that essentially parrot the language of the law. Lenders should not intentionally omit express perpetual language when dealing with lines of credit in expectation that the longer twenty-year lifespan will automatically be applied to the deed.

Courts are likely to limit the effect of the *Stearns Bank* decision to security deeds that feature language very similar to that relied upon by the Court of Appeals in that case. There is simply no need to utilize a security deed format that tests the limits of the courts' lenience with respect to perpetual language. Instead, *Stearns Bank* should serve as a potential tool for lenders that, as a result of oversight or otherwise, find themselves in a struggle to prevent a finding of lapse of a security deed (likely in an outdated format) that is vague as to intent to create a perpetual security interest.

Time Limitations for Filing Lawsuits: Court Holds that Four-Year Limitations Period Applies to Conditional Sale Contracts

Prior to November of 2015, no Georgia appeals court had decided which statute of limitations would apply to a creditor's suit to recover on a conditional sales contract. Such contracts, which involve a sale of goods on credit with the seller retaining a security interest in the goods, are commonly used in the sale of automobiles and consumer equipment. In the event that the purchaser fails to comply with the payment schedule set forth in the contract, the creditor can repossess and sell the collateral and file suit for any deficiency—just as with other secured transactions.

Although conditional sales contracts have long been in use, until recently creditors faced uncertainty as to the length of time within which they were required to file suit to recover unpaid obligations under the contracts. Some expected a six-year limitations period would apply, treating conditional sales contracts consistently with stand-alone security agreements and many other written contracts. Others expected a four-year limitations period would apply, consistent with the rule applied by the Uniform Commercial Code to contracts for the sale of goods.

The Georgia Court of Appeals finally decided the issue in its November 2015 opinion in the case of *Venable v. SunTrust Bank*. There, a purchaser entered into a conditional sale contract with SunTrust Bank in March 2006 for the purchase of an automobile. The purchaser defaulted on the required payments in December of 2008, but SunTrust did not promptly recover the collateral or sue for the debt. SunTrust repossessed and sold the car in October 2011, and in October 2012 filed suit against the purchaser to recover the deficiency.

The purchaser responded to the lawsuit by arguing that SunTrust could no longer recover the debt as the four-year limitations period had lapsed since the purchaser defaulted. SunTrust disagreed, arguing that a six-year limitations period applied and had not yet lapsed when the lawsuit was filed. Addressing the dispute, the Court of Appeals agreed with the purchaser.

continued on following page

MOORE CLARKE DUVALL & RODGERS
ATTORNEYS AT LAW

Albany
2829 Old Dawson Road
Albany, Georgia 31707
Tel. 229-888-3338

Valdosta
2611 N. Patterson Street
Valdosta, Georgia 31604
Tel. 229-245-7823

Atlanta
900 Circle 75 Parkway
Suite 700
Atlanta, Georgia 30339
Tel. 770-563-9339

Savannah
114 Barnard Street
Suite 2B
Savannah, Georgia 31401
Tel. 912-234-0995

E-mail
BusinessLaw@mcdr-law.com

Visit us on the web at
www.mcdr-law.com

This is a publication of Moore, Clarke, DuVall & Rodgers, P.C. The information contained in this newsletter is not intended to be, nor does it constitute, legal advice.

The hiring of a lawyer is an important decision that should be based upon an assessment of the attorney's level of skill and experience. Before you decide, ask us to send you free written information regarding our firm's qualifications.

The court explained that the dispute as to the appropriate statute of limitations must be resolved by looking to the "primary purpose" of the conditional sale contract. If the primary purpose of the contract was the sale of a car, it would be subject to a four-year limitations period like other contracts for sale of goods under the UCC. If instead the primary purpose of the contract was to grant a security interest to the creditor, it would be subject to a six-year limitations period like ordinary security agreements and written contracts.

Expressing little or no uncertainty, the court held that the primary purpose of the contract was to sell the automobile to the purchaser. The purchase-money credit provided in relation to the contract, and the security interest granted to secure that credit, were merely "incidental" to the sale of the car. As such, the four-year limitations period imposed by the UCC applied to the contract. The court sought to further support its decision by explaining that most other states that have addressed conditional sales contracts have also imposed the UCC's four-year limitations period applicable to contracts for the sale of goods.

As a four-year statute of limitations applied to the conditional sale contract before the court, and as SunTrust did not file its lawsuit until more than four years had lapsed since the purchaser's default on the required payments, SunTrust could not recover and its claim was dismissed.

While many financial institutions do not commonly utilize conditional sales contracts, those that do must take careful note of the *Venable* decision. A creditor that expects to have six years within which to file suit to recover a deficiency or other unpaid balance will be quite disappointed, and left with no right to recover, once four years has lapsed from the time of the purchaser's default.

New email address? Not on our contact list?

If you wish to continue to receive the quarterly *Lender's Source* newsletter, please let us know if your email address should change. If you do not currently receive the newsletter via email but would like to do so in the future, we will be happy to add you to our contact list. Please send an email message to BusinessLaw@mcdr-law.com with your correct email contact information.

Visit our firm's website.

You can find this and other issues of the *Lender's Source* newsletter, as well as information on a variety of other legal topics, at www.mcdr-law.com. Future editions of this newsletter will be added to the website as they are prepared.