

Albany Office
P. O. Drawer 71788
Albany, Georgia 31708
Telephone: (229) 883-2441
Facsimile: (229) 888-8148
www.gwsh-law.com

Atlanta Office
1201 Peachtree St., N.E.
400 Colony Square
Atlanta, Georgia 30361
Telephone: (404) 874-9588



GARDNER WILLIS
SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

May 17, 2013

FINANCIAL INSTITUTION UPDATE

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

We publish various newsletters regarding other areas of law. Please contact us for more information or email us at gwsh@gwsh-law.com if you prefer to receive our newsletters electronically.

Visit our website at:
www.gwsh-law.com

At Gardner, Willis, Sweat & Handelman, we offer a wide range of services including Banking; Bankruptcy; Business Law; Construction Law; Employment Law; Estate and Tax Planning; General Litigation and Appeals; Governmental Law; Real Estate; Trucking Litigation, and Workers' Compensation. Sherman Willis, our Managing Partner, is available to speak with you about your unique needs in these and other areas. For a consultation with Sherman, please call at 229-883-2441, or e-mail him at: sherman.willis@gwsh-law.com

All inquiries are confidential.

DO YOU HAVE TO PROVE CONSIDERATION TO RECOVER ON A NOTE?

In Nash v. Township, decided on March 19, 2013, the Georgia Court of Appeals held that a genuine issue of material fact existed as to whether the borrowers received consideration of the note so as to preclude the granting of summary judgment to the lender. Beginning in 2005, lender loaned \$475,151.93 to a corporation, which was guaranteed by Norman Nash. The 2005 Note was renewed several times and in each instance Norman Nash personally guaranteed the corporate debt. In 2008, Norman Nash and Norris Nash signed a new Promissory Note which provided as follows:

For value received, the undersigned Norman J. Nash and Norris J. Nash jointly and severally promise to pay to the order of Township Investments, LLC ("Lender") the sum of \$478,800, together with interest at the rate of 8% per annum.

Upon default, the lender filed suit on the Note and the borrowers asserted the defense of lack of consideration. The court reasoned that the terms of the Note do not specify the nature of the consideration that the Nashes received in exchange for executing the Note; rather, the Note states "[f]or value received" which is an ambiguity that permits admission of parol evidence regarding the specific nature of the consideration.

In depositions, the lender's representative explained that the purpose of the Note was to satisfy the corporation's outstanding debt to the lender and the lender was willing to accept the Note because it was executed by the individuals. The lender argued that satisfaction of the corporate antecedent debt constituted sufficient consideration for the Note. However, the borrowers disputed the lender's deposition testimony and argued that they received no value for the Note and that the corporate debt was not cancelled. Therefore, the court found that a genuine issue of material fact exists as to whether the Nashes executed the Note in exchange for satisfaction of the corporate antecedent debt.

If the Note had been renewed by the corporation and continued to have been guaranteed by the individuals, lack of consideration would not have been a valid defense. The renewal of a note cuts off all defenses of which the maker then had knowledge. Lenders should be cautious when having an individual sign a new Note to pay another's debt when the only consideration recited in the Note is "For value received." Language should have been added to the Note to explain the consideration. The corporate Note should have been marked satisfied and returned to the corporate borrower.

ARE DEBIT CARD OVERDRAFT FEES CONSIDERED INTEREST?

In Synovus Bank v. Griner, decided on March 28, 2013, the Georgia Court of Appeals found that the lender was not entitled to dismissal for failure to state a claim upon which relief may be granted of certain claims of civil usury, criminal usury, conversion, and money had and received. The lawsuit arises as a result of overdraft fees the bank charged in connection with debit card transactions and ATM withdrawals. The account holder alleged that the effective rate of interest charged by Synovus for the overdraft fee and the overdraft collection fee grossly exceeds the interest limit rates imposed by the State's usury laws, with the interest rate exceeding 1,000,000%.

The Court of Appeals held that the fees could be considered "interest" under Georgia's state usury law which defines interest as "a charge for the use of money computed over the term of the contract at the rate stated in the contract or precomputed at a stated rate on the scheduled principal balance or computed in any other way or any other form." O.C.G.A. §7-4-2. The criminal usury statute defines interest as including "commission for advances, discount, exchange, or the purchase of salary or wages; by notarial or other fees; or by any contract, contrivance, or devise whatsoever." O.C.G.A. §7-4-18(a). The court reasoned that the statutory definitions are very broad and do not, on their face, exclude the Overdraft and Overdraft Protection fees at issue in this case. In reviewing case law, the court concluded that a "fee" imposed by a financial institution will be considered interest where the financial institution: (1) advances money to a customer; (2) charges the fee in exchange for the advance of money; and (3) renders no service to the customer in exchange for that fee, other than the advance of the money.

Synovus argued that the fees are not "interest" and relied upon an Attorney General opinion from 2003 where the Attorney General concluded that an overdraft fee charged in connection with a check transaction likely did not constitute interest because the fee was not based on the time value of money. However, the Court of Appeals found that there is no evidence to assist a court in determining whether the fees at issue are provided in exchange for a service or, if so, whether the amount of the fee bears a reasonable relationship to the service rendered.

This case could have far reaching ramifications if it is found that the fees charged for the overdraft fee and the overdraft collection fees are usurious. Lenders may be required to base the fee on a percentage of the overdraft charge to avoid the usurious claims.

CHANGE IN LAW REGARDING SERVICE OF GARNISHMENTS ON BANKS

A new law becomes effective July 1, 2013, which modifies Georgia's law for service of process on corporations, including banks. The law previously allowed the service of a summons, including a summons of garnishment, to be served on a president or officer of a corporation, along with a "secretary, cashier, managing agent, or other agents" of a corporation. This language created problems as non-management employees are often times unaware of the importance of the deadlines associated with a summons when served. The new law changes who may be served with a summons on behalf of a corporation by eliminating "secretary," "cashier," and "other agents" from the list. Further, the new law defines "managing agent" as a person employed by a corporation who is at an office or facility in this state and who has managerial or supervisory authority for such corporation. Therefore, a summons directed to a corporation may now be served upon the president or other officer, a managing agent, or the registered agent for service of process.



This newsletter was prepared by Deena Plaire-Haas. Deena's practice includes representation of financial institutions and businesses in bankruptcy court, drafting contracts and leases, formation of new businesses, general business litigation, and closing complex commercial transactions. She understands the importance of responsiveness, efficiency, anticipation of clients' needs and creative solutions. Contact Deena at (229) 883-2441 or e-mail her at deena.plaire-haas@gwsh-law.com.

32-136-2013-02