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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.

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Increase In Residential Real Estate Exemption For Georgia Bankruptcy Filers

On May 2, 2012, Governor Nathan Deal signed Senate Bill 117 into law. The law increases the residential real estate exemption allowed in bankruptcy in Georgia under O.C.G.A. §44-13-100, from \$10,000 to \$21,500 for individuals, and from \$20,000 to \$43,000 for couples filing jointly. The change in the law is extremely beneficial to potential bankruptcy filers in every jurisdiction in Georgia. It is important for creditors to understand how their rights may be effected under the new law.

In Chapter 7 cases, the law allows more people to qualify for Chapter 7 bankruptcy without subjecting the equity in their home to attachment. Debtors are allowed to exempt more equity in property in the bankruptcy proceeding. The law now allows the Debtors to exempt twice the amount of equity that they could exempt previously.

In Chapter 13 cases, Debtors benefit from the new law in that the law makes it easier for Chapter 13 filers to meet the liquidation test, which is one of the requirements for a confirmable Chapter 13 plan. This test is also known as the "best interests of the creditors" test and requires unsecured creditors to receive at least what they would have received in a Chapter 7 liquidation of non-exempt property, in Chapter 13 cases. Because more equity is now exempt, the Debtors will have less non-exempt real property equity subject to the test.

The new law may allow more Debtors to qualify for bankruptcy in Georgia. It makes it more difficult for creditors to protect their rights.

Consignment Goods and Liens on Inventory

Under the Uniform Commercial Code (hereinafter "UCC"), special rules exist for consignment transactions. Suppliers or merchants who have consignment agreements with other merchants, yet wish to retain their security interest in the inventory must follow certain requirements under the UCC. A consignment transaction is a transaction in which a person delivers goods to a merchant for the purpose of sale and the "merchant": (a) deals in goods of that kind under a name other than the name of the person making delivery; (b) is not an auctioneer; and (c) is not generally known by its creditors to be primarily engaged in selling the goods of others. Additionally, the aggregate value of the goods delivered must exceed \$1,000 or more at the time of delivery; the goods cannot be consumer goods immediately before delivery; and, the transaction cannot create a security interest that secures an obligation. O.C.G.A. §11-9-102(21). A consignor is the person who delivers the goods to a consignee in a consignment. O.C.G.A. §11-9-102(22). In the majority of consignment transactions, the consignor wants to continue its security interest in the goods even after delivering them to the consignee.

One must determine the priority of a consignor's interest in consigned goods as against a security interest in the goods created by the consignee when the consignee's pre-existing creditors or lenders of the consignee who come after the assignment, claim an interest in the consigned goods. Under O.C.G.A. §11-9-103(d), the security interest of a consignor in goods that are the subject of a consignment is a purchase money security interest in inventory. Therefore, the standard for determining priority of purchase money security interests in inventory is used in consignment transactions. Pursuant to O.C.G.A. §11-9-324(b), a perfected purchase money security interest in inventory has priority over a conflicting security interest if: (a) the purchase money security interest is perfected when the debtor receives possession of the inventory; (b) the purchase money secured party sends an authenticated notification to the holder of the conflicting security interest; (c) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and (d) the notification states that the person sending it has or expects to acquire a purchase money security interest in inventory of the debtor and describes the inventory.

Therefore, the consignor's security interest must be perfected before the goods are consigned to take priority over security interests of the consignee's creditors. The consignor should file a UCC Financing Statement with the pertinent Clerk's office before delivering the goods to the consignee. Additionally, the consignor should conduct a diligent search to determine and locate any pre-existing "inventory" and "accounts receivable" creditors of the consignee and be sure to give said creditors notice of the consignment arrangement before the goods are delivered and identify the consigned goods with particularity. Failure to comply with the perfection statute could result in a consignor's "inventory" and "accounts receivables" being treated as part of the "inventory" or "accounts receivables" of the consignee, with the consignor deemed an unsecured creditor. If the consignee files bankruptcy, a bankruptcy trustee or creditor could assert that the consigned goods constitute inventory or accounts receivables of the Debtor/Consignee and prevail if the consignor failed to give notice and file UCC.