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

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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.

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

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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, Workers' Compensation, and Social Security. 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.

2015 GEORGIA LEGISLATIVE UPDATES

The 2015 Georgia legislative session has ended and several new bills relating to the financial industry have been signed by Governor Nathan Deal. A few of the more recent signed bills are outlined below:

(1) Mandatory Elder Abuse Reporting: On May 5, 2015, Governor Deal signed House Bill 72. The bill clarifies and expands Georgia's law related to elder abuse. The bill expands the list of mandatory reporters to include employees of financial institutions and investment companies to the list of mandatory reporters. Mandatory reporters having reasonable cause to believe that a disabled adult or elder person has been exploited shall report or cause reports to be made to the proper authorities;

(2) Payroll Card Fees: Also on May 5, 2015, Governor Deal signed Senate Bill 88. The bill allows employers to pay employees through the use of a payroll card. Employers electing to use this method shall credit the payroll card on the regular company pay dates. Employers must provide a written explanation of any fees associated with the payroll card account offered to the employee and the employee will have the ability to opt out of the payroll card system; and

(3) Processing Fees: Governor Deal signed House Bill 299 on May 6, 2015. This bill allows a merchant or lender in the business of making industrial loans, retail installment and home solicitation sales contracts, motor vehicle sales financing contracts, and insurance premium finance agreements to charge customers a fee for processing credit card, debit card or other forms of electronic payment. Any lender or merchant imposing a convenience fee pursuant to HB 299 shall provide clear disclosure of such fee prior to imposition. Such notice shall include the dollar amount of such fee, a statement that such fee is nonrefundable, and a statement that such fee is charged for payment by electronic means.

GEORGIA COURT OF APPEALS DETERMINES FORECLOSURE CONFIRMATION NOT REQUIRED FOR A SECOND PRIORITY LENDER'S RIGHT TO RECOVER

The Georgia Court of Appeals recently decided a case in favor of a lender holding a subordinate lien. In Hildebrand v. Bank of America, N.A., the Court ruled that two loans held by two different lenders on the same property are not "inextricably intertwined" such that one lender's failure to obtain confirmation of a non-judicial foreclosure does not bar the second lender's right to recover in its suit on a note.

Hildebrand purchased a condominium in July 2006. To facilitate the purchase, she borrowed $257,380 from DCD Federal Credit Union, which prepared a "80-20" mortgage loan package for her to sign. At the closing, Hildebrand signed two promissory notes; one for $205,100 and one for $51,280, each of which was secured by a separate deed on the condominium being purchased. The language of the deeds specified the security on the larger note was given first priority, and the deed securing the smaller note was given second priority. After the sale closed, the larger note was assigned to Cenlar FSB and the smaller note was assigned to Bank of America. Hildebrand sent separate checks to each company monthly; however, she eventually defaulted on both.

In June 2011, Cenlar foreclosed on the first priority deed. In August 2012, Bank of America ("BOA") sued Hildebrand on the promissory note for the principal amount of $50,842 plus interest and attorney's fees. The trial court granted summary judgment to BOA. Hildebrand appealed to the Court of Appeals alleging the two loans were "inextricably intertwined." Therefore, she argued that the funds secured by the second promissory note constitute a deficiency that cannot be collected because the foreclosure on the first security deed was not confirmed.

Many will be familiar with O.C.G.A. §44-14-161(a), which provides if a creditor conducts a non-judicial foreclosure and sells the property for less than the amount owed on the debt, the creditor must report the sale within 30 days to a superior court judge in the county where the property is located and obtain confirmation before proceedings with an action on the deficiency. Courts have held that certain debts to the same creditor secured by liens on the same real property are so intertwined that the creditor could not recover a second debt after foreclosing on the first unless there was a confirmation.

In this particular case, the Georgia Court of Appeals held that the two loans were not so intertwined as to require confirmation. The Court noted, as a practical matter, if the two notes were linked, the subordinate lienholder would have no remedies if the superior lienholder failed to confirm the foreclosure. As such, the Court held that, when notes are held by two different lenders on the same property, they are not so "inextricably intertwined" to require confirmation.

BANK'S FAILURE TO PRODUCE EVIDENCE OF AMOUNT OWED ON PROMISSORY NOTE RESULTS IN COURT OF APPEALS REVERSAL

The Georgia Court of Appeals recently reversed a trial court's judgment as to the amount of debt owed in a bank's suit on a commercial promissory note because the bank failed to provide a sufficient basis for the amount of debt. In Nelson v. Hamilton State Bank, the Plaintiff, Jimmy Nelson, signed a commercial promissory note in favor of the bank in the original principal amount of $2,977,019.70. Nelson then defaulted on the note and the bank brought suit and moved for summary judgment. The trial court granted summary judgment to the bank for $2,866,990.37, plus post-judgment interest.

On appeal, Nelson admitted executing the Note but contended the judgment amount was not supported by evidence in the record. Upon reviewing the verified complaint, the record, the briefs, and the trial court's Order, the Court of Appeals opined the bank failed to show how it calculated the amount due. The Court stated the bank could have shown the amount due on the loan in several different ways including; providing a breakdown of principal and interest in each payment, produced an amortization schedule for the loan or provided witness testimony of the amount the trial court ordered. Based on the bank's failure to produce evidence, the Court of Appeals determined the trial court's judgment as to the amount of debt lacked a sufficient basis and affirmed the judgment but reversed as to the amount of the award.

When filing suit on promissory notes, Lenders should be mindful of providing the court sufficient documents to evidence the amount owed.

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This newsletter was prepared by Deena Plaire-Haas and Smith N. Wilson. Their practices included 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. Should you have any questions, please contact either.