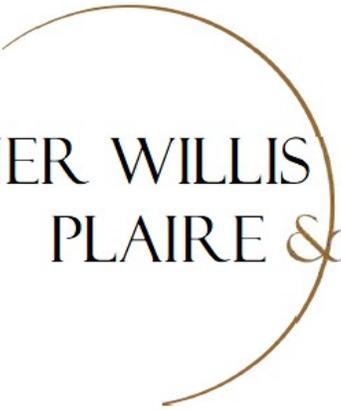


Albany Office
P. O. Drawer 71788
Albany, Georgia 31708
Telephone: (229) 883-2441
Facsimile: (229) 888-8148
www.gwspplaw.com

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



GARDNER WILLIS SWEAT
PLAIRE & PICKETT, LLP
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FINANCIAL INSTITUTION UPDATE

Gardner Willis Sweat Plaire & Pickett, LLP hope 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 gwsp@gwspplaw.com if you prefer to receive to receive our newsletters.

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At Gardner Willis Sweat Plaire & Pickett, LLP, we offer a wide range of services including Real Estate; Banking; Business Law; Bankruptcy; Estate and Tax Planning; Employment Law; Government Law; General Litigation & Appeals; Workers' Compensation; Family Law; DUI Defense; Trucking Litigation; Construction Law; and ADR. Sherman Willis, our Managing Partner, is available to speak with you about your unique needs in the areas listed in this newsletter as well as other areas. For a consultation with Sherman Willis, please call him at (229) 883-2441 or email him at sherman.willis@gwspplaw.com

All inquiries are confidential.

WAS CASHIER'S CHECK WRONGFULLY DISHONORED?

In Burrowes v. Bank of Am., N.A., 350 Ga. App. 248 (2017), the Court of Appeals affirmed a trial court's grant of summary judgment to a bank who refused to honor a cashier's check. On February 11, 2015 at 9:20 a.m., the bank was served with a garnishment seeking to recover \$143,199.85. After 2:00 p.m. on that same day, the Defendant came to the bank and sought to withdraw \$77,100 from the checking account. The branch manager recommended that the Defendant take \$10,000 in cash and the remainder in the form of a cashier's check. At 3:45 p.m. on that same day, the operations representative placed a garnishment freeze on the Defendant's checking account. Because the cashier's check had been purchased after the bank had been served, the bank placed a stop-payment order on the cashier's check effective the following day. The bank contacted the Defendant and requested that he return the cashier's check, but he refused. He deposited the cashier's check on February 17 at another bank, and Bank of America refused to honor the cashier's check.

Cross motions for summary judgment were filed by the parties. The Defendant argued that the bank wrongfully refused to honor the cashier's check. However, Bank of America argued that it is allowed to refuse to honor the cashier's check if payment is prohibited by law. The court reasoned that the garnishment laws provide that all property of the defendant in possession or control of the garnishee at the time of service of the garnishment is subject to process of garnishment. If the cashier's check was within the control of Bank of America, the funds were subject to garnishment. A cashier's check is a check drawn by a bank on itself. The funds given in exchange for such a cashier's check go into an account belonging to the bank. The issuance of the cashier's check operates as an assignment of funds to the payee - i.e., those funds, although held by the bank, are viewed as property of the payee. Until paid, the funds were within the control of Bank of America and subject to garnishment. Therefore, the court found that the bank acted properly in refusing to honor the cashier's check at issue.

GUARANTOR'S WAIVER OF ANTI-DEFICIENCY LAWS IS ENFORCEABLE

In York v. RES-GA LJY, LLC, 2017 GA Lexis 229 (4/17/17), the Supreme court held that guarantors waived any defenses under an anti-deficiency law such as O.C.G.A. §44-14-161, and such a waiver was permitted by law. In a prior case, the Supreme Court held that compliance with Georgia's confirmation statute is a condition precedent to the lender's ability to pursue a guarantor for a deficiency after foreclosure has been conducted, but a guarantor retains the contractual ability to waive the condition precedent requirement. PNC Bank National Ass'n v. Smith, 298 Ga. 818 (2016).

**CAN BORROWER ASSERT BREACH OF CONTRACT CLAIM
WHEN VA REGULATIONS ARE INCORPORATED IN DEED?**

In Wells Fargo Bank, N.A. v. LaTouche, 340 Ga. App. 515 (2017), a borrower sued Wells Fargo for breach of contract, wrongful foreclosure, negligence per se and surprise. The borrower said that Wells Fargo failed to comply with a VA regulation including the requirement of a "face-to-face interview" prior to the sale of the property under 38 CFR §36.4350(g)(1)(iii) before foreclosing and failure to notify the Secretary of HUD of such default. At the trial court, Wells Fargo's motion for summary judgment was denied and it appealed. Because the regulations are incorporated into the loan documents, the borrower argued that a claim can arise for breach of contract. A prior federal case, Bates v. JP Morgan Chase Bank, 769 F.3d 1126 (11th Cir. 2014) held that HUD regulations clearly referenced in a deed as conditions precedent to the power to accelerate and the power of sale could form the basis of a breach of contract action; yet, in that federal case, the court granted summary judgment against the borrower because no damages were caused by the alleged breach. Upon review of the regulations, the court found that the face to face interview with the borrower was only required in the event the holder has not established contact with the borrower. In this case, Wells Fargo engaged in substantive communication during the years preceding the foreclosure. Therefore, it was improper for the court to deny Wells Fargo's motion for summary judgment as to claims for wrongful foreclosure that hinge upon the VA regulations.

This newsletter was prepared by Deena Plaire. Her practices include representation of financial institutions and business creditors in bankruptcy court, drafting contracts and leases, formation of new business, general business litigation, and closing complex commercial transactions. Should you have any questions, please contact Deena Plaire at (229) 883-2441.