REPRESENTING BORROWERS: TIPS AND TOOLS FOR YOUR DEFENSE

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The economic downturn created a flurry of litigation over defaulted loans and the collateral that secured them. Many areas of the law that had been somewhat dormant for some years were suddenly brought to the forefront of trial calendars and appellate dockets. This article examines issues that are prevalent in the representation of borrowers and guarantors against their lenders: the foreclosure and confirmation process, suits on promissory notes and personal guaranties, fraudulent transfer actions, and the ethical implications commonly found in each.

I. FORECLOSURE AND CONFIRMATION ACTIONS

A. The Foreclosure Process

In Georgia, secured lenders can conduct non-judicial foreclosures if there is a power of sale provision in the security deed. When a lender fails to follow the requirements of the statute exactly, the borrower gains valuable defenses and leverage in the subsequent confirmation process (discussed in Section II, *infra*). This section will discuss the foreclosure requirements, including notice, advertisement, and conduct of the sale; the lender's duty when conducting the sale; and the borrower's strategies to prevent or delay the sale.

1. Notice

Before starting the foreclosure process, the lender's attorney must first review the promissory note and security deed's default provisions to ensure that the borrower's actions qualify as a default under the note and/or deed and whether the lender must provide notice and a cure period. The lender must follow all notice requirements

provided for in the note and deed strictly. If the loan has not matured, the law may also require the lender to give the borrower notice that it is accelerating the note and calling the entire loan balance immediately due based on the borrower's default. Since most loan documents are drafted by the lender, notice requirements are almost always waived by the borrower.

In addition to contractual notice provisions, some borrowers are also entitled to statutory notice. Georgia law now requires the lender follow specific notice provisions, regardless of whether the property is to be used as a dwelling place.[1] Specifically, the lender must give the borrower notice thirty days before the proposed foreclosure sale.[2] The notice must be in writing, and include the name, address, and telephone number of any individual or entity who shall have full authority to negotiate, amend and modify the terms of the mortgage with the debtor.[3] The borrower must send the notice by registered or certified mail or statutory overnight delivery, return receipt requested to the property address or to another address he debtor designates in writing to the lender.[4] Georgia law, however, states that no waiver or release of these notice requirements is valid if made contemporaneously with the security instrument containing the power of non-judicial foreclosure sale.[5]

Regardless whether required by the loan documents or Section 162, most lenders send "ten-day letters" to borrowers and guarantors in default in order to perfect its ten (10) day notice for attorneys' fees under Georgia law. O.C.G.A. § 13-1-11 states in relevant part:

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[1] O.C.G.A. § 44-14-162.2, -162.3.
[2] O.C.G.A. § 44-14-162.2.
[3] O.C.G.A. § 44-14-162.2.
[4] O.C.G.A. § 44-14-162.2.
[5] O.C.G.A. § 44-14-162.3(c).

> The holder of the note or other evidence of indebtedness or his attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, endorser, or party sought to be held on said obligation has ten days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement. The refusal of a debtor to accept delivery of the notice specified in this paragraph shall be the equivalent of such notice.

A lender's failure to comply with these notice requirements can raise valuable defenses for the borrower.

2. Advertisement

The lender must properly advertise the foreclosure sale once a week for a period of four (4) weeks immediately preceding the date of the sale in the legal organ of the county where the property is located.[6] If there is no newspaper so designated, the advertisement must be published in the nearest newspaper having the largest general circulation in the county.[7] The advertisement must give a full and complete description of the property being sold (including the property's legal description) and provide the names of any persons who may be in possession of the property.[8] If the advertisement contains the property's street address, the street address, city and zip code must be clearly set out in bold type.[9]

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[6] O.C.G.A. § 44-14-162; O.C.G.A. § 9-13-140.
[7] O.C.G.A. § 9-13-140.
[8] O.C.G.A. § 9-13-140.
[9] O.C.G.A. § 44-14-162.

3. The Sale

The lender must conduct the foreclosure sale on the date, time and place which is required of sheriff's sales.[10] This means that foreclosure sales must occur on the first Tuesday of the month, between the hours of 10:00 A.M. and 4:00 P.M. local time.[11] If the first Tuesday falls on New Year's Day or on Independence Day, the sale takes place on the immediately following Wednesday.[12] The sale takes place on the steps of the county courthouse where the property is located.[13]

4. The Lender's Duty During the Sale.

Generally, courts have held that the lender has a duty to conduct the foreclosure sale fairly. "It is our opinion that when a power of sale is exercised '(a)ll that is required of (the foreclosing party) is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith.'"[14] The person calling out the sale should not do anything that chills the bidding process.[15]

The lender's duty of good faith, however, does not require the lender sell the property for its highest market value unless the lender intends to confirm the sale. In Kennedy v. Gwinnett Commercial Bank,[16] the Georgia Court of appeals held that the lender does not have a fiduciary duty when conducting a foreclosure sale. The Kennedy court explained that the power of sale in a security deed gives the lender the remedy to

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[10] O.C.G.A. § 44-14-162.
[11] O.C.G.A. §§ 9-13-161(a) -(b).
[12] O.C.G.A. §§ 9-13-161(a); Miller Grading Contractors, Inc. v. Ga. Fed. Sav. and Loan, 247 Ga. 730 (1981).
[13] O.C.G.A. §§ 9-13-161(a).
[14] Giordano v. Stubbs, 228 Ga. 75, 78 (1971).
[15] Tarlton v. Griffin Fed. Sav. Bank, 202 Ga. App. 454 (1992).
[16] 155 Ga. App. 327, 328-329 (1980).

collect its debt in a summary way and does not create a fiduciary relationship between the lender and borrower. The court explained:

> In determining whether this duty under a power of sale has been breached the focus is on the manner in which the sale was conducted and not solely on the result of the sale. The foreclosing party is not an insurer of the results of his exercise of the power of sale; his only obligation is to sell according to the terms of the deed and in good faith and to obtain the amount produced by such a sale. If the manner in which the sale was conducted is otherwise unobjectionable, the mere fact that, in the debtor's opinion, it brought an inadequate price does not demonstrate that the power was exercised other than in good faith. It is only when the sale is conducted in such a manner and under such "circumstances" as to result in a grossly inadequate price that the foreclosing party has breached his duty to the debtor.[17]

A lender can be liable, however, if the sale is conducted unfairly. In Kennedy, the court explained when a lender can be liable: "[w]e reiterate that '(i)t is only when the price realized is grossly inadequate and the sale is accompanied by either fraud, mistake, misapprehension, surprise or other circumstances which might authorize a finding that such circumstances contributed to bringing about the inadequacy of price that the foreclosing party has breached his duty under the power of sale.[18]

5. Preventing a Foreclosure Sale

It is very difficult to prevent a foreclosure sale. A borrower may file a motion for a temporary restraining order, however, in order to be successful, the borrower must tender the amount owed to the court. "On the maxim that one who seeks equity must do equity, it has been said many times that one who seeks to restrain or set aside a sale under power in a security deed must do equity by paying or tendering to the creditor the

[17] Id.
[18] Id. (citing Giordano, 228 Ga. at 79).

amount of indebtedness owing to him."[19] In Michel v. Pickett,[20] the Georgia Supreme Court held that to enjoin a foreclosure proceeding, a borrower must tender the amounts admittedly due to the registry of the court. The Georgia Supreme Court has held that "a borrower who has executed a deed to secure debt is not entitled to an injunction against a sale of the property under a power in the deed, unless he first pays or tenders to the creditor the amount admittedly due."[21] Although a debtor may attempt to enjoin a foreclosure proceeding, the chances of prevailing are *de minimis* unless the debtor tenders the amounts due. Consequently, an injunction is very impractical as most debtors do not have the funds to tender the amounts due to the court.

Alternatively, the borrower can prevent the foreclosure, at least temporarily, by seeking bankruptcy protection. Pursuant to Section 362 of the Bankruptcy Code, there is an automatic stay in place immediately after a debtor seeks bankruptcy protection. If a lender conducted a foreclosure sale when the stay was in place, the sale is void. The lender can ask the bankruptcy court to lift the automatic stay, but this generally takes time and generally ensures a delay of the foreclosure sale. One should bear in mind, however, that putting the borrower into bankruptcy does not protect other people or entities that might have guaranteed the loan. The lender may bring suit against guarantors despite the borrower's filing for bankruptcy.

B. The Confirmation Action

Breaking it down to its most basic function, the confirmation action is the process

[19] Pindar's Georgia Real Estate Law, 2 Ga. Real Estate Law & Procedure § 21-105 (6th ed.).
[20] 241 Ga. 528 (1978).
[21] Brevard Federal Savings & Loan, Assoc. v. Ford Mountain Investments, 261 Ga. 619 (1991)(quoting Wright v. Intercounty Properties, Ltd., 238 Ga. 492 (1977)).

a bank or lender must go through after a non-judicial foreclosure sale in order to seek a deficiency judgment against a borrower or guarantor. More precisely, whenever any real estate is sold through non-judicial foreclosure under the "Power of Sale" clause contained in security deeds, mortgages, or other lien contracts, and the sale of the real estate is not enough to cover the amount of the debt secured by the deed, mortgage, or contract, the lender instituting the foreclosure proceedings cannot seek a deficiency judgment unless, within 30 days after the foreclosure sale, the lender reports the sale to a superior court judge of the county in which the land is located for confirmation and approval, and obtains an order of confirmation.[22]

A few years ago, the words "confirmation hearing" were unfamiliar to most attorneys, even those who either practiced real estate law or represented borrowers. Traditionally, when a lender foreclosed on a property, it would go through the confirmation process, show up at the hearing, testify as to the value of the property, and maybe once in awhile, a debtor or guarantor would show up to plead their case to the judge. After the crash of the real estate markets, as banks started taking back properties on an hourly instead of monthly basis, the confirmation proceeding suddenly took center stage. Now, rather than being a mere formality, the confirmation action is a critical battle that gives borrowers and guarantors the opportunity to eradicate their deficiencies in situations where lenders fail to follow the strict requirements of the confirmation statute.

1. Requirements of the Confirmation Statute

O.C.G.A. § 44-14-161 governs confirmations of foreclosure sales. O.C.G.A. § 44-14-161(a) provides:

[22] See O.C.G.A. § 44-14-161(a).

> Whenever any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds, mortgages, or other lien contracts and at the sale the real estate does not bring the amount of the debt secured by the deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and approval thereon.[23]

Because the statute is in derogation of common law, it must be strictly construed.[24] This strict construction can aid borrowers and guarantors if their counsel knows the confirmation statute well and pays close attention to detail. For some requirements of the statute, failure to comply results in dismissal, while other mistakes may only lead to a continuance or re-sale. Regardless, for any requirement of the statute, it is imperative as borrower's counsel to know the rules and quickly spot when the lender has broken them.

i. Reporting the Sale

First, after the foreclosure sale is conducted, Georgia law requires the lender to physically present a report of foreclosure sale to a sitting superior court judge.[25] A confirmation application is not a "civil action" in the superior court, but is a special statutory proceeding.[26] The Georgia Supreme Court explained, "[i]ndeed, entirely unlike a 'civil action' which is initiated by the filing of a 'complaint' with the clerk of the court, a confirmation proceeding can only be initiated by the creditor's report of the sale

[23] O.C.G.A. § 44-14-161(a).
[24] John Alder Life Ins. Co. v. Gwinnett Plantation, Ltd. 220 Ga. App. 846, 847 (1996); Bentley v. N. Ga. Production Credit Ass'n, 170 Ga. App. 361 (1984).
[25] Bentley, 170 Ga. App. at 361.
[26] Vlass v. Security Pacific Nat. Bank, 263 Ga. 296 (1993).

to the superior court judge."[27] Thus, rather than becoming a "Plaintiff," lenders seeking confirmation are "Petitioners" and borrowers and guarantors are "Respondents."

In John Alden Life Insurance Company v. Gwinnett Plantation, Ltd, the Court of Appeals explained "[t]he judge himself, not the clerk of court, is the one whose attention the report of sale and its particulars must be brought."[28] In John Alden, the lender personally presented the report of sale to the clerk of court, who assigned it to a judge.[29] Because the lender failed to present the petition to a judge himself, the Court of Appeals upheld the trial court's dismissal of the petition.[30] Similarly, in Goodman v. Vinson,[31] the Court of Appeals explained that presenting a report of sale to the clerk of court does not satisfy Georgia law.[32] The court reasoned that the code only mentions the judge—not the court or the clerk.

ii. Five Days' Notice Prior to the Hearing

Second, the lender must name and give all debtors and guarantors notice of the hearing. O.C.G.A. § 44-14-161(c) requires the debtor be given at least five (5) days notice prior to the hearing confirming a foreclosure sale. The term "debtor" includes all guarantors or other persons who could be subject to a subsequent deficiency

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[27] Vlass, 263 Ga. at 297; see also Hammock v. Issa, 310 Ga. App. 547 (2011) ("In a proceeding for confirmation of a foreclosure sale of real property, the judge sits as trier of fact, and his findings and conclusions have the effect of a jury verdict.").
[28] 220 Ga. App. at 847.
[29] Id.
[30] Id.
[31] 142 Ga. App. 420, 421 (1977).
[32] See also Citizens Bank of Effingham v. Rocky Mountain Enterprises, LLC, 308 Ga. App. 600, 600 (2011) (affirming trial court's dismissal of bank's application for confirmation where application was filed with the clerk of court rather than with the superior court judge).

judgment.[33]

Note that *personal service* of the notice of hearing is required under the confirmation statute.[34] Failure to personally serve the notice of hearing on a respondent to a confirmation action precludes a bank from subsequently seeking a deficiency against the respondent that was not personally served.[35] The fact that the respondent (or his attorneys) has actual knowledge of the hearing is insufficient. "It is of no moment that the debtor had actual notice of the confirmation hearing . . . for actual notice will not cure the failure to comply with the statute as to confirmation."[36]

In practice, this can happen quite often: opposing counsel for the lender does not personally serve the borrower or guarantor and sends counsel an email with a copy of the hearing notice. Unless counsel has agreed to acknowledge service on behalf of her client, this is insufficient under the law. While some judges will simply continue the case until the respondents can be personally served, some judges are so fed up with bank shenanigans and failure to follow the statute that some will "strongly suggest" that the bank settle at that point.

iii. The lender must name all parties against whom it seeks a deficiency.

Failure to name the guarantor as a party to a confirmation action and personally

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[33] Ameribank, N.A. v. Quttlebaum, 269 Ga. 857 (1998); Hill v. Moye, 221 Ga. App. 411, 413 (1996); First Nat'l Bank & Trust Co. v. Kunes, 128 Ga. App. 565, 567-68 (1973).
[34] See Vlass v. Security Pacific National Bank, 263 Ga. 296 (1993) ("all that is statutorily required is that the debtor be personally served with notice of hearing on the creditor's application at least five days prior thereto"); see also Phelan v. Wells Fargo Credit Corporation, 207 Ga. App. 54 (1993) ("personal service of the application is required in order to give legal notice").
[35] First National Bank & Trust Company v. Kunes, 128 Ga. App. 565 (1998); Ameribank, N.A. v. Quattlebaum, 269 Ga. 857 (1998).
[36] Id.

serve him with notice of the hearing bars a subsequent deficiency action against him. In First National Bank & Trust Company v. Kunes, the lender brought a deficiency action against a corporate debtor and two individual guarantors.[37] The Court of Appeals affirmed the trial court's dismissal of the two individual guarantors because the lender did not name and serve the individual guarantors in the confirmation action.[38] The court explained that because the individuals were not mentioned in the confirmation action, the lender did not comply with the statute and was barred from seeking a deficiency judgment against them.[39] Moreover, in affirming this holding, the Georgia Supreme Court held that "actual notice or knowledge will not cure the failure to comply with the statute as to confirmation. A party is not bound by every court proceeding of which he has knowledge."[40]

Service upon counsel for the guarantor is also insufficient. In Hometown Bank v. Second Avenue Development, Inc., *et al.*, the trial court dismissed a deficiency action against the guarantor where the guarantor was not named in the confirmation action and was not personally served with notice of the hearing.[41] Counsel for Hometown Bank argued that because guarantor's counsel also represented Second Avenue Development, Inc., which was named and served, the guarantor had knowledge of the hearing.[42] Citing Ameribank, the court noted, "the Supreme Court [has] reasserted its position that a dismissal against individual debtors is warranted where 'the debtors were not named as parties in the confirmation petition, and the court-issued notice of the hearing was

[37] 128 Ga. App. at 567-68.
[38] Id. at 566-67.
[39] Id. at 566.
[40] Ameribank, N.A. v. Quttlebaum, 269 Ga. at 859.
[41] Civil Action Number 2009 CV 169507, Fulton County Superior Court, Georgia, "Order Granting Defendants' Motion to Dismiss," Mar. 2, 2010.
[42] Id.

not directed to them.'"[43]

B. The Petitioner Must Prove the Regularity of the Sale

The lender must show it complied with statutory requirements as to "notice, advertisement, and regularity of the sale."[44]

1. Notice of the Sale

"A [trial] court should not confirm a sale under power if there is no evidence that the debtor was properly notified of the sale in accordance with [O.C.G.A. § 44-14-162.1]."[45] Additionally, all deeds under power shall contain recitals that notice was given in compliance with O.C.G.A. § 44-14-162.2.

2. Advertisement of the Sale

The court should set aside a foreclosure sale when the advertisement does not substantially meet the legal requirements.[46] An advertisement is legally insufficient when the irregularity or deficiency contributes to chilling the price on the sale of the property.[47] "A primary object of the advertisement is to attract buyers who will compete against one another so as to yield the highest price; its contents are important to the process."[48] If the advertisement is not done, the sale is not valid.[49] Defects in advertisement, however, will not bar confirmation unless there is a substantial defect

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[43] Id.
[44] O.C.G.A. § 44-14-161; Pope v. Trust Co Bank of Coffee County, 186 Ga. App. 23 (1988).
[45] TWK Partners v. Archer Capital Fund, 302 Ga. App. 443 (2010); Pope, 186 Ga. App. at 23.
[46] Williams v. S. Central Farm Credit, ACA, 215 Ga. App. 740, 742 (1994); Pope, 186 Ga. App. at 23.
[47] Id.
[48] Southeast Timberlands, Inc. v. Security Nat'l Bank, 220 Ga. App. 359, 360 (1996).
[49] Foster v. Farmers and Merchants Bank (In re Foster), 108 B.R. 361 (Bankr. M.D. Ga. 1989)(applying Georgia law).

that chilled the bidding.[50]

3. Regularity of the Sale

Regularity of the sale refers to the fact that the foreclosure sale must be conducted on the date, time and place which is required of sheriff's sales.[51] (See Section I.A.3., *supra*). This means that the sale must be held during the hours of 10:oo AM - 4:oo PM local time[52], on the first Tuesday of the month[53], on the steps of the county courthouse in which the property is located.[54] The trial court should deny confirmation if the sale does not occur on the date listed in the notice.[55]

Determining the regularity of the sale requires a careful reading of the Notice of Power Under Sale and the publisher's affidavit, an affidavit from the legal organ of the county in which the sale is being cried out that attest to the advertisement having been run for four weeks. Often times, determining the regularity of the sale itself requires a witness to attend the foreclosure hearing. In doing this, you can ask where the person who cried out the sale stood (were they on the proper courthouse steps?[56]), did the crier properly recite the Notice of Sale, did anyone inquire about the property or make an offer, and what time did the lender cry it out? Lender's counsel will often ask borrower's counsel to stipulate as to the regularity of the sale, but unless you have done your

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[50] Id. But see Dan Woodley Communites, Inc. v. Suntrust Bank, 310 Ga. App. 656 (2011) (affirming confirmation action even though bank's foreclosure advertisement failed to mention sales of 6 or 7 condo units prior to foreclosure and where it was claimed that such error chilled bidding).
[51] O.C.G.A. § 44-14-162.
[52] O.C.G.A. § 9-13-161(b).
[53] O.C.G.A. § 9-13-161(a).
[54] O.C.G.A. § 9-13-161(a).
[55] Hood Oil Co. v. Moss, 134 Ga. App. 477 (1975).
[56] Though most attorneys representing banks are now aware that there is a special area at the courthouse for foreclosure sales, some still just find the first set of steps and start reading. If they are not on the correct steps, the sale is irregular.

research and know the lender's counsel dotted all their i's and crossed all their t's, you could be giving up negotiating leverage without knowing it.

C. Proving and Disproving "Fair Market Value"

The lender has the burden of establishing that it sold the property at the foreclosure sale for its "true market value." O.C.G.A. § 44-14-161(b) provides:

> The court shall require evidence to show the true market value of the property sold under the powers and shall not confirm the sale unless it is satisfied that the property so sold brought its true market value on such foreclosure sale.

"True market value" is synonymous with fair market value.[57] The Georgia Court of Appeals explained that fair market value is "the price which (the property) will bring when it is offered for sale by one who desires, but is not obligated, to sell it, and is bought by one who wishes to buy, but is not under a necessity to do so."[58] The general rule that the amount brought during a public sale is *prima facie* evidence of market value does not apply to confirmation of foreclosure sales.[59] Instead, the court must conduct a "separate analysis of the value independent of the sum bid at the public sale."[60] The lender has the burden of proving that the sale brought the property's true market value.[61] Value must be based on date of the foreclosure sale.[62] The lender cannot discount the sale to reflect a "quick sale" or shortened time period, as it is not

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[57] Gutherie v. Ford Equip. Leasing Co., 206 Ga. App. 258, 259, 424 S.E.2d 889, 890 (1992).
[58] Id. (citations omitted).
[59] Id.
[60] Id.
[61] Id., 424 S.E.2d at 891.
[62] Thompson v. Maslia, 127 Ga. App. 758 (1972)

reflective of true market value.[63]

The traditional way the lender establishes value on the date of the foreclosure sale is by providing the testimonial evidence of an appraiser who appraised the property prior to the sale. The borrower's counsel may also want to have an appraisal of the property done if she thinks the lender's appraised value is too low.

The borrower's counsel should become familiar with appraisal nomenclature and processes: the basis for their calculations, the different methods they use, and the underlying rationales they base their mathematical assumptions on. If the borrower does not hire an appraiser, the only shot he has at disproving the lender's appraised value is through cross-examination of the lender's appraiser. If borrower's counsel is going to convince the judge that the borrower's appraiser is correct or the bank's appraiser is wrong, the borrower's counsel needs to sound just as knowledgeable about the appraisal process as her own appraiser.

For an effective cross-examination, borrower's counsel should depose the bank's appraiser prior to the hearing so that counsel will know what the appraiser will say in response to her questions. Sometimes a borrower client may not give cost-approval to depose the appraiser beforehand, so the cross-examination is critical. By analyzing the comparable properties used in the appraiser's analysis, understanding how the appraiser arrived at his conclusions, and having a plan of attack to dispute his numbers, a skilled attorney can break away the foundation of any appraiser's testimony and raise doubt as to the bank's claimed value at the time of the sale.

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[63] Gutherie, 206 Ga. App. at 261; Henderson Property Holdings, LLC v. Sea Island Bank, 310 Ga. App. 795 (2011).

D. Confirmation Action Procedural Issues

1. Confirmation Discovery is Limited

Parties are entitled to discovery in confirmation actions, however, because the nature of a confirmation hearing is limited, so too are the topics available for discovery. In Alliance Partners v. Harris Trust & Sav. Bank, the Georgia Supreme Court held that "discovery is limited to the issues considered at the confirmation hearing."[64] The Court then explained that a party in a confirmation hearing "is permitted discovery only on the regularity of the sale and the market value of the property."[65]

Generally, the parties' discovery focuses on any appraisals the lender has in its possession and depositions of the appraisers who created them. While this is important, the parties should also conduct discovery on the regularity of the sale.

2. At the Hearing

The lender has the burden of presenting evidence to meet the requirements of the confirmation statute. Borrowers then rebut that evidence during the hearing. Much like any other trial, preparation is the key to winning a confirmation hearing. Your preparation should include preparing a trial brief, thorough outlines of your direct and cross-examination of identified witnesses, and the preparation of useful demonstrative exhibits.

i. Trial Briefs

Trial briefs are especially useful during a confirmation hearing when you know you will have to argue a point of law and the judge will have to make a ruling that day, giving her little to no time to research the issue. While you have lived with the facts and

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[64] 266 Ga. 514 (1996).
[65] Id.

operative legal principles of your case for the past several months, the judge, or more importantly, her law clerk, likely knows nothing more than the style of the case and case number, if that much. Because the issues raised in a confirmation tend to be technical and dispositive, a trial brief is invaluable. Your goal should be to set the stage and arm the court with all of the tools to understand and apply the confirmation statute to the facts you present at trial. The facts give the court the critical context and must be 100% consistent with what you reasonably expect the evidence at trial to bear out.

Load your brief with the cases and analysis that support your interpretation of the confirmation statute. The brief should be a reference tool and a hornbook that the court can use to further its research on the matter and to arm the court with the framework within which to analyze the facts. Take every opportunity available to educate the court and do so better than your opponent. This will likely be your only chance to access this judge before she rules on the confirmation, so put your best foot forward.

This opportunity comes with the responsibility of completely thinking through your case and composing a logical discussion of the important elements. This exercise is not only useful for the judge, but is likely useful for the composing attorney.

ii. Examination of Witnesses

From the time you begin investigating the case, you should be preparing for your case in chief. While less glamorous than the opening and closing arguments, many cases are won and lost in the trenches of putting your essential facts into evidence through written and testimonial evidence. Effectively navigating the pitfalls of the rules of evidence and procedure at trial depends on one thing: organization. By the time you call your first witness, you must be certain what facts you need to win your case, how

you will put them into evidence and through what witnesses, and what objections or other obstacles you can expect at the time of the confirmation hearing. If you have done your homework and put the time in on the front end to get organized, you should expect a hearing with no surprises.

As Respondent, your first interaction with witnesses at the hearing will likely be the cross-examination of the lender's appraiser as to true market value, or the attorney who conducted the foreclosure as to the regularity of the sale. Cross-examination should be just as rote and routine as conducting a direct examination, though it rarely is. Assuming you have deposed the opposing witnesses effectively, a topic for another paper, you should know exactly what to expect in response to every question you pose while they are on the stand. Ask no question to which you do not already know the answer. The answer should be in black and white in the transcript of that witness' deposition that you conducted. You must base every question you ask on a response contained in that transcript. This is not the time to take chances. Ask nothing but leading questions that elicit nothing more than a "yes" or "no" answer. Do not allow the witness to expound if you can prevent it. Take control, and it becomes as if you are actually doing the testifying with the witness merely nodding and agreeing.

If a witness changes his or her story, you must be prepared to go through the proper steps to impeach that witness with his or her prior sworn testimony. This is where the fun begins. Now you have a witness for the other side who either lied during the deposition under oath or is lying to the judge in court. You will never know how effectively you conduct a deposition until you go to prepare and conduct a cross examination at trial.

Direct examination is your chance to lead your witnesses through the evidence. If

it is the person who conducted the sale, you should quickly establish the facts that the lender complied with Georgia law on conducting the sale. If you are examining the appraiser, guide him through his calculation step-by-step so that the trier of fact can hear in the appraiser's own words how he arrived at his calculation of value, and more importantly, why the other side's appraised value is incorrect. Your goal is to get the substance of your case before the trier of fact in a clean and concise fashion. You must also make sure that you keep the judge interested, so that he is attentive and not preparing his evening's grocery list. You should work hard at making the story appealing and the dialogue between you and the witness seamless.

Spending hours preparing your witness so that they know what you are going to ask and you know what they are going to answer is time well spent. Go through the documents you will refer to with that witness and manage the mechanics involved in authenticating documents and refreshing recollections. Do not allow your opposition to keep key documentary evidence out of the case because you failed to take the time to think ahead and proffer the evidence in the appropriate fashion. This may be a mundane process, but it is essential to trying a clean case. Outline your entire presentation with each witness and be sure not to leave anything out. Leave nothing to chance because once you make the ominous announcement, that "you rest," there is no turning back.

iii. The Directed Verdict

After the close of petitioner's case, respondent's counsel may move the court for a directed verdict if the lender: 1) has not met its burden of establishing the regularity of the sale or the true market value of the property at the time of the sale, or 2) failed to meet the requirements of the confirmation statute, e.g., failed to name and serve the

guarantor.

The Georgia Court of Appeals has ruled that the court may grant a directed verdict to respondents when a petitioner fails to personally serve the Rule Nisi. In Phelan v. Wells Fargo Credit Corporation, a borrower in a confirmation hearing was personally served with a confirmation petition and a Rule Nisi setting the confirmation hearing for November 26th.[66] The trial court subsequently issued a new Rule Nisi rescheduling the confirmation hearing for February 7th.[67] Instead of being personally served with the Rule Nisi for the February 7th hearing date, however, the borrower received the Rule Nisi via certified mail.[68] The borrower appeared before the trial court on February 7th and, at the conclusion of the petitioner's case, moved for a directed verdict on the ground that it was not personally served with the February 7th Rule Nisi as required by O.C.G.A. § 44-14-161(c).[69] The Georgia Court of Appeals reversed the trial court's denial of the borrower's motion for direct verdict.[70] The Court of Appeals held that service of the Rule Nisi by mail violated Georgia's confirmation statute, and that such service was improper even though the borrower had actual knowledge of the confirmation hearing as a result of the mailing.[71] The Court concluded that the "[borrower] appeared at the hearing but asserted his defense of insufficient service, which was meritorious and should have been sustained."[72]

iv. Exhibits

Exhibits can be anything, besides testimony, that can be presented as evidence in

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[66] Phelan v. Wells Fargo Credit Corporation, 207 Ga. App. 54 (1993)
[67] Id.
[68] Id.
[69] Id.
[70] Id.
[71] Id.
[72] Id.

the courtroom.[73] In a confirmation hearing, an exhibit can be anything from a visual aid that breaks down an appraiser's calculations, to an aerial photograph of the property and surrounding properties. Exhibits can be very useful tools in real estate litigation because they can have an immediate impact on the trier of fact. It would be ideal if every trier of fact could visit the subject property. Short of that, however, pictures say more than a thousand words. In a real estate case, seeing the property, especially in comparison to those used as comparables in an appraisal, gives invaluable context and heightens the judge's interest. A well-placed exhibit can create a connection between the judge and your case that will help you explain your client's position.

When used properly, exhibits can convey a tremendous amount of information in a manner that the trier of fact can understand and remember. Appraisal calculations can be confusing, so blowing them up on an exhibit board, and breaking them down in a manner that is easy to explain, can be incredibly useful to the judge.

When exhibits are improperly employed, they can confuse the trier of fact and derail your argument. An exhibit that may seem perfectly clear and logical to an attorney who is familiar with all the facts of the case may not be clear to a judge who has only known about the case for a matter of hours. A litigator must always be mindful of the audience to whom he or she is presenting an exhibit. Be certain that the reason for the exhibit and the message the exhibit is conveying are clear.

Like so many elements of trying any real estate case, the most important thing to remember about exhibits is to plan ahead. Your entire case should be one consistent message that leads the judge to your inevitable conclusion, and the exhibits you present should punctuate that message. Consider the elements of your case and incorporate the

[73] Thomas A. Mauet, Trial Techniques 167-68 (6th ed. 2002).

exhibits that address each element into the appropriate part of your presentation. Do not introduce an exhibit if it does not clarify or strengthen your message. Anything that distracts from your consistent message does a disservice to your case and to your client. If you have tried a clean case, entered the evidence as you designed, and set up the case you thought of months ago, you have done all you can do. The resolution rests in the hands of the judge.

E. The Court's Ruling: Deny, Confirm, or Re-sale

At the conclusion of the hearing, the judge must make specific findings of fact concerning the adequacy of the sales price. A mere recitation of the legal conclusion is insufficient; findings of fact must support the conclusion.[74] If either element is missing, regularity of the sale or failure to sell for true market value, the court must deny the confirmation.[75] However, if the lender fails to prove that the property sold for fair market value, the court may authorize resale.[76]

The confirmation statute states that the court may only order a resale of the property "for good cause shown."[77] The right is not automatic. "[T]here is no presumption in favor of resale and there is no entitlement to a resale."[78] The court has discretion to grant re-sale and it is the creditor's burden to prove good cause as to why it should be given another bite at the apple.

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[74] PSI Pneumatic Structures, Inc. v. Citizens & Southern Newnan Bank, 159 Ga. App. 766 (1981); Mathis v. Citizens Dekalb Bank, 157 Ga. App. 693 (1981)
[75] Martin v. Federal Land Bank of Columbia, 173 Ga. App. 142 (1984).
[76] Gutherie, 206 Ga. App. at 259.
[77] O.C.G.A. § 44-14-161(c).
[78] Resolution Trust Corp. v. Morrow Auto Center, Ltd., 216 Ga. App. 226, 228 (1995).

The confirmation hearing is limited and the court cannot determine any issues regarding the underlying debt or possible defenses the debtor may have.[79] Strategically, however, if there are any facts that show bad faith conduct on the part of the lender, while they may not be legally relevant, they may sway a judge on the fence to deny confirmation instead of granting a re-sale. For example, if the lender is a bank and it accepted TARP funds, it never hurts to point out that the bank is certainly not using those funds to work anything out with your client.

Confirmation hearings are surprisingly short, yet pivotal trials that can either save or cost borrowers and guarantors a lot of money. Abundant case law on the confirmation statute shows that, because it is strictly construed, an attorney that knows her stuff, pays attention to detail, and invests significant time and energy into preparing for the hearing, can secure success for her client. Thus the key to litigating the confirmation action is: 1) understanding the requirements of the confirmation statute, inside and out, 2) analyzing the facts to determine whether you have a strong case, 3) preparing your trial brief, outlines of the direct and cross-examinations, and any helpful exhibits; and 4) hoping that at the end of the day, the judge likes your client better.

II. SUITS ON PROMISSORY NOTES AND GUARANTIES

A lender may file suit on a promissory note and guaranties in lieu of foreclosing on real property that serves as collateral for the loan. When this occurs, instead of being given credit for the value of the collateral, the borrower is often placed in the precarious

[79] Dorsey v. Mancuso, 249 Ga. App. 259 (2001)(finding that due to the limited nature of a confirmation hearing, the judge in that proceeding could not make a determination as to whether the debtor executed a security deed in his personal or representative capacity); Alexander v. Weems, 157 Ga. App. 507 (1981)(holding "the [confirmation] statute does not contemplate that the court shall undertake to decide controversies between the parties as to the amount of the debt or side agreements which could have been the basis of an injunction preventing the foreclosure sale.").

position of being sued for the full amount owed under the loan (rather than the full amount less any credit given for the foreclosure sale of collateral) and retaining ownership of real property that has likely lost much of its value.

A. General Considerations When Reviewing Loan Agreements

In lawsuits where banking or credit institutions bring claims against debtors for breach of the underlying loan agreements, it is important to make an initial review of those agreements when the bank commences the lawsuit. This review is to determine if on the face of the loan agreements there are any defenses, including affirmative defenses, available to the debtor.

First, make a general review of whether the loan agreements are complete. Included in this review is whether the loan agreements have been fully executed by the bank and the debtor. Take note of whether there are any lines are blank, and whether those may be significant.

Assuming that the loan agreements are fully executed, the second inquiry is whether the agreements were properly executed. First, ensure that the persons signing for both the bank of the debtor actually had the authority to execute loan. Second, note whether the loan agreements were properly witnessed. If there is a requirement in the jurisdiction that the agreements must be notarized, make sure that the notarization is properly executed. Finally, review whether any amendments to the loan agreements were properly executed.

Third, if the proceeds of the loans were used to purchase real estate, and the property secured the loan agreements, determine whether the lending institution properly recorded the deeds. If the loans were collateralized such that the lender must

file UCC financing statements, determine whether the lending institution filed those statements properly.

B. Procedural Issues Which May Provide Defenses

There are numerous procedural issues to examine, which may provide a defense to the lending institution's claims for breach. Two will be examined here.

1. Did the Bank Accelerate the Loan in Good Faith?

The first inquiry is whether the loan matured on its own terms or whether the bank accelerated the loan pursuant to an acceleration clause set forth in the loan agreement. An acceleration clause allows a lender to require payment in full of the remaining loan balance or to accelerate the rate of the loan payment. In most cases, banks have complete discretion to accelerate the loan. This discretion, however, is not absolute.

A lending institution that wants to accelerate a loan must act in good faith and have some reasonable basis for believing that is indebtedness will not be paid in the event of a nonpayment default of the loan agreement. This good faith requirement is set forth in the codified by Georgia law. O.C.G.A. § 11-1-208 provides that: "A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or addition collateral 'at will' or 'when he deems himself insecure' or words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment and performance is impaired." The burden of establishing lack of good faith is on the lending institution and is a question of fact.[80]

[80] Custom Panel Sys., Inc. v. Bank of Hampton, 143 Ga. App. 681, 682 (1977); Ginn v. Citizens & S. Nat. Bank, 145 Ga. App. 175, 176 (1978).

Borrower's counsel should analyze the following factors to determine whether the lending institution accelerated in good faith: at what point in time did the lending institution accelerate, the method by which it accelerated, and on what basis it accelerated.

Once the determination is made that the lending institution accelerated the loan agreement, there are further considerations that must be analyzed. Specifically, it must be determined whether the lending institution gave proper notice of acceleration under the terms of the loan agreements. Further, most loan agreements provide a cure provision after notice is given. Ensure that the lending institution's notice provided the proper amount of time to cure the alleged insecurity or alleged default.

2. Do the Loan Documents Pass Muster under the Statute of Frauds?

The statute of frauds requires that a promise to answer for another's debt, to be binding on the promisor, "must be in writing and signed by the party to be charged therewith."[81] Courts interpret this statute to mandate further that a personal guaranty identify the debt, the principal debtor, the promisor and the promissee.[82] If a guaranty omits the name of the principal debtor, the promissee or the promisor, the guaranty is unenforceable as a matter of law. Even where the intent of the parties is manifestly obvious, where any of these names are omitted from the document, the agreement is not

[81] O.C.G.A. § 13-5-30(2).
[82] John Deere Co. v. Haralson, 278 Ga. 192, 193 (2004); see also Tampa Inv. Group, Inc. v, Brand Banking and Trust Co., Inc., 290 Ga. 724, 728 (2012).

enforceable because it fails to satisfy the statute of frauds.[83] The court must strictly construe an alleged guaranty contract in favor of the guarantor.[84]

Guarantor's counsel must closely examine the guaranty documents themselves and run the documents through the statute of frauds analysis. If the guaranty does not meet the requirements under the statute of frauds, a court cannot enforce it against a guarantor. For example, the court in Dabbs v. Key Equipment Finance Co. determined the guaranty was unenforceable when the debt was only identified as "Agreement" and "Agreement was not defined, described or identified.[85] The same guaranty was also unenforceable because the principal debtor was only identified as "customer" with no further clue as to who that "customer" might be.[86] In Legacy Communities Group, Inc. v. BB&T, the court determined the guaranties failed to refer to the principal debtor by name and therefore were not enforceable against the guarantors.[87]

III. FRAUDULENT TRANSFER ACTIONS

The Georgia Uniform Fraudulent Transfers Act (the "Act") governs fraudulent transfers of all property, which is defined under the Act to mean "anything that may be the subject of ownership."[88] The typical situation involves a debtor conveying an asset or incurring an obligation that impairs a creditor's ability to satisfy its claims against the debtor.[89] There are three separate types of transfers or obligations that may be set aside under the Act: (1) actually fraudulent transfers or obligations; (2) constructively

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[83] Dabbs v. Key Equip. Finance, 303 Ga. App. 570, 572-73 (2010).
[84] Id. at 572-73.
[85] Id. at 573-76.
[86] Id.
[87] 729 S.E.2d 612 (2012).
[88] O.C.G.A. § 18-2-71(10).
[89] Steven Shareff, Causes of Action to Set Aside or Recover for Fraudulent Transfer or Obligation Under Uniform Fraudulent Transfer Act, 26 Causes of Action 773, § 2 (2008).

fraudulent transfers or obligations; and (3) insider preference transfers.[90] The elements needed to prove a prima facie case for fraudulent transfer will depend on the type of transfer or obligation involved.[91]

A. Actually Fraudulent Transfers or Obligations

Under the Act, a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred upon showing: (1) the debtor made a transfer or incurred an obligation; (2) the plaintiff was a creditor of the debtor; and (3) the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor.[92]

O.C.G.A. § 18-2-74(b) lists several factors Georgia courts will consider in determining whether "actual intent" exists, including whether: 1) the transfer or obligation was to an insider; 2) the debtor retained possession or control of the property transferred after the transfer; 3) the transfer or obligation was disclosed or concealed; 4) before the transfer was made or obligation was incurred, the debtor has been sued or threatened with suit; 5) the transfer was of substantially all of debtor's assets; 6) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; and 7) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was

[90] See O.C.G.A. §§ 18-2-74 and 18-2-75.
[91] Shareff, supra Note 50, at § 3.
[92] Id.

incurred.[93] The factors listed in O.C.G.A. § 18-2-74(b) are not exclusive, and consideration may be given to other factors.[94]

In these cases, the plaintiff will need to show that the totality of the circumstances establishes the debtor's fraudulent intent.[95] Generally, evidence of several of the listed factors is sufficient to establish intent, particularly when there is a close relationship between the transferor and the transferee. For example, when a creditor attacks a conveyance from a husband to his wife, Georgia courts found that only slight circumstances may be sufficient to establish the existence of fraud.[96] Likewise, when taken in connection with the suspicious circumstances, such as a conveyances between father and daughter, Georgia courts held that an inadequate price raises a vehement presumption of fraud.[97]

B. Constructively Fraudulent Transfers or Obligations

The Act also provides a cause of action for a creditor set aside a constructively fraudulent transfer or obligation. To establish a prima facie case to set aside a constructively fraudulent transfer, the plaintiff must prove the following: (1) the debtor made a transfer or incurred an obligation; (2) the plaintiff was a creditor of the debtor; (3) the debtor did not receive reasonably equivalent value in exchange for the transfer or obligation; and (4) either: (a) the debtor was engaged or about to engage in a business or in a transaction for which the debtor's remaining assets were unreasonably small in

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[93] O.C.G.A. § 18-2-74(b).
[94] See id.
[95] Shareff, supra at § 4.
[96] Gerschick v. Pounds, 281 Ga.App. 531, 534 (2006) (decided under repealed statute O.C.G.A. § 18-2-22).
[97] Stinchcomb v. Wright, 278 Ga.App. 136, 142 (2006).

relation to the business or transaction;[98] (b) the debtor intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond the debtor's ability to pay as they became due;[99] or (c) the debtor made the transfer or incurred the obligation while insolvent without receiving a reasonably equivalent value in exchange for the transfer or obligation.[100]

To establish a claim for a constructively fraudulent transfer, the debtor's insolvency often plays an important role. A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation.[101] The debtor's assets include all property of the debtor, except (1) property encumbered by a valid lien; (2) property exempt under non-bankruptcy law; (3) property held in tenancy by the entirety; (4) property concealed or removed with the intent to hinder, delay, or defraud creditors; or (5) property that was the subject of a transfer voidable under the Act.[102] A debtor's debts include liability on all claims against it, and a "claim" is defined under the Act as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured."[103] According to O.C.G.A. § 18-2-72(b), "[a] debtor who is generally not paying his or her debts as they become due is presumed to be insolvent."[104]

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[98] O.C.G.A. § 18-2-74(a)(2)(A).
[99] O.C.G.A. § 18-2-74(a)(2)(B).
[100] O.C.G.A. § 18-2-75(a).
[101] O.C.G.A. § 18-2-72(a).
[102] Shareff, supra at § 7; see also, O.C.G.A. §§ 18-2-71(2) and 18-2-72.
[103] O.C.G.A. § 18-2-71(3).
[104] See also Word v. Stidham, 271 Ga. App. 435, 436-437 (2004) (citing Mercantile Nat. Bank v. Aldridge, 233 Ga. 318, 321(2) (1974)).

Georgia Courts have granted summary judgment to creditors able to prove these elements. For example, in Kent v. A.O. White, Jr.,[105] the trial court held that a judgment debtor's transfer of property to his daughter was a fraudulent conveyance, given that the debtor became insolvent shortly after the conveyance, the conveyance was without consideration, and the debtor maintained his law office on the property without paying rent.[106] Citing O.C.G.A. § 18-2-75(a), the appellate court upheld the ruling, concluding that "[p]retermitting actual intent to hinder, delay, or defraud a creditor under O.C.G.A. § 18-2-74(a)(1), evidence supported the trial court's conclusion that the transfer was fraudulent and must be set aside."[107]

Value is given in exchange for the transfer when "property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." [108] For example, in Kent, the Court gave weight to the fact that the debtor transferred the property to his daughter without consideration and then continued to operate his business on the property without paying rent.[109] Judgment in favor of the creditor has also been upheld in cases involving as little as $10.00 in consideration. In Stinchomb[110] there was evidence that the seller conveyed the property, valued at over $1,200,000.00 for an alleged consideration of

[105] 279 Ga. App. 563 (2006).
[106] Id. at 564.
[107] Id. (also citing Brown v. C. & S Nat. Bank, 253 Ga. 119, 122(2) (1984)).
[108] O.C.G.A. § 18-2-73(a).
[109] Kent, 279 Ga. App. at 564.
[110] 278 Ga. App. at 136.

$10.00.[111] The Court of Appeals found that $10.00 was not reasonable consideration for the property and the transfer was therefore invalid.[112]

C. Insider Preference Transfers

To establish a prima facie case in an action to set aside an insider preference transfer, the plaintiff must prove the following: (1) the debtor made a transfer to an insider for an antecedent debt; (2) the plaintiff was a creditor of the debtor at the time of the transfer; (3) the debtor was insolvent at the time of the transfer; and (4) the insider had reasonable cause to believe that the debtor was insolvent at the time of the transfer.[113] According to O.C.G.A. § 18-2-71(7)(A)(iv), an "insider" includes "[a] corporation of which the debtor is a director, officer, or person in control." It is important to keep in mind that a cause of action for an insider preference transfer is extinguished unless the action is brought within one year after the transfer was made or the obligation was incurred.[114]

IV. ETHICAL CONSIDERATIONS

Several ethical issues may arise during the course of representing borrowers and guarantors, including multiple party representations which can give way to conflicts of interest, a duty to make meritorious claims and defenses, and attorney's fees.

A. Multiple Party Representation and Conflicts of Interest

Real estate transactions often involve many parties working to make the transaction a success, and the law surrounding the transaction can be complicated. With so many parties involved in such a complicated transaction, a lawyer involved in

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[111] Id. at 142.
[112] Id.
[113] O.C.G.A. § 18-2-75(b).
[114] O.C.G.A. § 18-2-79(3), referring to fraudulent transfers under O.C.G.A § 18-2-75(b).

subsequent litigation can easily find himself representing multiple parties and confronting conflict of interest questions. Generally, transactional lawyers are much less constrained by conflict of interest rules than are the litigators that subsequently clean up (or make worse) the mess that resulted from a deal gone bad.[115] When representing multiple parties, it is always critical to keep in mind the interest of one's clients and, more importantly, who the client is. A lawyer can easily forget what is best for one client while pursuing the interest of another client.

Parties on both sides of the deal may have any number of reasons to choose to share representation. At times, a client may wish to share representation with another party in order to share his or her legal costs, or the lawyer's skill in the area may be so great that the client is willing to share the lawyer, or there might be a tactical reason to band together behind one advocate.[116] The law generally permits joint representation, provided the parties consent and the parties' interests are not too antagonistic.[117]

Many concurrent conflicts of interest can be overcome if the lawyer reasonably believes she can provide proper representation, the law does not prohibit the representation, the representation does not involve a claim by one client against another client represented by the same lawyer, and "each affected client gives informed consent, confirmed in writing."[118]

The Georgia Rules of Professional Conduct address conflicts of interest and provide:

> (a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties

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[115] Charles W. Wolfram, Modern Legal Ethics § 7.3.4 (1986).
[116] Id. at § 7.3.1.
[117] Id.
[118] MODEL RULES OF PROF'L RESPONSIBILITY R. 1.7(b)(2003).

to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

(b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:
  (1) Consultation with the lawyer,
  (2) Having received in writing reasonable and adequate information about the material risks of the representation, and
  (3) Having been given the opportunity to consult with independent counsel.

(c) Client consent is not permissible if the representation:
  (1) Is prohibited by law or these rules;
  (2) Includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
  (3) Involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

The maximum penalty for a violation of this Rule is disbarment.[119]

Several types of conflicts cannot be waived and are known under the Georgia rules as "impermissible conflicts."[120] Georgia Rules 1.7(c), 1.8, and 1.9 set forth the general standards for impermissible conflicts. Accordingly, before even asking a client to waive an actual or potential conflict, the attorney must evaluate the representation. If the attorney cannot, in good faith, protect the interests of the proposed client zealously because of the attorney's other representation, Rule 1.7(c) requires the attorney to decline the prospective representation. For example, if the attorney (or firm) possesses material information from one client that would impact the representation of another client, there is a genuine risk that the conflict is impermissible.[121]

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[119] GA. RULES OF PROF'L CONDUCT R 1.7.
[120] Curtis J. Romig, Ethical Considerations for the Real Estate Lawyer, Commercial Real Estate (program materials, Nov. 14, 2003).
[121] Id.

One potential pitfall in multiple-party representation is the violation of the obligation of confidentiality.[122] The attorney jointly representing two parties is still under a duty to maintain the confidentiality of information as to each client.

> When one client in a joint representation requests that some information relevant to the representation be kept confidential from the other client, the attorney must honor the request and then determine if continuing with the representation while honoring the request will: a) be inconsistent with the lawyer's obligations to keep the other client informed under Rule 1.4, Communication; b) materially and adversely affect the representation of the other client under Rule 1.7, Conflict of Interest: General Rule; or c) both.[123]

In many instances, honoring the client's request will require that the attorney withdraw from the joint representation.[124]

B. Duty to Make Meritorious Claims and Contentions

In addition to an attorney's responsibility to her client, an attorney also bears a responsibility to the legal system. Every lawyer must keep in mind both responsibilities, but a litigator, who spends most of her time balancing her client's wishes and the constraints of the law, must be especially careful to remember the responsibility owed to the legal system. This responsibility is evident in Georgia's rules regarding claims and candor.

Georgia's Rules of Professional Conduct address "Meritorious Claims and Contentions" in Rule 3.1 which states:

> In the representation of a client, a lawyer shall not:
> (a) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another;

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[122] GA. RULES OF PROF'L CONDUCT R 1.6.
[123] State Bar of Georgia Adv. Opinion 03-2 (2003).
[124] Id.

(b) Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

The maximum penalty for a violation of this Rule is a public reprimand.

Georgia's Rules of Professional Conduct address "Candor Toward the Tribunal" in Rule 3.3 which states:

(a) A lawyer shall not knowingly:
  (1) Make a false statement of material fact or law to a tribunal;
  (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
  (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known too the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(d) In an ex parte proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

The maximum penalty or a violation of this Rule is disbarment.

C. Attorney's Fees

The Georgia Code addresses the granting of an attorney's fees in situations involving improper use of the legal system and situations involving bad faith. Under O.C.G.A. § 9-15-14, a court may assess reasonable attorney's fees and expenses of litigation against a party if it finds (1) that the party's action lacked substantial justification *or* (2) that the party's actions were interposed for delay or harassment *or*

(3) that the party or its counsel unnecessarily expanded the proceedings by other improper conduct.[125] It is not necessary to prove that the party acted in bad faith.[126]

Attorney's fees are also available under O.C.G.A. §13-6-11. The Georgia code provides: "[W]here the plaintiff has specially pleaded and has made prayer therefore and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them."[127] A defendant who files a counterclaim against the plaintiff is also permitted to assert a claim for attorney's fees.

With respect to attorney's fees, real estate litigation is similar to other types of litigation. A plaintiff's attorney has a responsibility to advocate zealously for his client, but he must be careful not to abuse the system or manipulate it to advance a client's interests. Clients come and go. The bench and bar, however, will always be there and they have very long memories. Being sanctioned by an award of attorney's fees or defense costs is painful in the short run and can be fatal in the long run.

[125] See O.C.G.A. § 9-15-14 (2008); Gibson v. Decatur Fed. Savings & Loan Ass'n, 235 Ga. App. 160, 164 (1998).
[126] Lamar Company, LLC v. State of Georgia, 256 Ga. App. 524, 526 (2002).
[127] O.C.G.A. § 13-6-11 (2008).