FORECLOSURE DEFENSE STRATEGIES

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The key first step to any foreclosure defense strategy is a careful review of the borrower's loan documents, including the promissory note, deed to secure debt, any personal guaranties, and any loan agreement. The rights and responsibilities of the parties are defined by the loan documents, and only by knowing those documents inside and out will the attorney be able to assess what chance the borrower has in defending a suit by the lender and/or staving off the foreclosure of any collateral.

Practically speaking, the best means of foreclosure defense if the underlying note is in default is done by negotiating with the lender before any foreclosure occurs. This requires open communication with the lender's counsel, a thorough knowledge of the loan documents, and a firm handle on any conduct by the lender that would give rise to any defenses or affirmative claims on the part of the borrower and that would provide some amount of leverage on the lender. Even if the foreclosure has been noticed and advertised, it is often not too late to reach a resolution that takes foreclosure off the table or, at the very least, pushes the sale of the property back to allow the parties more time to negotiate.

I. The Foreclosure Process

A. 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

[1] The authors gratefully acknowledge the prior work of Stephanie A. Everett, Ariel D. Zion, Ryan E. Harbin, and Stephen M. Parham, portions of which are incorporated into this article.

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.[2] Specifically, the lender must give the borrower notice thirty days before the proposed foreclosure sale.[3] 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.[4] 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.[5] 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.[6]

Regardless of 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:

> 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

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

> 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.

B. Advertisement

The lender must properly advertise the foreclosure sale once a week for a period of four weeks immediately preceding the date of the sale in the legal organ of the county where the property is located.[7] If there is no newspaper so designated, the advertisement must be published in the nearest newspaper having the largest general circulation in the county.[8] 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.[9] If the advertisement contains the property's street address, the street address, city and zip code must be clearly set out in bold type.[10]

C. The Sale

The lender must conduct the foreclosure sale on the date, time and place which is required of sheriff's sales.[11] 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.[12] If the first Tuesday falls on New Year's Day or on Independence Day, the sale takes place on the immediately following Wednesday.[13] The sale takes place on the steps of the county courthouse where the property is located.[14]

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[7] O.C.G.A. § 44-14-162; O.C.G.A. § 9-13-140.
[8] O.C.G.A. § 9-13-140.
[9] O.C.G.A. § 9-13-140.
[10] O.C.G.A. § 44-14-162.
[11] O.C.G.A. § 44-14-162.
[12] O.C.G.A. §§ 9-13-161(a) -(b).
[13] O.C.G.A. §§ 9-13-161(a); Miller Grading Contractors, Inc. v. Ga. Fed. Sav. and Loan, 247 Ga. 730 (1981).
[14] O.C.G.A. §§ 9-13-161(a).

D. 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.'"[15] The person calling out the sale should not do anything that chills the bidding process.[16]

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,[17] 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 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.[18]

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

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[15] Giordano v. Stubbs, 228 Ga. 75, 78 (1971).
[16] Tarlton v. Griffin Fed. Sav. Bank, 202 Ga. App. 454 (1992).
[17] 155 Ga. App. 327, 328-329 (1980).
[18] Id.

such circumstances contributed to bringing about the inadequacy of price that the foreclosing party has breached his duty under the power of sale.[19]

II. Lack of Standing and MERS Restrictions

A. Georgia borrowers do not have standing to challenge the assignment of security deeds to which they are not parties.

Georgia cases have clearly rejected the proposition that borrowers have standing to challenge the assignment of security deeds.[20] The Georgia Supreme Court recently addressed this issue and definitively reached the same conclusion.

In Ames v. JP Morgan Chase Bank, N.A., the borrowers executed a security deed on their home in favor of Washington Mutual Bank, F.A. ("WaMu") to secure a loan refinancing their house.[21] The deed granted and conveyed the property and the power of sale to WaMu and its "successors and assigns."[22] After WaMu was declared insolvent, the FDIC was appointed as its receiver, and the FDIC and JP Morgan Chase Bank, N.A. ("Chase") executed a purchase and assumption agreement that transferred all loans of WaMu to Chase.[23] The FDIC appointed Chase to act as attorney-in-fact for the FDIC for the limited purpose of transferring "any interest in real estate … and any personal property appurtenant to the real estate from the [FDIC] to [Chase] or to an affiliate of [Chase]."[24] Chase subsequently assigned the borrowers' security deed to itself. [25] After the borrowers defaulted on the loan, Chase hired a law firm to initiate a foreclosure sale.[26] The borrowers filed suit, moving for a temporary restraining order to stop the

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[19] Id. (citing Giordano, 228 Ga. at 79).
[20] See Montgomery v. Bank of Am., 321 Ga. App. 343, 346 (2013) (because the borrower was not a party to the assignment of the security deed, he did not have standing to challenge its validity); Haynes v. McCalla Raymer, LLC, 793 F.3d 1246, 1251-52 (11th Cir. 2015) (holding that the borrowers did not have standing to challenge the assignment of their security deed because they were not parties to the allegedly forged assignment and were not intended beneficiaries of the assignment).
[21] No. S15G1007, 2016 WL 854582 (Ga. March 7, 2016).
[22] Id. at *1.
[23] Id.
[24] Id.
[25] Id.
[26] Id. at *2.

foreclosure and arguing that the assignment of the security deed was invalid, so Chase did not have the power to foreclose.[27] The trial court granted the law firm's motion to dismiss as to both it and Chase, concluding that the borrowers did not have standing to challenge the assignment of the security deed to Chase.[28] The Georgia Court of Appeals affirmed, and the Supreme Court granted certiorari.

The Supreme Court noted that to assert a claim of wrongful foreclosure against Chase based on the alleged flawed assignment of the security deed, the borrowers had to establish standing, "which requires showing an injury in fact that was caused by the breach of a duty owed by the defendants to the plaintiffs and that will be redressed by a favorable decision from the court."[29] The Court held that the borrowers could not meet the standing requirement with respect to their assignment claim.[30]

First, in making and receiving the assignment, neither the original security deed holder (WaMu and its receiver, the FDIC) nor the alleged assignee (Chase) breached a duty owed to the borrowers under the law or the terms of the deed.[31] Georgia law expressly authorizes the assignment of security deeds, and the deed at issue explicitly conveyed the borrowers' property to WaMu and its "successors and assigns."[32]

Second, the borrowers could not show that the assignment itself granted them any basis for standing that the security deed did not.[33] The assignment of a security deed is a contract between the deed holder and the assignee, and a lawsuit on a contract generally may be brought only by a party to the contract or an intended third-party beneficiary of the contract.[34] While the assignment of a security deed may affect the debtor in some ways, and the debtor may also be an intended third-party beneficiary of certain parts of the assignment, the typical assignment does not give the debtor any new rights, and the

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[27] Id.
[28] Id.
[29] Id. at *4.
[30] Id.
[31] Id. at *5.
[32] Id.
[33] Id.
[34] Id. (citing O.C.G.A. § 9-2-20).

debtor can vindicate all of the rights that it had under the deed that has been transferred by suing the assignee that claims to have taken ownership of the deed and its corresponding obligations.[35]

The Court held that what "the debtor cannot do is dispute the assignment; that may normally be done only by the assignor, because the debtor is not a third-party beneficiary of the assignment *as a whole* and particularly is not intended to directly benefit from the transfer of the power of sale."[36] "'Status as a third-party beneficiary does not imply standing to enforce every promise within a contract, including those not made for that party's benefit. To the contrary, 'a third-party beneficiary … can only enforce those promises made directly for his benefit.'"[37] The borrowers were not intended as third-party beneficiaries of the assignment at issue in this case.[38]

According to the Court, if the borrowers believed that the assignment of their security deed to Chase was invalid and that Chase was therefore subverting the FDIC's discretion to decide whether to foreclose, the borrowers should have alerted the FDIC to that concern so that the FDIC could decide to assert any rights that it had.[39] But there was no evidence in the case that the FDIC had any concern about the assignment to Chase, and the borrowers could not manufacture standing for themselves by asserting a claim that the party with standing had not asserted.[40]

B. MERS may assign security deeds to third-party entities.

Borrowers have frequently tried to attack the involvement of Mortgage Electronic Registration Systems, Inc. ("MERS") when it has been involved in the assignment of security deeds, but the Georgia courts have rejected these attacks. For example, in Montgomery v. Bank of America, the borrower obtained a mortgage from the National

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[35] Id.
[36] Id. (emphasis in original).
[37] Id. (quoting Archer W. Contractors, Ltd. v. Estate of Pitts, 292 Ga. 219, 226-27 (2012)).
[38] Id.
[39] Id. at *6.
[40] Id.

Bank of Kansas City and executed a promissory note and security deed.[41] The security deed named MERS as a nominee of the lender and as the grantee under the security deed.[42] The security deed conveyed to MERS and its successors and assigns the right to exercise any or all of the interests granted under the security deed, including the right to foreclose and sell the property. [43] MERS later assigned all of its right, title and interest in and to the security deed to BAC Home Loans Servicing, Inc. ("BAC").[44] After the borrower defaulted on his mortgage payments, BAC retained a law firm to begin a non-judicial foreclosure.[45] In response, the borrower filed suit, alleging that BAC lacked authority to foreclose because MERS lacked the authority to assign the security deed to it.[46] The trial court granted judgment on the pleadings against the borrower.[47]

The Georgia Court of Appeals affirmed, noting that under Georgia law, a "security deed which includes the power of sale is a contract and its provisions are controlling as to the rights of the parties thereto and their privies."[48] Furthermore, unless the instrument specifically provides to the contrary, a successor or assignee of the grantee in a deed to secure debt "may exercise any power therein contained; and such powers may so be exercised regardless of whether or not the transfer specifically includes the powers or conveys title to the property described."[49] The security deed at issue expressly provided that the borrower granted and conveyed to MERS and its successors and assigns power of sale with regard to the property.[50] The security deed further provided that MERS held legal title to the interests granted by the deed and that MERS had the right to "foreclose and sell the Property; and to take any action required of Lender including, but

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[41] 321 Ga. App. at 343.
[42] Id. at 343-44.
[43] Id. at 344.
[44] Id.
[45] Id.
[46] Id.
[47] Id.
[48] Id.
[49] Id. (quoting O.C.G.A. § 23-2-114).
[50] Id.

not limited to, releasing and canceling this Security instrument."[51] "Thus, the security deed expressly conveyed title to the interests in the security deed to MERS, gave MERS the right to invoke the power of sale, and authorized MERS to assign its rights and interests in the security deed to BAC."[52]

These cases demonstrate that the language of the borrower's security deed is crucial in determining the rights and abilities of MERS. If the security deed grants to MERS and its assigns the ability to foreclose on the borrower's property, then there is nothing in Georgia law to prevent MERS from assigning the deed or to prevent the assignee from exercising the power of sale should the borrower be in default. The key to making any claim that MERS is without power to assign a security deed or to foreclose upon property would be language within the document in question so stating. Borrowers must understand that the language of their loan documents will control and that courts do not have the ability under Georgia law to rewrite or ignore those documents.

II. Pooling and Servicer Agreement Defense

A. Possession of the underlying promissory note is not required for the non-judicial foreclosure sale of a security deed.

The Georgia Court of Appeals has recognized that the American mortgage system has changed dramatically in modern times. Generally, "early American mortgage loans were two party transactions with lenders holding their own notes, collecting payments, and foreclosing on defaulting borrowers when necessary."[53] However, because "the mortgage financing and construction industry ground to a halt during the Depression, 'the

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[51] Id. at 344-45.

[52] Id. at 345. See also Larose v. Bank of Am., N.A., 321 Ga. App. 465, 467 (2013) (where the security deed signed by the borrower granted and conveyed borrower's property to MERS, its successors, and assigns, along with the power of sale and stated that MERS had the right to foreclose and sell the property, this language granted MERS the power of assignment); Alexis v. Mortgage Electronic Registration Sys., Inc., No. 1:11-CV-1967-RWS, 2012 WL 716161, at *3 (N.D. Ga. March 5, 2012) (holding that the borrower "unequivocally authorized MERS's involvement in the transaction by executing a security deed in its favor," which recognized MERS's right of assignment in accord with Georgia law).

[53] Hildebrand v. Bank of Am., N.A., 332 Ga. App. 175, 178 (2015) (quoting Christopher L. Peterson, Predatory Structured Finance, 28 Cardozo L. Rev. 2185, 2194 (2007))

federal government ushered in a 'three-party' mortgage system by creating a secondary mortgage market designed to protect borrowers by underwriting loans.'"[54] "Those three parties were the borrower, the lender, and the government as a guarantor or assignee, and this secondary mortgage market greatly increased the amount of capital available for long-term mortgage loans."[55] "In the 1970s, federal agencies began buying home mortgages and sold participation in mortgage 'pools' that paid interest income to investors, which led to the eventual development of 'private label' home mortgage-backed securities."[56] "Unlike older two- or three-party loans, contemporary asset-backed securities conduits often have eleven or more integral parties: a borrower, a broker, an originator, a seller, an underwriter, a trust, a trustee, multiple servicers, a document custodian (which may be closely involved in foreclosure proceedings), an external credit enhancer, a securities placement agent, and investors."[57]

Borrowers seized on the decoupling of promissory note and security deed to argue that parties who held only the security deed but not the note were not authorized to conduct foreclosures when borrowers defaulted on the underlying note. They argued that because the basis for exercising the power of sale under the deed was a default on the note, only a party who held the note should be authorized to exercise this power.

In You v. JP Morgan Chase Bank, N.A., the Georgia Supreme Court rejected this argument by affirmatively answering the certified question: "Can the holder of a security deed be considered a secured creditor, such that the deed holder can initiate foreclosure proceedings on residential property even if it does not also hold the note or otherwise

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[54] Id. (quoting Barry Hester, Opportunity Costs: Nonjudicial Foreclosure and the Subprime Mortgage Crisis in Georgia, 25 Ga. St. U. L. Rev. 1205, 1209 (2009)).
[55] Id. (citing Peterson, 28 Cardozo L. Rev. at 2197).
[56] Id. (citing Peterson, 28 Cardozo L. Rev. at 2200-2201)
[57] Id. at 179 (citing Peterson, 28 Cardozo L. Rev. at 2256). See also You v. JP Morgan Chase Bank, N.A., 293 Ga. 67, 68 n.2 (2013) (citing Alan M. White, *Losing the Paper – Mortgage Assignments, Note Transfers and Consumer Protection*, 24 Loy. Consumer L. Rev. 468, 471-72 (2012) and Austin Hall, Note, Peach Sheets, Property, 25 Ga. St. U. L. Rev. 265, 266-68 (2008)) ("[A]ssignments have become common in the current era of securitization of mortgages, in which large numbers of loans secured by real estate are pooled and repackaged as securities for sale to investors.").

have any beneficial interest in the debt obligation underlying the deed?" [58] The Court first noted that Georgia law clearly authorizes the use of non-judicial power of sale foreclosure as a means of enforcing a debtor's obligation to repay a loan secured by real property, and this process is governed primarily by contract law, through the express terms of the secured instruments.[59] Georgia statutory law "evolved as a means of providing limited consumer protection while preserving in large measure the traditional freedom of the contracting parties to negotiate the terms of their arrangement."[60]

"The plain language of the non-judicial foreclosure statute nowhere specifies whether the foreclosing party must hold the note in addition to the deed. Moreover, the term 'secured creditor,' which is used to signify the foreclosing party, is not defined in the statute, an omission particularly notable given the statute's explicit definition of the term "debtor."[61] The term "secured creditor" was introduced into the statute in 1981 when the provisions requiring notice to the debtor were first enacted, and common law at the time allowed for the possibility of non-judicial foreclosure conducted by one who held legal title to the property but not the underlying note.[62] Thus, while the phenomenon of "splitting" ownership of the note from ownership of the deed may not have been prevalent until recently, this practice was not prohibited prior to the enactment of the modern non-judicial foreclosure statute in 1981, and the Georgia legislature at that time clearly did not intend to make substantive changes to the law governing non-judicial foreclosures or narrow the class of parties entitled to conduct such foreclosures.[63]

Further amendments to the non-judicial foreclosure statutes in 2008 "were a direct response to the foreclosure crisis brought on by the growth in sub-prime lending, which had been fueled by the rise of mortgage securitization."[64] "Securitization often involves the decoupling of the loan from the deed as a matter of course," but the 2008

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[58] 293 Ga. at 68.
[59] Id. at 69.
[60] Id. at 70.
[61] Id. at 71.
[62] Id.
[63] Id. at 71-72.
[64] Id. at 72.

amendments "made no express reference to this practice," and there is no evidence of the legislature's intent to change it.[65] "Rather, the aim of the amendments was simply to provide more transparency in the process to assist borrowers facing foreclosure."[66]

The Court further determined that the Uniform Commercial Code did not prohibit a party who does not hold the note from exercising the power of sale in the deed securing the note.[67] While promissory notes are negotiable instruments and are governed by Article 3 of the UCC, security deeds are not, and Georgia law governing the transfer of security deeds expressly provides that "transfers of deeds to secure debt … shall be sufficient to transfer the property therein described *and the indebtedness therein secured*."[68] Thus, the deed holder possesses full authority to exercise the power of sale upon the debtor's default, regardless of its status with respect to the note.[69]

The Court therefore answered the certified question in the affirmative, concluding that under Georgia law, "the holder of a deed to secure debt is authorized to exercise the power of sale in accordance with the terms of the deed even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed."[70] Accordingly, the argument that the pooling of mortgage loans provides the borrower with a defense to foreclosure in Georgia based on the separation of the note and security deed has been firmly rejected.[71]

B. Only minimal notice to debtors is required.

The You Court also addressed the question of whether O.C.G.A. § 44-14-162.2(a) requires that the secured creditor be identified in the foreclosure notice to the borrower.[72] The Court in response pointed to the language of the statute: "Such notice shall be in writing [and] shall include the name, address, and telephone number of *the individual or*

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[65] Id. at 72-73
[66] Id. at 73.
[67] Id.
[68] Id. (quoting O.C.G.A. § 44-14-64(b)) (emphasis in original).
[69] Id.
[70] Id. at 74.
[71] See also Montgomery, 321 Ga. App. at 345; Larose, 321 Ga. App. at 466-67.
[72] Id.

entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor."[73] "If that individual or entity is the holder of the security deed, then the deed holder must be identified in the notice; if that individual or entity is the note holder, then the note holder must be identified." [74] "If that individual or entity is someone other than the deed holder or the note holder, such as an attorney or servicing agent, then that person or entity must be identified. The statute requires no more and no less."[75] The Court therefore answered the second certified question in the negative.[76]

Moreover, in the context of providing the required contact information for the entity having full authority to negotiate, amend, and modify all terms of the mortgage, substantial compliance with the statute is sufficient.[77] Where a default notice provided the name of the lender-secured party and the contact information for the seller's attorney, who had "as much authority as any individual to negotiate a loan modification on [the lender's] behalf," the notice substantially complied with O.C.G.A. § 44-14-162.2.[78] The key is that the notice must provide sufficient contact information to enable the borrower to get in touch with the individual or entity with full modification authority over the mortgage. If the notice gives that bare amount of information, it substantially complies with the statutory requirement.[79]

III. Truth in Lending Act Violations and Rescission

The Truth in Lending Act ("TILA") is Title I of the Consumer Credit Protection Act, passed by Congress with the intent of safeguarding the consumer in consumer credit transactions. TILA contains specific provisions for credit advertising, for open-ended

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[73] Id. (emphasis in original).
[74] Id.
[75] Id. at 74-75.
[76] Id. at 75.
[77] Mbigi v. Wells Fargo Home Mortgage, No. A15A2067, 2016 WL 1102601, at *3 (Ga. Ct. Ap. March 22, 2016) (citing Peters v. CertusBank Nat'l Assoc., 329 Ga. App. 29, 31 (2014)).
[78] TKW Partners v. Archer Capital Fund, 302 Ga. App. 443, 445-46 (2010). See also Stowers v. Branch Banking & Trust Co., 317 Ga. App. 893, 896 (2012) (concluding that substantial compliance with the contact information requirement of O.C.GA. § 44-14-162.2(a) is sufficient).
[79] Mbigi, 2016 WL 1102601, at *1.

consumer credit plans, and for loans under closed-end credit plans. TILA is codified beginning at 15 U.S.C. § 1601.

A. TILA's Disclosure Requirements and Remedies for Violations

TILA applies to consumer credit transactions.[80] "Consumer" characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person and the money, property or services which are the subject of the transaction are primarily for personal, family, or household purposes.[81] This includes residential loan transactions.

TILA contains numerous disclosure requirements to which a creditor must strictly adhere. The chief disclosures are the "finance charge"[82] and the "annual percentage rate,"[83] which must be "clearly and conspicuously disclosed" in relation to all other required disclosures.[84]

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[80] 15 U.S.C. § 1602(i); see 15 U.S.C. § 1603(1) (TILA does not apply to credit transactions involving extensions of credit primarily for businesses, commercial or agricultural purposes, or to governmental agencies or instrumentalities, or to organizations).

[81] Id.

[82] "Finance charge" is the sum of all charges paid directly or indirectly by the borrower to the lender as a condition of the extension of credit, including interest, service or carrying charge, loan fee or finder's fee, credit report investigation fee, loan insurance premium, and broker fees. 15 U.S.C. § 1605.

[83] "Annual percentage rate" is the rate that will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balanced of the amount financed. 15 U.S.C. § 1606.

[84] 15 U.S.C. § 1632. Additional items that must be disclosed include: the identity of the creditor; the amount financed; a written statement that the consumer has a right to obtain, upon written request, a written itemization of the amount financed; the total of payments (amount financed plus finance charge); the number, amount and due dates or period of payments scheduled to repay the total of payments; a statement that a security interest has been taken in property; late payment charge; a statement indicating whether the consumer is entitled to a rebate of any finance charge; the aggregate amount of settlement charges for all settlement services provided in connection with the loan; the aggregate amount of fees paid to the mortgage originator; and the total amount of interest that the borrower will pay over the life of the loan. 15 U.S.C. § 1638(a).

TILA requires these disclosures be made to the borrower before credit is extended.[85] This requirement may be waived by the borrower to expedite the transaction if the extension of credit is needed to meet a bona fide personal emergency.[86] The borrower is also entitled to receive final form disclosures at the time of the consummation of the transaction.[87]

Only "creditors" are subject to liability under TILA. "Creditor," as defined by TILA, means someone who both (1) regularly extends consumer credit which is payable in more than four installments or for which the payment of a finance charge is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the indebtedness, or by agreement."[88] Assignees of a credit obligation are liable for TILA violations by the original creditor only if the violation is apparent on the face of the disclosure statement, except where the assignment was involuntary.[89]

Creditors who fail to comply with TILA's disclosure requirements are subject to civil liability.[90] Congress created a system of "private attorney generals," permitting aggrieved consumers to participate in policing TILA violations.[91] The relief available to private litigants includes actual damages, statutory damages,[92] and attorney's fees and costs.[93] TILA does not confer upon private litigants an implied right to an injunction or other equitable relief such as restitution or disgorgement.[94]

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[85] 15 U.S.C. § 1638(b).
[86] Id.
[87] Id.
[88] 15 U.S.C. § 1602(f). To be considered a creditor under TILA, a person must fall under both prongs of § 1602(f). Parker v. Potter, 232 Fed. Appx. 861, 864 (11th Cir. 2007).
[89] 15 U.S.C. § 1641(a). Parker, 232 Fed. Appx. at 865.
[90] 15 U.S.C. § 1640; Parker, 232 Fed. Appx. at 864.
[91] Christ v. Beneficial Corp., 547 F.3d 1292, 1297 (11th Cir. 2008).
[92] Statutory penalties of "twice the amount of any finance charge in connection with the transaction" range from $100 to $1,000 (or $400 to $4,000 for loans secured by real property). Id. at 1297 n.9.
[93] Id. at 1297. Attorney's fees are available only for a failure to notify the borrower of the right of rescission under 15 U.S.C. § 1635. See 15 U.S.C. § 1640(a)(3).
[94] Id. at 1298.

Statutory damages provide at least a partial remedy for all material[95] TILA violations; however actual damages ensure that consumers who have suffered actual harm due to a lender's faulty disclosures can be fully compensated, even if the total amount of their harm exceeds the statutory ceiling on TILA damages.[96] Plaintiffs must be able to demonstrate detrimental reliance on a faulty TILA disclosure in order to be entitled to actual damages under TILA.[97] That is, the plaintiff must present evidence to establish a causal link between the financing institution's noncompliance and his claimed actual damages.[98]

An award of statutory damages, attorney's fees, and costs is mandatory after rescission of a loan transaction under the plain text of TILA.[99] "The issue of the materiality of noncompliance with the requirements of [TILA] is a consideration when deciding whether the lender violated the Act, but it does not affect the remedies available when rescission is ordered."[100] "The district court must award statutory damages regardless of the belief that no actual damages resulted" or that the violations of TILA's rescission disclosure requirement were *de minimis*.[101] TILA provides for the automatic award of attorney's fees and costs to a prevailing borrower.[102]

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[95] "A nondisclosure is material if it is of the type that a reasonable consumer would view as significantly altering the total mix of information made available. The information must be of a type that would affect a reasonable consumer's decision to use credit or to engage that creditor when comparison shopping for credit." In re Smith, 737 F.2d 1549, 1554 (11th Cir. 1984) (citations and punctuation omitted). "The information need not be so important that a reasonable consumer would probably change creditors on the basis of it, but it must be relevant to the credit decision." Id. at 1555.
[96] Turner v. Beneficial Corp., 242 F.3d 1023, 1026 (11th Cir. 2001).
[97] Id. at 1028.
[98] Id.
[99] Harris v. Schonbrun, 773 F.3d 1180, 1185 (11th Cir. 2014).
[100] Id.
[101] Id. (citing Zamarippa v. Cy's Car Sales, 674 F.2d 877, 879 (11th Cir. 1982)).
[102] Id. (citing Dale v. Comcast Corp., 498 F.3d 1216, 1223 n.12 (11th Cir. 2007)).

B. Statute of Limitations and Tolling

TILA claims must be brought within one year from the date of the occurrence of the violation.[103] The occurrence of the violation is deemed to take place at the consummation of the agreement, or, stated another way, from each of the lender's inaccurate or unmade disclosures.[104] Nondisclosure is not a continuing violation for purposes of the statute of limitations.[105] The only exception to the one-year statute is when the TILA claim is asserted as a defense by recoupment or setoff in an action by the lender to collect the debt, unless the defense is otherwise barred by a state statute of limitations.[106]

However, equitable "tolling is available for stale TILA claims but only if the plaintiff was prevented from bringing suit on those claims 'due to inequitable circumstances.'"[107] But, inequitable circumstances cannot be established by the mere fact that the lender did not disclose documents that are required under TILA. "By definition, nondisclosure happens every time there is a TILA nondisclosure violation, and mere violation of the statute cannot serve as extraordinary circumstances that merit tolling."[108] Instead, the party seeking equitable tolling must show something more, such as that the lender fraudulently concealed his cause of action from him until after a year had passed.[109] The Eleventh Circuit has held that a plaintiff seeking tolling must "state facts sufficient to demonstrate that she was prevented from filing [the] lawsuit by

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[103] 15 U.S.C. § 1640(e).
[104] Id. See also Sampson v. Washington Mut. Bank, 453 Fed. Appx. 863, 865 (11th Cir. 2011).
[105] Id.
[106] 15 U.S.C. § 1640(e).
[107] Sampson, 453 Fed. Appx. at 865 (citing Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998)).
[108] Id. "To hold otherwise would mean that any failure to disclose at the time of closing would not only give rise to a TILA claim, but would also toll the statute of limitations, thereby eviscerating the time limit expressly set out in § 1640(e)." Frazile v. EMC Mortgage Corp., 382 Fed. Appx. 833, 838 n.2 (11th Cir. 2010).
[109] Ellis, 160 F.3d at 708. See also Bailey v. Glover, 88 U.S. 342, 347 (1874) (where a party injured by another's fraudulent conduct "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered").

extraordinary circumstances that were both beyond her control and unavoidable and that she had diligently sought to preserve her statutory rights within a year of the alleged nondisclosure violation."[110]

Further, when a borrower exercises a valid right to rescission (discussed below), "the creditor must take action within twenty days after receipt of the notice of rescission, returning the borrower's money and terminating its security interest."[111] Failure to do so constitutes a separate violation of TILA, and the one-year statute of limitations for this claim runs from twenty days after a plaintiff gives notice of rescission.[112]

C. Rescission and Notice Requirements

In the case of consumer credit transactions where the creditor takes a security interest in the borrower's principal "dwelling", the borrower has the right to rescind the loan transaction until the later of (1) midnight of the third business day following the consummation of the transaction; or (2) the delivery of the information and rescission forms required under 15 U.S.C. § 1635.[113] The creditor must "conspicuously disclose" the borrower's right to rescind, and must provide the appropriate forms for the borrower to exercise the rescission right.[114] Importantly, the right to rescind does not apply to (1) residential mortgage transactions for acquisition or initial construction;[115] or (2) a refinancing or consolidation (with no new advances) of the principal balance then due

[110] Frazile, 382 Fed. Appx. at 838 n.2 (citing Arce v. Garcia, 434 F.3d 1254, 1261 (11th Cir. 2006)).
[111] Id. at 839 (citing 15 U.S.C. § 1635(b)).
[112] Id. (citing Belini v. Wash. Mut. Bank, FA, 412 F.3d 17, 26 (1st Cir. 2005)).
[113] 15 U.S.C. § 1635(a).
[114] Id.
[115] A "residential mortgage transaction" is a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of the dwelling. 15 U.S.C. § 1602(w).

and any accrued and unpaid finance charges of an existing credit extension by the same creditor secured by an interest in the same property.[116]

The clear and conspicuous notice of the right to rescission includes the requirement that the lender deliver two copies of the notice of the right to rescind to each borrower entitled to exercise the right.[117] That notice must be "on a separate document that identifies the transaction and [must] clearly and conspicuously disclose … [t]he borrower's right to rescind the transaction."[118] "If the required notice or material disclosures are not delivered, the right to rescind shall expire [three] years after consummation of the transaction."[119]

TILA "does not require perfect notice; rather it requires a clear and conspicuous notice of [the right to rescind]."[120] "And a technical violation of [TILA], if immaterial, will not extend a borrower's deadline of the right to rescind."[121] Whether a borrower is actually deceived or harmed by the lender's noncompliance with TILA's requirements regarding notice of the right to rescind is irrelevant, because courts employ an objective standard to determine whether a borrower received clear and conspicuous notice; "it is unnecessary to inquire as to the subjective deception or misunderstanding or particular [borrowers]."[122]

A review for the cases shows that determining whether a notice of the right to rescind complies with TILA's requirements is a fact-intensive inquiry. For example, where a lender instructed the borrower to execute simultaneously the loan documents and

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[116] Id. § (e)(2). See also Frazile, 382 Fed. Appx. at 837 ("TILA exempts from the right of rescission residential mortgage transactions to finance the acquisition or initial construction of such dwelling.").
[117] Harris v. Schonbrun, 773 F.3d 1180, 1183 (11th Cir. 2014) (citing 12 C.F.R. § 226.23(b)(1)).
[118] Id.
[119] Id. (citing 12 C.F.R. § 226.23(a)(3) and 15 U.S.C.§ 1635(f)). The purpose of the notice is to give borrowers a "cooling-off period" to reconsider the loan transaction. Id. (citing Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1146 (11th Cir. 1994), abrogated on different grounds by Veale v. Citibank, F.S.B., 85 F.3d 577, 580 (11th Cir. 1996)).
[120] Id. at 1184 (quoting Veale, 85 F.3d at 580).
[121] Id. (citations omitted).
[122] Id. (citing Rodash, 16 F.3d at 1145).

a post-dated waiver of her right to rescission, the Eleventh Circuit held that execution of the waiver "during the transaction would confuse any reasonable borrower because it implies, incorrectly, that waiver is generally possible within three business days of the transaction. The simultaneous execution of both a loan and a waiver of the right to rescind precludes the possibility of clear disclosure."[123]

On the other hand, in Smith v. Highland Bank, the borrower alleged that the lender violated TILA by including with her mortgage papers a form entitled "Notice of Right to Cancel," because the form of the Notice deprived her of a meaningful right to cancel.[124] The Notice contained an "Acknowledgment of Receipt" that the debtor had to sign to confirm that the lender complied with TILA and a "Certificate of Confirmation" that the debtor was to sign after the expiration of the three-day rescission period to indicate that she had not exercised her rescission rights.[125] Below the Certificate of Confirmation appeared: "NOTE: All parties who execute Acknowledgment of Receipt must execute Certificate of Confirmation."[126]

The Eleventh Circuit rejected the borrower's argument that this statement, taken together with the placement of the Certificate of Confirmation on the same page as the Acknowledgment of Receipt, would lead the average consumer to believe that she had to sign the Certificate of Confirmation when she received the Notice. The court pointed out that even though the Certificate of Confirmation appeared on the same page as the Acknowledgment of Receipt, it was in a distinct paragraph and had to be separately signed.[127] Second, though the form was proffered on the date of the mortgage transaction, it did not mislead the consumer as to whether she could rescind during the three-day period following the transaction but instead indicated that the consumer was not to sign the Certificate of Confirmation until more than three business days had elapsed, with the Certificate subsection of the form dated several days after the

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[123] Id. (internal citations and punctuation omitted).
[124] 108 F.3d 1325, 1326 (11th Cir. 1997).
[125] Id.
[126] Id.
[127] Id. at 1327.

Acknowledgement of Receipt.[128] Third, the lender's form provided detailed information about how to cancel the mortgage transaction, thereby counteracting any confusion that the form might otherwise cause.[129] Finally, it was clear that the intent of the "Note" was to ensure that of the signatories to the Acknowledgment of Receipt concurred in the decision not to rescind.[130]

IV. Strategic Bankruptcy

A borrower can prevent a 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.[131] A foreclosure sale that is conducted after a bankruptcy stay goes into effect is void ab initio.[132]

The bankruptcy court has jurisdiction over all the debtor's property as of the date the bankruptcy petition is filed.[133] However, the bankruptcy court can order the stay lifted to permit an action to proceed against the property.[134] If the bankruptcy court lifts the stay and the debtor does not immediately move the bankruptcy court for a stay of that order pending appeal, a previously-noticed foreclosure may proceed.[135] The debtor's mere notice of appeal of the bankruptcy court's order to the federal district court and request for a supersedeas bond do not serve to prevent foreclosure.[136] Once the bankruptcy stay has been lifted, a creditor may proceed with a previously-noticed foreclosure without sending a second notice of default or otherwise restarting the process.[137]

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[128] Id.
[129] Id.
[130] Id. See also Veale v. Citibank, 85 F.3d 577, 581 (11th Cir. 1996) (holding that the TILA rescission notice was reasonably clear because it provided sufficient notice that the borrowers' current transaction with the lender could be cancelled but that the borrowers' previous transactions, including previous mortgages, could not be rescinded).
[131] See 11 U.S.C. § 362(a).
[132] Babalola v. HSBC Bank, USA, N.A., 324 Ga. App. 750, 753 (2013).
[133] Butler v. Household Mortgage Servs., Inc., 244 Ga. App. 353, 354 (2000).
[134] Id.; see 11 U.S.C. § 362(d).
[135] Hurt v. Norwest Mortgage, Inc., 260 Ga. App. 651, 659 (2003).
[136] Id.
[137] Rapps v. Cooke, 246 Ga. App. 251, 254 (2000).

While a mortgage foreclosure sale conducted after an automatic stay is in place is initially void ab initio, if the bankruptcy court later annuls the stay based on a finding that the debtor filed the bankruptcy petition in bad faith to avoid foreclosure, the foreclosure sale is retrospectively validated.[138]

In sum, a lender may be able to get the automatic stay lifted, but this generally takes time and normally 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 defaulted loan. The lender may bring suit against guarantors despite the borrower's bankruptcy filing and the automatic stay as to it.

V. Options for Settlement

The key to creating an environment for the settlement of a potential foreclosure is to develop means to put pressure on the lender such that it determines that resolving the dispute is a better option than going forward with the sale.

A. Wrongful Foreclosure Action

1. Elements of claim

"In Georgia, a plaintiff asserting a claim of wrongful foreclosure must establish a legal duty owed to it by the foreclosing party, a breach of that duty, a causal connection between the breach of that duty and the injury it sustained, and damages."[139] As a matter of law, a plaintiff cannot state a claim for wrongful foreclosure if no foreclosure sale has taken place.[140]

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[138] Vereen v. Deutsche Bank Nat'l Trust Co., 282 Ga. 284, 285 (2007). See also Farris v. Nationsbanc Mortgage Corp., 268 Ga. 769, 770 (1997) (holding that a foreclosure sale did not violate the automatic bankruptcy stay where the bankruptcy court ruled that the stay was annulled ab initio as to that sale).

[139] Sparra v. Deutsche Bank Nat'l Trust Co., No. A15A2103, 2016 WL 1164271, at *2 (Ga. Ct. App. March 25, 2016) (quoting Gregorakos v. Wells Fargo Nat'l Assoc., 285 Ga. App. 744, 747-48 (2007)).

[140] Id. (citing Patel v. JP Morgan Chase Bank, N.A., 327 Ga. App. 321, 326 (2014)). See also Jenkins v. McCalla Raymer, LLC, 492 Fed. Appx. 968, 972 (11th Cir. 2012) (concluding that "Georgia law requires a plaintiff seeking damages for wrongful foreclosure to establish that the property at issue was actually sold at foreclosure").

A "security deed which includes a power of sale is a contract and its provisions are controlling as to the rights of the parties thereto and their privies. In exercising a power of sale, the foreclosing party is required only to advertise and sell the property in accordance with the terms of the instrument and to conduct the sale in good faith."[141] "[I]nadequacy of the price paid upon the sale of property under power of sale contained in a deed to secure debt will not of itself and standing alone be sufficient reason for setting aside the sale."[142]

> The duty to sell the property according to the terms of the deed and to conduct the sale in good faith does not include a requirement that a specific amount such as the fair market value of the property be obtained. … 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 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.[143]

However, if the borrower can "show that the foreclosure sale price was grossly inadequate *and* that the grossly inadequate price was 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," then "such a sale may be set aside by a court of equity."[144] "In determining whether this duty … has been breached [in a wrongful foreclosure action,] the focus is on the *manner* in which the sale was conducted and not solely on the result of the sale."[145]

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[141] Wilson v. Mountain Valley Cmty. Bank, 328 Ga. App. 650, 651 (2014) (citation omitted).
[142] Id. (quoting Gordon v. S. Central Farm Credit, 213 Ga. App. 816, 818 (1994)).
[143] Id. (quoting Gordon, 213 Ga. App. at 818).
[144] Metro Atlanta Task Force for the Homeless, Inc. v. Ichthus Cmty. Trust, 298 Ga. 221, 237-38 (2015) (emphasis added).
[145] Id. at 238 (quoting Kennedy v. Gwinnett Commercial Bank, 155 Ga. App. 327, 330-31 (1980)) (emphasis in original).

2. Obtaining injunctive relief to stop a foreclosure

Generally, "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."[146] That typically means tendering any amount past due under the loan.[147] However, the Georgia Supreme Court has emphasized that "tender is not an absolute rule, especially where it is alleged that the foreclosing party procured the sale of the property through its own improper conduct."[148] "Equity believes in good conscience, honesty, and morality. It will not sanction oppression or extortion demanded by a party because of his own illegal act. … A party who violates the law knowingly and willfully, and thereby injures another, cannot demand of the latter party to do equity before he can establish his right and place himself in status quo."[149] For example, allegations that sale of notes was procured by improper actions of the defendants constituting tortious interference with the borrower's business relationships which prevented the borrower from tendering its debt were sufficient to create an exception to the tender requirement and to allow the borrower's claim to survive a motion to dismiss.[150] This was "not a case like many others over the years, where a party sought to excuse its failure to tender on grounds like poverty, non-compliance with foreclosure procedures, or other acts not involving tortious interference with the funds that would potentially comprise the tender itself."[151]

Furthermore, the grounds on which a foreclosure may be enjoined are limited. The Georgia Supreme Court has given the following general guidance:[152]

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[146] Sparra, 2016 WL 1164271 at *3 (quoting Brevard Fed. Savings & Loan Assoc. v. Ford Mountain Invs., 261 Ga. 619, 620-21 (1991)).
[147] Id. (citing Stewart v. SunTrust Mortgage, 331 Ga. App. 635, 640 (2015)).
[148] Metro Atlanta Task Force for the Homeless, Inc., 298 Ga. at 236.
[149] Id. (quoting Benedict v. Gammon Theological Seminary, 122 Ga. 412 (1905)). See also Coates v. Jones, 142 Ga. 237 (1914) (plaintiff was exempt from tender and was allowed to maintain an equitable petition to have a sheriff's sale set aside because of fraudulent conduct by the defendant).
[150] Id. at 236-37.
[151] Id. at 237 (citations omitted).
[152] Bramblett v. Bramblett, 252 Ga. 21, 22 (1984) (emphasis added).

> The grant or denial of the request to permanently enjoin the foreclosure of the security deed is not, as argued by the plaintiff, a matter lying within the discretion of the trial judge. ***Unless the security deed is found to be invalid, or unless there is found to be some other legal or equitable grounds supporting the injunction against foreclosure of the security deed, the security deed holder has the legal right to proceed with a foreclosure of it by exercising the power of sale contained therein.***
>
> Thus, in deciding whether or not to enjoin the foreclosure, the superior court must make findings and/or conclusions concerning the validity of the security deed as between these parties . . . .

More recently, Georgia courts have held that significant questions concerning the construction of a forbearance agreement between a lender and a debtor and the course of conduct, both of which, if proved, could constitute a waiver of strict performance of the deed to secure a debt, justify an interlocutory injunction restraining the lender's assignee from foreclosing on property based on the debtor's alleged failure to pay taxes on the property.[153] A permanent injunction enjoining enforcement of the foreclosure provisions of a security deed is also warranted where the deed is invalid.[154]

B. Fighting Confirmation of Foreclosure Sale

Another way to attempt to exercise some leverage in negotiations with a lender can arise if the value of the property is below the amount still owed by the borrower on the underlying promissory note. In that case, the lender will likely attempt to recover the deficiency remaining after the collateral is credited by bringing an action against the borrower. The lender cannot bring such an action, however, without first obtaining a confirmation order of the foreclosure. This creates the opportunity for the borrower to litigate the confirmation, and if successful, to prevent the lender from any further recovery beyond the collateral. Faced with that prospect, the lender may be more amenable to negotiating a favorable deal with the borrower that takes foreclosure off the

[153] Atlanta Dwellings, Inc. v. Wright, 272 Ga. 231 (2000).
[154] Jones v. Phillips, 227 Ga. App. 94 (1997).

table and allows the borrower more time and/or other concessions to bring the loan out of any default.

The confirmation action is the process a lender must go through after a non-judicial foreclosure sale in order to seek a deficiency judgment against a borrower and/or, at least in some circumstances, 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 generally 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 then obtains an order of confirmation.[155]

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:

> 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.[156]

Because the statute is in derogation of common law, it must be strictly construed.[157] This strict construction can aid borrowers and guarantors if their counsel knows the confirmation statute well and pays close attention to detail. For some

[155] See O.C.G.A. § 44-14-161(a).
[156] O.C.G.A. § 44-14-161(a).
[157] 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).

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.

a. 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.[158] A confirmation application is not a "civil action" in the superior court, but is a special statutory proceeding.[159] 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 to the superior court judge."[160] 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."[161] In John Alden, the lender personally presented the report of sale to the clerk of court, who assigned it to a judge.[162] 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.[163] Similarly, in Goodman v. Vinson,[164] the Court of Appeals explained that presenting a report of sale to the clerk of court does

[158] Bentley, 170 Ga. App. at 361.
[159] Vlass v. Security Pacific Nat. Bank, 263 Ga. 296 (1993).
[160] 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.").
[161] 220 Ga. App. at 847.
[162] Id.
[163] Id.
[164] 142 Ga. App. 420, 421 (1977).

not satisfy Georgia law.[165] The court reasoned that the code only mentions the judge—not the court or the clerk.

b. Five days' notice prior to 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 judgment.[166]

Note that *personal service* of the notice of hearing is required under the confirmation statute.[167] 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.[168] 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."[169]

c. 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 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

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[165] 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).

[166] 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).

[167] 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").

[168] First Nat'l Bank & Trust Company, 128 Ga. App. 565 (1998); Ameribank, N.A. v. Quattlebaum, 269 Ga. 857 (1998).

[169] Id.

against a corporate debtor and two individual guarantors.[170] 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.[171] 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.[172] 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."[173]

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.[174] 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.[175] 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 not directed to them.'"[176]

i. Guarantors may still be entitled to protection by the confirmation statute.

Whether guarantors are protected by the confirmation requirement, of course, has been the subject of debate since the Georgia Court of Appeals held in HWA Properties v.

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[170] 128 Ga. App. at 567-68.
[171] Id. at 566-67.
[172] Id. at 566.
[173] Ameribank, N.A. v. Quttlebaum, 269 Ga. at 859.
[174] Civil Action Number 2009 CV 169507, Fulton County Superior Court, Georgia, "Order Granting Defendants' Motion to Dismiss," Mar. 2, 2010.
[175] Id.
[176] Id.

Community & Southern Bank[177] that guarantors may waive the statutory confirmation requirement through the language of their guaranties. The Georgia Supreme Court has now spoken on that question in PNC Bank, N.A. v. Smith.[178]

In that case, the United States District Court for the Northern District of Georgia certified two questions:

1) Is a lender's compliance with the requirements contained in O.C.G.A. § 44-14-161 a condition precedent to the lender's ability to pursue a borrower and/or guarantor for a deficiency after a foreclosure has been conducted?
2) If so, can borrowers or guarantors waive the condition precedent requirements of such statute by virtue of waiver clauses in loan documents?[179]

The Georgia Supreme Court answered the first question in the affirmative, confirming that the confirmation statute is a condition precedent to a lender's liability to pursue a guarantor for a deficiency after a foreclosure sale.[180]

Next, citing the strong policy in favor of freedom of contract, the Supreme Court held that guarantors may waive their rights under the confirmation statute, but instructed that such waivers must be "explicit."[181] In PNC Bank, the guarantors waived "any and all rights or defenses … based on … '**antideficiency**' law or any law which prevents [PNC] from bringing any action, including claim for **deficiency** against [the guarantors], **before or after [PNC's] completion of any foreclosure action**…"[182] The guarantors also acknowledged PNC's right of foreclosure and agreed to remain liable for the indebtedness even if post-foreclosure confirmation did not occur.[183] The Supreme Court in PNC Bank also noted that the guaranty at issue in HWA Properties expressly provided

[177] 322 Ga. App. 877 (2013).
[178] ___ S.E. 2d ___, Case No. S15Q1445, 2016 WL 690406 (Feb. 22, 2016), *superseded by PNC Bank, N.A. v. Smith*, ___ S.E. 2d ___, 2016 WL 1276376 (April 4, 2016).
[179] *PNC Bank, NA v. Smith*, Case No. 11:14-CV-0336A-ELR, Order at *4 (N.D. Ga. June 3, 2015).
[180] 2016 WL 1276376 at *2.
[181] *Id.* at *3.
[182] *Id.* at *1 (emphasis supplied).
[183] *Id.*

that the guarantor would remain liable for any deficiency **even after foreclosure** of the property and release of the borrower.[184]

In RBC Bank v. Pellerin, the court granted summary judgment to the guarantors because the waiver provisions in their guaranties did not explicitly and expressly waive the confirmation requirements of the confirmation statute.[185] There was no mention in the guaranties of confirmation, foreclosure, anti-deficiency statutes, or release of the borrower.[186] The parties to the guaranties knew how to be explicit, as they did expressly waive other specific statutory protections, namely O.C.G.A. §§ 10-7-20 through 10-7-27. From this language and absence of language, the court concluded that there was no intent to waive the requirements of the confirmation statute.[187] The lender pointed to the general waiver provisions contained in the guaranties in which the guarantors waived "the application of any other defenses available," but the court concluded that such general catch-all provisions did not, under PNC Bank and HWA Properties, constitute a sufficiently clear and explicit waiver of the statutory condition precedent that a non-judicial sale be confirmed before a deficiency action may be brought against guarantors.[188] This finding was consistent with longstanding Georgia precedent that waivers of statutory rights are not favored and that such waivers must be "clearly intended and expressed."[189]

Accordingly, it is crucial that counsel representing a guarantor meticulously analyze the language of the applicable guaranty agreement to determine what protections it does and does not waive. To the extent that the guaranty does not explicitly and

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[184] *Id.* at *2.
[185] Civil Action 2014CV253557 (Superior Court of Fulton County Slip Op. May 2, 2016). A copy of this order is included herein as Exhibit 1.
[186] Id. at p. 4.
[187] Id.
[188] Id.
[189] Id. at pp. 4-5. See, e.g., Nelson v. Mixon, 265 Ga. 441, 443 (1995) (holding that language in settlement agreement incorporated in divorce decree, that "the parties expressly waive their right to petition for any modification of any of the terms of this agreement," was not sufficiently specific to constitute waiver of father's statutory right to seek downward modification of child support obligations, as the language did not specifically refer to the statutory right to seek modification of the support award).

expressly waive the protection of the confirmation statute, there is still room under Georgia law to argue that confirmation must be completed before the lender may pursue any deficiency against the guarantor.

2. 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."[190]

a. 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]."[191] Additionally, all deeds under power shall contain recitals that notice was given in compliance with O.C.G.A. § 44-14-162.2.

b. Advertisement of the sale

The court should set aside a foreclosure sale when the advertisement does not substantially meet the legal requirements.[192] An advertisement is legally insufficient when the irregularity or deficiency contributes to chilling the price on the sale of the property.[193] "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."[194] If the advertisement is not done, the sale is not valid.[195] Defects in advertisement, however, will not bar confirmation unless there is a substantial defect that chilled the bidding.[196]

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[190] O.C.G.A. § 44-14-161; Pope v. Trust Co Bank of Coffee County, 186 Ga. App. 23 (1988).
[191] TWK Partners v. Archer Capital Fund, 302 Ga. App. 443 (2010); Pope, 186 Ga. App. at 23.
[192] Williams v. S. Central Farm Credit, ACA, 215 Ga. App. 740, 742 (1994); Pope, 186 Ga. App. at 23.
[193] Id.
[194] Southeast Timberlands, Inc. v. Security Nat'l Bank, 220 Ga. App. 359, 360 (1996).
[195] Foster v. Farmers and Merchants Bank (In re Foster), 108 B.R. 361 (Bankr. M.D. Ga. 1989)(applying Georgia law).
[196] Id. But see Dan Woodley Communites, Inc. v. Suntrust Bank, 310 Ga. App. 656 (2011) (affirming confirmation action even though bank's foreclosure advertisement

c. 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.[197] (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[198], on the first Tuesday of the month[199], on the steps of the county courthouse in which the property is located.[200] The trial court should deny confirmation if the sale does not occur on the date listed in the notice.[201]

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?[202]), 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 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.

3. Proving and disproving "true 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:

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failed to mention sales of 6 or 7 condo units prior to foreclosure and where it was claimed that such error chilled bidding).

[197] O.C.G.A. § 44-14-162.

[198] O.C.G.A. § 9-13-161(b).

[199] O.C.G.A. § 9-13-161(a).

[200] O.C.G.A. § 9-13-161(a).

[201] Hood Oil Co. v. Moss, 134 Ga. App. 477 (1975).

[202] 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.

> 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.[203] 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."[204] 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.[205] Instead, the court must conduct a "separate analysis of the value independent of the sum bid at the public sale."[206] The lender has the burden of proving that the sale brought the property's true market value.[207] Value must be based on date of the foreclosure sale.[208] The lender cannot discount the sale to reflect a "quick sale" or shortened time period, as it is not reflective of true market value.[209]

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

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[203] Gutherie v. Ford Equip. Leasing Co., 206 Ga. App. 258, 259 (1992).
[204] Id. (citations omitted).
[205] Id.
[206] Id.
[207] Id.
[208] Thompson v. Maslia, 127 Ga. App. 758 (1972)
[209] Gutherie, 206 Ga. App. at 261; Henderson Property Holdings, LLC v. Sea Island Bank, 310 Ga. App. 795 (2011).

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.

4. Confirmation action procedural issues

a. Limited discovery

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."[210] 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."[211]

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

b. 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

[210] 266 Ga. 514 (1996).
[211] Id.

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 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.[212] The trial court subsequently issued a new Rule Nisi rescheduling the confirmation hearing for February 7th.[213] Instead of being personally served with the Rule Nisi for the February 7th hearing date, however, the borrower received the Rule Nisi

[212] 207 Ga. App. 54 (1993).
[213] Id.

via certified mail.[214] 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).[215] The Georgia Court of Appeals reversed the trial court's denial of the borrower's motion for direct verdict.[216] 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.[217] 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."[218]

iv. Exhibits

Exhibits can be anything, besides testimony, that can be presented as evidence in the courtroom.[219] 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

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[214] Id.
[215] Id.
[216] Id.
[217] Id.
[218] Id.
[219] Thomas A. Mauet, Trial Techniques 167-68 (6th ed. 2002).

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 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.

5. The Court's ruling: deny, confirm, or order resale

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.[220] If either element is missing, regularity of the sale or failure to sell for true market value, the court must deny the confirmation.[221] However, if the lender fails to prove that the property sold for fair market value, the court may authorize resale.[222]

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[220] PSI Pneumatic Structures, Inc. v. Citizens & Southern Newnan Bank, 159 Ga. App. 766 (1981); Mathis v. Citizens Dekalb Bank, 157 Ga. App. 693 (1981).
[221] Martin v. Federal Land Bank of Columbia, 173 Ga. App. 142 (1984).
[222] Gutherie, 206 Ga. App. at 259.

The confirmation statute states that the court may only order a resale of the property "for good cause shown."[223] The right is not automatic. "[T]here is no presumption in favor of resale and there is no entitlement to a resale."[224] 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.

The confirmation hearing is limited and the court cannot determine any issues regarding the underlying debt or possible defenses the debtor may have.[225] 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 material, 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.

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[223] O.C.G.A. § 44-14-161(c).

[224] Resolution Trust Corp. v. Morrow Auto Ctr., Ltd., 216 Ga. App. 226, 228 (1995).

[225] 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").