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FINANCIAL INSTITUTION UPDATE

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

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Free Seminars Available

If you and your employees are interested in learning more about a particular legal topic, we would be happy to provide a seminar on such topic at no charge. The seminar can be at your business location or at our firm's location in Albany.

Examples of seminars:

- General Banking Law
- Legal Issues in Agriculture
- Workers' Comp Overview
- Return to Work in Workers' Comp
- Sexual Harassment
- Americans with Disabilities Act
- Family and Medical Leave Act
- Negligent Hiring
- Estate Planning

Payable on Death Accounts Cannot Name Corporations as Third Party Beneficiaries

In a recent Supreme Court of Georgia case, Tuvim v. United Jewish Communities, Inc. (UJC), the beneficiaries of an estate sued several banks to determine whether Payable on Death Certificates of Deposit, trust accounts, and savings bonds were properly payable to UJC or whether the same were invalid as a matter of law and should be included in their mother's estate. Each of these CDs, accounts, and savings bonds listed the UJC as the third party beneficiary.

Georgia law provides that a "payable on death payee" ("P.O.D. payee") must be "a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons." O.C.G.A. 7-1-810(11). Similarly, a beneficiary on a trust account must be a "a person named in a trust account as one for whom a party to the account is named as trustee." O.C.G.A. 7-1-810(2). A "person" is defined as "an individual, trust, general or limited partnership, unincorporated association, or any other form of unincorporated enterprise." O.C.G.A. 7-1-4(26). Therefore, as a matter of law, a corporation is not a proper P.O.D. payee nor proper trust account beneficiary. Hence, UJC was not a proper legal beneficiary of the P.O.D. Certificates of Deposit or trust accounts.

With regard to U.S. Savings bonds, federal regulations make clear that UJC is also not a proper P.O.D. payee on those financial instruments. While a corporation may be an original, registered owner of a Series EE savings bond, a beneficiary on such a bond must be an "individual named in the registration of the security." 31 CFR 351.3. The federal regulation goes on to clarify the definition of individual: "Individual means a natural person. It does not mean an organization, representative or fiduciary."

As a result of the litigation, the assets were included in the individual's estate and did not pass to the corporate entity that the person had named as the beneficiary in life. Therefore, banks should not allow individuals to name corporations as the beneficiary on P.O.D. Certificates of Deposit, trust accounts, or savings bonds.

Was Notice of Default by Bank Sufficient? Were Borrower's Affirmative Defenses Valid?

Integrity Bank filed suit against Ramsey Salahat as guarantor of a commercial promissory note executed in favor of the Bank in the principal amount of \$11,700,000. The trial court granted the Bank's motion for summary judgment concluding that the Bank was entitled to the judgment as a matter of law on its claim to recover the outstanding principal amount of the debt. The guarantor appealed the grant of summary judgment and argued that the bank failed to give the requisite notice and opportunity to cure the default and, therefore, improperly accelerated the note, and that the Bank failed to overcome the guarantor's affirmative defenses.

The Promissory Note provided the following: In the event of default in payment of principal and interest, the note "shall, at the option of the Bank and with notice to the Borrower, at once become due and payable and may be collected forthwith, regardless of the stipulated date of maturity." However, the note further provided "[n]otwithstanding the foregoing..., [borrower] shall not be deemed to be in default of its obligations and representations contained herein ... as to matters which require the payment of money unless and until the undersigned shall have failed to cure such default within ten (10) days after receipt by the undersigned of written notice from the Bank of such default."

On August 24, 2007, the bank sent a letter to the Borrower and the guarantor via certified mail advising them that the note was in default, that the Bank had accelerated the debt, and demanded payment of principal, interest and late fees. The Borrower argued that acceleration was improper because it had not been given notice and opportunity to cure the default. The court held that even if the correspondence made a premature demand for payment of the entire indebtedness, it was nonetheless sufficient written notice of default.

The guarantor raised the affirmative defenses of waiver and estoppel. The Borrower argued that the bank's failure to give notice of strict compliance under O.C.G.A. 13-4-4 prior to acceleration constituted a waiver. The court held that the statute that requires notice of strict compliance with the terms of a promissory note only applies when there is a mutual departure and some evidence that money was paid or received under such departure. In this case, the Borrower did not pay any monies after May, 2007, months prior to the time that the note matured in October, 2007. The court found that the record was devoid of any evidence that the Bank agreed to tolerate nonpayment or intended to forego its enforcement rights under the note. With regard to his estoppel defense, the court found that it failed because the guarantor could not establish detrimental reliance on the Bank's alleged verbal assurances regarding refinancing the indebtedness. The record contained evidence that the guarantor testified that the default resulted because the Borrower ran out of interest reserves to pay the interest payments due under the commercial note, not any representation from bank employees.

This case is extremely favorable to banks. It would not be surprising if the Borrower appealed the decision to the Supreme Court of Georgia. However, for now, the June 30, 2009 opinion is evidence of the willingness of the Georgia Court of Appeals to strictly construe all language in notes and to defeat attempts by Borrowers to raise defenses that have no merit.

If you have questions or concerns on these or other Financial matters, please contact Deena Plaire-Haas at Gardner, Willis, Sweat, & Handelman. Deena's contact information is 229-883-2441-phone, 229-888-8148-fax, and deena.plaire-haas@gwsh-law.com DPH/32-292.901