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FINANCIAL INSTITUTION UPDATE

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

We publish various newsletters regarding other areas of law as well. Please call us for more information.

If you prefer to receive our newsletters electronically, please forward an email informing us to gwsh-law@gwshlaw.com.

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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

Lead Bank Liability for Breach of Participation Agreement Disclosure Obligations

In Sun American Bank v. Fairfield Financial Services, Inc., the United States District Court, Middle District of Georgia, has issued an Order which finds the originating lender, Fairfield Financial Services, Inc., in breach of a participation agreement and ordered the lender to repurchase the interest of a participating bank, Sun American Bank. The case involved a Participation Agreement related to a loan of \$21,840,000 between various lender related to a condominium project in Jacksonville, Florida. Sun American alleged that Fairfield Financial breached the participation agreement by failing to disclose to participants in a timely manner the downgrades in its credit relationship with the borrower and of circumstances that were likely to have a material, adverse effect on the loan. Fairfield had lowered the credit rating of the loan three times, from level 4 [acceptable risk] to level 7 [substandard risk], because of the borrower's declining liquidity. Sun American notified Fairfield that it considered Fairfield's failure to disclose the liquidity issues and the resulting credit rating changes to be a material default of the Participation agreement and demanded that Fairfield repurchase the participation interest. Fairfield refused. Sun American filed a motion for summary judgment asserting that there were no disputed material facts related to Fairfield Financial's failure to meet its disclosure obligations to the participants. The Motion for Summary Judgment was granted and Sun American was awarded judgment in the amount of \$1.9 million, plus interest against Fairfield Financial Services, Inc. The Order granting the Motion for Summary Judgment is being appealed to the 11th Circuit Court of Appeals by Fairfield Financial.

Does Suit on Note Before Foreclosure Prevent Confirmation Requirement?

Branch Banking & Trust Company sued SMI Construction, LLC, Seagraves management, Inc., and Robert B. Seagraves, Individually, on a Promissory Note, which was collateralized by a Security Deed. All Defendants were properly served and failed to answer resulting in a Default Judgment against all Defendants dated March 13, 2008. On May 6, 2008, the bank exercised the power of sale in the security deed and conducted a foreclosure on the property.

On June 17, 2008, the Defendants filed a Motion to Set Aside the Default Judgment on the grounds that the damages remained unliquidated with respect to them as guarantors. Another case has recently held that you cannot obtain a default judgment against guarantors: a hearing must be held to determine the liquidated damages. An Order dated August 11, 2008 set aside the Default Judgment as against the guarantors and set a hearing on damages. Because the Motion to Set Aside the Default was granted as to the guarantors, the guarantors attempted to argue that the foreclosure sale was invalid. The court held that the foreclosure sale was based on a valid judgment at the time of the foreclosure sale and, therefore, the Lender was not required to seek confirmation of the sale before seeking damages against the guarantors. The trial court found that, because the Defendants did not file the Motion to set Aside the Default Judgment until June 17, 2008 [which was 96 days after issuance of the default judgment and 42 days after the foreclosure sale], the Default Judgment was valid on the date of the foreclosure sale and no confirmation was required. This Order from the Superior Court of Gwinnett County is currently on appeal.

True Market Value of Foreclosed Property at Confirmation Hearing

In REL & Associates, LLC v. FDIC as Receiver for Integrity Bank, the Court of Appeals confirmed a trial court's order confirming a foreclosure sale. REL appealed the trial court's Order confirming the sale in the amount of \$2,945,000, challenging the trial court's valuation of the property. Integrity loaned REL \$5,376,800 on 263.08 acres of undeveloped real estate in Rockdale County, Georgia. Upon default, FDIC foreclosed against the property and FDIC was the highest bidder for \$2,945,000. After the confirmation hearing, the court entered an Order finding that the true market value of the property was \$2,630,000, which amount is \$315,000 below the FDIC's bid. REL argued that the property did not bring its true market value. On appeal, the Court of Appeal reviews the trial court's determination of true market value to determine "whether the record contains any evidence to support the findings of the trial court" and not whether the evidence upon which the findings are based is the most accurate. REL argued that the appraiser who testified at the hearing was based on the flawed assumption that the property did not have sewer service. However, at the time of the foreclosure, the property did not have sewer service. The Court of Appeals found the fact that a lift station constructed by the borrower adjacent to the property could have serviced the property in question did not conflict with the appraiser's conclusion that the property was without sewer service on the date of the foreclosure. Therefore, the trial court did not err in determining true market value of the property.

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/42-137-2010