

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

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



GARDNER WILLIS
SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

May 6, 2011

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. Please contact us for more information or email us at gwsh@gwsh-law.com if you prefer to receive our newsletters electronically.

This newsletter was prepared by Deena Plaire-Haas. Deena's practice includes representation of financial institutions and businesses in state and federal courts, including bankruptcy court, drafting contracts and leases, formation of new businesses, general business litigation, and closing complex commercial transactions. She understands the importance of responsiveness, efficiency, anticipation of clients' needs and creative solutions. Deena is currently a member of the Lee County Kiwanis club, Albany Chamber of Commerce, United Way, and First Methodist Church of Albany. She and her husband, Bob, have a daughter, Haley.

Contact Deena at (229)883-2441 or e-mail her at deena.plaire-haas@gwsh-law.com.

DOES TYPOGRAPHICAL ERROR IN GUARANTY DEFEAT GUARANTY WHEN MODIFICATION IS SUBSEQUENTLY ENTERED

In Sowell v. Branch Banking & Trust Company, 307 Ga. App. 816 (2011), the lender sued the borrower and guarantors after default under the terms of a Loan Modification Agreement. The trial court granted summary judgment to the lender and the Court of Appeals affirmed.

The lender loaned \$75,000 to Everyday, Inc. on March 27, 2002. Manuela Evans, president of Everyday, Inc., signed the promissory note on the corporation's behalf and executed a Guaranty Agreement simultaneously therewith. On March 21, 2007, Sowell executed a Guaranty Agreement with the lender, which mistakenly identified Sowell as the borrower, instead of the corporation. The Guaranty did not contain any other references to the original loan or promissory note.

On June 11, 2008, Sowell cured the defect by executing a Modification Agreement which identified Everyday, Inc. as the borrower, included the note number, account number and loan amount from the original note and extended the maturity date of the loan to June 7, 2009. The Modification also provided as follows:

that each Guarantor hereby ratifies and affirms his/her Guaranty Agreement under which each Guarantor unconditionally guaranteed the payment when due of all indebtedness and obligations owing by Borrower to Lender under this Agreement and the Loan Documents, all in accordance with the terms and conditions of the Guaranty Agreement.

Guarantor, Sowell, attempted to argue that her Guaranty violated the Statute of Frauds which has been interpreted to mandate that a Guaranty Agreement identify the debt, the principal debtor, the promisor, and the promisee. Because the original guaranty did not identify the corporate borrower, Sowell argued that it failed to satisfy the Statute of Frauds. Sowell also argued that the Modification was unenforceable because she received no consideration in exchange for execution. However, the Court of Appeals found that the bank gave the corporation and the guarantors additional time to pay off the debt and said forbearance constituted a benefit to Sowell sufficient to constitute consideration. Therefore, the borrower and guarantors were liable to the lender.

DOES AN UNSIGNED APPLICATION OF CREDIT VOID THE ENFORCEABILITY OF THE GUARANTY AGREEMENT

In LaFarge Building Materials, Inc. v. Pratt et al, 307 Ga. App. 767 (2011), a creditor filed a verified complaint against a limited liability company and its principal, who signed a personal guaranty attached to a credit application for building materials. The trial court granted the principal partial summary judgment and the creditor appealed. The Court of Appeals held that the credit application and guarantee could not be read together to ascertain the identity of the principal debtor without violating the Statute of Frauds. Therefore, the creditor was unable to hold the principal liable for the debt of the limited liability company.

The important facts in this case were as follows. The Application for Credit was unsigned. The second page of the Application for Credit includes a separate box containing a "Continuing Guaranty" which was signed by Pratt, the principal. The first page of the Application contains a blank for the name of the Company/Individual, which was completed with the name of the limited liability company. Said Application contains a line which reads "Authorized Signature" which was intended for the signature of the representative of the customer seeking credit to sign. Said line was not signed, but left blank. The Guaranty on the second page does not incorporate the terms of the Application by reference and it does not define Applicant.

Again, the Statute of Frauds requires that a promise to answer for the debt of another be in writing and be signed by the party to be charged. This requirement has been interpreted to mandate further that a guaranty identify the debt, the principal debtor, the promisor, and the promisee. The Court found that even where the intent of the parties is manifestly obvious, where any of these names is omitted from the document, the agreement is not enforceable because it fails to satisfy the Statute of Frauds. The creditor argued that the identity of the principal debtor is obviously the limited liability company when the Application and the Guaranty are read together. However, the Court found that the strict rules of construction applicable in this context provides that nothing may be inferred merely from the presence of another form on the same paper. The Court found that the Application and Guaranty must be treated as two separate writings. The two could have been read in conjunction with the other if (1) the guaranty refers to the other writing, or (2) the two can be deemed contemporaneous writings.

Thereafter, the Court addressed whether the guaranty referred to the other writing. The Court explained that if a guaranty does not incorporate a credit application by reference or use the same material terms, the two cannot be read together. In this case, the Guaranty did not incorporate the terms of the Application by reference. Therefore, the Court held that the Guaranty referred generically to the principal debtor as the "Applicant" and did not incorporate the Application by reference.

Then, the Court addressed whether the guaranty and the application could be deemed contemporaneous writings. The Supreme Court of Georgia has held "that as long as all the necessary terms are contained in signed contemporaneous writings, the statutory requirements and the purpose of the statute of frauds have been met, whether or not the writings are cross referenced." However, if the writings relied upon are not signed, the contemporaneous writing rule does not apply. Because the Application for Credit was not signed in this case, the contemporaneous writing rule could not apply to save the guaranty enforceability.

Make certain that an Application for Credit or Promissory Note is signed by the parties. Otherwise, a signed Guaranty Agreement, even if a part of the same document, may not be enforceable.