P. O. Drawer 71788
2408 Westgate Drive
Albany, Georgia 31708-1788
Website: www.gwsh-law.com

GARDNER WILLIS
SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

October 11, 2006

FINANCIAL INSTITUTION UPDATE

EFFECTS OF NEW BANKRUPTCY LAWS

It has been almost one (1) year since the new bankruptcy law became effective last October, 2005. Nationwide bankruptcy filings are fifty percent (50%) of what filings were previously. Therefore, the new law has resulted in a significant decrease in filings nationwide. Locally, the Middle District of Georgia bankruptcy court has also seen a decrease of approximately fifty percent (50%). For example, the average number of bankruptcy filings in recent months have been around 700. In prior years, the average number of filings per month were approximately 1400. Some predict filings to begin increasing again as lawyers and debtors learn the new system and become more comfortable with filing.

Several of the new provisions have been litigated at the bankruptcy level and below are some of the decisions which may be of interest to creditors:

(1) Pre-filing Counseling: All debtors are required to obtain budget and credit counseling within 180 days preceding the filing of the bankruptcy case. This briefing can be in person, by telephone or over the internet as long as the agency has been approved by the United States Trustees. The courts are strictly construing the credit counseling requirement. A Florida court dismissed an elderly couple who filed prior to receiving the counseling in order to stop an eviction, although they sought the counseling within an hour of filing. However, it may be up to the creditor to move for dismissal if the certificate of credit counseling does not evidence that the counseling was obtained prior to the filing.

(2) Vehicle Cram down: The biggest victory for lenders under the new law is the significant limitation on the ability to cram down the value of purchase money security interest in vehicles purchased within 2 ½ years of filing in a Chapter 13 case. The limitation only applies if the vehicle was "purchased for the debtors' personal use." Therefore, if the car is for the benefit of another family member or for use in a business, the court may find that cram down is authorized. With regard to the interest allowed on the value, most of the judges have ruled that these claims must be paid with interest. However, the courts have ruled that the creditors are not necessarily entitled to their contract rates of interest, but that the interest rates may be modified.

GARDNER WILLIS SWEAT & HANDELMAN, LLP
ATTORNEYS AT LAW

Telephone: 229-883-2441
Facsimile: 229-888-8148
Email: gwsh@gwsh-law.com

NEW LAWS EFFECTING CREDITORS

(1) Clarification Regarding Levy: A new law was passed by the Georgia General Assembly which provides that neither the cash surrender value nor the proceeds of life insurance policies and annuity contracts are subject to garnishment or levy in favor of any creditor of the insured. Nothing in the new code section prevents the insured from assigning said annuities and/or policies as collateral to a creditor.

(2) New Real Estate Form "Notice of Real Estate Settlement": Effective January 1, 2007, we will begin seeing a new form in the real estate records. The new form must identify the Buyer, Seller, a description of the land affected and the following language: "Notice is hereby given of a contract, agreement, and mortgage and commitment between the parties hereto."

After the filing of the notice, any person claiming title to, an interest in, or a lien on the real estate shall be deemed to have acquired the title, interest or lien with knowledge of the anticipated settlement and shall be subject to the deed or mortgage between the parties. The notice of settlement shall be effective for 30 days from the date of fling. Any lien filed during said 30 days shall attach to the premises described in the notice immediately upon the expiration of the 30 days, provided that the premises have not been conveyed and notwithstanding the filing of a subsequent notice of settlement.

(3) Disclosure of Social Security Numbers: A new statute provides that a person, firm, or corporation shall not publicly post or publicly display (so as to make the same available to the general public) social security numbers, require an individual to transmit his or her social security number over the Internet (unless the connection is secure or the number is encrypted), or require use of the social security number to access an internet website (unless other PIN or authentication device is also required). This statute does not apply to applications, forms, or documents sent by mail, e-mail, or facsimile as a part of an application or enrollment process, to establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the individual's social security number.

BANK'S LIEN ON JUDGMENT IN FAVOR OF BORROWER

In a recent Georgia Court of Appeals decision, All Fleet Refinishing, Inc. v. West Georgia National Bank, 2006 Ga. App. Lexis 845 (July 7, 2006), the court held that a bank's lien on a "payment intangible" encompasses a judgment in favor of a Borrower. West Georgia National Bank had a security interest and perfected lien on All Fleet Refinishing, Inc.'s "business accounts receivable, inventory, contract rights and general intangibles now owned and hereafter acquired." The company obtained a judgment on a commercial tort claim in the amount of $300,000. The bank claimed an interest in the proceeds of the judgment. The borrower claimed that the bank could not legally assert a claim in the proceeds of the judgment. The Court of Appeals found that once a tort claim has been reduced to a contractual obligation to pay, the payment becomes a "payment intangible" in which a creditor may assert an interest.

In the same case, the borrower alleged that the bank's efforts to collect the proceeds of the judgment constituted a predicate act for purposes of civil RICO violations. The Court of Appeals held that the Georgia legislature did not intend to proscribe the conduct alleged here – a Bank's attempt to secure payment of a debt through legal means. Therefore, the trial court's ruling that All Fleet failed "to offer evidence of 'a pattern of racketeering' to support a RICO claim" was upheld by the Court of Appeals. This case should be an excellent defense to banks facing civil RICO claims in the future.

32-279.602