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## FINANCIAL INSTITUTION UPDATE

### **When is the Foreclosure Sale Completed?**

In the past, it has been generally known that a foreclosure sale is completed upon acceptance of the bid amount at the foreclosure sale. The authority for this position comes from Pearson v. Fleet Finance Center, Inc., 75 B.R. 254 (N.D. Ga. 1985); McKinney v. South Boston Savings Bank, 156 Ga. App. 114 (1980); In re Gray, 37 B.R. 532 (N.D. Ga. 1984); In re Foster, 37 B.R. 537 (N.D. Ga. 1984). If the borrower files a bankruptcy petition, the petition is effective only if bankruptcy is filed before the high bid is received at the foreclosure sale. *Id.* This understanding of the law has prevailed until recently.

We have learned that a bankruptcy judge in the Middle District of Georgia has held that the foreclosure was not complete in a particular case because the lender had not made a notation in its records of the foreclosure result and had not recorded a Deed Under Power of Sale prior to the filing of the bankruptcy petition. In re Geiger, 340 B.R. 422 (M.D. Ga. 2006), a lender conducted a foreclosure at approximately 10:05 a.m., and the lender was the high bidder. The borrower filed Chapter 13 on the same day at 10:55 a.m. The lender argued that the foreclosure sale was final upon acceptance of the highest bid. The borrower argued that the foreclosure sale was not final because there was no tender of consideration (the

bid amount), no execution of a deed of foreclosure, and no evidence that the lender made an "internal notation on its records" that it was the highest bidder before the borrower filed for bankruptcy relief. The court held that where the bidder and the creditor are the same entity, there must be an objective standard to determine when or if the transfer has occurred. The court further reasoned that where the deeds have not been delivered nor the notes marked paid in full, it is clear that the proceeds of sale have not been transferred. Therefore, the court held that the borrower's interest in the real property was not terminated before the filing of the bankruptcy relief. Thus, the court refused to validate the foreclosure sale, and the property was determined to be a part of the bankruptcy estate.

This case represents a significant change to prior law with regard to foreclosures and bankruptcies filed after the foreclosure has been called out on the courthouse steps. In light of this case, it may be prudent for lenders to actually prepare a Deed Under Power of Sale prior to attending the foreclosure in anticipation that the lender will be the high bidder and have the deed ready to be recorded immediately after the sale has taken place. Additionally, it will be imperative that the foreclosing attorney call the lender to advise of the purchase at the foreclosure sale so that the lender can make an internal note regarding the fact that the lender has purchased the property at the foreclosure sale.

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## **Lender's Failure to Send Notice to Proper Address Bars Recovery of Deficiency**

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In a recent Georgia Court of Appeals case, Consumer Portfolio Services, Inc. v. Rouse, 282 Ga. App. 314 (2006), Consumer Portfolio repossessed a vehicle and sent a certified letter within ten (10) days of repossession to the borrower notifying her of her statutory rights under O.C.G.A. §10-1-36. The letter was sent to a post office box shown on the borrower's checks, as well as on an Extension Agreement that she signed. However, there was no evidence that the borrower ever designated this address as the address where notices should be sent instead of that shown on the original contract. Therefore, the Georgia Court of Appeals held that the lender had not complied with O.C.G.A. §10-1-36, which requires the creditor to send the required notice "to the address of the buyer shown on the contract or later designated by the buyer."

Additionally, in this case, the Court addressed an issue regarding the borrower's demand of a public sale which was sent to the lender via facsimile. The applicable statute, O.C.G.A. §10-1-36, provides that the buyer has the right to demand a public sale and that the buyer shall in writing so advise the seller or holder of his or her election by registered or certified mail or statutory overnight delivery. In this particular case, the borrower sent a facsimile demanding a public sale to the lender. The lender subsequently conducted a private sale. In the case, the lender argued that the borrower's failure to send the request via registered or certified mail, or overnight delivery, prevented the lender from having to comply with the request. The Court found that there was an issue of whether the lender had waived strict compliance with the statute. The notice which was sent to the borrower invited her in several places to contact the lender by telephone, and it appears that she did contact the lender by telephone. She then sent the notice by facsimile to a number that the trial court found was "obviously provided to her" by the lender. Therefore, there was

an issue of waiver. However, the case was decided based upon the fact that the lender failed to send the notice to the address listed on the original contract.

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## **Dispute Between Wachovia Bank and State of Michigan Regarding Preemption**

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In 2003, a dispute began between the State of Michigan's regulators and Wachovia Mortgage, a state chartered institution. Wachovia Mortgage notified Michigan regulators that it had become an operating subsidiary of Wachovia Bank. This change in corporate structure called into question whether or not Wachovia Mortgage had to comply with Michigan law, which required that it submit annual financial reports, pay annual operating fees, and make its files available for inspection.

Wachovia Mortgage argued that because it became a subsidiary of Wachovia Bank, the federal law of the Office of the Controller of Currency controlled and preempted any state law. The federal laws provide that the federal regulators have the responsibility for inspecting the books of national banks and, therefore, that regulatory function lies with the federal government.

The trial court agreed with Wachovia Mortgage in holding that it would not have to comply with the State reporting requirements. The federal court's ruling was upheld at the Court of Appeals, and now the Supreme Court is considering this case.

There are 1,900 national banks in the United States which have assets totaling Six Trillion Dollars. This legal battle could have significant implications for national banks who favor federal regulation and oppose having to also comply with state regulatory frameworks. It will be interesting to see how the Supreme Court rules in this important case of Watters v. Wachovia Bank, N.A.