

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

FINANCIAL INSTITUTION UPDATE

May 22, 2008

GEORGIA'S 2008 FORECLOSURE STATUTE AMENDMENTS

Three Changes with Regard to Foreclosures:

- Effective May 13, 2008.
 1. The security instrument or assignment vesting the secured creditor with title to the security instrument must be filed before the time of sale in the office of the clerk of the superior court of the county in which the real property is located.
 2. With regard to property that is the debtor's dwelling when the security deed is signed, the notice of the initiation of proceedings to exercise a power of sale in the security deed must be given to the debtor by the secured creditor no later than 30 days before the date of the proposed foreclosure. The old statute required 15 days notice. Such notice must be in writing and include the name, address, and telephone number of the individual or entity who has full authority to negotiate, amend and modify all terms of the mortgage with the debtor.
 3. The notice must be given by mailing or delivering to the debtor a copy of the Notice of Sale to be submitted to the publisher.

New Notice Regarding Satisfaction of Security Deed:

- Effective May 13, 2008.
- Adds a notice provision in the procedure to satisfy a mortgage.
- Purpose is to help consumers better understand their rights to have a mortgage satisfied.
- Requires the lender to send notice to the borrower at the borrower's last known address within 60 days of the full payment.
- The notice shall provide: "The indebtedness secured by the above-referenced instrument has been paid in full. Accordingly, pursuant to O.C.G.A. § 44-14-3 (b) (2), Lender shall, within 60 days of the date of the full payment, cause to be furnished to the Clerk of the Superior Court of the county or counties in which the instrument is recorded, a legally sufficient satisfaction or cancellation to authorize and direct the clerk or clerks to cancel the instrument of record. In the event that lender fails to fulfill this obligation in a timely manner, you have a right to demand payment of \$500 in liquidated damages from lender."
- Lenders may include the notice in their letter of congratulations when the note has been paid off.

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AGRICULTURAL INPUT LIENS THAT LENDERS SHOULD BE COGNIZANT

An agricultural supplier may attempt to secure its open account by obtaining a security agreement from a farmer which grants to the agricultural supplier, i.e. UAP, Agriliance, or others, a security interest in crops. If the agricultural supplier properly obtains the security interest by having a note, security agreement, and UCCs recorded, that agricultural supplier could possibly obtain priority over a blanket security interest in the farmer's crops.

This priority lien is what is commonly referred to as the "input lien" or "new value" lien. If the supplier can establish that they gave new value to enable the farmer to produce the crops and that the security interest was given not more than 3 months before the crops became growing crops, it will have priority over an earlier perfected security interest to the extent that the other lien secures a debt which was incurred more than 6 months before the crops were planted. This priority will be effective even if the supplier who gave "new value" had knowledge of the earlier perfected security interest in the crop. O.C.G.A. §11-9-322, Crops Produced With New Value. Hence, the moral of the story is to not rely on a blanket lien on crops for future years.

Key Elements to Establish "Input Lien"

- UCC Filing not more than 3 months before crops growing;
- New Value given to enable production of crops;
- Prior Security Interest Secures Debt incurred more than 6 months before crops planted, i.e. blanket lien.

The UCC input lien statute gives the holders priority over blanket liens which exist more than 6 months before the current crops are planted. Some lenders file a UCC with knowledge that it will be valid for a period of five (5) years assuming to have priority. Said reliance is misplaced. If the lender relies on a prior year filed UCC, the lender needs to be aware that input lien holders may have priority if they can establish all of the necessary elements.

Disputes between competing lien holders would have to be determined in a declaratory action proceeding filed in the Superior Court. Such a proceeding could be complex and protracted.

Alternatively, a Writ of Possession proceeding could be filed to determine the validity of the liens and incidentally determine the priority of the same. Writ of Possession proceedings are generally summary proceedings which are decided in a more expeditious manner.

Either course of action will necessarily be expensive because of the legal fees associated with litigation. Obviously, disputes between such creditors can be amicably resolved by mediation and/or arbitration also.

Preventative Measures:

- Do not rely on preexisting UCCs relating to crops for multiple year.
- File a new UCC each calendar year within 3 months of the planting of the crop.
- Undertake the expense of conducting UCC searches each year to determine perfected security interest positions.