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James C. Marshall

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Commercial Law

by James C. Marshall*

On November 18, 1991, less than one week before the scheduled printing of this Article, a panel of the Georgia Court of Appeals ruled that Georgia's version of the Uniform Commercial Code ("U.C.C.") grants certain judgment creditors priority over later purchase money secured creditors. Given the obvious importance of this development, the editors of Mercer Law Review were kind enough to permit the author to append a hastily prepared discussion of the court's decision to the end of this Article. The reader consequently may wish to begin at the end.

I. Remedies Upon Default

Perhaps the most significant development in Georgia commercial law during the regular survey period, however, was the absence of significant developments concerning the import of the 1990 Georgia Supreme Court decision in *Contestabile v. Business Development Corp.*[1]

A. Continued Doubt Concerning the Consequences of Commercially Unreasonable Nonjudicial Foreclosure Sales of Personal Property

The decision in *Contestabile* received considerable attention in last year's survey,[2] and a lengthy discussion of the decision in this article is not necessary. Suffice it to say that the decision in *Contestabile* reawakened nonjudicial foreclosure issues that Georgia commercial lawyers thought the court's 1987 decision in *Emmons v. Burkett*[3] had laid to rest. In *Emmons* the court silently overruled its decisions in two earlier opinions[4] and concluded that a creditor attempting to collect a deficiency

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* Professor of Law, Walter F. George School of Law, Mercer University. Princeton University (A.B., 1972); Boston University (J.D., 1977). Member, State Bar of Georgia.

1. 259 Ga. 783, 387 S.E.2d 137 (1990).
2. James C. Marshall, *Commercial Law*, 42 Mercer L. Rev. 107, 107-14 (1990).
3. 256 Ga. 855, 353 S.E.2d 908 (1987).
4. United States/On Behalf of Farmers Home Admin. v. Kennedy, 256 Ga. 345, 348 S.E.2d 636 (1986); Reeves v. Habersham Bank, 254 Ga. 615, 331 S.E.2d 589 (1985).

following a nonjudicial foreclosure sale of personal property under the U.C.C. must satisfy the rebuttable-presumption rule.[5] The court in *Emmons* described the rebuttable-presumption rule as follows:

> Under the rebuttable-presumption rule, if a creditor fails to give notice or conducts an unreasonable sale, the presumption is raised that the value of the collateral is equal to the indebtedness. To overcome this presumption, the creditor must present evidence of the fair and reasonable value of the collateral and the evidence must show that such value was less than the debt. If the creditor rebuts the presumption, he may maintain an action against the debtor or guarantor for any deficiency. Any loss suffered by the debtor as a consequence of the failure to give notice or to conduct a commercially reasonable sale is recoverable under [O.C.G.A.] § 11-9-507 and may be set off against the deficiency.[6]

Immediately prior to the decision in *Emmons*, the creditor who conducted a commercially unreasonable foreclosure sale or who failed to give proper notice prior to sale lost the right to collect any deficiency, even from additional collateral.[7] The court in *Emmons* specifically disapproved of such absolute forfeitures, noting that the U.C.C. itself rejects the imposition of penalties for violation of its provisions.[8]

Some commercial lawyers read the court's decision in *Constestabile* to reinstate the rule of forfeiture disapproved of in *Emmons*. At least two sentences from the court's decision in *Contestabile* clearly support such a reading:

> If the sale is determined to be commercially unreasonable, the creditor loses not merely the right to recover a personal judgment against the debtor, but also the right to recover the deficiency. In other words, if the creditor conducts a commercially unreasonable sale, he or she is barred from proceeding against other collateral pledged for the debt and/or from seeking a deficiency judgment against the debtor or the guarantor.[9]

This language gives the careful reader substantial doubt about the continued vitality of the rule of *Emmons*. Indeed, since the decision in *Contestabile*, cautious lenders have considered different strategies that might lessen or avoid the potential impact of the absolute forfeiture rule.[10]

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5. 256 Ga. at 857, 353 S.E.2d at 910.
6. *Id.* (citations omitted).
7. *See supra* note 4 and accompanying text.
8. 256 Ga. at 858, 353 S.E.2d at 911.
9. 259 Ga. 783, 783-84, 387 S.E.2d 137 (1990) (citations omitted).
10. The obvious first step is to redouble efforts to assure that nonjudicial, personal property foreclosure sales are conducted with the appropriate notice and in a commercially reasonable fashion, a step that the absolute forfeiture rule was designed to encourage. Second, both predefault and postdefault waivers might be sought from debtors. (Of course, the effectiveness of predefault waivers is severely limited by O.C.G.A. section 11-9-501(3) (1982), but

The survey period decision of the court of appeals in *Ervin v. Arnold*[11] and a superior court decision following remand in *Contestabile*[12] itself illustrate the uncertainty caused by the decision in *Contestabile*.

In *Ervin* the court of appeals does not cite *Contestabile*. Rather, the court in *Ervin* relied solely upon *Emmons* as controlling authority.[13] The secured party in *Ervin* evidently was inexperienced with foreclosure proceedings under the U.C.C., an innocence given inappropriate emphasis in the court of appeals decision. After taking possession of the collateral, a tractor-trailer and front end loader, the secured party obtained bids from four different individuals with experience concerning the value of such equipment. She then sold the equipment to the highest bidder and sought an in personam judgment for the deficiency.[14]

The debtor in *Ervin* contested the secured party's right to a deficiency judgment on two grounds: (1) she did not give him the notice required under the Motor Vehicle Sales Finance Act[15] within ten days of the time of repossession, and (2) she did not conduct the foreclosure sale in a commercially reasonable manner. Trial before a jury evidently revealed that the secured party had not provided notice within ten days of repossession. In addition, the secured party's only evidence establishing the value of the collateral was her own testimony concerning the bids received, the condition of the collateral, the expenses she incurred preparing it for sale, her desire to get top dollar, and her understanding of the expertise of the four bidders.[16]

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such waivers can be quite helpful in some settings, particularly commercial. See, for example, Ford Motor Credit Corp. v. Solway, 825 F.2d 1213 (7th Cir. 1987)). Third, the lesser threat associated with nonjudicial foreclosure sales of real property suggests that a creditor secured by both real and personal property should first proceed nonjudicially against the real property despite the fact that this choice is usually to the overall detriment of the debtor. Fourth, creditors concerned that individual sales of collateral might lead to absolute forfeiture of the right to future sales of additional collateral could address this concern by seizing and selling all collateral in a brief time span and selling first those items least likely to give rise to a commercial reasonableness dispute. Certainly, creditors would be well advised to seize more collateral than might otherwise be seized. For that matter, creditors concerned by the threat of absolute forfeiture might opt for judicial foreclosure, rather than nonjudicial, despite the fact that the judicial foreclosure process is more costly and less likely to obtain a commercially reasonable price. Finally, the absolute forfeiture rule might encourage the use of multiple, cross collateralized notes along with the real property foreclosure strategy suggested by the 1977 court of appeals decision in Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622 (1977).

11. 197 Ga. App. 841, 399 S.E.2d 548 (1990).

12. Contestible v. Business Dev. Corp., No. D-62162 (Super. Ct. Cobb County, Ga. Feb. 7, 1990).

13. 197 Ga. App. at 842, 399 S.E.2d at 549.

14. *Id.*

15. O.C.G.A. §§ 10-1-30 to -41 (1989).

16. 197 Ga. App. at 843, 399 S.E.2d at 549.

In a seven to two decision, the court of appeals reversed the trial court's grant of a directed verdict in favor of the debtor.[17] The court concluded that this secured party did not fit the definition of those obligated to send notice within ten days of repossession under the Motor Vehicle Sales Finance Act because she was not "engaged in the business of selling motor vehicles to retail buyers in retail installment transactions."[18] The court also concluded that the secured party provided sufficient notice under the requirements of the U.C.C. and that the case should be remanded for further proceedings with regard to the question of commercial reasonableness.[19] The court ruled that, assuming the sale was commercially unreasonable, the debtor had introduced sufficient evidence to reach a jury despite the *Emmons* presumption that the value of the collateral equalled the debt.[20] The court stated:

> Although bids cannot be *equated* with considered opinions as to value, they generally do reflect the bidder's opinion as to the value of the item, by indicating that the bidder believes the item is worth *at least* that amount, and thus are indicative of at least a general range of value. Appellant testified that she sought bids from people who handled this sort of equipment all the time, and relied on their bids to bring a fair price. She testified she did everything she could to get the most money for the equipment.
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> Appellant is not a commercial seller or lender, but an individual who herself obtained a bank loan against her personal savings in order to help out appellee, and she made extraordinary efforts to obtain the best price for the equipment after appellee abandoned it and refused to disclose its location. We find appellant's evidence was sufficient to overcome a presumption that the value of the collateral was equal to the amount of the debt, and . . . the issue of the deficiency balance should have gone to the jury.[21]

This quote suggests the *Ervin* majority has confused evidence relevant on the issue of commercial reasonableness with evidence relevant to establishing the value of the collateral. An unsophisticated or otherwise disadvantaged secured party might well be held to a lesser standard concerning the commercial reasonableness of her foreclosure sale efforts since commercial reasonableness depends, in part, upon the circumstances of the foreclosing seller.[22] What justifies the imposition of a lesser evidentiary

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17. *Id.*, 399 S.E.2d at 550.
18. *Id.* at 842, 399 S.E.2d at 549.
19. *Id.*, 399 S.E.2d at 549-50.
20. *Id.*, 399 S.E.2d at 550.
21. *Id.* at 843, 399 S.E.2d at 550.
22. Indeed, assuming the two-step process contemplated by *Emmons* is followed, a fact finder might conclude that the sympathetic, unsophisticated secured party in *Ervin* con-

standard concerning proof of value, however, once the unsophisticated creditor brings the matter to court for the collection of a deficiency, presumably through counsel? Surely the *Ervin* majority is not condoning unsophisticated representation of unsophisticated clients.

The dissent in *Ervin* seems to have the better end of it with its conclusion that bids are not competent evidence of value.[23] The majority itself notes that the bid merely gives the bidder's opinion that the collateral is worth *at least* a certain dollar amount.[24] A ten dollar bid for the Empire State Building is not probative of that property's fair value, although it does state the bidder's opinion that the Empire State Building is worth at least ten dollars. Furthermore, the secured party's testimony that she relied upon bidders with greater expertise and sophistication than she possessed might suggest to a fact finder that the bids were lower than they might have been if the secured party were more worldly wise.[25] Nothing in the evidence summarized by the court of appeals suggested that the four bidders were particularly altruistic or that they were interested in paying top dollar for the collateral.[26]

Difficult cases make bad law and sympathetic appellants can also. Perhaps the main point to be drawn from the decision in *Ervin* is that the court of appeals relied solely upon *Emmons* as the law governing the consequences of conducting a nonjudicial foreclosure sale of personal property in a commercially unreasonable fashion. At least one other post-*Contestabile* decision has done the same. In *Matter of Johnson*,[27] a bankruptcy court ruled that the consequence of failing to act in a commercially reasonable manner in conducting a foreclosure sale under the U.C.C. is not loss of the right to a deficiency, but rather, the prospect of damages.[28]

Although neither the court of appeals in *Ervin* nor the bankruptcy court in *Johnson* cited or discussed *Contestabile*, the superior court that

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ducted a commercially reasonable foreclosure sale even though the finder also believed that the price obtained, $25,000, was less than the value of the collateral. For example, the finder might believe that a more sophisticated creditor would have obtained $35,000 for this collateral and yet still conclude that the sale underlying the dispute in *Ervin* was commercially reasonable in light of all of the circumstances, including the secured party's lack of sophistication and sincere efforts. Judgment would then be entered for the entire deficiency. Alternatively, the finder might conclude that the foreclosure was not commercially reasonable, in which case, the amount of the deficiency judgment should be reduced by a $10,000 setoff.

23. 197 Ga. App. at 845, 399 S.E.2d at 551 (McMurray, J., dissenting).

24. *Id.* at 843, 399 S.E.2d at 550.

25. *Id.*

26. *Id.*

27. 116 Bankr. 863 (Bankr. M.D. Ga. 1990).

28. *Id.* at 866.

heard the underlying case on remand from the Georgia Supreme Court could not overlook the decision.

The appellant in *Contestabile* successfully challenged a superior court ruling that injunctive relief was unavailable to stop a nonjudicial foreclosure sale of real property. The superior court, probably following *Emmons*, believed that the alleged impropriety of the prior foreclosure was irrelevant. No injunction issued and, evidently, no stay was granted pending appeal since the real property was sold before the Georgia Supreme Court's reversal of the superior court.[29] Upon remand, the superior court dismissed the equitable action as moot.[30]

This dismissal upon remand, however, did not end the dispute between the parties. A deficiency remained even after sale of the real property, and the lender brought suit in another superior court to collect this deficiency.[31] The debtor denied liability and counterclaimed for wrongful foreclosure of the real property, no doubt contending that the decision in *Contestabile* had reintroduced the pre-*Emmons* rule that the creditor who conducted a commercially unreasonable nonjudicial foreclosure of personal property had no right to conduct additional foreclosures or to obtain an in personam deficiency judgment.[32] Each side requested conflicting jury instructions on this issue and, by pretrial order dated February 14, 1991, the superior court adopted the debtor's view.[33]

There have been no further proceedings before the superior court as of this writing. On September 6, 1991 the Georgia Supreme Court issued an order granting the lender's request for a writ of certiorari to review the superior court's pretrial order.[34] It thus appears that the Georgia Supreme Court will revisit issues that, until *Contestabile*, most Georgia commercial lawyers thought *Emmons* had resolved.

The decision in *Emmons* has been criticized for introducing a rule that does little or nothing to curb creditor abuse, particularly of consumer

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29. 259 Ga. 783, 783-84, 387 S.E.2d 137, 138 (1990).

30. Contestible v. Business Dev. Corp., No. D-62162 (Super. Ct. Cobb County, Ga. Feb. 7, 1990).

31. Business Dev. Corp. v. Contestabile, No. 89-11456-18 (Super. Ct. Cobb County, Ga. Feb. 14, 1991).

32. *Id.*

33. *Id.* The author here relies upon the report he has received from one of the attorneys involved in the litigation. The superior court's pretrial order does not reflect the trial court's belief, stated to counsel, that *Emmons* and *Contestabile* are irreconcilable. That order provided as follows: "It is hereby ordered that the court shall rely on the case of *Contestabile v. Business Development Corp.*, 259 Ga. 793 (1990) during the trial of the above-styled action and the legal principles set forth therein shall be applied as the law of the instant action."

34. Business Dev. Corp. v. Contestabile, cert. no. S91C1062 (Super. Ct. Ga. Sept. 6, 1991).

debtors.[35] However, many tools currently exist to deal with creditor abuse if the Georgia courts are willing to employ them in an appropriate fashion.[36] Perhaps the Georgia Supreme Court will give additional guidance

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35. *See* O.C.G.A. § 11-9-504(3) (1982), which implicitly bars the creditor from purchasing at its own private sale in recognition of the fact that abuse is most likely if the foreclosing creditor or a confederate is the purchaser. Absent such circumstances, it is fair to assume that the foreclosing creditor is interested in maximizing its return from the foreclosure. A creditor's failure to maximize the value of its collateral is foolish, particularly given the expenses associated with the collection of deficiencies and the likelihood that many debtors are judgment proof. Absent unusual circumstances, courts should assume that the commonly accepted foreclosure process is commercially reasonable even though it typically results in sale prices that are far less than the retail value of the collateral. For example, *see* McMillan v. Bank South, 188 Ga. App. 355, 373 S.E.2d 61 (1988).

If the foreclosing creditor or a confederate is the purchaser at a foreclosure sale, the creditor's motives may not be so straight forward. If the creditor does not risk forfeiture of the right to collect a deficiency from additional collateral or in personam and if no other restraint is imposed, the foreclosing creditor is financially motivated to conduct a commercially unreasonable sale for the purpose of purchasing the collateral at far less than fair value. Assuming a debt of $100, why shouldn't the creditor purchase a $50 item of collateral at its foreclosure sale for $10? This tactic potentially transforms the $100 debt into a $140 value, $50 due to the purchased asset and $90 due to the deficiency. Such numbers provide a substantial temptation for abuse, particularly if there is no downside risk. If the creditor risks no penalty for pursuing such tactics, then the worst result is that the creditor is left in the same position it was before the attempted abuse. The $100 debt retains its value, $50 due to the asset foreclosed upon and $50 for the collectible ($90 minus a $40 setoff) deficiency.

36. O.C.G.A. § 11-9-507 (1982) gives the debtor a cause of action for "any loss caused by" the creditor's violation of O.C.G.A. § 11-9-504(3) (1982). If this language is interpreted to merely place the debtor in the position the debtor would have been had the sale been conducted in a commercially reasonable fashion, then this code section does nothing to alter the temptations for abuse discussed in the immediately preceeding footnote. Of course, the prospect that the creditor will incur attorney fees beyond those needed to collect a deficiency following a commercially reasonable foreclosure acts as some deterrent to creditor abuse. The prospect of paying the debtor's attorney fees, however, would be a greater deterrent, but thus far the jurisdictions considering this issue have concluded that attorney fees cannot be collected under U.C.C. § 9-507 despite the "any loss" language of that section. See, for example, First City Bank v. Guex, 677 S.W.2d 25 (Tex. 1984).

Georgia law currently provides for the collection of attorney fees in the case of intentional torts as additional damages for aggravating circumstances. O.C.G.A. § 51-12-5 (1982). This code section might be used by Georgia courts to control debtor abuse in conjunction with a conversion, fraud, or wrongful foreclosure theory. O.C.G.A. § 13-6-11 (1982) offers another possible avenue to the collection of attorney fees and costs of litigation if the court is willing to conclude that a creditor acted in bad faith during the collection process. Finally, O.C.G.A. § 9-15-14 (Supp. 1991) permits the court to award attorney fees and costs for the assertion of frivolous claims and defenses. A court might characterize as frivolous the pleading of a creditor attempting to collect a grossly excessive deficiency following a commercially unreasonable foreclosure sale that brings a grossly inadequate price.

Of course, merely the prospect of paying the debtor's attorney fees may not be deemed sufficient to curb some creditor abuse. Intentional and gross violations of the rights of debtors under O.C.G.A. § 11-9-504 (1982) might be deemed fraudulent or otherwise tortious,

concerning creditor abuse in its second *Contestabile* decision. The legitimate concern about such abuse, however, should not persuade the court to return to the pre-*Emmons* era in which creditor mistakes during the nonjudicial foreclosure process could result in a severe penalty wholly unrelated to the damages (if any) suffered by the debtor as a result of the mistake.

B. Proof Concerning Value and Commercial Reasonableness of Nonjudicial Foreclosures of Personal Property

Besides the previously discussed decision in *Ervin v. Arnold*,[37] several other survey period developments concerning proof of value and the commercial reasonableness of nonjudicial foreclosure sales of personal property are noteworthy. The court of appeals opinion in *Borden v. Pope Jeep Eagle, Inc.*[38] covers many issues, but of primary interest is the court's conclusion that the time for determining value of collateral is the time the creditor takes possession, not the time of sale.[39] In *Borden* the creditor did not sell an automobile for approximately one year after repossession, evidently because the debtor alleged wrongful repossession and filed suit.[40] The creditor conducted the sale only after successfully defending the debtor's suit and prevailing on the counterclaim for judgment on the underlying debt.[41]

Concluding there was no proof of the value of the automobile at the time of repossession or of the reasonableness of the creditor's delay in conducting its foreclosure sale, the court of appeals reversed the lower court judgment in favor of the creditor on its counterclaim.[42] The court did note that nothing prohibited a creditor from proceeding to judgment on its underlying debt rather than pursuing nonjudicial remedies.[43] The court stated, however, that a creditor "cannot deprive the debtor of possession of the collateral for an unreasonable length of time and not reduce the debt owed by the reasonable value of the collateral at the time of repossession."[44] Citing pre-*Emmons* authority involving suits for deficiencies following nonjudicial foreclosure sales, the court ruled that the credi-

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entitling the debtor to recover punitive damages despite Georgia's general limitation upon the collection of punitive damages "in cases arising on contracts." O.C.G.A. § 13-6-10 (1982).

37. 197 Ga. App. 841, 399 S.E.2d 548 (1990) discussed *supra* notes 11-26 and accompanying text.

38. 200 Ga. App. 176, 407 S.E.2d 128 (1991).

39. *Id.* at 181, 407 S.E.2d at 133.

40. *Id.*

41. *Id.*

42. *Id.*, 407 S.E.2d at 133-34.

43. *Id.*, 407 S.E.2d at 133.

44. *Id.*

tor's burden of proof with regard to its counterclaim included an obligation to prove that the value of the collateral did not equal the debt at the time of repossession.[45]

None of the cases cited by the court in *Borden* involved substantial disputes concerning the time for measuring value.[46] Each case was decided prior to the decision in *Emmons*. Pre-*Emmons*,[47] the time for determining value was of lesser importance than it is in the *Emmons* era. Pre-*Emmons*, if the deficiency was collectible at all, the deficiency was usually the difference between the outstanding debt and the foreclosure sale price. Under *Emmons*, however, the collectible deficiency might often equal the difference between the outstanding balance and the "value" of the collateral, rather than the sale price.[48] Consequently, the time for determining value has obtained heightened importance in the *Emmons* era, and courts should not feel constrained by casual language on this subject in pre-*Emmons* cases in which the time for determining value was unlikely to be the focus of significant adversarial efforts.

If *Emmons* remains good law after *Contestabile*, then the court of appeals timing discussion in *Borden* is surely subject to criticism. Under *Emmons* a creditor's unreasonable delay in selling repossessed property entitles the debtor to damages or a set off based upon the results that should have been obtained if the creditor had acted in a commercially reasonable fashion.[49] Under *Emmons* the commercially reasonable date of sale would rarely be the date of repossession.[50] Rather, the court should ask the finder of fact to determine what the foreclosure sale would have brought if the creditor had conducted the sale in a commercially reasonable fashion under all of the circumstances, including time. Does it make any sense to pick the date of repossession as the date for determining value in a case like *Borden* in which the Motor Vehicle Sales Finance Act[51] surely applies and requires at least a ten day delay before sale if the

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45. *Id.*

46. *See* Richard v. Fulton Nat'l Bank, 158 Ga. App. 595, 281 S.E.2d 338 (1981); Farmers Bank v. Hubbard, 247 Ga. 431, 276 S.E.2d 622 (1981).

47. This term refers to that period in Georgia law when the creditor lost the right to a deficiency if it conducted a nonjudicial foreclosure sale of personal property in a commercially unreasonable fashion or without first giving appropriate notice.

48. Emmons v. Burkett, 256 Ga. 855, 857, 353 S.E.2d 908, 910 (1987).

49. *Id.* at 857, 353 S.E.2d at 910.

50. *Id. See* O.C.G.A. § 11-9-504(3) (1982). This code section requires that the debtor be given notice before any foreclosure sale unless the "collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market." *Id.* This notice requirement seems inconsistent with the notion that foreclosure sales will occur upon the date of repossession.

51. O.C.G.A. §§ 10-1-30 to -41 (1989).

creditor wishes to obtain a deficiency judgment?[52] Doesn't *Emmons* contemplate that the debtor bears the risk of price declines between repossession and foreclosure so long as the creditor does not delay unreasonably given all of the circumstances? And suppose, as is rarely the case, the price increases?

Despite *Borden's* questionable analysis, Georgia commercial lawyers should certainly heed the timing view expressed when preparing their proof in litigation involving deficiencies following nonjudicial foreclosures of personal property. One other survey period decision was instructive on the subject of proof in this setting as well. In *In re Cherry*,[53] the debtor in bankruptcy objected to the creditor's proof of claim on the grounds that the motor vehicle foreclosure conducted by the creditor was commercially unreasonable.[54] Had the debtor lodged this same objection in a state court proceeding brought by the creditor to obtain a deficiency judgment, the creditor would have had the burden of proof on the issue of commercial reasonableness. The court in *Cherry* makes clear in its decision that this burden remains upon the creditor in the bankruptcy setting, but unlike the state process, the debtor has the initial burden of producing sufficient evidence to overcome the prima facie evidentiary impact of the creditor's proof of claim. Assuming the debtor produces sufficient evidence to rebut the prima facie case established by the filing of a proof of claim, the creditor then has the burden of going forward and proving entitlement to deficiency.[55] Since the debtor in *Cherry* "produced no evidence whatsoever"[56] on the issue of commercial reasonableness, the court overruled the debtor's objection to the creditor's proof of claim.[57]

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52. *Id.* § 10-1-36. Unless the creditor governed by the Motor Vehicle Sales Finance Act is willing to forgo collection of any deficiency, the creditor theoretically and practically cannot sell a repossessed motor vehicle on the date of repossession. *Id.* O.C.G.A. § 10-1-36 requires that the creditor send a written notice to the debtor within ten days after repossessing the motor vehicle. If the creditor informs the debtor in this notice that a private foreclosure sale will be held, the creditor must delay the sale for a minimum of ten days within which time the debtor may demand a public sale. *Id.* If, as is virtually never the case, the letter informs the debtor that a public sale will be held, the procedures required for a public sale preclude its immediate occurrence. In any event, the required letter must inform the debtor of a right to redeem. *Id.* To be meaningful, such a notice could not inform the debtor that redemption must occur on the date of repossession. *Id.*

53. 116 Bankr. 315 (Bankr. M.D. Ga. 1990).

54. *Id.* at 315.

55. *Id.* at 316-17.

56. *Id.* at 317.

57. *Id.* On the question of the burden of proof under Georgia law regarding commercial reasonableness, see Granite Equip. Leasing Corp. v. Marine Dev. Corp., 139 Ga. App. 778, 230 S.E.2d 43 (1976).

C. *Finality of Foreclosure Sales*

And speaking of bankruptcy, because of the Fifth Circuit decision in *Federal Deposit Insurance Corp. v. Dye*,[58] some doubt existed concerning whether the filing of a bankruptcy petition could undo a foreclosure sale of real property. In a 1984 bankruptcy court decision, *In re Gray*,[59] the court concluded that the Fifth Circuit decision in *Dye* did not permit a foreclosure sale to be undone regardless of the payment of consideration and transfer of the foreclosure deed.[60] Another bankruptcy court during the survey period reaffirmed the conclusion of the court in *Gray*. In *Matter of Morgan*,[61] the court discussed *Dye* and concluded that the foreclosure sale could not be undone by the filing of a bankruptcy petition.[62] In light of the decisions in *Dye* and *Morgan*, debtor's counsel should view the foreclosure sale, and not the transfer of consideration and the foreclosure deed, as the deadline for filing a petition in bankruptcy.

D. *Foreclosure of Multiple Notes and Deeds to Secure Debt*

Creditors secured by Georgia real property typically hold deeds to secure debt that include a power of nonjudicial sale upon the debtor's default.[63] A creditor cannot obtain a deficiency judgment following a sale under power unless it initiates a confirmation proceeding in the local superior court within thirty days after the sale.[64] In this confirmation proceeding, the petitioning creditor has the burden of proving "that the property so sold brought its true market value."[65] Under the courts' recent definition of "true market value," obtaining confirmation of a sale under power can be difficult unless the creditor reconciles itself to recovering less than the full debt.[66]

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58. 642 F.2d 837 (5th Cir. Unit B 1981). This decision is binding in the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981).

59. 37 Bankr. 532 (Bankr. N.D. Ga. 1984).

60. *Id.* at 534.

61. 115 Bankr. 399 (Bankr. M.D. Ga. 1990).

62. *Id.* at 402.

63. O.C.G.A. §§ 44-14-161 to -165 (1982).

64. *Id.* § 44-14-161(a).

65. *Id.* § 44-14-161(b). Concerning the burden of proof, see Wheeler v. Coastal Bank, 182 Ga. App. 112, 354 S.E.2d 694 (1987); Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238 (1972).

66. *See Wheeler*, 182 Ga. App. at 112, 354 S.E.2d at 694; First Nat'l Bank v. Childress-Ross Properties, Inc., 189 Ga. App. 765, 377 S.E.2d 533 (1989). These decisions essentially require that the creditor obtain retail value in a foreclosure process that almost never will produce a bid above wholesale unless the creditor or a confederate is the bidder. Of course, if the creditor bids the retail price, the ultimate recovery of the creditor on the debt is reduced by the expenses incurred by the creditor in disposing of the property so purchased. In the author's view, *Childress* and *Wheeler* are wrongly decided and should be overruled.

These and other problems have persuaded many creditors collateralized by real property arising from single or multiple transactions with the same debtor to use multiple cross collateralized notes and, if appropriate, multiple security deeds to minimize the risks associated with the confirmation process. According to the 1977 court of appeals decision in *Vaughn & Co. v. Saul*,[67] failure to obtain confirmation of the sale under power pursuant to one deed does not jeopardize the right to collect any deficiency upon notes that were not sought to be satisfied by the unconfirmed foreclosure.[68] The survey period decision in *CKC, Inc. v. Free*[69] is instructive concerning the limits and proper execution of the strategy suggested by the decision in *Vaughn*.

In *Free* the debtor executed two purchase money notes (herein "note A" and "note B"), each secured by a deed to secure debt on the purchased property.[70] Following default, the creditors accelerated note A and notified the debtor that they intended to begin foreclosure proceedings. Then, probably mindful of the *Vaughn* strategy, the creditors brought suit on note A and advertised the property for nonjudicial foreclosure to satisfy only note B. The creditors themselves were the high bidders at this foreclosure sale, evidently bidding an amount equal to or less than the payoff due on note B. Thereafter, in an unsuccessful attempt to confirm this foreclosure sale, the creditors listed the indebtedness collateralized by the deed to secure debt as evidenced by both notes. The debtor then moved for summary judgment in the suit on note A, arguing that the creditors' failure to obtain confirmation required that judgment be entered against them.[71]

The court of appeals agreed. According to the court, the creditors, in their suit on note A, were merely attempting to obtain a deficiency judgment with regard to the entire indebtedness.[72] The court stated:

> No deficiency judgment is involved when a creditor seeks to enforce a judgment obtained prior to instituting foreclosure. Further, recovery on a separate, subsequent and different note for a different debt and for which separate property was conveyed is not recovery of a deficiency

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See James C. Marshall, *Commercial Law*, 41 MERCER L. REV. 75, 81-85 (1988); James C. Marshall, *Commercial Law*, 39 MERCER L. REV. 83, 92-95 (1987).

67. 143 Ga. App. 74, 237 S.E.2d 622 (1977).

68. *Id.* at 75-77, 237 S.E.2d at 625-26.

69. 196 Ga. App. 280, 395 S.E.2d 666 (1990). For another survey period decision citing *Vaughn* and involving the consequences of failure to confirm multiple notes, see Regan v. United States Small Business Admin., 926 F.2d 1078 (1991). The court in *Regan* was not troubled by the failure to confirm. *Id.* at 1082.

70. 196 Ga. App. at 280-81, 395 S.E.2d at 666.

71. *Id.*, 395 S.E.2d at 667.

72. *Id.* at 282-83, 395 S.E.2d at 668.

> judgment on a previous note that contained a dragnet clause. An unsecured note that is part of the same transaction involving a secured note may be sued upon despite a failure to obtain confirmation of the foreclosure for the secured note.[73]

These principles did not apply in the present case, according to the court of appeals, because the parties executed both notes as part of the same transaction, "secured by the same deed and the same property."[74] Although this alone may have persuaded the court of appeals, the court also noted that the creditors' notice of acceleration for note A mentioned foreclosure and the creditors' confirmation petition listed the indebtedness as secured by both notes.[75]

The result in *Free* might well have been the same regardless of the degree of care taken in executing the *Vaughn* strategy during the foreclosure process. The court in *Free* appears to focus upon the substance of the transaction and the indebtedness rather than its form. Nevertheless, from a creditor's perspective, the transaction structure used in *Free* is tempting. However, such a structure is not free of downside risk.[76]

II. Financing and Continuation Statements

The survey period produced several decisions of note concerning the necessity for and sufficiency of financing and continuation statements.

A. *Attorney Fees*

In *In re Diamond Manufacturing Co.*,[77] the United States District Court for the Southern District of Georgia ruled that an attorney's lien

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73. *Id.* at 282, 395 S.E.2d at 668 (citations omitted).

74. *Id.*

75. *Id.*

76. Some risk is suggested by the possibility of excess proceeds from the foreclosure sale of Note B. Surely, to be effective, the *Vaughn* strategy requires that the creditor waive any dragnet clause based claim to an equal priority lien in the proceeds. Likewise, the creditor using a *Vaughn* strategy would be ill advised to state in its foreclosure advertisement that excess proceeds would be applied to any other indebtedness between the parties, and some authority suggests that such a statement may be required before the foreclosing creditor could set off the proceeds against the indebtedness on Note A. *See* G. Pindar, Georgia Real Estate Practice and Procedure § 21-88 (3d ed. 1986). In any event, absent priority rights under the dragnet clause, would not the set off right be subordinate to any other liens that might have attached to the property between the date of the deed and the date of the foreclosure? Georgia law provides that such liens follow the proceeds. *Id.* The creditor might attempt to circumvent this priority problem by taking and perfecting a U.C.C. security interest in general intangibles and specifically in any surplus from any foreclosure sales. The U.C.C. lien in the surplus, however, might well be deemed subordinate to prior liens in the real property foreclosed upon to create that surplus.

77. 123 Bankr. 125 (S.D. Ga. 1990).

pursuant to Official Code of Georgia Annotated ("O.C.G.A.") section 15-19-14 in funds recovered on behalf of a client is perfected without the necessity of filing a financing statement.[78] The court declined to follow a contrary 1981 bankruptcy court decision, *In re Burnham*,[79] from the Northern District of Georgia.[80] Despite the decision in *Diamond*, attorneys still are well advised to perfect their right in fee recoveries by obtaining an appropriate security agreement and filing an appropriate financing statement. Many standard fee agreements would qualify as a security agreement, but not a financing statement.

B. Description of Farm Equipment

In Georgia mechanic's liens are usually subordinate to earlier perfected security interests in personal property.[81] This may not be so, however, in some situations involving farm equipment. In 1985, reacting to the farm crisis, the Georgia Legislature amended U.C.C. section 9-310[82] to provide that a "mechanics' lien on farm equipment and machinery arising on or after July 1, 1985, shall have priority"[83] over earlier perfected security interests:

> unless the financing statement describes the particular piece of farm machinery or equipment to which the perfected security interest applies. Such description may include the make, model, and serial number of the piece of farm machinery or equipment. However, such description shall be sufficient whether or not it is specific if it reasonably identifies what is described and a mistake in such description shall not invalidate the description if it provides a key to identifying the farm machinery or equipment.[84]

The last two sentences of this statute suggest that, to avoid losing priority to subsequent mechanics' liens, the secured party's financing statement should specify each item of farm collateral. Innocent errors concerning things like the "make, model and serial number," however, will not result in loss of priority.[85]

The last two sentences certainly soften the statute's requirement that the financing statement describe "the particular piece of farm machinery

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78. *Id.* at 128.
79. 12 Bankr. 286 (Bankr. N.D. Ga. 1981).
80. 123 Bankr. at 128.
81. Newton Ford Tractor Co. v. J.I. Case Credit Corp., 163 Ga. App. 497, 294 S.E.2d 723 (1982).
82. O.C.G.A. § 11-9-310 (Supp. 1991).
83. *Id.* § 11-9-310(2).
84. *Id.*
85. *Id.*

or equipment,"[86] but do they emasculate that requirement to the extent found by the court of appeals in its 1991 decision in *Goodwin v. South Atlanta Production Credit Association*?[87] In *Goodwin* the court decided that a 1982 financing statement listing "all farm machinery and equipment, tractors, tilling and harvesting tools of every kind and description" as collateral did describe the "particular piece" of farm equipment.[88] Besides highlighting the last two sentences of the above quoted statute, the court emphasized the word "all" in the financing statement and cited general authority about the notice purpose of financing statements.[89] Of course, the court might have found such general authority inapposite with regard to farm financing statements covered by the 1985 Legislature. Surely the 1985 legislation requires a more particular description than was then required of any financing statement.[90] If not, the 1985 enactment is superfluous.

If correct, the court's ruling severely limits the impact of the 1985 legislation. Perhaps it is more than a coincidence that the ruling enabled the court to duck the difficult issues presented by the lender's argument that the law does not or cannot apply to financing statements filed prior to its effective date.[91]

C. *"Active" Insufficient to Continue Effectiveness*

In another survey period decision, *Kubota Tractor Corp. v. Citizens & Southern National Bank*,[92] the court of appeals concluded that a creditor did not file a timely continuation statement.[93] The court rejected the creditor's argument that a document labelled an "amendment" served as a continuation statement.[94] Other than its title, this document had a number of shortcomings, one of which was its failure to state that the original statement was still "effective."[95] Instead, the statement included

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86. *Id.*

87. No. A91A0826 (Ct. App. Ga. Sept. 3, 1991).

88. *Id.*

89. *Id.*

90. U.C.C. § 9-402 (1985) already imposed a collateral description requirement intended to put searchers on inquiry notice. See, for example, the authority cited in *Goodwin*.

91. Retroactive application of this law raises constitutional questions. In United States v. Security Indus. Bank, 459 U.S. 70 (1982), Justice Rehnquist indicated that bankruptcy law amendments permitting debtors to avoid certain prior perfected liens would pose serious constitutional questions if retroactively applied. *Id.* at 78.

92. 198 Ga. App. 830, 403 S.E.2d 218 (1991).

93. *Id.* at 831, 403 S.E.2d at 220.

94. *Id.* at 832, 403 S.E.2d at 221.

95. *Id.*

language that " 'the original financing statement . . . is still active.' "[96] The court distinguished between the words "active" and "effective," saying that "active" may refer simply to the existence of "litigation or other collateral issues [which] remained pending that demanded action thereon."[97]

III. MISCELLANEOUS

A. Bona Fide Purchasers ("BFP") and Innocent Lienholders Not Secure From Drug Forfeiture

The 1991 decision of the United States District Court for the Northern District of Georgia in *United States v. All That Tract or Parcel of Land Lying & Being in the Sixth District & 3rd Section of Gordon County, Georgia*[98] should be quite alarming to lenders who have not considered the full potential impact of the federal law providing for forfeiture of property acquired using the proceeds of illegal drug dealings.[99] In *Gordon County*, the court ruled that the United States had reasonable grounds to believe that Mr. Bart Nation had obtained the title to the real property at issue with proceeds of drug sales.[100] Mr. Nation later sold the property to Mr. Timms, who gave a deed to secure debt to Calhoun First National Bank protecting a $35,000 loan. So far as the court was aware, neither Timms nor Calhoun Bank knew that Nation had obtained the property using illegally obtained proceeds of drug sales, and both proclaimed that they were "innocent owners" within the meaning of the forfeiture law.[101]

Nevertheless, the court granted the government's motion for summary judgment.[102] In doing so, the court stated:

> In reaching this result the Court is aware of the hardship that application of the "relation back" doctrine works on the claimants in this case. The exception under the forfeiture statute for "innocent ownership" is rendered nugatory where, as here, the forfeiture relates back to predate an interest which could give rise to a claim of "innocent ownership." The Court is also fully aware of the hardship this result works on commercial lenders who have little or no opportunity to protect themselves in transactions based on assets tainted by the drug trade. Further, remission or mitigation of such forfeitures is not within the discretion of this Court

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96. *Id.* (comparing In the Matter of Nickerson & Nickerson, Inc., 329 F. Supp. 93, 96 (1971)).

97. *Id.*

98. 762 F. Supp 1479 (N.D. Ga. 1991).

99. *See* 21 U.S.C. §§ 853, 881 (1988).

100. 762 F. Supp. at 1483.

101. *Id.* at 1481.

102. *Id.* at 1485.

> but is instead the prerogative of the United States Attorney General. *See* 21 U.S.C., section 881(d). Despite the harshness of this result, however, this Court believes it to be required by the authorities cited herein. The power to change this result belongs to the United States Congress.[103]

Many courts and commentators believe that Congress never intended such a result.[104] Other courts have reached a conclusion contrary to *Gordon County* and have protected innocent lienholders and lenders, at least to the extent of their reliance.[105] Unfortunately, the *Gordon County* case has not been appealed, and until it is specifically overruled by legislation or court decision, title attorneys might consider adding an appropriate qualification to their opinions. At least the title attorney can react constructively to the *Gordon County* decision. By definition, the innocent lender or purchaser can only wait for the other shoe to fall.[106]

B. Waiver of Venue Provisions

The Constitution of the State of Georgia generally provides that venue in civil cases involving Georgia citizens is only appropriate where the defendant resides.[107] In the case of promissory notes, the Georgia Constitution provides that: "Suits against the maker and endorser of promissory notes, or drawer, acceptor, and endorser of foreign or inland bills of exchange, or like instruments, residing in different counties, shall be tried in the county where the maker or acceptor resides."[108] Additionally, "suits against joint obligors . . . residing in different counties may be tried in either county."[109]

Venue problems can be quite vexatious and expensive, as the survey period decision in *Goodman v. Vilston, Inc.*[110] indicates. In that case, the court concluded that an individual residing in Tennessee, who was a joint obligor with a resident of Georgia, could not be sued where the Georgian resided despite the constitutional provision that suits " 'against joint obligors . . . residing in different counties may be tried in either county.' "[111]

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103. *Id.* at 1484-85.

104. United States v. A Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Avenue, Rumson, N.J., 937 F.2d 98 (3d Cir. 1991); Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165 (1990); Comment, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. § 881: The "Innocent" Lienholder's Rights*, 21 TEX. TECH L. REV. 2127 (1990).

105. *See supra* note 58.

106. This exaggeration is intended for effect. At the very least, purchasers and lenders could increase their scrutiny of the prior history of the subject property.

107. *See* GA. CONST. art. VI, § 2, para. 1-8 (1983).

108. *Id.* at para. 5.

109. *Id.* at para. 4.

110. 197 Ga. App. 718, 399 S.E.2d 241 (1990).

111. *Id.* at 720, 399 S.E.2d at 243 (quoting GA. CONST. art. VI, § 2, para. 4 (1983)).

Had the Tennessee citizen who was doing business in Georgia registered with the Secretary of State, the Tennesseean would have been deemed to "reside" in Georgia for purposes of the joint obligor provision.[112] Unfortunately, from the perspective of the plaintiff, the Tennesseean had not registered with the Secretary of State and, according to the court, did not "reside" in Georgia for purposes of the joint obligor provision.[113] The court acknowledged that its reading would necessitate separate suits on joint obligations in many instances involving resident and nonresident defendants, "thereby making litigation against joint obligors more cumbersome."[114] According to the court, "[a]ny correction of this anomaly must be left to the General Assembly."[115]

The General Assembly may not be the only source of solace to frustrated plaintiffs. Indeed, some self-help may be possible in light of the 1990 decision of the court of appeals in *Harbin Enterprises, Inc. v. Sysco Corp.*[116] and the 1989 decision of the Georgia Supreme Court in *Holcomb v. Ellis*.[117] Both cases state that a party may waive the constitutional defense of improper venue.[118] In *Harbin* the court found effective language in an open account agreement providing that a nonresident agreed to personal jurisdiction in the State Court of Fulton County.[119]

So far as this author is aware, the subject of waiver of venue rights has not been given great attention in Georgia. In a 1958 informal opinion, the attorney general opined that a party could not waive venue.[120] In light of the decisions in *Harbin* and *Holcomb*, is there any reason a court should not find effective appropriate waiver language included in notes and other agreements, particularly in a commercial setting? Admittedly, in both decisions, the acts constituting waiver of venue occurred simultaneously with or followed the filing of the original complaint in the case.[121] But does anything in the Georgia Constitution suggest that the issue of waiver might turn upon whether the acts allegedly giving rise to waiver occur before or after the alleged default or the commencement of litigation?[122]

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112. *Id.* at 721, 399 S.E.2d at 243.

113. *Id.*

114. *Id.*, 399 S.E.2d at 244.

115. *Id.*

116. 195 Ga. App. 694, 394 S.E.2d 618 (1990).

117. 259 Ga. 625, 385 S.E.2d 670 (1989).

118. 259 Ga. at 626, 385 S.E.2d at 671; 195 Ga. App. at 695, 394 S.E.2d at 620.

119. 195 Ga. App. at 695, 394 S.E.2d at 620.

120. 1958-59 Op. Att'y Gen. 88 (1958).

121. *See supra* notes 116-19 and accompanying text.

122. Such a distinction certainly is not unheard of in commercial law. For example, O.C.G.A. § 11-9-501(3) (1982) invalidates certain predefault waivers.

C. *The Intangible Defense*

Georgia law permits a party to plead a willful failure to file an intangible tax return as a complete defense to any attempt to collect upon a note.[123] In *American Mini-Storage, Marietta Boulevard, Ltd. v. Investguard, Ltd.*,[124] the court affirmed an award of summary judgment despite the debtor's contention that the lender had not filed an intangible tax return.[125] According to the court, the debtor "waived this defense by not timely raising it in its answer."[126] How does the debtor discover before the date for answering a suit on a note that the plaintiff has not returned the required intangible tax? Can a debtor plead such a defense on information and belief without risk of sanctions? Even if the defense is timely pleaded, the consequences to the plaintiff are not drastic since Georgia law also removes any bar to the action once the taxes are returned.[127]

D. *Wake Up Calls From Max Headroom?*

And if things weren't bad enough already, in *Georgia Public Service Commission v. Charles H. Turner, Inc.*,[128] the court of appeals ruled that the Public Service Commission did not have the discretion to deny a permit for the use of automatic dialing and disseminating ("ADAD") devices in the collection of bad debts, despite the commission's opinion that "it was not in the public interest for ADAD equipment to be used for the collection of doctor and hospital bills."[129] Fortunately, despite this limitation upon the discretion of the Public Service Commission, both Georgia and federal law contain significant restrictions upon the use of ADAD equipment to collect debts.[130] Georgia law evidently requires consent before the use of ADAD equipment[131] and federal law prohibits harrass-

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123. O.C.G.A. § 48-6-32 (1991).

124. 196 Ga. App. 862, 397 S.E.2d 199 (1990).

125. *Id.* at 863, 397 S.E.2d at 200.

126. *Id.*

127. O.C.G.A. § 48-6-32 (1991); Springer v. Gaffaglio, 190 Ga. App. 272, 378 S.E.2d 691 (1981); Peters v. Thomason, 157 Ga. App. 513, 277 S.E.2d 798 (1981); Holt v. Reichert, 143 Ga. App. 337, 238 S.E.2d 706 (1977); Beets v. Padgett, 125 Ga. App. 551, 188 S.E.2d 265 (1972). Both *Beets* and *Holt* refer to the intangible tax defense as being an affirmative defense that must be properly pleaded. *Beets*, 125 Ga. App. at 552, 188 S.E.2d at 266; *Holt*, 142 Ga. App. at 338, 238 S.E.2d at 708. Presumably, like *American Mini-Storage*, these cases are authority that the defense must be pled by way of answer to the complaint.

128. 200 Ga. App. 144, 407 S.E.2d 113 (1991).

129. *Id.* at 145, 407 S.E.2d at 114.

130. 15 U.S.C. § 1692 (1988); O.C.G.A. § 46-5-23 (Supp. 1991).

131. O.C.G.A. § 46-5-23 applies to the use of ADAD equipment in Georgia. Subsection (b)(3) was amended in 1990 to provide that ADAD calls relating to "collection of lawful

ment and communications with most third parties.[132] By the way, how does an unattended ADAD machine know who answered the phone?[133]

E. Priority for Certain Judgment Creditors Over Purchase Money Secured Creditors

On November 18, 1991, prior to the scheduled printing of this Article, a panel of the Georgia Court of Appeals ruled that the U.C.C. grants certain judgment creditors priority over later purchase money secured creditors. The obvious importance of the court's decision in *Corim, Inc. v. Belvin*[134] persuaded the editors of the Mercer Law Review to permit the addition of this hastily prepared summary of the decision.

Corim, Inc. held an unsatisfied, properly docketed judgment against Oscar Belvin on February 7, 1989 when Crossroads Bank of Georgia loaned him $35,000 to enable his acquisition of a cotton picker. Although Belvin had actually purchased and obtained possession of the cotton picker on January 28, 1989, both the trial and appellate court concluded

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debts" are not subject to the restrictions imposed upon most other ADAD calls. *Id.* § 46-5-23(b)(3). Subsection (a)(2) states:

> It shall be unlawful for any person to use . . . ADAD equipment for the purpose of advertising or offering for sale, lease, rental, or as a gift any goods, services, or property, either real or personal, primarily for personal, family, or household use or for the purpose of conducting polls or soliciting information where:
>
> (A) Consent is not received prior to the initiation of the calls . . .
>
> (B) Such use is other than between the hours of 8:00 A.M. and 9:00 P.M.
>
> . . .

Id. The subsection (b) exception for bill collecting expressly provides that the 8:00 a.m. to 9:00 p.m. limitation does not apply to bill collecting. *Id.* § 46-5-23(b)(3). By implication, then, the consent limitation was intended to apply even though bill collecting arguably is not included in the general description of ADAD uses that are included within the coverage of subsection (a)(2). Thus section 46-5-23 arguably requires that the debtor give consent before ADAD equipment may be used for the purpose of bill collecting, whether the calls are made at noon or midnight.

132. Besides the specific regulation of the use of ADAD equipment found in O.C.G.A. § 46-5-23 (Supp. 1991), use of that equipment for the purpose of bill collecting would be regulated by 15 U.S.C. § 1692 (1988). That statute prohibits most telephone contacts for the purpose of collecting debt unless made within the hours of 8:00 a.m. to 9:00 p.m. *Id.* § 1692c(a)(1). The statute also prohibits causing "a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harrass any person at the called number." *Id.* § 1692d(5). Perhaps most importantly, the statute prohibits communications with most third parties concerning the debt unless the debtor consents to the communication. *Id.* § 1692c(b).

133. Could the machine satisfy state and federal law by beginning with an unmonitored announcement like the following: "Hello, this is a private message for John Doe. It is intended for Mr. Doe only. If you are not Mr. Doe, please hang up now. Mr. Doe, you too should hang up if you do not wish to hear a communication from Max Headroom . . . . *Pay up, buddy.*"

134. Nos. A91A1285 & A91A1286 (Ga. Ct. App. Nov. 18, 1991).

that Crossroads was a purchase money lender and that Crossroads had timely filed its financing statement on February 10, 1989, within fifteen days of the date that Belvin took possession of the cotton picker. Consequently, both courts concluded that Crossroads enjoyed a purchase money security interest in the cotton picker.[135] Nevertheless, the appellate court ruled that Corim had priority over Crossroads.[136]

In Georgia, a properly docketed judgment lien floats and attaches to property acquired by the judgment debtor after rendition and docketing of the judgment.[137] In a 1941 decision,[138] the Georgia Supreme Court summarized the case law concerning priority disputes between the floating judgment lien and a lien to protect an extension of credit that enabled the debtor to acquire property after judgment:

> [A]nother principle, long settled in this State and recognized with little dissent in other jurisdictions, [is] that a mortgage or deed to land, securing its purchase-money, and executed as a part of the same transaction in which the purchaser acquires title, will exclude or take precedence over any prior lien against the property arising through or against the purchaser.[139]

Of course, subsequent statutory developments may modify this general rule. In most instances, O.C.G.A. § 11-9-310 now governs the priority dispute between a prior perfected judgment lien and a purchase money security interest in personal property in Georgia.[140] As revised in 1978, that code section provides in pertinent part that:

> [A] perfected security interest in collateral takes priority over [liens established by certain Georgia laws], provided, nevertheless, that:
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> . . . .
>
> (d) A lien for . . . a duly rendered judgment . . . takes priority over such perfected security interest, but only if [the lien is appropriately recorded] prior to the perfection of the subject security interest, and if the subject security interest is not a purchase money security interest entitled to priority under subsection (2) of Code Section 11-9-301.[141]

The court in *Belvin* read this language to provide that the prior recorded judgment lien primes the purchase money security interest unless

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135. *Id.* O.C.G.A. § 11-9-312(4) provides that a purchase money security interest may be perfected within fifteen days after the debtor obtains possession of collateral. O.C.G.A. § 11-9-312(4) (1982).

136. Nos. A91A1285 & A91A1286 (Ga. Ct. App. Nov. 18, 1991).

137. Kollock v. Jackson, 5 Ga. 153 (1848).

138. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941).

139. *Id.* at 556, 16 S.E.2d at 17.

140. O.C.G.A. § 11-9-310 (Supp. 1991).

141. *Id.*

the latter is entitled to "priority under subsection (2) of [O.C.G.A.] § 11-9-301."[142] The court then concluded that subsection (2) of section 11-9-301 reverses this new order of priority only in narrow circumstances. That subsection provides that

> If the secured party files with respect to a purchase money security interest before or within 15 days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.[143]

In essence, *Belvin* concluded that the lender's rights are prior only to those of the judgment lien creditor that arose during the fifteen day grace period for perfecting a purchase money security interest. Corim's rights as a prior recorded judgment lien creditor did not arise "*between* the time [Crossroads'] security interest [attached] and the time of filing."[144] Consequently, the court of appeals concluded that Corim's rights as a judgment lien creditor primed those of Crossroads as a purchase money secured creditor.

No doubt many commercial lawyers will be surprised by the decision in *Belvin* and greatly concerned about its potential impact upon commercial transactions. How does Sears safely finance the purchase of one of its freezers on Saturday morning? How does someone like Mr. Belvin obtain the crop financing he needs to continue farming, his only realistic hope of eventually satisfying his judgment? Surely not daily trips to the courthouse.

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142. Nos. A91A1285 & A91A1286 (Ga. Ct. App. Nov. 18, 1991) (citing O.C.G.A. § 11-9-310 (1991)).

143. O.C.G.A. § 11-9-301(2) (1982).

144. *Id.* (emphasis added).