12-1994

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Commercial Law

by James C. Marshall*

Georgia legislation concerning perfection of security interests, federal bankruptcy amendments, and a decision by the United States Supreme Court were the most significant developments in Georgia commercial law during the survey period.

I. REALIZING UPON REAL PROPERTY COLLATERAL

Georgia creditors secured by real property typically enjoy a power of sale contained within a deed to secure debt granted by the debtor.¹ This power permits the creditor to conduct a nonjudicial foreclosure sale of the collateral upon the debtor's default.² If the proceeds of such a sale do not satisfy the debt, the Georgia creditor typically seeks to collect the deficiency by foreclosing upon additional collateral, if any, or by obtaining an in personam deficiency judgment against the debtor. Before obtaining a deficiency judgment, however, the creditor must first file a petition for confirmation with the local superior court.³ The court receiving such a petition will "confirm" the foreclosure sale if it concludes the sale was regularly conducted⁴ and the price received reflected the property's "true market value."⁵ If the court refuses to confirm the

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³ Although this foreclosure sale is conducted without judicial assistance, the creditor essentially must use the same process as would be employed in a judicial sale. See Id. § 44-14-162 (1982); Id. §§ 9-13-140 to -178 (1982 & Supp. 1994).

⁴ The petition for confirmation must be filed within 30 days of the sale. Id. § 44-14-161(a).

⁵ In general, the creditor must advertise the sale, including a description of the property, in an appropriate local newspaper at least once a week for the four weeks preceding the sale. Id. § 9-13-140. Unless a court orders otherwise, the creditor must hold the sale "by public outcry" at the county courthouse on the first Tuesday of the month between the hours of 10:00 a.m. and 4:00 p.m. Id. § 9-13-161.

⁶ Id. § 44-13-161(b),(c). The burden of proving the property brought true market value is on the creditor. See Wheeler v. Coastal Bank, 182 Ga. App. 112, 354 S.E.2d 694 (1987),
sale, the court may permit a resale, essentially restarting the foreclosure process.\(^6\) If the court does not confirm and does not permit a resale, the creditor loses any right to collect an *in personam* deficiency judgment.\(^7\)

The survey period produced interesting decisions concerning the debtor's entitlement to notice of confirmation hearings,\(^8\) the necessity for obtaining confirmation when the creditor holds multiple notes,\(^9\) the effect of bankruptcy upon the confirmation process,\(^10\) and the timing of collateral valuation when the court permits a resale after refusing to confirm.\(^11\) These confirmation developments, however, pale in comparison to the significance of the decision of the United States Supreme Court in *BFP v. Resolution Trust Corporation.*\(^12\)

A. The Demise of the Rule in *Durrett*

If a nonjudicial foreclosure of real property under power of sale satisfies the creditor's debt, confirmation is unnecessary since no deficiency remains for collection. Assuming it is regularly conducted, Georgia law provides that such a foreclosure sale is final and may be set aside only if tainted by fraud or procedural irregularity.\(^13\) Gross inadequacy of the price received at the sale evidently does not provide grounds under Georgia law for avoiding a regularly conducted, non-fraudulent foreclosure sale.\(^14\) But, until the decision in *BFP,* regularly conducted foreclosure sales that were not fraudulent under Georgia law could be avoided under federal law if the debtor filed bankruptcy within one year of the date the sale became binding against a subsequent bona fide purchaser for value.\(^15\) Following the lead of the Fifth Circuit with its decision in *Durrett v. Washington National Insurance Co.,*\(^16\) many

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14. Id.
16. 621 F.2d 201 (5th Cir. 1980).
federal courts avoided foreclosure sales after concluding that the sale price was not a "reasonably equivalent value" for the collateral within the meaning of the fraudulent conveyance statute found in federal bankruptcy law. Indeed, the decision in Durrett often was cited for the proposition that the price received at a regularly conducted, non-fraudulent foreclosure sale must equal or exceed seventy percent of the collateral's fair market value if the sale is to withstand a timely avoidance attack under federal bankruptcy law.

The Durrett rule may have had a chilling effect upon Georgia foreclosure sales because, generally speaking, prospective buyers could not be certain the sale was final until a year elapsed following recordation of their foreclosure deeds. In essence, the better the deal, the greater the uncertainty of its survival. But it is more likely that Durrett had a beneficial effect upon the price received at Georgia foreclosures since, in actual practice, the price received is almost always dictated by the wishes of the creditor conducting the foreclosure sale and not by third party bidding.

Most creditors foreclosing upon Georgia real estate participate as bidders in the foreclosure sales they conduct. If the creditor is concerned about obtaining confirmation following the sale and if the local confirmation process works as designed, the creditor is motivated to bid more than seventy percent of the collateral's fair market value because the creditor is concerned about proving to the superior court that the price received was the property's "true market value." But, in many cases, the foreclosing creditor is not concerned about obtaining confirmation of a particular foreclosure sale. This could be because the sale will satisfy the debt, or other collateral is available to satisfy the debt, or the debtor is judgment proof, or confirmation is unnecessary under one of the numerous exceptions created by court decision, or for some other reason. Absent a confirmation concern, the Durrett rule was the only significant legal reason motivating foreclosing creditors in Georgia to assure the price received upon foreclosure bore some relation to the property's fair market value.


18. According to the decision of the Georgia Court of Appeals in Wheeler v. Coastal Bank, 182 Ga. App. 112, 354 S.E.2d 694 (1987), "true market value" means the price that would be obtained by an owner in an arm's-length transaction free of the shadow of default and potential bankruptcy. Id. at 114, 354 S.E.2d at 696. The court held it was inappropriate to reduce this price by anticipated expenses associated with carrying the property and liquidating it. Id.

19. A number of these decisions are cited and discussed in Marshall, Commercial Law, 45 Mercer L. Rev. 87, 92-99 (1993).
The Supreme Court eliminated the *Durrett* rule with its five to four decision in *BFP*. There, the Court held that the price received at a regularly conducted, non-collusive foreclosure sale of real property was conclusively presumed to be "reasonably equivalent value" in exchange for the involuntary transfer of that property and that, therefore, such sales could not be avoided under federal bankruptcy law. Although its pronouncement specifically is limited to real property foreclosures, *BFP* certainly presages the demise of the *Durrett* rule for personal property foreclosures as well.

The decision in *BFP* might encourage more third party bidders to attend foreclosure sales in the hopes that the foreclosing creditor is not concerned about confirmation and, therefore, will not be motivated to bid "true market value." Under the regime of *BFP*, third party bidders attending foreclosure sales might stumble upon a real deal that cannot be undone so long as the sale is regularly conducted and non-collusive. Thus, the decision in *BFP* may heighten third party interest in foreclosure sales and, in that sense, promote the bidding process rather than chill it. But, perhaps in a more important sense, the decision in *BFP* may chill bidding by eliminating a substantial motivation for the foreclosing Georgia creditor to obtain a price commensurate with fair market value, a price that is not a real deal for the buyer. After all, chilling the bidding is problematic only if it results in lower prices.

It is quite unlikely that Congress will overrule the decision in *BFP*, and consequently, states must determine whether they wish to fill the gap left by the demise of *Durrett*. Of course, *Durrett* can be viewed as a relatively recent, insulting, and unnecessary infringement upon states' rights. State lawmakers holding such views are likely to herald *Durrett's* demise and are unlikely to fill any void created. For the time

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20. 114 S. Ct. at 1757.

21. A collusive sale is fraudulent. No doubt the Court used the term "non-collusive" instead of "non-fraudulent" because the question before it concerned whether the sale was fraudulent under 11 U.S.C. § 548(a)(2). It would sound a bit circular for the Court to say that a regularly conducted, non-fraudulent foreclosure sale cannot be a fraudulent conveyance.

22. 114 S. Ct. at 1760.

23. Writing for the majority, Justice Scalia noted that title to real property is a matter of significant local interest, and suggested that principles of comity and federalism warranted federal deference to state lawmakers with regard to such local matters. 114 S. Ct. at 1764-65. Consequently, with regard to personal property foreclosures, the decision in *BFP* might be distinguished on the ground that the state's local interest is not as great since personal property is mobile while real property is not. But a different result for personal property foreclosures seems unlikely since the term "reasonably equivalent value" would then have multiple meanings in a foreclosure setting, a result difficult to square with the plain language or with any probable congressional intent.
being, however, nothing like Durrett operates to constrain creditors in Georgia, and both debtors and creditors should plan accordingly. If a bankruptcy petition is inevitable or likely, debtors are well advised to seek a commitment from a foreclosing creditor concerning the price it will bid at its foreclosure sale. The debtor should consider filing its petition before the sale if the creditor is not forthcoming concerning its bid price or if the stated bid price is insufficient.

B. Multiple Notes and the Necessity for Confirmation

In Ward v. Pembroke State Bank, a creditor holding two notes conducted a nonjudicial sale under power and did not confirm the sale. The two notes were secured by the same tract of land under one deed to secure debt, the second note by virtue of an “open end” or dragnet clause. After purchasing the property at foreclosure by bidding the amount of its first note, the creditor then filed suit to recover on the second note. The debtor defended this action with reference to the creditor’s failure to confirm, and the court of appeals determined that its decision in C.K.C., Inc. v. Free, was controlling.

In Free the court held that when notes are related and secured by the same security deed, a creditor’s failure to obtain confirmation of foreclosure sale conducted to satisfy one note will bar any deficiency judgment on the second note. The court distinguished Ward from Clements v. Fleet Finance and Devin Lamplighter, Ltd. v. American General Finance in which the courts ruled that a creditor is not barred from instituting a deficiency judgment after foreclosing upon a prior note if the subsequent note is a separate debt secured by a separate security deed.

25. Id.
26. Id.
27. Id., 441 S.E.2d at 692.
29. 212 Ga. App. at 323, 441 S.E.2d at 692.
33. 212 Ga. App. at 323, 441 S.E.2d at 692. In both Devin Lamplighter and Clements, a junior creditor acquired a senior creditor’s note and deed to secure debt. In Clements, the court observed that the junior creditor bought the senior position because it “was concerned about its collateral position as the second mortgagee.” 206 Ga. App. at 737, 426 S.E.2d at 912. The court in Devin Lamplighter gave no reason for the junior’s acquisition of the senior position in that case. Both courts concluded, however, that the two debts were unrelated to one another despite the acquisition. Consequently, according to both courts, confirmation of a foreclosure sale of the senior deed was not a prerequisite to a subsequent
clause effectively caused the second loan to merge with the first and become one debt for purposes of foreclosure.\textsuperscript{34} The court emphasized the two notes were secured by the same deed to the same property.\textsuperscript{35}

C. Timeliness of Notice to Debtor of Confirmation Hearing

In \textit{Vlass v. Security Pacific National Bank},\textsuperscript{36} the Supreme Court of Georgia affirmed the constitutionality of the notice provisions in Georgia's confirmation statute.\textsuperscript{37} The creditor in \textit{Vlass} conducted its nonjudicial foreclosure on October 6, 1992, and reported the sale to the superior court on October 30, 1992, well within the thirty day period mandated by the confirmation statute.\textsuperscript{38} On December 9, 1992, the creditor served the debtor with a copy of the confirmation application and gave the debtor notice that the confirmation hearing was scheduled for December 28, 1992.

The debtor found this timing and process objectionable, contending that service of the creditor's application for confirmation must comply with the Civil Practice Act ("CPA").\textsuperscript{39} But the court in \textit{Vlass} found the CPA inapplicable because the confirmation process is begun by an application, not a complaint, the application invokes only the supervisory powers of the superior court and the confirmation process generally is not an action of a "civil nature."\textsuperscript{40} Having decided that the CPA was inapplicable, the court then concluded the timing of notice was governed solely by the confirmation statute.\textsuperscript{41} That statute requires only that the debtor be personally served at least five days prior to the date of the confirmation hearing.\textsuperscript{42}

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\textsuperscript{34} 212 Ga. App. at 323, 441 S.E.2d 692.
\textsuperscript{35} 36. 263 Ga. 296, 430 S.E.2d 732 (1993).
\textsuperscript{37} Id. at 298-99. See O.C.G.A. §§ 44-14-160 to -303 (1982).
\textsuperscript{38} 38. See O.C.G.A. § 44-14-161 (a).
\textsuperscript{39} Id.; O.C.G.A. § 44-14-161 (1982).
The court in *Vlass* also rejected the debtor's alternative contention that the five day notice provision constituted an unconstitutional denial of equal protection because other "defendants" in "civil actions" received greater notice under the CPA. Once again the court disagreed with the debtor's essential premise that he was a defendant in a civil action, and the court concluded that the confirmation statute permissibly treated different classes differently. Unfortunately, the court also noted that *Vlass* received nearly three weeks notice of the scheduled hearing, much more than the required five days notice. This observation invites subsequent litigants to distinguish *Vlass* in an attempt to establish the confirmation statute's five day notice period unfairly advantages the creditor and violates constitutional due process requirements.

Certainly five days is an exceedingly brief period within which to fairly prepare for a contested confirmation hearing since the debtor typically should produce expert appraisal testimony concerning value. But the debtor's substantive right to confirmation is solely a creature of the confirmation statute. Absent very unusual circumstances, a statute solely responsible for creating a right may prescribe and limit the procedures protecting the right, thereby further defining the right. It might be unwise or impolitic, but the confirmation statute constitutionally could prohibit the debtor altogether from participating in the confirmation process, assuming such a prohibition did not run afoul of some constitutional requirement or limitation concerning the exercise of judicial authority. If the debtor's participation could have been altogether prohibited by the confirmation statute, then surely the statute constitutionally may limit the required notice to five days (or three days or one or none, for that matter).

Of course, at least in theory if not always in practice, whenever a nonjudicial foreclosure of real property collateral fails to satisfy an obligation for which a deficiency judgment might be sought by the creditor, the debtor is on notice from the time of sale that the creditor may seek to confirm the sale that any confirmation proceeding will involve several limited issues and that the notice of a confirmation hearing could be as short as five days. In most instances in which the debtor is capable of effectively participating in the confirmation hearing, the debtor also is capable of preparing (and should prepare) well in advance of receiving formal notice. At the very least, the debtor should

43. 263 Ga. at 298, 430 S.E.2d at 735.
44. Id.
45. Id.
46. Id.
monitor the filing of any confirmation application through contact with the creditor or the creditor's counsel or the applicable superior court. Creditors, on the other hand, should weigh the potential tactical advantages of keeping formal notice to a minimum, while remembering that it is within the discretion of the superior court to grant a continuance upon the request of a debtor needing more time to fairly prepare for a confirmation hearing.

Finally, since the court in Wlass concluded that the Civil Practice Act is inapplicable to confirmation proceedings and further stated that those proceedings merely invoke the supervisory authority of the superior courts, presumably the superior courts are left with the supervisory discretion and burden to determine the appropriate procedures to be followed in confirmation proceedings. The superior court's discretion to establish and enforce appropriate procedures evidently is limited only by the specific and minimal procedural commands of the confirmation statute and by minimal due process requirements imposed by the federal and state constitutions. As a result, the procedural practice in confirmation proceedings can vary widely from court to court.

Perhaps the Council of Superior Court Judges of Georgia should propose the adoption of uniform rules governing confirmation proceedings. To avoid the "trial by ambush" problem with confirmation hearings, any uniform rules should, at a minimum, enable creditors to obtain from debtors timely admissions or denials of the allegations in an application for confirmation. The rules also should give both sides an opportunity to conduct some discovery prior to the hearing, including an opportunity to timely review and copy all appraisals and depose all valuation witnesses. So long as the rules of practice before a particular court remain unclear and the opposing counsel or party is uncooperative, counsel participating in confirmation proceedings should consider asking the superior court to exercise its supervisory discretion by imposing appropriate discovery requirements in advance of the confirmation hearing.

47. Id.
48. The council is established by O.C.G.A. § 15-6-34 and is composed of "the judges, senior judges, and judges emeriti of the superior courts of [Georgia]." O.C.G.A. § 15-6-34 (1994).
49. Art. 6, Sec. 9, Par. 1 of the Georgia Constitution provides that the Supreme Court of Georgia "shall, with the advice and consent of the council of the affected class or classes of trial courts, by order adopt and publish uniform court rules . . . for the . . . resolution of disputes."
D. The Effect of Bankruptcy upon Confirmation Proceedings

In *Breeze v. Columbus Bank & Trust Co.*, a creditor obtained relief from the automatic stay and conducted a foreclosure sale on May 3, 1993 while the debtor's bankruptcy proceeding was still pending. The debtor's bankruptcy proceeding was dismissed on August 20, 1993, and the creditor began its confirmation process on August 31, 1993. The superior court confirmed the sale, and the debtor appealed, contending confirmation was not authorized because more than thirty days elapsed before the creditor reported the sale to the bankruptcy court. The court of appeals rejected this contention and held that the debtor's pending bankruptcy tolled the thirty-day time period for reporting foreclosures under a power of sale.

By bringing its confirmation proceeding, the creditor in *Breeze* was attempting to protect its right to obtain a deficiency judgment and, ultimately, to satisfy its deficiency through judicial execution against the debtor's non-exempt assets and income. This collection avenue must be distinguished from the creditor's right to assert a deficiency claim in the

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51. Id. at 534, 448 S.E.2d at 277.
52. Id.
53. Id. O.C.G.A. § 44-14-161 requires a creditor to report any non-judicial foreclosure sale within 30 days for confirmation by a superior court.
54. Id. The court relied upon Bankruptcy Code section 108(c), 11 U.S.C. 108(c), which provides as follows:

(c) ... (If applicable nonbankruptcy law ... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor [or an individual protected by the co-debtor stay found in chapters 12 and 13 of the Bankruptcy Code] and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of —

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
(2) 30 days after notice of the termination or expiration of the stay under § 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

Particularly in light of the opinion of the Georgia Supreme Court in *Vlass*, cited and discussed *supra* notes 35 through 48 and accompanying text, it is arguable that the tolling provisions of Bankruptcy Code section 108(c) should not apply to a confirmation proceeding because such a proceeding is not a "civil action" and does not involve "a claim against the debtor" but instead involves the supervisory power of superior courts to monitor nonjudicial foreclosure sales conducted within their counties. But federal law provides the meaning of terms in federal statutes, and it would be somewhat inconsistent for federal law to automatically stay confirmation proceedings under Bankruptcy Code section 362, 11 U.S.C. § 362, without also tolling the time for bringing confirmation proceedings after termination of the bankruptcy proceeding.
debtor's ongoing bankruptcy proceeding and share in distributions from the bankruptcy estate.

*Breeze* did not involve a potential deficiency claim asserted against the assets of a bankruptcy estate. But the survey period decision in *In re Wiggins* did. Like *Breeze*, the creditor in *Wiggins* obtained relief from the automatic stay, conducted a foreclosure sale, and did not confirm the sale because the debtor remained in bankruptcy. Unlike *Breeze*, however, the debtor in *Wiggins* ultimately obtained a discharge of his obligation to the creditor and thereby extinguished the creditor's right to recover the deficiency via further state court process. The creditor did pursue its only other collection alternative by filing a proof of claim in the bankruptcy court for the deficiency amount. The bankruptcy trustee objected to the creditor's deficiency claim because the creditor had not confirmed its nonjudicial foreclosure sale.

The bankruptcy court in *Wiggins* sustained the trustee's objection. The court observed that, under Georgia law, the creditor's failure to confirm was fatal to its right to collect a deficiency. The court then noted that, under federal law, a claim against a bankruptcy estate cannot be allowed if the claim is unenforceable under any agreement or applicable law. For these two reasons, the court concluded the creditor's deficiency claim should be disallowed.

The bankruptcy court's decision in *Wiggins* was upheld by the district court on appeal. In its opinion, the district court specifically noted that the creditor's motion for relief from stay "did not request permission to have the foreclosure sale confirmed nor was this right specifically granted [by the bankruptcy court]." Of course, the result in *Wiggins*

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56. 167 B.R. at 991.
57. *Id.*
58. *Id.*
59. *Id.* at 992, citing 11 U.S.C. § 502(b)(1) which provides that a claim must be disallowed to the extent that —
   (1) such claim is unenforceable against the debtor and property of the debtor under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.

Arguably, the court of appeals' decision in *Breeze* suggests the creditor's right to collect a deficiency in *Wiggins* was unenforceable simply because it remained "contingent or unmatured" pending confirmation. Confirmation of the *Wiggins* sale still was possible under the authority of *Breeze* because the 30-day period for commencing a confirmation action had been tolled throughout the relevant time periods involved in *Wiggins*.

60. 167 B.R. at 992.
62. *Id.* at 993.
would be easier to square with the tolling rule of *Breeze* if the creditor in *Wiggins* had received permission to confirm its sale and failed to begin the confirmation process within the thirty-day period.\(^63\) Combining *Breeze* and *Wiggins* illustrates a rule of practice currently followed by most Georgia creditors: When seeking relief from stay in bankruptcy to conduct a nonjudicial foreclosure on Georgia real property, always request authorization to confirm the anticipated sale unless it clearly is pointless to preserve a deficiency claim against the debtor or the debtor's bankruptcy estate.

On a final note, it is interesting to speculate about the impact of the decision in *Wiggins* upon the "eat dirt" plans now in vogue in Chapter 11 bankruptcies. Such a plan abandons collateral to a secured creditor in partial or complete satisfaction of the creditor's claim.\(^64\) The extent to which the creditor's total claim is satisfied, however, depends upon the value placed upon the collateral by the bankruptcy court. Courts generally give collateral a fair market value if the debtor proposes to retain it. But when the debtor proposes to abandon the collateral to the creditor in an "eat dirt" plan, both the applicable bankruptcy statute and the developing bankruptcy case law suggests the bankruptcy court should deduct the creditor's anticipated holding period costs, resale expenses, and, perhaps, the time value of money for the anticipated duration of the holding period.\(^65\) This contrasts markedly with Georgia decisions defining "true market value" for purposes of the confirmation statute.\(^66\) If *Wiggins* is authority that confirmation is required before a deficiency claim may be allowed and if confirmation would be denied unless a nonjudicial foreclosure brought "true market value," should not the "eat dirt" valuation be "true market value" as defined by Georgia law? Is it relevant that Georgia law permits a creditor to easily circumvent the confirmation process by simply obtaining judgment on the underlying obligation before conducting a nonjudicial foreclosure?

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\(^63\) See *supra* note 55.

\(^64\) The seminal decision is in *In re Matter of Sandy Ridge Development Corp.*, 881 F.2d 1346 (5th Cir. 1989).


\(^66\) For a description of the meaning of the phrase "true market value," see *supra* note 17.
E. Date for Determining Value Upon Resale

In Kong v. Shearson Lehman Hutton Mortgage Corp., the superior court denied confirmation of the creditor's initial foreclosure sale but did permit the creditor to resell. The creditor then resold the collateral for a slightly higher price, and upon confirmation, the superior court concluded that this higher price did represent the property's "true market value" as of the date of the second sale. On appeal, the debtor challenged this choice of dates for determining value. In essence, the debtor contended the property had declined in value between the two sales and "true market value" should be determined as of the date of the first sale because the necessity for resale had been occasioned by the creditor's initial failure to comply with the dictates of the confirmation statute. Presumably the debtor would not have taken this view if the property had appreciated in value, but instead would argue for use of the second date on the theory that the creditor should not be permitted to benefit from its wrongful failure to meet its foreclosure responsibilities.

As it has so often in recent years, the court of appeals in Kong emphasized that the confirmation statute is in derogation of the common law and must be strictly construed. The court ruled that "true market value" is to be determined as of the date of the sale sought to be confirmed, not the date of a prior sale. In part, the court justified its decision with the rather remarkable observation that the debtors were themselves somewhat responsible for the decline in value because they successfully challenged the creditor's initial confirmation request. Suppose the debtors had not participated in the original confirmation process and the superior court nevertheless did its duty and denied confirmation. No doubt the court in Kong would have reached the same result. So the court's observation about the debtors' culpability should be read merely as an ad terrorum warning to debtors contemplating a confirmation challenge in a declining market or in any setting in which the value of the collateral could decline for any reason. Frankly, in light of the decision in Kong, debtors successfully challenging confirmation

68. Id. at 94, 438 S.E.2d at 133.
69. Id. at 94-95, 438 S.E.2d at 133.
70. Id. at 95, 438 S.E.2d at 133.
71. Id.
72. Id.
73. Id., 438 S.E.2d at 133-34.
74. Id. at 96, 438 S.E.2d at 134.
should consider requesting that the superior court condition any grant of authority to resell upon some appropriate concessions by the creditor concerning risk of loss. Obtaining such a concession from a petitioning creditor arguably is within the broad discretion of the superior court in considering the creditor's request that it be permitted to resell.

F. Attorney Fees Percentage Calculated on Total Debt, Not Merely Foreclosure Deficiency

The decision of the court of appeals in Kenemer v. First National Bank of Atlanta\(^7\) confirms the common understanding that the attorney fees percentages detailed in Official Code of Georgia Annotated ("O.C.G.A.") section 13-1-11\(^7\) apply to the entire debt, not merely the deficiency remaining after the creditor conducts a foreclosure sale "by and through" its attorney.\(^7\) The court in Kenemer distinguished the decision in David v. ITT Diversified Credit Corp.,\(^8\) because in David a portion of the debt was satisfied by a longstanding repurchase agreement and, therefore, was not collected by and through an attorney.\(^9\) By negative implication from the court's discussion in Kenemer, a creditor that advertises and conducts its own foreclosure sale will not be entitled to charge the attorney fees percentage against the portion of the debt satisfied by the sale proceeds although the deficiency following the sale might be collected "by and through" an attorney. What happens in the unlikely case in which the attorney sends the acceleration and demand letter but does not participate in the foreclosure process?

II. MISCELLANEOUS

A. Central Filing for Financing Statements

Georgia legislation enacted piecemeal in 1993 and 1994, and fully effective as of January 1, 1995, established a central filing system for financing statements under Article 9 of the Uniform Commercial Code (U.C.C.).\(^8\) The new system is the product of much labor by members of the Uniform Commercial Code Committee of the Corporate and Banking Law Section of the State Bar of Georgia, particularly A. H. Conrad, Jr. and Richard P. Kessler, Jr. These gentlemen and others
already have written extensively concerning the new system\textsuperscript{81} so this Article will offer only a brief summary of its provisions.

Under the new central filing system, financing statements are effective if filed in any county in Georgia regardless of the location of the debtor's residence or place of business or the location of the collateral.\textsuperscript{82} In addition, to fully perfect rights in certain real estate related collateral, notice of the U.C.C. filing must be made in the appropriate county's real property records.\textsuperscript{83} Beginning July 1, 1994, the filing of a financing statement is required to perfect rights in fixtures.\textsuperscript{84} All filings under the new system must include the debtor's social security number or taxpayer identification number or a statement that the debtor is not required to have such a number.\textsuperscript{85} Errors concerning this information will not affect priority, however, unless the competing party can prove the secured party "failed to make a good faith effort to obtain an accurate number from the debtor."\textsuperscript{86} The secured party may rely upon the debtor's written acknowledgement concerning the accuracy of this information, and the debtor's signature on a "financing statement or amendment which includes such" information is deemed to be a written acknowledgement by the debtor.\textsuperscript{87}

The new system will simplify and speed U.C.C. lien searches and should greatly alleviate a perfection problem that has plagued Georgia

\begin{footnotes}
\item[81] See, e.g., Kessler and Jordan, Uniform Commercial Code New Georgia Central Indexing and Local Filing System, Paper Prepared for Secured Lending Seminar conducted by the Institute of Continuing Legal Education in Georgia (September 16, 1994); Null, UCC Update—Centralized Filing of Financing Statements in Georgia and Other Recent Developments, Material Prepared for Real Property Institute conducted by the Institute of Continuing Legal Education in Georgia (May 12-14, 1994); Conrad, Georgia's New Financing Statement Filing and Central Indexing System: An Outline for Supplemental Legislation in 1994, Materials Prepared for Secured Lending Seminar conducted by the Institute of Continuing Legal Education in Georgia (September 17, 1993); Harper, New Georgia UCC Article 9 Amendments—Central Indexing and Local Filing, an Introduction to the Central Indexing System, Material Prepared for Secured Lending Seminar conducted by the Institute of Continuing Legal Education in Georgia (September 17, 1993); Kessler, New UCC Article 9 Transition Rules, Material Prepared for Secured Lending Seminar conducted by the Institute for Continuing Legal Education in Georgia (September 17, 1993); Jordan, Creation and Perfection of Security Interests in Personal Property under Georgia's UCC Article 9 and Newly-Revised UCC Article 8, Materials Prepared for Secured Lending Seminar conducted by the Institute of Continuing Legal Education in Georgia (September 17, 1992).
\item[83] Id. § 11-9-403 (4).
\item[84] Id. § 11-9-402 (6).
\item[85] Id. § 11-9-409.
\item[86] Id.
\item[87] Id.
\end{footnotes}
lenders for decades: filing in the wrong location. Once the system is running and debugged, Georgia law concerning the perfection of other liens should be amended to include filing in the central system. Judgment liens should be the first candidate for inclusion.

B. Alleged Breached of Commitment Letter; No Duty of Good Faith

The survey period opinion of a panel of the court of appeals in *Lake Tightsqueeze, Inc. v. Chrysler First Financial Services Corp.*, 88 is a reminder that Georgia remains an inhospitable forum for lender liability claims. *Lake Tightsqueeze* involved an appeal from the trial court's grant of summary judgment to a lender in a suit by a borrower 89 who alleged, in essence, that the lender breached a written loan commitment. Resolving disputed facts in the borrower's favor produces a compelling story. 90 The lender's commitment evidently was made in connection with an initial loan to the borrower to be used for the development of a subdivision. By letter to the borrower, one of the lender's branch managers apparently indicated the lender would provide future financing to creditworthy purchasers of lots in the new subdivision provided several conditions were satisfied. This letter evidently did not detail proposed financing terms with any specificity, but no doubt the borrower's principal testified on deposition that he understood the lender's commitment to mean the lender would evaluate in good faith any credit applications submitted by prospective purchasers and would make loans to prospective purchasers upon its ordinary lending terms for the particular type of collateral provided the purchaser met the lender's ordinary requirements for creditworthiness. 91

Unfortunately, when the borrower's principal later inquired about the promised financing, he was told the lender "no longer loaned money on individual real estate lots but was focusing on credit purchases for small retail items at that time." 92 The borrower never presented the lender with any credit applications from proposed purchasers, an act that surely would be futile in light of the lender's statement that it was no longer in the business of real estate finance. The borrower defaulted on the initial loan and sued the lender for breach of contract, fraud, breach

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89. Actually, both the borrower, Lake Tightsqueeze, Inc., and a guarantor filed suit, perhaps as a preemptory strike because of a default on an existing note with Chrysler. In the interest of clarity and economy, this Article omits further reference to the guarantor.
90. The court of appeals' summary mentions many facts that arguably are irrelevant to the grant of summary judgment.
92. Id. at 179, 435 S.E.2d at 487.
of the duty of good faith, negligent misrepresentation, reckless misrepresentation, and intentional misrepresentation. The lender counterclaimed on the note, and the trial court granted summary judgment to the lender on all claims. The court of appeals summarily disposed of each of the borrower's lender liability theories. The court first opined that the lender's written commitment concerning future financing was not an enforceable contract since it did not specify all terms and conditions. According to the court, the lender had merely agreed to future negotiations. Furthermore, the court determined that, even if the letter was a contract, it was not enforceable until the specified preconditions were met. Having already concluded there was no binding written contract, the court also found that the borrower could not succeed on its promissory estoppel claim because "the record is devoid of any promises made [by the lender]." The court similarly discarded the borrower's claims of negligent, reckless and intentional misrepresentation, concluding that the borrower had "not shown that and misrepresentations [had] been made." The court stated that the implied duty of good faith under the U.C.C. is only applicable to the sale of goods and does not apply to the financing of real estate lots. Assuming for the sake of argument that a duty of good faith did exist, however, the court then ruled that "the failure to act in good faith in the performance of contracts or duties under the Uniform Commercial Code does not state an independent claim for which relief may be granted."

The court's discussion of good faith in Lake Tightsqueeze is somewhat misleading and incomplete. The court rejected the borrower's argument that the lender breached an implied duty of good faith under the Uniform Commercial Code (U.C.C.) by simply stating that the U.C.C. did not apply to the alleged contract at issue since the contract involved the

93. Id. at 178, 435 S.E.2d at 486.
94. Id.
95. Id.
96. Id. at 179, 435 S.E.2d at 488.
97. Id.
98. Id. The court ignored altogether the possibility that the borrower's failure to meet the required conditions merely was a natural response to the lender's anticipatory repudiation of the letter agreement. Borrower's faced with circumstances similar to Lake Tightsqueeze would be well advised to tender performance rather than risk relying upon an argument that such a tender would have been futile.
99. Id. at 180, 435 S.E.2d at 488.
100. Id.
101. Id.
102. Id. at 181, 435 S.E.2d at 488.
sale of real property, not personal property.\textsuperscript{103} If the U.C.C. did apply, its relevant provision states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."\textsuperscript{104} But if the U.C.C. does not apply, then Georgia contract law essentially provides that every contract imposes upon each party a duty of good faith and fair dealing in its performance or enforcement.\textsuperscript{105} Under Georgia law, parties to contracts must act in good faith regardless of whether the contract is governed by the U.C.C. or by the general law of contracts.\textsuperscript{106}

Surely the borrower's miscitation to the U.C.C. does not explain the court's rejection of the borrower's good faith count in \textit{Lake Tightsqueeze}. The absence of a loan agreement enforceable under Georgia law is (or should have been) the critical assumption underlying the court's discussion of good faith. The court's opinion should be read as authority that the obligation of good faith does not extend to contract formation, as distinguished from contract performance or enforcement. So read, the opinion in \textit{Lake Tightsqueeze} states a familiar proposition of Georgia law.\textsuperscript{107}

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103. \textit{Id.} at 180-81, 435 S.E.2d at 488.
106. This assumes, of course, that the contract has not permissibly negated the duty. In Automatic Sprinkler Corp. of Am. v. Anderson, 243 Ga. 867, 868, 257 S.E.2d 283, 284, the Georgia Supreme Court stated that "it is possible to so draw a contract as to leave decisions absolutely to the uncontrolled discretion of one of the parties and in such a case the issue of good faith is irrelevant." \textit{Id.}
107. Commitments to lend money are not enforceable in Georgia without a writing. O.C.G.A. § 13-5-30 (Supp. 1994).
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Although fraud can be predicated on a misrepresentation as to a future event where the defendant knows that the future event will not take place, fraud cannot be predicated on a promise which is unenforceable at the time it is made. A promise to make a loan with no specification of the interest rate or maturity date is not enforceable and will not support an action for fraud. Beasley v. Ponder, 143 Ga. App. 810, 240 S.E.2d 111 (1977). Although, generally speaking, an allegation of fraudulent inducement circumvents the parol evidence rule in Georgia, Georgia cases are particularly hostile to such allegations of fraud based upon alleged oral assurances and promises made by bank officers. First Nat'l Bank & Trust Co. v. Thompson, 240 Ga. 494, 241 S.E.2d 253 (1978). The reasons for this hostility are clearly illustrated in the opinion of the Supreme Court of Kansas in Stevens v. Inch, 98 Kan. 306, 308, 158 Pac. 43, 44 (1916), a case in which the maker of a note attempted to avoid enforcement by stating that he had received inconsistent oral assurances concerning his obligations.

It does not help the defense to call the statements and promises of Stevens fraudulent. The books teem with cases involving oral promises that notes need not be paid, or are mere memoranda, or will be surrendered without satisfaction, or may be paid out of
C. Waiver of Jury Trials in Loan Agreements and Guaranties

In Bank South v. Howard the Supreme Court of Georgia refused to enforce a provision of a guaranty agreement that waived the right to a jury trial in any action on the guaranty. The court held that the right to a jury trial is guaranteed by the Constitution of Georgia and can only be waived in two circumstances: (1) when no issuable defense is filed, and (2) when the parties do not demand a jury trial. O.C.G.A. section 9-11-39(a) also allows for waiver by express stipulation either written or made orally in open court. The court concluded a jury trial waiver could only be made if there is litigation actually pending. The court in Howard specifically distinguished arbitration clauses because the enforceability of pre-litigation arbitration agreements is established by statute. Although the court did not specifically discuss the relationship between arbitration and jury trial waivers, the court did cite Weyant v. MacIntyre, a court of appeals case upholding the enforceability of pre-litigation agreements to arbitrate. Many lenders do include arbitration provisions in their loan agreements.

the profits of a business venture if successful, and need not be paid otherwise. In all such cases the promises made to induce the maker to sign the note, and if the promise be not kept, it works a fraud. The theory of the law is that more fraud would result if all notes were open to qualification and contradiction by parol evidence than if the door were closed and locked against such evidence. Consequently, to defeat liability on a note because obtained by fraud, the fraud must consist in something else than representations and promises of the kind referred to. Id.

In Tallman v. First Nat'l Bank of Nevada, 66 Nev. 248, 208 P.2d 302 (1949), the court said

If testimony as to parol understandings contrary to a written agreement were admissible to prove fraud and if the rule does not apply where fraud is proven, quite obviously we would have no parol evidence rule, for then, in each case evidence as to oral understandings would be admissible to contradict a written agreement.

Id. at 258, 208 P.2d at 306-7.

109. Id. at 340-41, 444 S.E.2d at 800.
110. Id. at 340, 444 S.E.2d at 800.
111. Id.
112. Id.
113. Id.
115. Id. Most states have upheld arbitration clauses as an effective waiver of the right to trial by jury. See, e.g., Long v. DeGeer, 753 P.2d 1327, 1329 (Okla. 1987); Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650 (Minn. 1990); Lawrence v. Walzer & Gabrielson, 207 Cal. App. 3d 1501, 1507 (1989); Family Loan Co. v. Surratt, 149 S.E.2d 334, 336 (S.C. 1966). For that matter, most states as well as the federal courts have held pre-litigation waivers of jury trials are enforceable if made knowingly and voluntarily. See, e.g., Telum v. E.F. Hutton Credit Corp., 859 F.2d 835, 836 (10th Cir. 1988); Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755
documentation. More will begin to do so as a result of the decision in Howard.

D. Recent Bankruptcy Amendments of Interest to All Commercial Lawyers

Some of the provisions of the Bankruptcy Reform Act of 1994 (the “Act”) should be noted by a broader audience than bankruptcy specialists. The Act became effective October 22, 1994, and all of the provisions discussed in this Article are effective with regard to cases commenced on or after that date.

Hotel and Motel Revenues as Cash Collateral. The Act amended Bankruptcy Code section 552(b) to expand the categories of property that remain subject to an agreement entered into before the filing of a bankruptcy petition even though the property was acquired by the debtor after the bankruptcy filing. Those categories previously included “proceeds, products, offspring, rents, or profits” arising from property in which the creditor held a security interest upon the date of filing. The Act deleted the term “rents” from this passage, but added a new subsection, Bankruptcy Code section 552(b)(2), that effectively includes not only rents but also “fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties...” Lenders holding a prepetition interest now will enjoy a postpetition interest in these items “except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.”


117. BRA § 702.

118. BRA § 214.

119. Id.

120. Id. This amendment evidently resolves, or at least moots, a disagreement among different courts concerning whether hotel and motel revenues constitute cash collateral. See, e.g. In re Tollman-Hudley Dalton, 162 B.R. 26 (Bankr. N.D. Ga. 1993), compare, In re S.F. Drake Hotel Assoc., 147 B.R. 538 (N.D. Cal. 1992). Bankruptcy Code section 363 concurrently was amended to expand the definition of cash collateral to include “the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties.” BRA § 214.

121. Id. This exception has been used to establish that at least some portion of the property received postpetition should be free of the creditor’s security interest in
“Bankruptcy Remote,” Single Asset Real Estate Financing. In recent years, many single asset real estate bankruptcy cases have produced court opinions considering whether the case was filed in bad faith or is one in which relief from the automatic stay should be granted for cause. The Bankruptcy Code now includes a definition for “single asset real estate.” As used in the Bankruptcy Code, that term now means real property constituting a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent liquidated secured debts in an amount no more than $4 million.

For “single asset real estate” bankruptcy cases filed on or after October 22, 1994, the Bankruptcy Code section 362(d) adds another, independent basis for relief from automatic stay. The additional ground entitles a creditor holding a claim secured by an interest in the real estate to relief from stay unless

(3) . . . not later than . . . 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) —

(A) The debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) The debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor’s interest in the real estate.

recognition of the fact that the particular property did not, or was not, acquired by the debtor solely because of the debtor’s continued possession and ownership of the creditor’s collateral. After all, cows do not produce cash, they produce milk. And they only produce milk if they are supplied the correct mood music.

122. See In re Natural Land Corporation, 825 F.2d 296 (11th Cir. 1987); In re Albany Partners Limited, 749 F.2d 670 (11th Cir. 1984).
123. BRA § 218.
124. Id.
125. Id.
126. Id.
The provisions of 362(d) remain disjunctive. A court may grant relief from stay "for cause" and also grant relief from stay because the debtor lacks equity and has no reasonable likelihood of reorganization. The single asset amendments appear to make a bad faith filing determination slightly more likely. Single asset debtors now must be able and prepared to make the required payments within ninety days. If the debtor's circumstances upon the filing date suggest no reasonable prospect of doing so, then the filing is more likely to be in bad faith. Immediate cash flow is now critical to the debtor.

The new single asset provision should encourage lenders to insist, when possible, that the borrower be structured (or restructured) to fit the definition of the single asset case. The term "Bankruptcy Remote" is becoming a common requirement in real estate loan commitments.

Warning: File Continuation Statements and Take Other Action to Maintain Perfection. The filing of a petition in bankruptcy automatically stays many acts that might otherwise have been taken against the debtor or the debtor's property. Because of this, most Georgia secured creditors do not file continuations statements or take other actions to maintain perfection when a bankruptcy is pending. For bankruptcy cases filed on or after October 22, 1994, the automatic stay no longer prohibits most of these actions, and Bankruptcy Code section 546(b) specifically permits them.

127. Id.
128. BRA § 218.
130. Section 546(b) now provides:

(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—
(A) permits perfection of an interest in property to be effective against an entity that acquired rights in such property before the date of perfection; or
(B) provides for the maintenance or continuation of perfection of an interest in the property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If—
(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and
(B) such property has not been seized or such action has not been commenced before the date of the filing of the petition;
such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement. BRA § 204.
No doubt many secured lenders will lose their perfected status because they were unaware of this change in the Bankruptcy Code. Continuation statements may now be filed and must now be filed during bankruptcy proceedings.\textsuperscript{131}

For some creditors, ruin may be the consequence of Congress’ largesse.

\textsuperscript{131} Presumably the tolling provision of Section 108(c) no longer protects creditors who fail to timely file their continuation statements because that section is lifted “30 days after notice of the termination or expiration of the stay under section 362 . . . .” If that is so, then the perfection rights of creditors, at least versus one another if not the bankruptcy trustee, are no longer fixed as of the petition date.