Commercial Law

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A. Loan Commitments

Loan commitments, as most first-year law students learn, must be in writing to be enforceable under the Statute of Frauds, codified in Georgia at O.C.G.A. section 13-5-30(7). Of course, that rule begs the question of which written memoranda will qualify thereunder. In Oceanmark Bank, F.S.B. v. Stubblefield, the court found that a bank's letter stating the borrower's loan application was approved did not constitute a binding loan commitment under the Statute of Frauds because it did not specify a maturity date. Further, the letter did not include a provision pertaining to the rate of interest after the first year of the loan. Because the letter did not show that an agreement had been reached on all terms and conditions, "no enforceable loan commitment was made."

Similarly, the court in Kamat v. Allatoona Federal found that various documents failed to satisfy the Statute of Frauds in the loan commitment context. In Kamat plaintiff-borrower made an application with defendant-lender preparatory to plaintiff's attendance at a condominium auction. Plaintiff bid at the auction after being informed by defendant-


As with last year's article, many thanks to my wife, Laurie, for all her support.

2. Id. at 400, 496 S.E.2d at 467.
3. Id.
5. Id. at 262, 498 S.E.2d at 154-55.
lender that “their loan application was approved.” In plaintiff’s subsequent breach of contract claim against the defendant-lender for its failure to provide financing after plaintiff became contractually bound to purchase the condominium, defendant-lender raised the Statute of Frauds defense. Plaintiff responded by citing a letter from the lender prior to the auction stating that plaintiff’s loan application was “approved.” Plaintiff also cited a good faith estimate of closing costs, which set forth “the loan amount and the interest rate for an FHA insured adjustable mortgage.” The court held that neither of these documents satisfied the Statute of Frauds. As to the first document, the court noted the letter listed defendant’s reasons for being unable to provide plaintiff with financing, and therefore, the letter could not be viewed as a loan commitment. Further, the reference in the letter to an earlier loan approval was, at most, a reference to the lender’s oral commitment. Finally, the good faith estimate, although containing the terms of the proposed loan, contained no written commitment by defendant to make the loan.

Finally, the court in Georgia First Bank v. Mathis demonstrated that Georgia courts remain reluctant to force a lender to extend credit under a loan commitment when the borrower fails to adhere to the terms of the commitment. In Mathis the bank issued a five-page commitment letter to the borrower, who proposed to construct an amusement park. Signed by both parties, the letter listed five situations under which the bank could cancel the commitment to loan the money. One of these grounds was the occurrence of “any adverse change with respect to the project, the collateral, or other source of repayment.”

When the bank issued the letter, it did so in contemplation of receiving a first lien position on borrower’s residence, even though the bank knew at the time that another lender had a first position. When the bank learned that the holder of the first position would not subordinate as the borrower had indicated, the bank was entitled to cancel the commitment because “the absence of this security was material.” The court thus found that an “adverse change” had

6. Id. at 261, 498 S.E.2d at 154.
7. Id. at 262, 498 S.E.2d at 154.
8. Id. at 261, 498 S.E.2d at 154.
9. Id., 498 S.E.2d at 155.
10. Id. at 262, 498 S.E.2d at 154.
11. Id.
12. Id., 498 S.E.2d at 154-55.
14. Id. at 770, 490 S.E.2d at 441.
15. Id. at 772, 490 S.E.2d at 442.
occurred "with respect to the project, the collateral, or other source of repayment." Regrettably, the court refused to address the bank's argument that the commitment was not an enforceable contract. Had it chosen to do so, the court could have provided valuable guidance to those drafting such documents.

B. UCC Issues

The court in *Weldon v. Trust Co. Bank, N.A.* addressed issues "concerning the circumstances under which payment on a cashier's check may be stopped by either the bank issuing the check or the remitter, who is one who purchases a cashier's check payable to another party." The court began its discussion by differentiating between a cashier's check, which is a "check drawn by a bank on itself," and a certified check, which is "a personal check that a bank has accepted." In *Weldon* an individual who wished to purchase goods from seller deposited funds into his mother's account at defendant-bank. On March 23, 1995, the mother purchased a cashier's check from the bank with those funds. Four days later the son's agent delivered the cashier's check to the seller, who released and shipped the goods in reliance of the cashier's check. The next day the son contacted the bank to request a stop payment on the cashier's check because the goods were defective. Although the bank initially stopped payment and dishonored the cashier's check, it subsequently paid the item upon learning from the seller's bank that the check had in fact been delivered to the seller.

The question was whether a cashier's check, like a certified check, "operates as an assignment of funds to the payee." The court began by noting that although a majority of commentators disagree, Georgia courts subscribe to "the view that a cashier's check is the equivalent of a certified check" and that "[c]ases subsequent to Wright hold that a cashier's check is accepted in advance by the act of its issuance and operates an assignment of funds to the payee." Accordingly, the stop-payment order came too late under O.C.G.A section 11-4-303(1). "When the money was withdrawn from [the mother's] account and the

16. *Id.* at 778, 490 S.E.2d at 441.
17. *Id.*
19. *Id.* at 458, 499 S.E.2d at 394.
20. *Id.* at 460, 499 S.E.2d at 395.
21. *Id.* at 458-59, 499 S.E.2d at 394-95.
22. *Id.* at 460, 499 S.E.2d at 395.
23. *Id.* at 460-61, 499 S.E.2d at 395-96 (footnotes omitted).
24. *Id.* at 463, 499 S.E.2d at 397.
A cashier's check was issued in [seller's] name, it became [seller's] property. [The mother] could not recall the cashier's check or stop payment on it.\textsuperscript{25} Because prerevision statutes applied, the court did not indicate whether its holding in \textit{Weldon} would be binding under the 1996 version of Uniform Commercial Code ("UCC") Articles 3 and 4.

In \textit{Vickers v. Broxton State Bank},\textsuperscript{26} the issue was whether a bank had exhibited the "good faith" that is a prerequisite to the sixty-day statement rule in O.C.G.A. section 11-4-406.\textsuperscript{27} Plaintiff and his partner maintained an account with defendant-bank. Although the account could only properly be drawn upon by items containing the signatures of both plaintiff and his partner, the bank paid several thousand dollars in checks signed only by plaintiff's partner. The bank defended its actions under O.C.G.A. sections 11-4-406 (1) and (4), which provide that a customer may not recover against the bank for improperly paid items when the bank sent an account statement accompanied by items paid in "good faith," and the customer does not discover and report any improperly paid items within sixty days from such statement.\textsuperscript{28} The trial court granted the bank partial summary judgment based on this defense.\textsuperscript{29}

On appeal, plaintiff argued he was entitled to have a jury determine whether the bank had paid the improperly signed checks in "good faith."\textsuperscript{30} The court of appeals disagreed, noting that "issues of good faith [did] not always present jury questions."\textsuperscript{31} The court of appeals found that although evidence showed plaintiff "was a new customer of the bank, and the bank had a long-term relationship with his partner, this relationship [gave] rise to no inference that the bank treated him dishonestly."\textsuperscript{32} Further, "any bad faith the bank exhibited after [plaintiff] notified it of the errors [was] immaterial because '[t]he transactions regarding which lack of good faith must be shown are paying the checks and debiting [the] account.'"\textsuperscript{33} Therefore, grant of partial summary judgment to the bank was proper.\textsuperscript{34}

\begin{itemize}
  \item \textsuperscript{25} \textit{Id.} at 461, 499 S.E.2d at 396 (footnote omitted).
  \item \textsuperscript{26} 230 Ga. App. 170, 495 S.E.2d 645 (1998).
  \item \textsuperscript{27} \textit{Id.} at 171, 495 S.E.2d at 646.
  \item \textsuperscript{28} \textit{Id.} at 170-71, 495 S.E.2d at 646.
  \item \textsuperscript{29} \textit{Id.} at 171, 495 S.E.2d at 646.
  \item \textsuperscript{30} \textit{Id.}
  \item \textsuperscript{31} \textit{Id.}, 495 S.E.2d at 647.
  \item \textsuperscript{32} \textit{Id.} at 172, 495 S.E.2d at 647.
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{34} \textit{Id.}
\end{itemize}
The court in *Summit Transportation Services, Inc. v. NationsBank (South), N.A.*
also addressed issues pertaining to a bank's "statement" defense under O.C.G.A. section 11-4-406. First, the court held that sending only imaged copies of paid items to a customer constituted a "reasonable manner" of making items available to its customer under O.C.G.A. section 11-4-406(1). Second, the court addressed the quantum of evidence necessary for a plaintiff to demonstrate that its bank was negligent in honoring forged checks. In *Summit* the bank was unable to produce (1) documentary evidence explaining its policies in verifying signatures on checks, (2) signature cards or the depository agreement with plaintiff, or (3) any witness to explain its verification procedures. Therefore, the bank failed to show that it had complied with industry standards and "exercised the requisite degree of ordinary care in processing [plaintiff's] checks." In addition, the court found that the standard for determining the bank's negligence within the sixty-day period was the same as that for determining the bank's negligence under the fourteen-day period set forth in O.C.G.A. section 11-4-406(3).

As a final note on UCC issues, the court in *Jurisco, Inc. v. Bank South, N.A.* addressed two issues pertaining to an issuer-bank's obligation under a letter of credit. The letter of credit in *Jurisco* required "a signed written statement from an authorized officer" of the beneficiary of the letter of credit, for a valid draw to be made. The beneficiary was in receivership, and the question was whether the receiver was "an authorized officer" under the terms of the letter of credit. Noting that there was no Georgia precedent on this issue, the court found that substantial rather than strict compliance under the terms of a letter of credit was the applicable standard. Therefore, the court held that the beneficiary's receiver was an "authorized officer" "entitled to make a demand for payment on the letter of credit." The court also addressed the independence principle, which states that a "bank's obligation to the beneficiary is independent of the beneficiary's

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36. Id. at 10, 500 S.E.2d at 913.
37. Id. at 10-11, 500 S.E.2d at 913.
38. Id.
39. Id.
40. Id. at 11, 500 S.E.2d at 914.
42. Id. at 801, 492 S.E.2d at 767.
43. Id.
44. Id. at 802, 492 S.E.2d at 768.
45. Id. at 803, 492 S.E.2d at 768.
performance on the underlying contract. Put another way, the issuer must pay on a proper demand from the beneficiary even though the beneficiary may have breached the underlying contract with the applicant. The question was whether Georgia recognized a fraud exception to the independence principle. The court stated that the type of fraud required to enjoin payment on a letter of credit must be “fraud so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money . . . . Where the beneficiary’s conduct has so vitiated the entire transaction that the legitimate purposes of the independence of the issuer’s obligation would no longer be served . . . .” Because there was no evidence that the beneficiary “ever misrepresented . . . the amount actually owed,” the fraud exception to the independence principle did not apply.

C. Account Management Issues

The survey period produced a decision addressing allegations that a bank was negligent in opening an account. In Nicholl v. NationsBank of Georgia, N.A., plaintiff lost his wallet, which included his driver’s license, social security card, and other items of identification. Plaintiff discovered that an imposter had opened an account in plaintiff’s name with defendant-bank. Plaintiff made this discovery after the imposter’s handling of the account resulted in an adverse credit rating for plaintiff. The trial court granted summary judgment to the bank on plaintiff’s claim that the bank had negligently opened the account in his name. The court of appeals affirmed. Although none of the documents in plaintiff’s lost wallet had the address or telephone numbers that were on the checks printed for the imposter’s account, and although the signatures on the checks differed from plaintiff’s real signature, the court of appeals found the evidence insufficient to support a negligence claim. In particular, the evidence revealed nothing about what identification, stolen or forged, the imposter presented to the bank in opening the account. Further, the record contained no evidence that plaintiff attempted to obtain through discovery “more specific information about [the bank’s] conduct in opening the account.” However, the

46. Id., 492 S.E.2d at 768-69.
47. Id. at 804, 492 S.E.2d at 769.
48. Id. at 803-04, 492 S.E.2d at 769.
49. Id. at 803, 492 S.E.2d at 769.
51. Id. at 287, 488 S.E.2d at 752.
52. Id.
53. Id. at 288-89, 488 S.E.2d at 753.
54. Id. at 289, 488 S.E.2d at 753.
court indicated that such a claim might be supported by expert testimony on what would be a reasonable identification policy for a bank to have.\textsuperscript{55}

Joint and survivor accounts under O.C.G.A section 7-1-813 also received treatment during the survey period. In \textit{Bradshaw v. McNeill},\textsuperscript{56} decedent created several joint accounts with plaintiff prior to decedent's death. Approximately one month prior to her death, decedent executed a power of attorney in favor of defendant, specifying that any activity undertaken by defendant was to be taken on decedent's behalf. Upon learning of the joint accounts between decedent and plaintiff, defendant liquidated these joint accounts and created new joint accounts between herself and decedent using the power of attorney. Plaintiff learned of this after decedent's death and sued defendant to recover the sums that had originally been in a joint account between plaintiff and decedent.\textsuperscript{57}

The court began its analysis by noting that the power of attorney, which required any activity be taken on behalf of decedent, prohibited any person acting thereunder "from benefitting from their position to the principal's detriment."\textsuperscript{58} In light of defendant's testimony that the withdrawn funds were to be used to pay for decedent's care, and the fact that decedent died without having an opportunity to ratify or repudiate defendant's actions, a jury question existed on whether defendant was acting on behalf of decedent or whether defendant exceeded the scope of her authority by retaining the funds.\textsuperscript{59}

The court of appeals also addressed joint-control agreements required by sureties on guardianship accounts. In \textit{Traveler's Indemnity Co. v. Trust Co. Bank},\textsuperscript{60} plaintiff-surety required a guardian to sign a joint-control agreement on the ward's account with defendant-bank, whereby funds could be withdrawn from the account only by joint signature of plaintiff and the guardian. Defendant-bank regularly sent statements on the account to the guardian's address, which was listed as the "account address" on the account application.\textsuperscript{61} Plaintiff never requested monthly statements from either the bank or the guardian. When it became apparent that the guardian had misappropriated the ward's

\textsuperscript{55} Id.
\textsuperscript{56} 228 Ga. App. 653, 492 S.E.2d 568 (1997).
\textsuperscript{57} Id. at 653-54, 492 S.E.2d at 569-70.
\textsuperscript{58} Id. at 654, 492 S.E.2d at 570.
\textsuperscript{59} Id. at 654-55, 492 S.E.2d at 570.
\textsuperscript{60} 228 Ga. App. 893, 495 S.E.2d 296 (1997).
\textsuperscript{61} Id. at 894, 495 S.E.2d at 298.
funds, the probate court required plaintiff to make the losses good.\textsuperscript{62} Plaintiff then sued the bank for violating the joint signature agreement because the bank had paid checks bearing only the guardian’s signature.\textsuperscript{63} After summarily dismissing the bank’s argument that joint-control agreements violate public policy, the court proceeded to determine the validity of plaintiff’s claim in light of the “statement” rule contained in O.C.G.A. section 11-4-406.\textsuperscript{64} This rule provides that if a customer fails to report an “unauthorized signature” within sixty days from the time a statement is made available, it is precluded from asserting such unauthorized signature in an attempt to recover against the bank.\textsuperscript{65}

The first question was whether plaintiff’s “missing” signature constituted an “unauthorized” signature within the meaning of O.C.G.A. section 11-4-406.\textsuperscript{66} The court concluded that it did, and that plaintiff was a customer of the bank by virtue of the joint-control agreement.\textsuperscript{67} Relying on New Jersey caselaw, the court held that the joint-control agreement did not negate the operation of O.C.G.A. section 11-4-406.\textsuperscript{68}

[Plaintiff] could easily have requested that [the bank] send it monthly statements or could have asked [the guardian] to provide it with those statements. [Plaintiff] apparently did not request any statements during the almost four years after the account was closed, and it must bear the burden of loss for its failure.\textsuperscript{69}

Under a convoluted set of facts, the court in \textit{Longino v. Bank of Ellijay}\textsuperscript{70} affirmed the principle that a “bank owes no legal duty to act as a customer’s legal or financial advisor.”\textsuperscript{71} In \textit{Longino} plaintiff-attorney represented a physician, Fernandez, operating as Ellijay Medical Center, P.C. In an attempt to gain control of North Georgia Medical Center, Fernandez purchased three notes from the Bank of Ellijay collateralized by stock in North Georgia Medical Center. Fernandez financed the purchase of these notes by obtaining a loan from the Bank of Dahlonega, using assets of his professional corporation as

\begin{thebibliography}{99}
\bibitem{62} Id.
\bibitem{63} Id. at 893-94, 495 S.E.2d at 298.
\bibitem{64} Id. at 895, 495 S.E.2d at 299.
\bibitem{65} Id. at 895-96, 495 S.E.2d at 299.
\bibitem{66} Id. at 895, 495 S.E.2d at 299.
\bibitem{67} Id.
\bibitem{68} Id. at 896, 495 S.E.2d at 299-300.
\bibitem{69} Id.
\bibitem{70} 228 Ga. App. 37, 491 S.E.2d 81 (1997).
\bibitem{71} Id. at 39, 491 S.E.2d at 85 (quoting First Union Nat’l Bank of Georgia v. Gurley, 208 Ga. App. 647, 648, 431 S.E.2d 379, 381 (1993)).
\end{thebibliography}
a security interest. Plaintiff, as attorney for Fernandez and the professional corporation, requested that the Bank of Ellijay redeem certificates of deposit ("CDs") held by it and directed that the proceeds from these CDs be placed in a cashier's check made payable to the professional corporation. Plaintiff did this without realizing that the CDs were actually held in the names of Ellijay Medical Center Profit Sharing Plan and Ellijay Medical Center Pension Plan, both of which were shielded from creditors (including the Bank of Dahlonega) by the Employee Retirement Income Security Act ("ERISA"). Before plaintiff or his client could take actual possession of the cashier's check, the Bank of Dahlonega notified the Bank of Ellijay of its security interest in the assets of the professional corporation. Because ERISA protection evaporated upon conversion of the CDs into the cashier's check, the Bank of Dahlonega received payment of these funds. After a malpractice action against plaintiff resulted in settlement, plaintiff sued the Bank of Ellijay alleging that it fraudulently failed to inform him of the ERISA protected status of the CDs.\(^7\)

The court of appeals affirmed the trial court's award of summary judgment to the bank.\(^7\) In addition to the fact that there was no material misrepresentation by the bank, "there was no fiduciary or other special relationship between the [plaintiff]" and the bank.\(^7\) Plaintiff "acted on information he received about the account from Fernandez and not the bank."\(^7\) Thus, the bank was "under no obligation to provide [plaintiff] with information to which he had equal access, and under such facts, [plaintiff] could not reasonably rely on any alleged representations or concealment of facts by the [bank]."\(^7\)

II. DEBTOR-CREDITOR RELATIONSHIP

A. Perfection and Priority

In JCS Enterprises, Inc. v. Vanliner Insurance,\(^7\) the court addressed an issue of first impression in Georgia: the rights of a secured creditor in insurance benefits payable from a third-party tortfeasor's insurer upon the destruction of the collateral. Plaintiff sold a vehicle and retained a security interest in it. After plaintiff had properly perfected its security interest in the vehicle, the vehicle was totaled in a collision

\(^7\) Id. at 37-39, 491 S.E.2d at 83-84.
\(^7\) Id. at 41, 491 S.E.2d at 86.
\(^7\) Id. at 39, 491 S.E.2d at 85.
\(^7\) Id. at 40, 491 S.E.2d at 85.
\(^7\) Id.
with a third-party tortfeasor. At the time of the collision, the purchaser of the vehicle was in default on its obligation to plaintiff. As the insurance company for the third-party tortfeasor, defendant paid insurance proceeds directly to the vehicle owner. When plaintiff learned of defendant's payment, it sued defendant for conversion.\textsuperscript{78}

The court began its analysis by stating that an "exercise of 'dominion or control' over secured property which is 'inconsistent with' the rights of the secured party is conversion."\textsuperscript{79} Because plaintiff's perfection of its security interest was constructive notice to defendant, the question was "when [was] the security interest extended to the insurance payment" made by defendant.\textsuperscript{80} Defendant contended that its payment did not become "proceeds" until it was received by the vehicle owner.\textsuperscript{81}

According to O.C.G.A. section 11-9-306(1), "'Proceeds' includes whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds."\textsuperscript{82} The court found that "although some courts have interpreted UCC § 9-306 'to mean that proceeds do not come into existence until they are received, the better view is that the right to payment under the insurance policy is also proceeds for these purposes and is subject to Article 9 of the UCC.'\textsuperscript{83} Therefore, defendant was liable for conversion by making payments to the vehicle owner.\textsuperscript{84} However, the court qualified its holding by stating that "the failure to pay insurance proceeds to a secured party would not in all cases constitute conversion.\textsuperscript{85} For example, a different result might be obtained if the terms of the security agreement between the debtor and secured party allowed for the debtor to retain any insurance proceeds for repair or replacement of the collateral. The court also suggested that a different result might have been reached had the parties raised the issue of O.C.G.A. section 11-9-306(3), which provides for a lapse in the protection of security interest ten days after a debtor receives proceeds.\textsuperscript{86}

\begin{itemize}
\item \textsuperscript{78} \textit{Id.} at 371-72, 489 S.E.2d at 96.
\item \textsuperscript{79} \textit{Id.} at 372, 489 S.E.2d at 96.
\item \textsuperscript{80} \textit{Id.} at 373, 489 S.E.2d at 96.
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id.}, 489 S.E.2d at 97.
\item \textsuperscript{83} \textit{Id.} at 375, 489 S.E.2d at 98 (quoting \textit{In re Reda, Inc.}, 54 B.R. 871, 875 (Bankr. N.D. Ill. 1985)).
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.} at 376, 489 S.E.2d at 98.
\item \textsuperscript{86} \textit{Id.}, 489 S.E.2d at 99.
\end{itemize}
The court in *Western Auto Supply Co. v. McKenzie*\(^7\) considered "which of two liens ha[d] priority on the proceeds sale of a [business]" when the business had undergone a name change and a change in corporate structure during the perfection period.\(^8\) Creditor A filed a financing statement on all business assets of "John Hadden d/b/a Western Auto Associates Store" on April 27, 1982. Creditor B also filed a financing statement naming the same debtor on December 31, 1986. On January 12, 1987, debtor incorporated under the name WASLA, Inc. Creditor A filed a new financing statement, naming WASLA, Inc. as debtor, on March 23, 1987, on all of the business assets of WASLA, Inc. Creditor B filed another financing statement on July 15, 1988, naming "John Hadden d/b/a Western Auto Associates Store" as debtor. On January 9, 1992, WASLA, Inc. was administratively dissolved. Creditor A's 1987 financing statement was continued on October 4, 1991, and Creditor B's 1988 financing statement was continued on March 25, 1993. On August 30, 1994, the store was sold. In that transaction, "John Hadden, d/b/a Western Auto" was listed as seller, and bills of sale were executed by both WASLA and John Hadden.\(^9\) The trial court found that Creditor B had the superior lien, reasoning that as of January 9, 1994, (two years after administrative dissolution) WASLA, Inc. ceased to exist, so that there were no assets to which Creditor A's lien could attach.\(^0\)

The court began its analysis by citing O.C.G.A. section 11-9-402(7), which states:

> Where the debtor so changes his name, or in the case of a organization, its name, identity, or corporate structure, that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with the respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.\(^1\)

Creditor B contended that upon dissolution of WASLA, Inc., the debtor's identity was changed to John Hadden, so that Creditor A's 1987 financing statement on WASLA, Inc. became "seriously misleading."\(^2\)

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88. Id. at 477, 489 S.E.2d at 538.
89. Id.
90. Id. at 478, 489 S.E.2d at 538.
92. 227 Ga. App. at 479, 489 S.E.2d at 539.
Nevertheless, the court found that this did not "invalidate an otherwise valid financing statement." Under O.C.G.A. section 11-9-402(7), the financing statement became ineffective only on "collateral acquired by the debtor more than four months after the change." Therefore, Creditor A maintained priority to the proceeds of the sale.

The court also considered lien priority in aircraft collateral. In *Southern Horizons Aviation v. Farmers & Merchants Bank of Lakeland*, the competing lien claimants were an aircraft mechanic who had initiated a lien foreclosure action in superior court, but who had failed to record his lien with the FAA, and a bank that had recorded its purchase money security interest with the FAA after the mechanic began his lien foreclosure proceedings. The relevant dates and events were as follows. On January 25, 1994, debtor executed a promissory note and security agreement in favor of the bank that financed debtor's purchase of the aircraft. Between January 29, 1994 and July 1994, the mechanic made repairs to the aircraft. On July 22, 1994, the bank recorded a financing statement in the superior court. The mechanic initiated lien foreclosure proceedings in superior court during November 1994. Due to clerical errors, the bank's financing statement with the FAA was not recorded until December 1994 or February 1995. The mechanic never filed his lien with the FAA. The court ruled in favor of the bank, finding that "[a] mechanic's lien which has not been recorded with the FAA is not valid."

B. Repossession

*u* Lewis Broadcasting Corp. v. Phoenix Broadcasting Partners*99 addressed a creditor's attempt to obviate a debtor's right to redeem collateral upon default under the terms of a security agreement. Plaintiff loaned defendant $650,000, and in exchange received a promissory note, a security interest in all defendant's assets except for FCC licenses, and an option to purchase defendant's assets, including the FCC licenses, upon defendant's default under the note. All documents were executed the same day as part of the same transaction. When defendant defaulted on the note, plaintiff sought to exercise its
Defendant refused, and plaintiff sought specific performance of the option. The trial court granted summary judgment to defendant, finding "the option agreement was an impermissible restraint on the debtor's right to redeem its collateral upon default."\textsuperscript{101} The general rule is that "an option to purchase collateral for a fixed price upon default, entered into at the time of the original loan transaction granting a security interest in such collateral, constitutes an impermissible attempt to defeat the debtor's right to redeem the collateral."\textsuperscript{102} The court indulged plaintiff's contention that an exception to this rule existed "whereby a borrower may validly waive the right of redemption by entering into a subsequent agreement supported by additional consideration."\textsuperscript{103} Although an issue of first impression in Georgia, the court found that "such an exception is not inconsistent with the language [of prior case law], which states that 'any provision in the mortgage at its inception which takes away the right of the mortgagor to exercise his equity of redemption is void."\textsuperscript{104} Nevertheless, the option agreement before the court failed to qualify for the exception because "the option agreement was part of the initial loan transaction and constituted part of the consideration" for the loan by plaintiff.\textsuperscript{105} Plaintiff also argued that because it did not have a security interest in the FCC licenses, defendant enjoyed no equity of redemption, and the general rule did not apply.\textsuperscript{106} However, because the option agreement was not severable, and did not allow plaintiff to purchase less than all of the defendant's assets, this contention failed.\textsuperscript{107}

In \textit{Welch v. Ford Motor Credit Co.,}\textsuperscript{108} the issue was whether a creditor repossessing a motor vehicle was entitled to a deficiency judgment.\textsuperscript{109} Under O.C.G.A. section 10-1-36, a creditor repossessing a motor vehicle may not seek a deficiency judgment unless he notifies the debtor of his intention to do so within ten days of repossession.\textsuperscript{110} The debtor stated that he voluntarily surrendered the vehicle to the creditor by returning it on May 31, 1995, although the creditor's records showed it was returned June 6, 1995. On June 2, 1995, the creditor

\textsuperscript{100} Id. at 94-95, 502 S.E.2d at 254-55.
\textsuperscript{101} Id. at 95, 502 S.E.2d at 255.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 96, 502 S.E.2d at 256.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 96-97, 502 S.E.2d at 256.
\textsuperscript{109} Id. at 904, 490 S.E.2d at 207.
\textsuperscript{110} O.C.G.A. § 10-1-36 (1994).
informed the debtor by letter that he was in default and had until June 12, 1995 to cure. Two days later, the creditor sent the notice required by O.C.G.A. section 10-1-36.111 The dispositive issue concerned the date on which the ten-day period began to run.112 Previous cases held that voluntary surrender will trigger the ten-day period if at the time of surrender "the debtor was in default, and the creditor had the right to repossess."113 The creditor contended that it did not have the right to repossess, therefore the ten-day period did not begin to run until June 12, 1995, the date it stated it intended to repossess the vehicle.114 The court rejected this position, finding that O.C.G.A. section 10-1-36 does not "allow a creditor to unilaterally 'toll' the ten day requirement."115 The court remanded for determination of whether the debtor surrendered the vehicle on May 31, 1995, as he contended, in which event the creditor's June 14, 1995 notice was untimely, or on June 6, 1995, as the creditor stated, in which event notice was timely.116

C. Fraudulent Conveyance

The survey period decision in Beeson v. Crouch117 emphasized the sine qua non of a fraudulent conveyance action—status as a creditor. Defendant transferred patents to a trust that granted CLI, Inc. an exclusive license to use the patents. Defendant then proposed a joint venture to plaintiffs whereby the parties would market, use, and sell the patents in conjunction with CLI. Plaintiffs invested over $300,000 in the venture. Defendant then informed plaintiffs that the trustee had canceled CLI's license, and that the venture was terminated. Plaintiff contended that defendant's conveyance of the patents to the trust was fraudulent and sought imposition of a constructive trust in their favor.118 Because plaintiffs "presented no evidence that they are or have been creditors of [defendant] . . . [and did not hold] demands against [defendant] at the time the allegedly fraudulent conveyance occurred," they lacked standing to pursue a claim for fraudulent conveyance.119

111. 227 Ga. App. at 904-05, 490 S.E.2d at 207-08.
112. Id. at 905, 490 S.E.2d at 207.
114. Id.
115. Id.
116. Id. at 904-05, 490 S.E.2d at 207-08.
118. Id. at 578-79, 490 S.E.2d at 120-21.
119. Id. at 684, 490 S.E.2d at 124.
III. EMPLOYMENT AGREEMENTS

A. Restrictive Covenants

A previous edition of this survey article claimed that attempting a synthesis of Georgia caselaw on restrictive covenants in employment agreements would be next to impossible. In Habif, Arogeti & Wynne, P.C. v. Baggett, Judge Beasley accomplished the impossible by thoroughly discussing the state of the law in Georgia on noncompete and nonsolicit covenants of shareholders in a professional corporation. Georgia has traditionally distinguished between “covenants ancillary to an employment contract, which receive strict scrutiny and are not blue-penciled, and covenants ancillary to a sale of a business, which receive much less scrutiny and may be blue-penciled.”

The Supreme Court of Georgia has also created an intermediate level of scrutiny “for covenants ancillary to professional partnership agreements.” Such covenants deserve treatment different from employment contracts, because in the former, the consideration flows equally among all parties, and each partner enjoys a bargaining position equivalent to the partnership. The principle inquiry in determining whether to apply the intermediate level of scrutiny is the relative bargaining powers of the parties. To assess the relative bargaining power of the parties in Baggett, the court considered the following factors: (1) length of service, including the portion during which the party was a shareholder, (2) the degree of management responsibility possessed by the restricted party, (3) salary relative to other partners or shareholders, and (4) whether other shareholders or partners had executed similar agreements benefitting the restricted party. Considering these factors, the court concluded that the restricted party and the corporation were in an equivalent bargaining position so that an intermediate level of scrutiny applied.

Applying intermediate scrutiny to the covenant not to compete, the court made the following holdings that are instructive for drafting of

122. Id. at 289-90, 498 S.E.2d at 349.
123. Id. at 290, 498 S.E.2d at 349.
124. Id.
125. Id. at 291 n.9, 498 S.E.2d at 350 n.9.
126. Id. at 291, 498 S.E.2d at 350.
127. Id.
such agreements. First, the court came as close as it could to giving an absolute stamp of approval on a two-year duration period.\textsuperscript{128} Second, the court rejected the defendant's claim that the seven-county territorial restriction was overbroad as it prohibited him from working in counties in which he had not worked on plaintiff's behalf in the two years prior to his departure.\textsuperscript{129} Under the lesser degree of scrutiny, "territorial restrictions expressed in terms of a certain number of miles radius of a city" are generally valid, and the focus is rather on "whether the restricted area coincides with the territory served by the employer, not by the employee."\textsuperscript{130} When considered in conjunction with a clause in the covenant not to compete whereby defendant agreed "that the covenant was 'reasonable' and that breach of the agreement 'would work harm' to the partnership," the territorial restriction was valid.\textsuperscript{131} Third, defendant argued that the scope of prohibited activity was overbroad because it "prevented him from accepting unsolicited business and thus impinged on the public's ability to choose the professional services it prefers."\textsuperscript{132} The court rejected this argument as being founded on policy considerations applicable in the context of covenants not to solicit, but inapplicable for purposes of assessing the validity of activity-based restrictions in covenants not to compete.\textsuperscript{133} "The key in covenants not to compete cases is that the forbidden services or activities cannot be performed in a certain territory; it is not relevant who the clients are or what activities, whether soliciting or otherwise, occur outside the territory."\textsuperscript{134} The court separately analyzed the covenant not to solicit. As with the covenant not to compete, the court found the two-year limitation reasonable.\textsuperscript{135} As for the territorial aspects of the nonsolicit covenant, the court stated that such a covenant is "generally valid if it prohibits soliciting clients of the employer whom the employee had contacted during her employment with the employer, regardless of whether it has a territorial restriction."\textsuperscript{136} Because the covenant not to solicit in Baggett prohibited solicitation "only of the clients of [plaintiff] for whom [defendant] had 'done substantial work, it could lack a territorial

\textsuperscript{128} Id. at 292, 498 S.E.2d at 351.
\textsuperscript{129} Id. at 294, 498 S.E.2d at 352.
\textsuperscript{130} Id. at 293-94, 498 S.E.2d at 352.
\textsuperscript{131} Id. at 294, 498 S.E.2d at 352.
\textsuperscript{132} Id. at 295, 498 S.E.2d at 353.
\textsuperscript{133} Id. at 296, 498 S.E.2d at 354.
\textsuperscript{134} Id. at 296-97, 498 S.E.2d at 354.
\textsuperscript{135} Id. at 297, 498 S.E.2d at 354.
\textsuperscript{136} Id., 498 S.E.2d at 354-55.
restriction and still be valid."³⁷ Lastly, as to the scope of activity prohibited, the court found that "prohibiting the solicitation and diversion of clients is reasonable as is prohibiting the contact of clients."³⁸

Any practitioner drafting a noncompete covenant for a member of a professional entity should review Judge Beasley's opinion in Baggett. It is replete with annotations of restrictive covenant cases. Regrettably, the court did not need to reach the question of whether blue-penciling is allowed under the intermediate level of scrutiny. Therefore, it remains an unresolved issue.

In William N. Robins, P.C. v. Burns,³⁹ the strict standard of scrutiny applied to the employment agreement between a law firm and an associate attorney. The agreement, which stated that its intent was to comply with the Directory Rules of the State Bar of Georgia, prohibited the associate from soliciting any clients if he left the firm, and provided a fee structure for those clients who wished to have the associate continue providing representation. However, the agreement contained no limitation on duration.⁴⁰ The court found the agreement unenforceable because it contained no term limiting its duration or the area to which its geographic restrictions applied.⁴¹

The issue in Enron Capital v. Pokalsky⁴² was whether a choice of law provision would be given effect in an employment agreement containing restrictive covenants. The employment agreement (1) provided that the employee would not disclose any confidential business information of defendant after leaving defendant's employ; (2) prohibited the employee from competing with defendant for a period of one year "in any geographic area or market where [defendant] conducts any business, which may limit the employee's ability to engage in certain businesses anywhere in the world;" and (3) stated that it was to be controlled by Texas law.⁴³ The court refused to give effect to the choice of law provision, stating that "a Georgia court will not enforce the contract if it is 'particularly distasteful.'"⁴⁴ This contract was "particularly distasteful" because its restrictions, which inhibited the former employee from competing anywhere in the world in any capacity, are unenforce-

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³⁷ Id. at 298, 498 S.E.2d at 355.
³⁸ Id.
⁴⁰ Id. at 263-64, 488 S.E.2d at 761-62.
⁴¹ Id. at 264, 488 S.E.2d at 762.
⁴³ Id. at 728, 730, 490 S.E.2d at 138, 139.
⁴⁴ Id. at 730, 490 S.E.2d at 139.
able in Georgia. The contract restrictions were further “particularly distasteful” because they contained no time limitation and were geographically overbroad. Pokalsky implies that a choice of law clause, which selects the law of a foreign jurisdiction in a covenant not to compete, will not be given effect to the extent that the law of the foreign jurisdiction permits restrictions broader than allowed for by Georgia caselaw.

*Harville v. Gunter* assessed the validity of a covenant not to compete in an employment agreement in terms of its territorial restriction and scope of activities prohibited. The noncompete covenant in *Harville* contained the following territorial restriction: “Troup County, Upson County, Pike County, Lamar County, Georgia, or any town or city in such other county or counties as Employee may hereinafter practice speech-language pathology in the employment of the Employer.” The covenant further prohibited the employee “from working as a speech pathologist with any person, organization, or at any facility serviced by [employer] at any time during her employment [with employer].” This language was overbroad because of its reference to “other counties” and “other facilities,” both of which were open-ended descriptions that prohibited the employee from determining the extent of the prohibition at the time the agreement was entered. The covenant was also overbroad on the scope of activity prohibited. Specifically, the covenant forbade the employee from owning stock in, or serving as an officer or director of, a company providing speech pathology services. This description was “very different from [employee’s] work as a speech pathologist” with employer and was thus “broader than necessary to protect the employer.”

**B. Terminable at Will Employment**

The court in *Simpson Consulting v. Barclays Bank* considered the existence of a promissory estoppel exception to the general rule that employment for an indefinite period is terminable at will. The court found that no exception existed, holding,

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145. *Id.*
146. *Id.*
148. *Id.* at 198, 495 S.E.2d at 863.
149. *Id.* at 199-200, 495 S.E.2d at 864.
150. *Id.* at 200, 495 S.E.2d at 864.
151. *Id.*
while the principle of promissory estoppel . . . "provides that, in certain circumstances, the reliance by the promissee or third party upon the promise of another is sufficient consideration, in and of itself, to render the executory promise enforceable against the promisor, this principle has no application . . . where the promise relied on was for employment for an indefinite period." 153

IV. PROMISSORY NOTES AND GUARANTY

A. Prima Facie Showings and Representative Capacity

A holder of a promissory note establishes a prima facie case to recover upon proof that the note is authentic, is signed by the maker, and that the maker is in default. 154 In determining whether a maker's signature was in a representative capacity, practitioners should first determine the date of the signature. In Marek Interior Systems v. White, 155 the court found that O.C.G.A. section 11-3-402, effective July 1, 1996, only governs a maker's signature in a representative capacity made on or after its effective date, because its adoption by the legislature "created a substantive change in the law." 156 As for a guaranty, it must be in writing, and contain language whereby the purported guarantor agrees to guaranty the debts of a specified person or entity.

B. Defenses

1. Lack of Consideration. A review of the survey period decisions shows that lack of consideration is the most popular defense to a suit on a note. This is curious, as it seems to be the least successful. In NationsBank v. Peavey, 157 defendant gave plaintiff a note secured by an automobile. Upon his default on the note, defendant surrendered the automobile to plaintiff. When plaintiff threatened to sue for a deficiency, defendant signed an unsecured second note. Plaintiff sued to collect after defendant defaulted on the second note, and defendant raised the defense of failure of consideration. 158 However, the failure of consider-
ation defense is unavailable “when the note has been renewed.”\textsuperscript{159} Defendant admittedly signed the second note to avoid plaintiff’s threat of a deficiency proceeding. Taken in conjunction with defendant’s belief that a deficiency would exist following repossession, the court found that “the second note was a renewal of the first note.”\textsuperscript{160} A “renewal cuts off all defenses of which the maker then had knowledge” at the time of renewal, which in this case included the defendant’s defenses “based on the first note, on an alleged oral agreement with [Plaintiff], and arising from the repossession and sale of the automobile.”\textsuperscript{161}

The court in \textit{Kenerly v. Bryant}\textsuperscript{162} addressed the use of parol evidence to challenge the existence of consideration for a note. Defendant had signed several notes reciting that they were given “for value received” in favor of plaintiff in lieu of real estate commissions owed to plaintiff by defendant.\textsuperscript{163} The court conceded that use of the phrase “for value received” was sufficiently ambiguous to “support the admission of parol evidence regarding the existence of consideration.”\textsuperscript{164} However, defendant’s parol evidence did not seek to contradict the existence of consideration, “but rather [to establish] the existence of contemporaneous oral agreements . . . that the notes would never be enforced.”\textsuperscript{165} As “use of parol evidence for such a purpose [was] improper,” plaintiff was entitled to recover on the notes.\textsuperscript{166}

Defendant in \textit{Miller v. Calhoun/Johnson Co.}\textsuperscript{167} also defended a suit on a note based on failure of consideration. Prior to execution of the note, the maker was indebted to the holder for building materials sold to him on open account. In exchange for the holder’s execution of lien waivers on the maker’s construction projects, the maker executed a note in favor of the holder to settle the unpaid account balance. When the holder sued, the maker contended that holder had “breached its agreement not to demand payment of the note until it conducted an audit and review of the underlying account,” and that this constituted a failure of consideration.\textsuperscript{168} The court rejected this contention, stating that “no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation

\textsuperscript{159} Id. at 139, 488 S.E.2d at 702.  
\textsuperscript{160} Id.  
\textsuperscript{161} Id.  
\textsuperscript{163} Id. at 749, 490 S.E.2d at 457.  
\textsuperscript{164} Id.  
\textsuperscript{165} Id.  
\textsuperscript{166} Id.  
\textsuperscript{168} Id. at 648-49, 497 S.E.2d at 398.
Notwithstanding defendant's claims that he did not feel that he owed the holder any money at the time he executed the note, and that he only agreed to sign the note under protest, defendant adduced no evidence in support thereof. Therefore, the defense of failure of consideration was unavailable.\(^{170}\)

The court's decision in *Autrey v. UAP/GA AG CHEM, Inc.*\(^{171}\) demonstrated the futility of challenging the enforceability of a guaranty for lack of consideration when the guaranty recites nominal consideration and is executed under seal: "A contract under seal raises a prima facie presumption of consideration, which is rebuttable. Thus, although a contract under seal imports consideration, the defense of failure of consideration can be asserted. However, any nominal consideration recited in sealed instruments is sufficient as a matter of law."\(^{172}\)

### 2. Fraud

Makers during the survey period also defended actions on the basis that notes or guarantees given by them were procured by fraud. In *Autrey* a corporation was indebted to plaintiff for purchases of fertilizer on an open account. The corporation claimed it was due a set off on the account for damages suffered by it from defective fertilizer. Plaintiff accepted a promissory note from the corporation for the balance due on the account and a guaranty of the note by defendant, a corporate principal. In exchange, plaintiff agreed to assist the corporation in settling its claim against the fertilizer manufacturer. When plaintiff sued on the guaranty, defendant claimed that he had been induced by fraud to execute the guaranty, and that "the only reason he executed the guaranty was because representatives of [plaintiff] agreed that in an exchange for the promise 'it would arrange payment' for the crop damage [the corporation] suffered due to the allegedly defective fertilizer."\(^{173}\) The court rejected defendant's fraud defense, finding that the "alleged agreement was simply too vague to establish fraud."\(^{174}\) Because "the alleged fraud was predicated on a promise which was unenforceable at the time it was made," it was insufficient as a defense to the guaranty.\(^{175}\)

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169. *Id.* at 650, 497 S.E.2d at 399 (quoting First State Bank & Trust Co. v. Young, 202 Ga. App. 556, 567, 415 S.E.2d 18, 19 (1992)).

170. *Id.*


172. *Id.* at 770, 497 S.E.2d at 405.

173. *Id.* at 768, 497 S.E.2d at 404.

174. *Id.* at 769, 497 S.E.2d at 405.

175. *Id.* at 769-70, 497 S.E.2d at 405-06.
The fraud defense was equally unavailing to the defendant in *Fuller v. Greenville Banking Co.* Although defendant testified that "he 'did not realize that the note required monthly payments' and that he thought it 'was like the original [note] where [he] could pay the interest at the end of the year or if [he] sold the lots,'” the note did in fact require monthly payments. Notwithstanding defendant's testimony on what he thought the terms of the note were, "[i]t was incumbent upon [him] to exercise ordinary diligence to make his own independent verification of the contractual terms and his failure to do so bars an action based on fraud.”

Defendant in *Peavey* also defended on the basis that "he was fraudulently induced to sign the note which plaintiff [sought] to collect.” Defendant claimed that plaintiff's failure to inform him that it was not entitled to a deficiency judgment for the balance of previous note constituted fraudulent inducement. However, in light of defendant's admission "that he took no steps to determine his rights prior to the execution of the note," the defense failed.

3. **Laches.** *Kenerly* also addressed the use of laches to defend against enforcement of a note. The trial court had applied laches to limit the amount of interest recoverable by plaintiff. The court of appeals reversed. An action on a note is an action at law, whereas laches is an equitable defense inapplicable to actions at law. Even if the equitable doctrine of laches applied, it would be unavailable during the statute of limitations period, which for notes under seal is twenty years.

4. **Duress.** Defendants in *Hovendick v. Presidential Financial Corp.* and *Miller* both raised the defense of duress based on their respective economic distress. The court in both cases rejected the defense, holding that "financial difficulties do not constitute legal duress."

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177. Id. at 64, 495 S.E.2d at 321.
178. Id. at 65, 495 S.E.2d at 322.
180. Id.
182. Id. at 748, 490 S.E.2d at 456.
183. Id.
184. Id.
C. Course of Dealing

Several survey period decisions addressed the impact of the parties’ course of dealing on the enforceability of a note or guaranty. In Quintanilla v. Rathur,\(^\text{187}\) defendant purchased a medical practice from plaintiff, and in connection therewith, the parties executed a purchase and sale agreement and a lease for the office space, and defendant gave plaintiff a promissory note for the purchase price. Although the purchase and sale agreement contained a provision stating that neither seller nor purchaser could recover damages from the other except attorney fees, the note contained an acceleration clause. During the course of the first three years, defendant only made sporadic payments on the note. In plaintiff’s suit on the note, defendant claimed that the parties’ conduct constituted a mutual departure from the note’s payment terms.\(^\text{188}\)

The court disagreed, stating that “the earlier acceptance of some late and irregular payments [does] not demonstrate a mutual departure where many payments [are] missed altogether.”\(^\text{189}\) Although defendant made a number of late and partial payments that were accepted by plaintiff, he completely failed to make twenty payments.\(^\text{190}\) And notwithstanding plaintiff’s alleged statement that the financial problems could be “worked out,” there was no evidence that plaintiff had “agreed to non-payment, as opposed to late payment[s].”\(^\text{191}\)

In Greenwald v. Columbus Bank & Trust Co.,\(^\text{192}\) a corporation executed notes individually guaranteed by five of the corporation’s shareholders. The guaranty provided that (1) the notes could be extended or renewed by the holder at any time, (2) the holder could exercise its rights under the guaranty in such manner and sequence as it wished, (3) the guarantors were jointly and severally liable, and (4) the holder could compromise or substitute collateral. Two of the shareholders-guarantors split from the corporation to form a new corporation. Afterwards, the holder renewed the notes, and extended additional credit to the debtor-corporation, notwithstanding the holder’s knowledge that the debtor-corporation’s creditworthiness was rapidly deteriorating.\(^\text{193}\) The trial court entered summary judgment in favor

\(^{188}\) Id. at 788-89, 490 S.E.2d at 473-74.
\(^{189}\) Id. at 792, 490 S.E.2d at 476.
\(^{190}\) Id.
\(^{191}\) Id.
\(^{193}\) Id. at 527-28, 492 S.E.2d at 249-50.
of the holder in its suit against the five guarantors, finding them jointly and severally liable.\textsuperscript{194}

The guarantors who had split from the debtor-corporation prior to the note renewal claimed that they should not be liable on the guaranty because the holder had “propped up” the failing debtor-corporation with the note renewal and additional credit extension and in so doing had “favored the other guarantors and [the debtor-corporation] to their detriment by failing to foreclose sooner on the secured collateral.”\textsuperscript{195} The court found this reasoning unpersuasive, as appellants had consented “in advance to changes that [were] subsequently made.”\textsuperscript{196}

Further, even if the holder’s conduct compromised or impaired the collateral, it was not a breach of any duty of good faith because “a contracting party cannot breach an implied covenant of good faith where it has done what the provisions of the contract expressly permit it to do.”\textsuperscript{197}

Lastly, \textit{Puccini v. Thomas & Howard Co.}\textsuperscript{198} held that a change in payment terms from C.O.D. to open account did not release the guarantor of liability for the account balance, when “the plain language of the credit and guaranty agreement authorized the [creditor] to change the payment terms without affecting [guarantor’s] liability.”\textsuperscript{199}

\begin{itemize}
  \item \textsuperscript{194} \textit{Id.} at 528-29, 492 S.E.2d at 250.
  \item \textsuperscript{195} \textit{Id.} at 529, 492 S.E.2d at 250.
  \item \textsuperscript{196} \textit{Id.}
  \item \textsuperscript{197} \textit{Id.}, 492 S.E.2d at 251.
  \item \textsuperscript{198} 228 Ga. App. 537, 492 S.E.2d 297 (1997).
  \item \textsuperscript{199} \textit{Id.} at 537, 492 S.E.2d at 298.
\end{itemize}