

# What's New In Georgia

McCurdy & Candler, LLC



## Fourth Quarter 2004

<i>Georgia General Assembly Limits Lender Liability In Evictions</i>	1
<i>Increasing Trend by Chapter 13 Trustees to Administer Post-Petition Payments</i>	2
<i>Avoid Losing Secured Lender Status</i>	4
<i>Can a "Current" Debt Be Considered in "Default" for Applicability of the FDCPA?</i>	5
TECHNOLOGY CORNER: <i>Avoiding Mold Dust in Recorded Docs in Georgia</i>	7

## Georgia General Assembly Limits Lender Liability In Evictions

By Sidney Gelernter, Esq.

On July 1, 2004, House Bill 762 became law in the State of Georgia amending Chapter 7 of Title 44 of the Official Code of Georgia Annotated, Code Section 44-7-55. This law has proven to be beneficial to lenders who are forced to have evictions performed on REO property. The relevant portion is included as a new subsection (c) and reads as follows: "Any writ of possession issued ... shall authorize the removal of the tenant or his or her personal property or both from the premises and permit the placement of such personal property on some portion of the landlord's property or on other property as may be designated by the landlord and as may be approved by the executing officer; provided however, that the landlord shall not be a bailee of such personal property and shall owe no duty to the tenant regarding such personal property. After execution of the writ, such property shall be regarded as abandoned." [Underlined added]

For years, because of a lack of direction by the Georgia legislature, lenders have fretted over the personal property set out upon the execution of the writ and eviction. Was there a duty to store the property for 30 days? Did the lender have to leave the personal property at the real property for twenty-four hours before paying a contractor to remove it from the property? Was storage of the property necessary for any period of time? What happens if the property was stolen by third parties or damaged by weather? Now, all these concerns appear to have been answered by this Amendment. The placement of the personal property is proper, if permitted by the Sheriff or Marshall of that particular county where the real property is located, in the front yard of the residence. There is no liability to a lender or its contractors as to the personal property once it has been placed in the yard.

Since the enactment of this law, all post-eviction concerns for lenders have been removed from the equation. The president of the largest eviction company in Georgia

*Continued on next page*

*The placement of the personal property is proper, if permitted by the Sheriff or Marshall of that particular county where the real property is located, in the front yard of the residence. There is no liability to a lender or its contractors as to the personal property once it has been placed in the yard.*



McCurdy  
&  
Candler LLC

Delivering superior legal services  
for over half a century.



### ***McCurdy & Candler Rewards Your Ideas!***

Since our newsletter is for your benefit, we would like to hear from you about any mortgage default related issues, questions or concerns you may have that you would like for us to cover in our next quarterly issue. It can be anything from a technology question to a legal process question (for the states of Georgia and Tennessee). Any idea used by us will result in the award of a \$50 American Express Gift Certificate to the person who submitted it. Please note that we will not be providing any detailed legal opinions, but instead, we will contact you to determine if you need something more “official” than what we normally include in our newsletters.

Please email your ideas to [dhandler@mccurdycandler.com](mailto:dhandler@mccurdycandler.com) by **October 30, 2004** and include your name, company name and phone number. We look forward to hearing from you and, as always, to be of assistance!

## **Lender Liability Limits**

*Continued from previous page*

confirms that this Amendment has worked well for his company and his client lenders. There is no longer any confusion on what implied duties may be attributed to a lender regarding the personal property. The personal property is no longer placed in the right-of-ways, reducing any obstructions. Further, the company has found that the time to perform an eviction has decreased thereby reducing the costs to their clients. As of the date of this article, only two counties - Henry and Coweta (both located just south of the City of Atlanta) - require immediate removal of the personal property from the site.

---

*Should you have any questions or comments pertaining to this article, please contact Sid Gelernter ([sgelernter@mccurdycandler.com](mailto:sgelernter@mccurdycandler.com)).*

## **Increasing Trend by Chapter 13 Trustees to Administer Post-Petition Payments**

*By Christie Godwin, Esq.*

In Georgia, the majority of Chapter 13 cases are filed to prevent creditors from exercising their state law remedies as to their collateral. The primary reason is to stop a scheduled foreclosure of the real property, especially since Georgia's non-judicial process permits a fast completion of the foreclosure. Most Chapter 13 cases are filed with the specific intent of curing the mortgage arrearage and to provide for the maintenance of on-going, post-petition mortgage payments.

A secured creditor is notified of the treatment of their claim by the Chapter 13 plan. The plan usually provides for pre-petition arrearage to be paid as a secured claim by the Trustee. The Chapter 13 plan then addresses how the post-petition payments are to be maintained during the pending Chapter 13 case. The plan will provide for the debtor either to make direct payments to the mortgage servicer or to send the post-petition payments to the Chapter 13 Trustee who will then distribute them to the mortgage servicer along with the pre-petition payments. Although the latter approach is practiced by a minority of Chapter 13 Trustees, it is a rapidly growing minority.

In the Northern and Southern Districts of Georgia, the plan generally provides that the regular monthly post-petition mortgage payments are to be paid directly by the debtor. These maintenance payments are due on the monthly due date specified in the underlying contract. Most mortgage servicers prefer the direct payment method.

In the Middle District of Georgia, the plan generally requires the Chapter 13 Trustee to distribute the post-petition mortgage payments. Specifically, if the pre-petition arrearage is comprised of three or more payments, the plan must provide for the Trustee to make the post-petition payments. In this district, the Trustee makes distributions on both the pre-petition claim and the regular monthly maintenance (post-petition) payments. Generally, the Chapter 13 Trustees prefer to disburse these payments for various reasons.

*Continued on next page*

## Chapter 13 Trustees Trend

*Continued from previous page*

The Trustees assert that their office maintains better record keeping than the debtors and, therefore, that information regarding payments can be more easily ascertained. Also, many Trustees are hoping to reconcile the records between the debtor's payments and the mortgage servicer's payment history. Since the Chapter 13 Trustees maintain accurate record keeping, they believe that they are in the best position, at the completion of a Chapter 13 plan, to assert that all payments have been made to the mortgage servicer. After a Chapter 13 case has been paid in full, the debtor's discharge does not apply to long-term debts. See *In re Bateman*, 331 F. 3d 821 (11th Cir. 2003) and 11 U.S.C. §1322 (b)(5). For this reason, the Trustee is verifying, through various legal tools, that the default has been cured by the completed Chapter 13 plan.

Mortgage servicers have their own concerns. As with most issues in managing national portfolios, the requirements vary among different Trustees and different jurisdictions. The lack of consistency among Trustee procedures for payment of post-petition mortgage payments proves to be problematic for servicers.

A major concern among servicers is the timing of the distribution of the post-petition mortgage payments by the Trustee. According to the debtor's underlying contractual obligations, the servicer is allowed to collect late fees when the monthly mortgage payment is not timely remitted. However, when payments are distributed by the Trustee, late fees may not be assessed if the Trustee does not remit the payment to the servicer on time. See *In re Harris*, 297 B.R. 61 (Bankr. N.S. Miss. 2003). However, a worse case scenario with respect to the timing of the distribution can occur when the Chapter 13 Trustee has held all post-petition payments pending confirmation of the plan and the plan is not confirmed, resulting in those payments being returned to the debtor. If the debtor had been directed to make the post-petition payments to the servicer, the servicer would have been able to retain the payments even if the plan had not been confirmed.

Another concern is the difficulty in identifying what monies should be posted to the pre-petition arrearage and the post-petition amounts due. This is especially burdensome when the distribution from the Trustee is made in a single check. Most servicers post the entire payment to the oldest payment due, which is usually the contractual due date, and

not, therefore, to any post-petition payments. This causes problems when servicers file Motions for Relief when the Trustee has actually distributed money "ear-marked" for post-petition payments. Most Trustees believe that mortgage servicers' accounting systems are not equipped to handle the bifurcated claims.

In order to avoid these problems, the servicer should provide current, accurate information (especially detail as to ARM payment changes, escrow analysis, and the servicer contact) to the Chapter 13 Trustee regarding the mortgage loan as soon as possible. Also, it is imperative that communication exists between the mortgage servicer and the Chapter 13 Trustee especially when the Trustee is distributing post-petition payments. This can be burdensome for servicers when the Trustee has limited office hours and availability. Therefore, servicers should take steps, if they have not already done so, to gain online access to the various Chapter 13 Trustees' websites (or to a national website such as the National Data Center at [www.13datacenter.com](http://www.13datacenter.com)) to

*The plan will provide for the debtor either to make direct payments to the mortgage servicer or to send the post-petition payments to the Chapter 13 Trustee who will then distribute them to the mortgage servicer along with the pre-petition payments.*

facilitate obtaining the current status of payments received and distributed by the Trustee. Communication and the reconciliation of the payments between the Trustee and the servicer (including the application of the funds to pre-petition arrearage vs. post-petition payments) are especially critical prior to the servicer filing a Motion for Relief.

This topic is now at the forefront of the industry as more and more Trustees appear to be adopting this "minority" approach. Also, it was recently a hot topic of discussion at the National Association of Chapter 13 Trustee's (NACTT) annual convention held in Las Vegas in June 2004 and at the American Legal and Financial Network (AFN) Seminar held in Sedona, Arizona in August 2004. At the later seminar, Sidney Gelernter, the Bankruptcy Managing Partner at McCurdy and Candler, LLC, served on the panel along with several attorneys and two Chapter 13 Trustees.

---

*Should you have any questions or comments pertaining to this article, please contact Christie Godwin ([cgodwin@mccurdycandler.com](mailto:cgodwin@mccurdycandler.com)) or Sidney Gelernter ([sgelernter@mccurdycandler.com](mailto:sgelernter@mccurdycandler.com)).*

## Avoid Losing Secured Lender Status

By Michael Dugan, Esq.

Most lenders think that once a mortgage is executed and recorded that their lien entitles them to a “secured lender” status should the borrower file for bankruptcy protection. For the majority of loans, that assumption is correct. But some bankruptcy Trustees are employing certain action on an increasingly frequent basis that could strip the secured status of a mortgage and transfer a mortgage lender’s debt to an unsecured status.

How do the Trustees do it? 11 U.S.C. Section 547 grants the bankruptcy court the power to “undo” certain transactions that have taken place within 90 days of the filing of the petition by filing a “preference action.” A mortgage closing is considered a transaction that is subject to this statute. In Sec. 547(c)(1) & (3), a Trustee can file a preference action to void or set aside a mortgage if the mortgage has not been perfected within the allowable timeframe.

Simply put, if the mortgage closing occurs within 90 days of a bankruptcy filing, the Trustee may review the circumstances to consider it for a possible preference action. As part of that review process, the Trustee will determine the number of days from the date of the execution of the mortgage to the date it is recorded – the perfection timeframe. The Trustee will not be able to “undo” the transaction if the lender recorded the mortgage within 20 days of the execution date when the underlying loan is a purchase money security instrument or within 10 days of the execution date if the underlying loan is a refinance mortgage.

The effects of a successful preference action are profound. Although the debt owed by the borrower remains, there is no security for the mortgage. Since there is no secured collateral, the lender cannot invoke the power of sale provisions and foreclose on the property, and the now unsecured debt is dischargeable by the debtor.



*The effects of a successful preference action are profound. Although the debt owed by the borrower remains, there is no security for the mortgage.*

this matter. A successful preference action creates an immediate claim for total loss under standard title insurance policies, so any advance notice to the title insurer will garner instant attention.

There is a pending case in the Northern District Bankruptcy Court that is testing this type of preference action. Other circuit courts in the United States have applied the “ear-marking doctrine” to similar cases, whereby a mortgage is not voided simply because of a delayed recording. While this doctrine has not been recognized in the 11th Circuit, it is a worthwhile attempt to at least minimize the severity of the preference statute.

McCurdy & Candler is involved in the above-referenced pending case and will keep its clients and readers updated on the developments in this important case.

---

*Should you have any questions or comments pertaining to preference actions, please contact Michael Dugan (mdugan@mccurducandler.com).*

So what do you do if you see that your mortgage was recorded beyond the allowable perfection period? In most cases, the 90 day period from the date of the loan origination to the filing of the petition by the debtor has lapsed, and the Trustee cannot invoke this provision. However, if your loan is less than 90 days old, call the settlement agent as soon as possible. Most lenders require title insurance policies insuring that their mortgage is a valid lien against the property as of the date of the loan closing. If you notice that your mortgage has not been filed in a timely fashion, then you should place the title insurance company on notice in writing as soon as possible. It is recommended that you contact your legal counsel for advice and help in

## Can a “Current” Debt Be Considered in “Default” for Applicability of the FDCPA?

By Deborah Y. Chandler, Esq.

Is there a trigger as to when a debt goes into “default” for purposes of the Fair Debt Collection Practices Act (“FDCPA”)? Can and should a debt be considered in “default” as soon as a day after it is due? Does it matter if the third party contractor genuinely thought that it was merely servicing a debt and not engaged by the lender as a collection agency?

These seemingly easy questions were addressed by the U.S. Court of Appeals for the Second Circuit in *Alibrandi v. Financial Outsourcing Services, Inc.*, 333 F.3d 82 (2d Cir. 2003). The outcome, however, serves up an extra dose of caution for servicers and other third party entities when communicating with debtors, especially for any company providing what they (and even the associated lender/servicer) deem to be loan servicing activities, not collection type services, on behalf of the lender.

The debt in question in the Second Circuit case arose at the end of a car lease that the debtor, David Alibrandi, had with First Union. When the lease expired in October 1999, First Union determined that Alibrandi owed them \$543.98 for excess wear and tear on the vehicle. Even though the terms of the agreement did not consider his debt to be default for

120 days after the debt became due, First Union assigned the debt outright to North Shore Agency, Inc., for assistance in its collection efforts. North Shore then sent a collection letter to the debtor in November 1999 with full FDCPA warnings and disclosure including that they were a collection agency attempting to collect the debt on behalf of First Union.

Then in January 2000, when the debt remained uncollected and undisputed by Alibrandi, First Union transferred the collection responsibility to Financial Outsourcing Services, Inc. However, Financial Outsourcing was unaware of North Shore’s letter. Furthermore, their contract with First Union not only stated that the account was not delinquent, but it also stated that Financial Outsourcing would act as a “service provider” and not as a “collection agency” when handling the account. On January 27, 2000, Financial Outsourcing sent a letter to Alibrandi without any FDCPA warnings or disclosures; it simply stated that it was “servicing” the account on behalf of First Union and to remit the payment to them. The debtor contended that this letter from Financial Outsourcing was in violation of the FDCPA.

The U.S. District Court for the Eastern District of New

*Continued on next page*



## Can a “Current” Debt Be Considered in “Default”?

*Continued from previous page*

York held in favor of Financial Outsourcing, holding that the company was not a “debt collector” as both First Union and Financial Outsourcing did not consider Alibrandi’s debt to be in default at the time the January letter was sent to him and, therefore, the FDCPA requirements were not applicable to that letter. Alibrandi appealed that decision based on two theories – (1) that his debt was in default immediately after it became due in October 1999 and (2) that First Union had already declared his debt as being in default, prior to Financial Outsourcing’s letter, through the letter sent by North Shore, which specifically identified North Shore as a “debt collector” for First Union.

*The focus for the Court on determining if an entity is a “debt collector” subject to the FDCPA hinged then not on the type of collection activities involved, but rather upon the status of the debt.*

The judges in the Second Circuit Court rejected the first theory as being contrary to the “pro-debtor” objectives of the FDCPA. Said objectives would not be properly served if a debt could be considered as being in default without a much longer period of time having passed. Unfortunately, the FDCPA does not provide a definition of “default”; instead, the Court relied on the existence of numerous judicial decisions and various federal regulations that provide for some extended lapse of time (even though the actual length of time was inconsistent) before a outstanding debt can be considered to be in default. The Court reasoned that to classify a debt in “default” status so quickly would be adverse to debtors. It would result in more immediate exposure to negative credit bureau reports, acceleration of debt, repossessions, and other fallout from which the FDCPA was intended to “afford debtors a measure of protection.”

The more troubling and unexpected decision by the Court concerned the debtor’s second theory. Under the FDCPA, a company is not deemed to be a debt collector unless the debt it is attempting to collect is in default. In addition, there is an exception to the “debt collector” definition if the debt claimed to be owed was not in default at the time that the debt was obtained by the person or company trying to collect payment on that debt. The focus for the Court on determining if an entity is a “debt collector” subject to the

FDCPA hinged then not on the type of collection activities involved, but rather upon the status of the debt.

By First Union engaging North Shore for collection activities on the debt and by North Shore specifically identifying itself as a debt collector with full FDCPA disclosure in the letter it sent to the debtor, First Union had essentially declared the debt to be in default. The status of the debt could not be changed merely by agreement between First Union and Financial Outsourcing stating that the debt was not considered to be delinquent and that Financial Outsourcing was working as a “service provider” not as a “collection agency” for First Union. Also, the Court deemed it irrelevant that Fi-

ancial Outsourcing may have sincerely believed that it was servicing a debt that was not in default.

In summary, the Court determined that Financial Outsourcing was a “debt collector” and that the debt was in “default”

at the time that the letter was sent to the debtor by Financial Outsourcing. Therefore, it held that Financial Outsourcing did violate the FDCPA by failing to include the appropriate disclosures and warnings in the January letter it had sent to the debtor.

### **Can this decision impact you? What can you do to minimize exposure?**

Although this case was decided by the U.S Court of Appeals for the Second Circuit, servicers and any third party vendors who initiate communications with debtors on behalf of a lender or servicer should still at least make sure that they have a complete history of any communications (including copies of any written correspondence) between the lender, servicer, or other third party vendors associated with the loan and the debtor. Then, prior to initiating any contact with the debtor, if there is any question, based on the perceived status of the loan, on the part of the sender as to whether or not the FDCPA disclosures and warnings should be included in the correspondence, the sender should seek legal advice as appropriate to help avoid any potential liability.

---

*Should you have any questions or comments pertaining to this article, please contact Deborah Chandler (dchandler@mccurdycandler.com).*

## Technology Corner



*“Technology Corner” is a new regular feature of our newsletter beginning with this issue. With technology having become so pervasive in the mortgage industry and with its related vendors, it’s sometimes hard to stay ahead of the learning curve. With many companies striving to be paperless (or already are), with increased emphasis on the speed and timing of electronic communication between servicers and their vendors, and with so much information and options available at our fingertips, it seems at times that the workflow has become more burdensome, rather than easier. Therefore, we offer this special focus section to help you negotiate through the technology quagmire, keeping you ahead of that curve and on the cutting edge.*

## How to Avoid Inhaling Mold Dust When Searching for Recorded Docs in Georgia

*By Deborah Y. Chandler*

I remember the good old days, not that long ago, when before attempting to look for and review old recorded deeds while doing title searches in Fulton County, Georgia, you had to don a surgical mask, rubber gloves and old clothes before daring to delve into the deed books. Those days for the most part, thankfully, will soon be behind us.

In 1993, the Georgia Superior Court Clerks’ Cooperative Authority (“GSCCCA”) was established and tasked by the Georgia Legislature to implement and administer an online statewide central index of all UCC filings. Not only did they complete this initial project, but they also assumed several others, including the online statewide indexing of all real estate transactions (1996), liens (2002), and plats (2002). The GSCCCA’s website also enables users to search statewide for notary publics.

The real estate index currently contains all property transactions from all 159 Georgia counties dating from January 1, 1999. Data for 1993 to 1998 is being added with more historical data planned for inclusion at a later date. Also, numerous counties have been adding the images of the corresponding documents, including copies of plats and liens, to the web site, making it convenient to obtain copies of the documents revealed through the index searches.

What benefits does this site have for our clients? By using this site, we are able to obtain copies of recorded security deeds more quickly than through standard title search methods to avoid any delays in initiating foreclosure actions or filing bankruptcy motions if our clients are unable to provide us with copies of the security instruments. Also, we are able to verify the recording of the Deed Under Power of Sale and obtain a copy to use during the eviction process and/or REO closing without necessarily having to wait for the original recorded deed to be returned via regular mail; therefore, enabling us to reduce overall timeframes for post-foreclosure processes.

Another advantage to this website is that it is readily accessible by anyone, anywhere, anytime. Also, it is very user friendly and the documents are in PDF format (the user will need Adobe Acrobat Reader freeware to view and save the documents to his/her computer), which makes download time to the user’s computer faster and minimizes storage needs. Therefore, if you prefer to use the site directly or would just like to check it out, the web site address is [www.gscca.org](http://www.gscca.org). They currently offer a “guest” use which allows you to try out the system at no charge for 4 consecutive hours. Otherwise, for more extended or frequent use, there is a charge per user and per page (for any documents downloaded by the user). The pricing structure is available on the web site.

*Please contact Deborah Chandler ([dchandler@mccurdycandler.com](mailto:dchandler@mccurdycandler.com)) for any questions or comments you may have concerning this article.*



**McCurdy  
&  
Candler LLC**

***Street Address:***

250 E. Ponce De Leon Ave, Suite 600  
Decatur, GA 30030

***Mailing Address:***

P.O. Box 57 • Decatur, GA 30031

**(404) 373-1612**

(404) 373-2471 fax

Subscribe On-line:

[www.mccurdycandler.com](http://www.mccurdycandler.com)