# The Lender's Source

MOORE CLARKE DUVALL & RODGERS
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## Reminder: New Law Changing Security Deed Requirements Effective July 1, 2023

Last year the state legislature amended Georgia's property laws to impose new content requirements for security deeds. That amendment took effect on July 1, 2023. Beginning on this date, a security deed must contain several mandatory items of information on the first page of the deed in order to be recordable in the official deed records. These are:

- the date of the deed
- the names of all parties to the deed
- the lender's mailing address
- the tax map and parcel number for the collateral property
- the original loan amount, or if the deed is a modification of a prior loan, the amount of outstanding principal and the amount of any new money advanced
- the maturity date of the loan
- the amount of intangibles tax imposed
- if the deed is a modification of a prior loan, the amount of intangibles tax imposed on any additional advance given; and
- if no intangibles tax is owing, a citation to the statute or regulation making the deed exempt from taxation.

Most security deed formats already in use will contain some, but not all, of this information on the deed's first page. It is important to assure that every security deed form in use after July 1st is promptly updated to contain all of the required items, as absence of even one item should cause county officials to refuse to record the deed. Refusal could be costly, as gaps in time between a lender's disbursal of funds and recordation of its deed can leave a lender subject to intervening liens, sales, and bankruptcy filings.

The express language of the amendment only includes "deeds," and makes no reference to modification agreements or the like. However, we expect that many courts and county officials will interpret the amendment to include a modification agreement or similar document that is to be recorded after July 1st with reference to a prior security deed. For this reason we suggest including the required items in any document that modifies a prior security deed and is to be recorded after the July 1st effective date. To clarify, however, the new amendment does not invalidate or otherwise affect any security deed that was already filed of record prior to July 1, 2023.

## Save the Date for Upcoming MCDR Banking Law Seminars

The law firm of Moore, Clarke, DuVall & Rodgers, P.C. will be offering its annual banking law seminars this summer. Seminars will be held on July 27th in Albany; August 31st in Valdosta; and September 14th in Savannah.

As always, all financial institution officers and employees are welcome to attend free of charge. Invitations with further details of the seminars have been recently distributed to those on our firm's banking contact lists. However, despite our efforts to keep our contact lists inclusive and updated, we don't have updated contact information for everyone in the banking industry throughout southern and central Georgia. If you would like to attend but have not received an invitation, please let us know.

If you have questions regarding the seminars, or if you would like to attend but did not receive an invitation, please contact Kim Shirley via telephone at 229-888-3338 or via email at kshirley@mcdr-law.com. We hope you will make time in your schedule to attend one of these informative events.

## Appeals Court Decides "Continuing" Dragnet Language is Sufficient to Extend Lifespan of Disputed Security Deed

In a recent opinion known as *Freeport Title & Guaranty v. Braswell*, the Court of Appeals of Georgia ruled that the particular verbiage of the dragnet clause in a lender's security deed was sufficient "perpetual language" to provide an extended 20-year lifespan for the deed. This opinion is something of a lender-favorable departure from prior opinions from the court that had found several commonly used dragnet or open-end clause forms insufficient to extend the life of a security deed.

The general rule under Georgia law is that a security deed lapses, or becomes ineffective, seven years after the maturity date of the secured debt stated in the deed. However, where the language of the deed expressly shows that the parties intend to create a perpetual or indefinite security interest in the collateral (commonly known as *perpetual language*), the deed can remain effective until the later of seven years after maturity, or 20 years after the date of the deed. Many disputes have arisen in the courts over what wording is sufficient to constitute perpetual language, thus extending the life of a disputed security deed.

The dispute in *Braswell* involved a June 2004 security deed that secured a loan with a maturity date in September of 2004. The borrower did not repay the loan, but the lender did not foreclose promptly after default. In March of 2020—more than fifteen years after maturity of the loan—the borrower sold the property to Freeport. The lender foreclosed a month later and eventually claimed title to the property as the successful bidder at the foreclosure sale.

Freeport filed a lawsuit asking the court to rule that Freeport was the true owner of the property, and that the foreclosure was invalid because the security deed lapsed before the 2020 foreclosure. The trial court ruled against Freeport, finding that the security deed remained valid for 20 years after it was signed.

Freeport appealed the trial court's ruling. Freeport argued that the security deed did not contain perpetual language, and thus it was subject to the general rule that validity lapses seven years after the September 2004 maturity date in the deed. The lender argued in response that the particular open-end or dragnet language in the lender's deed was sufficient to provide a longer 20-year lifespan.

The Court of Appeals agreed with the lender. The crucial fact was that the deed featured ordinary open-end language (the deed secures all debts then or thereafter owing by borrower to lender) *followed by* the following sentence: "It is the purpose of this instrument to operate as a continuing security deed, and it shall secure any indebtedness in favor of Grantee created at any time before this instrument is actually cancelled."

The court ruled the word *continuing* could be equated with *perpetual* or *indefinite*. Thus, express language that the security deed was a *continuing* security deed effective until *actually cancelled* was an affirmative statement that the parties intended to create a perpetual or indefinite security interest. Such a statement is all that is required for effective "perpetual language." Due to the perpetual language, the deed remained effective for 20 years following its June 2004 date. The lender's 2020 foreclosure was thus valid, and lender was the title-holder, because the lender completed the foreclosure before the 2024 lapse of the deed.

This new court opinion is a positive development for lenders in that it provides new guidance on determining perpetual language and it likely enlarges, somewhat, the types of language that can be relied upon as a basis for an extended security deed lifespan. However, lenders should not simply hope that arguably ambiguous language will suffice. If a longer lifespan is intended, the security deed should expressly state the intent to create a perpetual or indefinite security interest. This approach will minimize likelihood of future disputes over the lapse dates of security deeds.

## Understanding the UCC1: Coverage of "All Assets" or "All Personal Property"

Attorneys sometimes recommend lenders follow the rule of thumb that the collateral description used in a UCC1 financing statement should closely match the collateral description used in the parties' security agreement. The practical reasoning is clear: a UCC1 is not itself a contract with the debtor, but is instead the lender's own notice to the public that the lender may claim a security interest in certain property. The security agreement signed by the debtor (the borrower or other grantor of collateral) is the document that actually grants collateral to the lender. So regardless of the description used in the UCC1, the lender's security interest will only reach the collateral that is described in the security agreement.

It may be practical and desirable in most situations to use matching collateral descriptions between the security agreement and UCC1, but the UCC does allow for a looser approach. It provides that a UCC1 collateral description will be sufficient if it either describes the collateral by item or category (e.g., equipment or inventory), *or* if it states that "all assets" or "all personal property" are covered. In contrast, the UCC prohibits use of a collateral description such as *all assets* in a security agreement. The UCC authors reasoned that such a "supergeneric" phrase is insufficient, as between the debtor and lender, to objectively identify what collateral is intended to be covered. The security agreement must affirmatively describe the collateral by item, category, or other descriptive method.

Taken together, these rules permit a scenario where a UCC1 provides broad, nondescriptive coverage of a huge range of a debtor's assets even though the underlying security agreement, and thus the lender's actual security interest, reaches a only smaller range of more specifically described assets. For example, assume a debtor signs a security agreement with lender that grants a security interest in all of the debtor's inventory and equipment. The lender files a UCC1 describing its collateral as "all assets." The UCC1 will properly perfect the lender's interest in the inventory and equipment (and their proceeds), but it won't give the lender any rights in anything else. The UCC1 is simply ineffective for any assets other than inventory and equipment.

That may sound like a reasonable approach in academic isolation, but an "all assets" UCC1 can have frustrating effects in actual practice for both debtors and other lenders (and in some cases, potential buyers from the debtor). A potential new lender cannot know, from a UCC search alone, what assets of the debtor are actually encumbered. A UCC searcher must assume from the UCC1 that all of the debtor's personal property assets—from a tractor, to an account receivable, to an equity interest in a limited liability company—are encumbered by the filing creditor. The searcher can't simply disregard the UCC1 because it is extremely broad or vague.

Reliably assessing a potential collateral position where an "all assets" or similarly broad UCC1 was filed requires written confirmation from the filed creditor of whether a given item of collateral is, or is not, covered. The debtor's own representations will not protect a subsequent lender. The UCC gives the debtor (but no one else) a right to demand that the filed creditor either provide a signed list of collateral that is subject to its security interest, or a signed acknowledgement that certain collateral is not subject to its security interest. There is a 14-day deadline for the creditor to respond to the debtor's demand, though that deadline isn't always honored. There is no specific format required of the creditor's response. The crucial aspects are that it clearly address the given collateral that the new lender wishes to encumber and that it be electronically or otherwise signed by the creditor. This can be a slow and frustrating process, but written documentation from the filed creditor is necessary when considering a potential collateral position after an "all assets"-type UCC1 has been filed.

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