As most Georgia lenders are aware, the Georgia superior court clerks collect an intangible recording tax on all long term promissory notes (promissory notes having a maturity date more than three (3) years from the date of execution) secured by real estate. The term “secured by real estate” means that the holder of the promissory note takes a security interest in certain real property owned by the borrower through the execution of a security deed, mortgage, bond for title or purchase money security deed. This tax is collected at the time of the recording of the security deed or other applicable security instrument and is assessed at a rate equal to one dollar and fifty cents ($1.50) for every five hundred dollars ($500.00) of principal indebtedness secured by such instrument, with a maximum cap of $25,000.00. For loans of one million dollars or more, this results in a tax totaling in the thousands of dollars. Most Georgia lenders are also aware that there are certain exemptions to the payment of the intangible tax, the most frequent exemption taken advantage of by lenders being that instruments with maturities of three (3) years or less are not subject to the intangible tax. Many commercial lenders, especially for larger lending transactions that would require the payment of thousands of dollars in tax, frequently structure the transaction with a shorter maturity to avoid the tax. Besides the maturity exemption, there are also somewhat lesser known exemptions to paying the Georgia intangible tax. One such exemption is for security deeds that secure an instrument that is not a promissory note, i.e. a letter of credit or a guaranty. In these cases, the intangible tax does not have to be paid.

At Westfall, LLC, we often see commercial lending transactions involving real estate where multiple entities are involved. Many businesses often form separate holding companies or affiliated entities to own and hold their real estate. As such, it is necessary for lenders making loans to these businesses to also include the real estate owning entity in the credit approval so as to properly secure such real estate. A popular option for lenders is to simply make all entities co-borrowers, in which case all entities would sign the promissory note and the co-borrower owning the real estate would grant a security interest in the real estate by executing a security deed in favor of the lender. This is probably the easiest practice as it establishes contractual privity and direct consideration with each of the entities involved, however, it also requires the payment of intangible tax if the promissory note has a maturity of more than three (3) years.

An alternative to this practice is to make the real estate owning entity a guarantor (as opposed to a borrower) in the transaction. In this case the guarantor would execute a guaranty of the loan indebtedness evidenced by the promissory note rather than co-sign the promissory note directly. Additionally, to secure the guarantor’s interest in the real estate collateral, the guarantor would also execute a guarantor’s security deed in favor of the lender. The guarantor’s security deed would secure the guarantor’s obligations and liabilities under the guaranty rather than the debt obligations and liabilities of the promissory note directly. Effectively, the guarantor, by execution of its guaranty, obligates itself to pay the borrower’s obligations and liabilities under the promissory note if the borrower fails to do so, and also provides security to the lender by the granting of a security interest in the real estate collateral owned by the guarantor vis-à-vis the execution of a guarantor’s security deed. By structuring the transaction in such a manner, the lender is able to establish contractual privity and direct consideration, while at the same time avoiding the imposition and cost of Georgia’s intangible tax, as the guarantor’s security deed is exempt from the payment of intangible tax since it secures a guaranty rather than a promissory note.

Because the above guarantor transaction structure can be used for a variety of reasons, we recommend that lenders develop a guarantor’s security deed in their real estate lending document profile, or alternatively, set up a protocol to modify or replace their existing documents in the event that a security deed needs to be given by a guarantor. We also recommend, for the benefit of the superior court clerk (the office that will record the security deed and determine the applicability of the intangible tax exemption), the addition of language on the face of the security deed indicating that it is a “Guarantor’s Security Deed” and therefore exempt from the tax. These security deeds should be titled “Guarantor’s Security Deed” or “Guarantor’s Deed to Secure Debt” and should also include a note to the clerk identifying the exemption from the tax. With proper structuring of a transaction and reliance on available exemptions, a lender can help their borrowers save thousands of dollars in connection with the each loan transaction by avoiding the imposition of the intangible tax. This provides a competitive, cost-savings advantage to the lender that incorporates such practices over those lenders that do not.

If you would like to speak with us on how we can help you and your clients save money by structuring your transactions to be exempt from Georgia’s intangible tax or if you have any other lending question, please do not hesitate to contact one of our experienced commercial lending attorneys at Westfall, LLC.

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