Real Property Law Section NEWSLETTER

State Bar of Georgia

A Publication for Real Property Lawyers **Spring 2012**

REAL PROPERTY LAW SECTION

COMMENTS FROM THE CHAIR

J. Noel Schweers III, Esquire
J. Noel Schweers III, P.C., Augusta

The Executive Committee has continued to seek programs and tools to benefit the Section's members. One of the latest is improvements recently made to the Section's website. The website can be accessed at http://garealpropertylaw.com. If you have not visited the site lately, you are in for a pleasant surprise.

Some have questioned why some sections of the website now require a password to access. This has been added to restrict certain materials to section members only. The primary controlled areas are the new forms database, the member forum described below, and certain publications produced by the Section. You can submit forms to the website in accordance with the instructions found on the forms page.

The new forum allows section members with a website account to post and reply to various topics and inquires. This forum, including archived topics, is easily searchable. Also, there are various settings for receiving notices of new topics by email. These new posting can be tracked in various ways, as determined by the forum participant. This includes the receipt of an email immediately upon each post, a daily email summarizing the day's posts, or other choices. Any topic which is not of interest can be blocked and ignored by the member. This allows one to focus only on topics of interest. I am confident this forum will be a great tool for the future.

Additionally, the website has a membership directory which one can personalize with his or her profile. One hint for us not so young folks: an avatar is your photo (or other depiction that you believe appropriately identifies you).

If you have not yet done so, please logon to the website. To do so go to the home page and set up an account by following the directions on the right hand side about one-third of the way down the page. Once you have logged in, access the forum and forms sections by clicking on the "MEMBER AREA" tab on the far right. From time-to-time, we will provide tips for members to maximize the usefulness of the website.

I would like to recognize several people who have contributed to the success of the website. The Listserve/Website committee is responsible for the site. The committee is composed of Brad Hutchins, Chad Henderson and Jonathon Hunt. Also, I would be remiss if I did not thank our website administrator, Steve Combs. Steve, a lawyer and past chair of the Technology Law Section, has provided invaluable guidance with the project. Users of the website are invited to share their suggestions with members of the committee.

The early months of 2012 have also brought to our Section the monitoring of the current, and this year very active, legislative

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INTANGIBLE RECORDING TAX – SOME PRACTICE TIPS

Jeff Greenway, Troutman Sanders LLP

Compared to other states, Georgia's tax on real property secured debt is relatively inexpensive. In Georgia, intangible recording tax is payable at the approximate rate of $3.00 per $1,000.00 of "long-term" secured indebtedness and is capped at $25,000.00. See O.C.G.A. § 48-6-61. Other states have much higher mortgage tax rates. In Florida, for instance, the rate is approximately $7.00 per $1,000.00 of indebtedness ($10.50 in Miami-Dade County) and there is no cap. Nevertheless, borrowers and

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session. Chairs John Taylor and Gayle Camp have worked diligently with their committee to monitor, promulgate and comment on numerous proposed laws which affect our daily practice. I am grateful for their hard work and on behalf of the Section, thank them.

Finally, remember that the State Bar Elections will be held during the month of April. The ballots will be mailed out on April 1st and the deadline for submitting your vote is April 30th at 11:59 p.m. We have many members of our section on the ballot so please take time to vote!

lenders prefer to minimize or save the Georgia intangible tax altogether if possible. The tax can be payable at several points during the life of a loan. Obviously, tax may be due and payable when the loan closes initially. However, tax can also be payable if the loan is modified later on, especially if the loan is increased. Here are a few of the most common issues for lawyers representing both lenders and borrowers to consider when closing a new loan or modifying an existing loan.

Determine What Is Being Secured. The intangible recording tax is assessed when a security instrument securing a "long-term note secured by real estate" is presented for recording. The security deed is the most common form of security instrument in Georgia, but the tax also applies to mortgages, bonds for title and other forms of security instruments. However, if the security instrument does not secure a note, no intangible recording tax is due when the security instrument is presented for recording. See Ga. Comp. R. & Regs. § 560-11-8-.14(d). Thus, for example, if the security instrument in question secures only a guaranty or a letter of credit reimbursement agreement, no intangible recording tax is due at recording.

For most loans, the security instrument will secure a note. If this is the case, the critical question for deciding whether intangible recording tax is payable is the length of the term of the loan. The tax is only payable if the note being secured is "long-term" – i.e., any portion of the principal may fall due more than three years from the date of the note or the security instrument. Likewise, a "short-term" note is one in which the entire principal is due less than three years from the date of the note or the security instrument. See Ga. Comp. R. & Regs. § 560-11-8-.03(3) & (4).

The tax is imposed on the full face amount of the note. Unlike in other states, intangible recording tax cannot be minimized by setting a limit on the amount of indebtedness secured by a security instrument. For example, if the security instrument secures a $10,000,000 note, intangible recording tax will be based on that face amount regardless of whether the security instrument caps the amount that is secured.

If the security instrument secures multiple notes, then intangible tax is payable upon the entire secured indebtedness (up to the $25,000 cap) even if only one of the multiple notes is a long term note. See Ga. Comp. R. & Regs. § 560-11-8-.12. If the note evidences a line of credit or revolving credit facility, then the term of the loan determines whether the note is "long-term". If the term is more than three years, the note is deemed to be "long-term" and tax is payable upon the total amount of the credit facility (subject to the cap of $25,000). However, proceeds of the loan may be borrowed, repaid and reborrowed without any additional tax being due as long as the principal outstanding does not at any time exceed the face amount of the note. See Ga. Comp. R. & Regs. § 560-11-8-.13.

Extension Periods. Consider whether the borrower has the right to extend the maturity date. If the borrower does have this right, and if the maturity date as extended would cause any part of the

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LAW STUDENTS HONORED WITH SCHOLARSHIPS BY RPLS

After a highly successful Commercial Real Estate Seminar, chaired by Jeff Schneider, the Executive Committee of the RPLS hosted a dinner to honor past Chairs of the RPLS section, speakers and presenters at the Commercial Seminar as well as various local law students. The law students, representing all of the Georgia law schools, were vetted for their academic accomplishments and were presented with scholarships presented by the Section. The 2011-2012 RPLS Student Award Recipients are Rachel S. Fox, Emory University School of Law, Andrew C. Mullen, Georgia State University School of Law, Walter Henry Grell IV ("Henry"), John Marshall School of Law, Hal Higgins, Mercer University School of Law and Greg Alan Raburn, University of Georgia, School of Law. The students were selected based on their academic performance, along with an interest in pursuing real estate in future careers. The Commercial Real Estate Seminar was well attended and included reports of the current status of condo developments, commercial lending updates and experts from across the Commercial Real Estate world.

HONORED at Commercial Dinner were two recipients of RPLS Law scholarships: (left) Andrew Mullen, GSU Law School; and Rachel Fox, Emory Law School. Presenting the awards were: Chad Henderson, Chair, Awards Committee and J. Noel Schweers, Chair, Executive Committee, Real Property Law Section.

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principal of such note to be due more than three years from execution, that note is deemed to be a "long-term" note and thus is subject to up-front payment of the tax. See Ga. Comp. R. & Regs. § 560-11-8-.03(5).

Exemptions. Review the list of exemptions in the intangible tax rules and regulations (Ga. Comp. R. & Regs. § 560-11-8-.14) to determine whether the security instrument is exempt from the tax. The exemption for security instruments that do not secure a note has already been mentioned but there are others. For example, no tax is payable on a security instrument given as additional security for indebtedness. Also, no tax is payable if a church is the lender or if a federal or state agency or department is a party to the security instrument.

Apportionment. If the security for the loan includes real property in other states, intangible tax can be saved by apportioning the tax between the Georgia property and the property located outside Georgia, provided the lender is not a Georgia resident. The tax is determined by multiplying the total tax otherwise due on the note (without applying the $25,000 cap) times the ratio of the value of the Georgia property to the value of all property, in-state and out-of-state. The $25,000 cap is applied after this calculation. See Ga. Comp. R. & Regs. § 560-11-8-.07.

Modifications; Refinancings. A modification that merely extends the maturity date of a note, evidences an assignment or gives additional security for an existing note does not require payment of any intangible recording tax, provided that either the intangible recording tax was paid on the original instrument or the original note or holder of the original instrument was exempt from paying the tax. See Ga. Comp. R. & Regs. § 560-11-8-.04. It is critical that the lawyer modifying a loan review the original loan documents and each prior modification to determine that all intangible recording tax has been paid or that an exemption applies. If no tax was payable on the original instrument because it secured a "short-term" note, then review the terms of the modified note or the new note to determine if the extension, measured from the original maturity date, is for more than three years. If it is for more than three years, then intangible recording tax will be due unless an exemption is available. See Ga. Comp. R. & Regs. § 560-11-8-.03(4)(c). The question of whether additional tax is payable becomes less clear the more the parties deviate from the terms of the original loan documents. The rules and regulations do not provide any clear cut guidance on how much change can occur before the modification amounts to a refinancing of the original debt. A refinancing is exempt from intangible recording tax provided that the refinancing is between the original lender and original borrower and either intangible recording tax was paid on the original instrument or the original holder was exempt. See Ga. Comp. R. & Regs. § 560-11-8-.05. Obviously, if the modification involves a loan increase, it is important to carefully evaluate whether intangible tax must be paid on that increase. If the loan increase is evidenced by a new note, the intangible tax would be determined according to the terms of the new note. See Ga. Comp. R. & Regs. § 560-11-8-.06. The regulations do not expressly state what happens if the loan increase is documented by modification of the existing note, which leads to the next point.

What To Do If The Code And Regs Are Not Clear. It is often the case that the Code or the regulations will not provide clear guidance on whether tax is payable. This is particularly the case in connection with loan modifications. For example, if a "long-term" note is modified one year before maturity to provide for an increase, must intangible tax be paid on the amount of the increase? The Code and the regulations do not expressly address this scenario. How do you find the answer? There are a few options. First, contact the Commissioner's Office of the Department of Revenue. The Revenue department maintains a liaison with the public to discuss such questions and provide some guidance on how the department views whether the tax is payable in certain situations. Second, pay the tax under protest and seek a refund. The process for claiming a refund is clearly set forth in the Code and the regulations. See O.C.G.A. § 48-6-61; Ga. Comp. R. & Regs. § 560-11-8-.06. A third option is to request a determination letter ruling from the Commissioner's Office. This can be a lengthy process, so given the cap on intangible tax and the speed with which most transactions move these days, this is an option seldom utilized.

Focus on intangible tax early when closing a new loan or modifying an existing loan. The tax can be payable at several points during the life of a loan. It is best to point out early to clients the intangible tax that will be payable at closing. This will allow for a fourth option – revising the terms of the transaction so that the intangible tax is saved or minimized.

UPCOMING CALENDAR DATES
REAL PROPERTY LAW SECTION

2012

May 10th – 12th, 2012
Real Property Law Institute
(Amelia Island Plantation)

CONFIRMATION ACTIONS AND MARKETABLE, INSURABLE TITLE

Lynn M. Wilson, Esquire
Morris, Manning & Martin, LLP

If the dramatic increase in foreclosures has resulted in the closing attorney being forced to get up to speed in short order on nonjudicial foreclosure and its effect on marketable and insurable title. A title report with a properly recorded Deed Under Power is only the first step toward a closing attorney certifying to marketable and insurable title of foreclosed real estate. As a result of the declining real estate values, property is often not worth the underlying debt owed to the lender. Therefore, lenders are filing confirmation actions in much higher numbers (particularly on commercial property) in an effort to preserve the lender's ability[1] to file a deficiency action against a borrower and/or guarantor. The effect of a pending confirmation action on marketable and insurable title is an issue real estate closing attorneys must address before the conveyance of a foreclosed property.

Let's consider this hypothetical. Lender is the new owner by nonjudicial foreclosure of a 70 acre tract that is comprised of platted lots. The lender/seller is anxious to recover its lost revenue on the underlying transaction so is moving quickly to market and sell the property at a significant discount. The lender/seller is also eager to recover what it can from the borrower and guarantor so, as a first step to what will be a deficiency action, the lender has reported the sale and has filed a petition to confirm the foreclosure sale. Residential Builder is thrilled to be able to pick up the lots in a partially developed subdivision for a fraction of what the lots were being sold for three years ago and enters into a contract to purchase all of the lots. The purchase and sale agreement is silent as to the issue of a pending confirmation action because neither the broker nor the asset manager is aware of any such action. A title examination reveals a recorded Deed Under Power of Sale, that on its face, indicates that the foreclosure sale met all the statutory requirements, but there is no separate search of the civil dockets[2]. To all the parties, it would appear that a closing is just over the horizon.

However on these facts, the pending confirmation action renders the title unmarketable. Georgia Title Standard 17.3, states "if a confirmation is pending or subject to an appeal, title is considered to be unmarketable." In addition, the pending confirmation action also renders the property uninsurable. The confirmation statute, at O.C.G.A. Section 44-14-161 provides in part:

> (a) When any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds, mortgages, or other lien contracts and at the sale the real estate does not bring the amount of the debt secured by the deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings, shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and approval thereon.
>
> (b) The court shall require evidence to show the true market value of the property sold under the powers and shall not confirm the sale unless it is satisfied that the property sold brought its true market value on such foreclosure sale.
>
> (c) The court . . . shall also pass upon the legality of the notice, advertisement, and regularity of the sale. The court may order a resale of the property for good cause shown.

The petitioner/lender must prove three elements to the satisfaction of the court: (1) did the lender follow the strict requirements of the confirmation statute in its petition in providing notice, naming of parties and service? (2) is the lender able to prove the regularity of the foreclosure sale, in notice, advertisement and regularity in calling the sale? (3) was the property sold by the lender for its fair market value? At the confirmation hearing, the court can rule to confirm the sale (thereby satisfying the necessary prerequisite to a suit on the deficiency), the court can deny the confirmation, (which has the effect of barring the lender from filing suit on the deficiency, but holds the foreclosure sale itself a valid nonjudicial foreclosure), or finally, the court can not only deny the confirmation but also order a re-sale of the property. In fact, the case law is clear that it is within the total discretion of the court to order a resale. Therefore, in every confirmation action there is the risk that the court will void the foreclosure sale and order a resale of the property.

Going back to our hypothetical, Residential Builder now not only owns the lots but a considerable amount of time has passed between the filing of the action and the confirmation hearing, so Residential Builder has now constructed and sold completed homes to end-sale buyers. A court voiding the foreclosure sale and ordering a resale would have a devastating effect on Residential Builder, its lender, each end-sale buyer and each of their lenders.

As a result, the title insurance companies have taken a firm position regarding the insurability of title to property with regard to which a confirmation action is pending. First American Title Insurance Company, (hereinafter "First American"), Fidelity National Title, (hereinafter "Fidelity") and Stewart Title (hereinafter "Stewart") provide that title is uninsurable while a confirmation action is pending. Unless an exception is set out in Schedule B setting forth the risk and excepting from the policy any loss as a result of a pending confirmation action.

First American, in its Title Solutions, The Georgia Underwriting Newsletter dated September 2010, detailed the exception that must appear in any policy issued with confirmation action pending:

"No insurance is afforded as to the possibility that the foreclosure sale through which the insured or its predecessor in title acquired the property might not be confirmed, or might be set aside, in a proceeding for confirmation of the sale."

In addition, because there is a statutory thirty (30) day appeal period following the filing of an order in Superior Court, any policy issued after an order of confirmation but before the expiration of the statutory thirty (30) day period must also contain this exception.

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In Bulletin No, 2010-GAO8, dated April 26, 2010, Fidelity provided guidance to its agents by providing the following exception which provides a specific recitation to the deed to secure debt that was foreclosed as well as a reference to the pending confirmation proceeding. The exception reads:

> "Any final order to require [Lender] to re-foreclose that certain Deed to Secure Debt recorded in Deed Book ___, page ___, ____ County Georgia records in that certain Confirmation Proceeding in Case No. _____, _____ County Superior Court."

Stewart has issued national guidelines and bulletins which deal with the issue of Insuring At or After Foreclosure. In Item 8, of Bulletin No. 128898342900000015, agents are directed to "not issue without Stewart Underwriter approval if you know that the lender is currently pursuing a separate deficiency judgment against the mortgagors and such judgment is not yet final."

Clearly, the hypothetical illustrates the perfect storm in the area of confirmations. Closing attorneys can take affirmative measures that will facilitate the attorney being aware of a pending confirmation action. If the closing attorney represents the purchaser, a representation and warranty in the contract stating that a confirmation action is not pending and a covenant by the seller in the contract that such an action will not be filed is recommended. In addition, closing attorney's title examiner should be instructed that on every REO sale, the civil dockets must be checked for the existence of a pending confirmation action.[3] Furthermore, as a part of the pre-closing checklist requirements closing attorney should require a certification by seller that a confirmation is not pending and (if the contract has been entered into within thirty (30) days of foreclosure that an action will not be filed). This language should also be included in the Owner's Affidavit to be signed by the seller.

An answer in the affirmative as to a pending confirmation action does not necessarily put the death knell on the transaction. It may be that a seller/lender when faced with a purchaser (or purchaser's lender) who is unwilling to close under these circumstances and with the exception to title, may choose to dismiss the confirmation action with prejudice in an effort to save the transaction. It also may be that the timing of the confirmation hearing is imminent, and the purchaser and seller/lender are willing to extend the closing date to provide for the hearing outcome and the passage of the statutory thirty (30) day appeal period. In both cases, the policy would be issued without exception.

The effect of the economic downturn in 2007 is truly a gift that just keeps on giving. As a result, closings are more difficult and fraught with more challenges. The confirmation statute and its ever growing effect on marketable and insurable title is just one example of how the real estate practice is a fluid and always changing practice area.

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[1] Assuming the underlying debt securing the property is recourse.

[2] The confirmation statute does not require notice of confirmation to be recorded in the deed records.

[3] If property being conveyed has come out of a foreclosure that occurred within the past 3-5 years, out of an abundance of caution it is recommended that the civil dockets are searched for a pending confirmation (as to the parties to the foreclosure). If the confirmation matter is contested the civil action can take a significant amount of time before the court rules and the appeal process is concluded.

RPLS SPONSORS SUCCESSFUL SPRING RESIDENTIAL PRACTICE SEMINAR

The RPLS, in conjunction with the Georgia ICLE, presented the annual Spring Residential Practice Real Estate Seminar on February 12, 2012. This program, aimed at helping residential closing practitioners fine tune their day to day activities and challenges, was presented live at the Georgia Public Broadcasting Studios and broadcasted throughout the state. Over 268 attendees statewide participated in the program both in person, through satellite and on replay. Topics ranged from updates on the Unauthorized Practice of Law, helpful tips on bankruptcy, foreclosure and short sale trends, Probate and Estate basics and a litigation update. Co-chairs J.V. "Jay" Dell and Triece G. Ziblat gathered practitioners and industry leaders as presenters. The program received high marks by the attendees and is an annual event.

RPLS CREATES A FORMS LIBRARY

John Cripe, Chair of the Forms Committee of the RPLS, recently announced the creation and kickoff of a forms library on the RPLS Website. This site is for the use and reference of section members. Forms can be uploaded to be shared with members of the section as follows: http://garealpropertylaw.com/form-upload/ Press "control" and click to activate the link. Forms will be vetted by the Forms Committee prior to being uploaded on the site.

"The Forms Committee has worked diligently to create a resource for real estate practitioners", said Cripe, "the benefits of having access to standard transactional forms, along with litigation forms or relevant caselaw will be invaluable to the real estate practitioner".

The browse box at the bottom of the upload form allows the contributor to find and select a form to submit. Forms are welcome which will assist the section members, such as practice forms, in addition to legal opinions and useful information on the practice and title standard issues. For more information, please contact John Cripe at jpcripe@windstream.net.

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RPLS NEWSLETTER TO "GO GREEN"

The Executive Committee of the Real Property Law Section is pleased to announce that beginning with the Summer 2012 Newsletter edition, the RPLS Newsletter will be provided to members solely in electronic format, via the email members on file with the State Bar. The change from having both a printed paper version sent via mail, along with the electronic blast delivery, will save the section considerable monetary resources, while helping global efforts to conserve natural resources.

Reminders of the conversion were published in the Fall 2011, as well as the Winter/Spring 2012 edition, of the Newsletter. If you do not receive the RPLS Newsletter electronically now, and wish to continue to receive it via regular mail, you may choose to do so. Simply send a written communication to RPLS Executive Director, Jeril S. Cohen, 2217 Donato Drive, Belleair Beach, Florida 33786, requesting that you continue to have the Newsletter mailed to you. Your request to continue to receive a copy of the Newsletter in written form will be accommodated by Ms. Cohen as a courtesy to you as a section member.

If there are any questions or concerns regarding this change in our procedure, please send any comments to RPLS Newsletter Editor Monica K. Gilroy, Dickenson Gilroy LLC, 3780 Mansell Road, Suite 140, Alpharetta, Georgia 30022 or via email at mkg@dickensongilroy.com.