

# REAL PROPERTY SECTION OF THE MISSISSIPPI BAR NEWSLETTER

## July 2009

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### Message from Chair

My year as the Chairman of the Real Property Section has passed quickly, and I thank all who contributed to the success of our Section this year. A number of projects were initiated under the direction of the Executive Committee and through the help of members who contributed time and expertise. I urge our members to participate by volunteering their time and expertise to a Section project; just contact a Section Officer and let them know you are willing to help.

This year, our Section established a \$1,000 annual scholarship at both the Mississippi College School of Law and the University of Mississippi School of Law. The scholarships are awarded to a law student who (i) has exemplified an aptitude for real property law and (ii) has a financial need. These scholarships allow us to contribute to a deserving student interested in real property law.

Additionally, as an added value to your membership in the Real Property Section, the following three teleseminars have been or will be offered to Section members free of charge:

Documenting and Closing Construction Loans: An Overview  
(1hr CLE credit)  
Matthew H. Grenfell, Butler Snow  
June 30, 2009 from 12-1pm

Negotiating Commercial Leases - Practical Considerations  
(1hr CLE credit)  
Grace H. I. Tate, Butler Snow  
August 26, 2009 from 12-1pm

Ethical Considerations in Real Estate Closings  
(1hr CLE credit)  
K. F. Boackle, Boackle Law Firm  
October 22, 2009 from 12-1pm

These seminars are presented by members of our Section as a service to our membership. A registration form for these teleseminars was emailed to our Section members; however, if you did not receive the email you may contact Rene Garner at the Mississippi Bar.

Under the direction of Ken Farmer, our Section has formed a committee to review the Uniform Common Interest Ownership Act for the purpose of seeking its adoption by the Mississippi legislature. This Act is a comprehensive act that governs the formation, management and termination of a common interest community, whether that community is a condominium, planned community or real estate cooperative. It combines, in a single comprehensive law, prior uniform laws in this area. This Act (or substantially similar laws) have been adopted in nearly half of the fifty states and have had an influence on both legislation and courts regarding common interest communities.

Finally, our members continue to express appreciation for this Newsletter, which is organized each year by Rod Clement. If you have cases, articles or comments to the Newsletter please send them to Rod (rclement@brunini.com).

Our Section will continue to move forward with these and other projects next year under the leadership of the incoming Section Chairman, Paul Randall. Thanks again to everyone who contributed to these Section projects this year.

**Ad Valorem Taxes After Sale to Exempt Entity**

Attorney General's Opinion No. 2009-00060, 2009 WL 927976, March 16, 2009. The South Delta Regional Housing Authority ("SDRHA"), which according to this opinion is a public body and exempt from ad valorem taxes, purchased land from a private party in 2008. As is customary, the seller's share of the current year's ad valorem taxes were prorated and the SDRHA withheld the seller's share of 2008 taxes, \$896. On December 1, 2008, SDRHA tried to pay the seller's prorated share of the 2008 taxes to the tax collector. The tax collector refused to accept the payment on the basis that this was less than the full amount of the taxes. SDRHA asked the Attorney General for an opinion about (a) whether the tax collector could refuse the tender of the \$896, and whether tax collector could reflect a lien on the property for unpaid taxes, and whether the lien could be foreclosed. The Attorney General's office, in an opinion by Special Assistant Attorney General Ellen O'Neal, sidestepped the question about whether the tax collector was correct in declining to accept the tender of partial payment of the taxes on the basis that the Attorney General could only issue an opinion to SDRHA about SDRHA's duties and could not issue an

opinion to SDRHA about the tax collector's duties. This opinion states, however, that the lien for 2008 taxes was extinguished when SDRHA purchased the land in 2008, and that pursuant to statutes providing that land owned by a public housing authority was not subject to execution sale, the property could not be sold for unpaid ad valorem taxes. The opinion also states that the seller, who owned the property on January 1, 2008, remained personally liable for the entire amount of the 2008 taxes, and that the tax collector could seek to collect the 2008 taxes from the seller.

Note 1: In order to appreciate this opinion, it helps to know some of the prior cases and opinions on this subject. Taxes are assessed on January 1. Section 27-25-5 of the Mississippi Code provides that ad valorem taxes are the personal obligation of the person who owns the property to which the tax is assessed. In *Gloster Lumber Co. v. Adams County*, 163 So. 2d 865 (Miss. 1935), a private party sold land to the federal government on January 11. The Mississippi Supreme Court held that the seller was liable for the taxes for the entire year, even though the government owned the land for 354 days of the year. The court stated that it assumed that the government took the land free of tax liens, but this was not part of or necessary to its holding. In 1994 the Attorney General opined that the lien of ad valorem taxes was extinguished if a public body acquired the land. Opinion No. 93-0998, 1994 WL 32601, January 21, 1994. Then in 2000, in *Lupo v. Mississippi Department of Transportation*, 771 So. 2d 358 (Miss. 2000), the Mississippi Supreme Court, relying in part on the 1994 Attorney General's opinion, held that the tax liens that attached to property were extinguished when the state acquired the property. The Attorney General opined in 2001, in an opinion also involving SDRHA, that a tax assessor could not prorate taxes for a year between the time that the property was owned by an exempt and a non-exempt party. Opinion No. 2001-0056, 2001 WL 283645, Feb. 1, 2001. The Attorney General also has opined that a public body could not assume liability to pay taxes, but that a public body with authority to purchase land could agree to pay the current year's taxes as part of the consideration for the purchase price. In other words, a public body could agree in a contract of sale that it would pay the taxes, but absent such a contractual obligation, the public body could not pay the taxes. Opinion No. 93-0998, 1994 WL 32601, January 21, 1994; Opinion No. 2001-0056, 2001 WL 283645, February 1, 2001. This 2009 opinion seems to be a logical extension of these precedents.

Note 2: So where does this opinion leave the parties? The seller is going to be unhappy that it has personal liability for the 2008 taxes after the purchaser withheld part of the purchase price. Typically in this circumstance both the contract of sale and the deed would provide that the purchaser has the obligation to pay the current year's taxes when due. Does the seller have a breach of contract action against the purchaser? What does the purchaser do with the money that it withheld from the purchase price to pay the taxes if it does not have any authority to pay taxes? How likely is it that the tax assessor (or tax collector?) is going to bring an action seeking to enforce the seller's personal obligation to pay the taxes? Is the seller still in existence, does it have assets remaining after the sale to pay the taxes,

and is it cost-efficient for the county to take steps to enforce this personal obligation? The editor has never heard of a county or municipality bringing an action to enforce the personal liability of the owner of land to pay taxes, but given this line of cases and opinions, and the financial pressure on local governments, we may see more of these types of actions to enforce the personal obligation to pay taxes.

### **Renewal of Note Waives All Lender Liability Claims**

*Holland v. Peoples Bank & Trust Co.*, 3 So. 3d 94 (Miss. 2008). Holland was the borrower on several loans from Peoples Bank and Trust Company. Holland also attempted to set up a Section 1031 exchange from the sale of other land with the bank as the qualified intermediary. The bank received the proceeds from the sale of the land and applied them to a loan owed by Holland to the bank. The bank claimed that the agreement for the Section 1031 exchange had never been completed and that the sale proceeds were never deposited in an escrow account. Holland, who was represented by counsel, subsequently entered into a workout agreement regarding the loans and signed an amended promissory note renewing the loan. Holland then brought an action against the bank alleging, among other things, that the bank misapplied the proceeds from the sale of the land and thereby breached a fiduciary duty to Holland. Holland also alleged negligent misrepresentation and fraudulent misrepresentation. The bank argued that any possible claims that Holland had against the bank were waived when Holland entered into the workout agreement and signed the renewal notes. Holland argued that the workout agreement and renewal notes only pertained to the loans and were not related to the alleged misapplication of the proceeds from the sale. The trial court granted the bank's motion for summary judgment on this issue. On appeal the Mississippi Supreme Court, in a decision by Justice Carlson, affirmed. By executing the workout agreement and renewal note, Holland waived all possible claims that he had against the bank.

Note 1: The court relied on *Austin Development Company, Inc. v. Bank of Meridian*, 569 So. 2d 1209 (Miss. 1990). In the *Austin Development* case the bank held a letter of credit as collateral for its loan and failed to make a timely demand for payment on the letter. As a result the borrower went into default and had to sign a renewal note. When the borrower brought an action against the bank for negligence in failing to make demand on the letter of credit, the court held that by signing the note, the borrower waived his negligence claim against the bank. In the *Austin Development* case, the negligence claim arose out of roughly the same set of facts. In the *Holland* case, the claims that the court held were waived arose out of what appears to the editor to be a separate transaction. The *Holland* case therefore arguably is an expansion of the waiver doctrine applied in *Austin Development*.

Note 2: It is interesting to the editor that the fact that the borrower executed a renewal note seems sufficient to the courts in both the *Austin Development* and *Holland* cases to waive the other claims, without the necessity that the note or workout agreement reference the other claims. In *Austin Development* there was only a note and not a workout agreement. In *Holland* the borrower signed a workout agreement as well as a note, but the court did not quote from the workout agreement or make reference to any of its terms. In neither case did the court scrutinize the wording of the relevant documents, but found that the fact that a renewal note had been signed sufficient without any express waivers. Most of the workout agreements that the editor sees contain pages and pages of detailed waivers. Are these detailed waivers really necessary, and do they potentially create a risk that if we try to cover every circumstance, we risk missing one?

Note 3: In *Austin Development* the borrower was an experienced commercial developer. In *Holland* the borrower was a cotton broker and commodities trader who was represented by counsel. Would a court apply this waiver doctrine as strictly if the borrower was an unsophisticated consumer? The author of the *Austin Development* decision, Justice Roy Noble Lee, noted in that opinion that he had dissented in an earlier case applying this waiver doctrine because the borrower was “an unsophisticated woman who had been defrauded by her husband, and she signed a promissory note initially based upon a representation of the Bank, which turned out to be false.” 569 So. 2d at 1212 n. 2.

### **Protecting Tenants at Foreclosure Act of 2009**

The federal Helping Families Save Their Homes Act of 2009, Public Law 111-22, became effective on May 20, 2009. A complete copy of this new law can be downloaded from the web page of the ABA’s Real Estate Financing Group at <http://www.abanet.org/dch/committee.cfm?com=RP279000>. This massive bill is causing plenty of headaches for mortgage lenders and their attorneys, but one part is of particular interest to real estate lawyers who foreclose. Title VII, Sections 701-704, is the Protecting Tenants at Foreclosure Act of 2009. This title provides that in the case of a foreclosure of a federally related mortgage loan or on any dwelling or residential real property after May 20, 2009, the title of the purchaser at the foreclosure sale is subject to a ninety-day notice to any bona fide tenants. The term “federally related mortgage loan” has the same meaning as under Section 3 of RESPA. Moreover, the Act provides that the rights of the purchaser at the foreclosure sale are subject to the rights of any bona fide tenant “under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest [purchaser at foreclosure sale] may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice...” It sounds like the intent of this provision is that the purchaser of the foreclosure sale cannot terminate a lease entered into before the notice of foreclosure sale is published unless the purchaser

has another tenant lined up, but the reference to the “sale of the unit to a purchaser” doesn’t fit.

Although the Act does not address this, presumably the terms of the lease will continue during this ninety-day period, including the tenant’s obligation to pay rent. If the tenant stops paying rent, or otherwise defaults, is the purchaser at the foreclosure sale’s right to terminate the lease still subject to giving the ninety-day notice? When a lender commences foreclosure on an apartment complex, typically some of the tenants stop paying their rent.

Under the common law and the law of Mississippi, of course, a lease executed subsequent to the deed of trust being foreclosed upon will be extinguished by the foreclosure. While there have been many new federal statutes passed as a result of the bursting of the housing bubble, the editor can’t recall another statute that directly adjusted priorities in titles like this one.

### **Department of Insurance Limits Certificates of Insurance**

On March 24, 2009, the Commissioner of Insurance issued Regulation 2009-1, entitled “General Property and Casualty Binders, Certificates of Insurance or Indemnity Agreements.” The Regulation provides that no insurer or producer can issue a certificate that alters an insurance policy; that any insurer or producer that issues a certificate other than the standard ACORD or ISO form of certificate must file the certificate with the Commissioner for approval; and that any certificate of insurance must contain the following statement: “This certificate of insurance neither affirmatively nor negatively amends, extends, or alters the coverage afforded by policy number \_\_\_\_ issued by \_\_\_\_.” A copy of this Regulation can be downloaded from the Department of Insurance’s website at <http://www.mid.state.ms.us/regulations/20091reg.pdf>.

In order to appreciate this regulation, some background may be helpful. In 2003 ACORD, the organization that authors certificates of insurance, and the Mortgage Bankers Association jointly prepared and issued the ACORD 28 Evidence of Commercial Property Insurance. This form was intended to give lenders making loans secured by real estate assurance at closing that their collateral was insured against casualty. The significance of this form being designated as an “evidence” rather than a “certificate” is that historically the recipient of an “evidence” is entitled to rely on the evidence and that the rights granted by the evidence will not be cancelled without notice. In 2006 ACORD, allegedly acting contrary to its own rules and at the urging of the insurance companies and producers (agents and brokers), issued a revised form of ACORD 28. The 2006 form added a provision that the recipient could not rely on the form and that the coverage represented on the form could be cancelled without notice to the recipient. The mortgage lending community objected vehemently to the changes. At the request of the lenders, ACORD has held telephone meetings of representatives of insurers, lenders and producers to attempt to achieve a consensus form, but that effort has stalled. The website of the ABA’s

Mortgage Lending Committee,  
<http://www.abanet.org/dch/committee.cfm?com=RP282000>, has more information about the changes in the ACORD certificate, including copies of both the 2003 and 2006 ACORD 28 forms.

In the meantime, insurers and producers have been asking state insurance commissioners to issue bulletins adopting their position that the ACORD 28 does not amend the underlying insurance policy and does not grant any rights to the recipient. About twenty states have issued bulletins or regulations to this effect. The Mississippi Department of Insurance fell in line with the insurers and producers by issuing Regulation 2009-1.

The underlying problem for lenders is that a new policy of casualty insurance usually is not available for inspection by the lender at closing, even though the premium is paid at closing. In fact it often takes the insurer six months or more to prepare the policy. This is a problem not only for lenders, but also for landlords who want to make sure that a tenant has property insurance sufficient to rebuild its improvements in the event of a casualty. A lender can get a binder, but binders expire after six months. The worst case scenario was played out after the World Trade Center bombing in 2001. The properties had been refinanced but the policies had never been issued. So one of the many questions was what the policies actually provided.

The Insurance Department for the State of New York has taken on this problem by requiring insurance companies and producers to propose a way for lenders and others to confirm the existence of insurance. The deadline is October 2009. A copy of this bulletin from the Insurance Department of the State of New York can be downloaded at [http://www.ins.state.ny.us/circltr/2008/cl08\\_20.htm](http://www.ins.state.ny.us/circltr/2008/cl08_20.htm).

### GENERAL

This Newsletter is a publication of the Real Property Section of The Mississippi Bar for the benefit of the Section's members. Members are welcomed and encouraged to send their corrections, comments, articles or news to the editor, Rod Clement, by mail to P.O. Drawer 119, Jackson, Mississippi 39205 or by email to [rclement@brunini.com](mailto:rclement@brunini.com). Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases or statutes are intended only to bring current issues to the attention of the Section's members for their further study and are not intended to and should not be relied upon by readers as authority for their own or their client's legal matters; rather, readers should review the full text of the cases or statutes referred to herein before relying on these cases or statutes in their own matters or in advising clients. All commentary reflects only the opinion of the editor and does not represent a position of the Real Property Section or The Mississippi Bar.