

Real Property Law Section NEWSLETTER

State Bar of Georgia

A Publication for Real Property Lawyers

Fall 2003

COMMENTS FROM THE CHAIR

By: Rachel Iverson, Section Chair
Morris, Manning & Martin, LLP

It is 6:00 a.m. on a Tuesday morning and I am asking myself for what must be the 100th time why I agreed to serve as Chair of this section. Yet even this early in the morning, there is that inaudible whisper inside my head reminding me that I do believe in the profession and in its' ability to serve the public. I am too old to be as idealistic as I once was. I understand and empathize with my former law school classmate who told me when I was chairing the Real Property Law Institute that he "wouldn't do THAT for anything!". I guess truth be told, I envied him. There is, however, a reason that I, who am definitely not a morning person, dragged myself out of bed to write this column and more importantly, why I decided to be involved in the Real Property Section.

It dawned on me while I was meeting with real estate lawyers from several States last Saturday at a UPL symposium that if we want to be a part of this profession five years from now, we need to preserve it today. Most of the lawyers at the symposium had a few years on me and all were extremely proud of their profession. One of the lawyers opined that it is difficult to get the members of our profession involved because they are too busy addressing the day to day issues of their practice to concern themselves with the state of our practice five years from now. We must, however, concern ourselves with the future of our practice. Unfortunately, while we are making it through our day, the Federal Trade Commission and the Department of Justice are making cases against our practice with no valid data. While we are making it through the day, other lawyers are making a mockery of our profession or ignoring bar regulations with no apparent ramifications. While we are making it through our day, our profession is eroding. If we want to continue to protect the public, we must maintain a profession worthy of doing so.

I need to remember to talk to lawyers who have been practicing more than 30 years or so more often. With few exceptions, they make me aspire to something greater, taking pride in all aspects of my work, desiring to maintain ethics beyond question, wanting to be proud of the product I produce and the office I maintain. We need to aspire to something greater. Through my service on the Executive Committee, I have made a profound discovery. The lawyers practicing in the area of real estate either contribute to the profession or contribute to its erosion. Are you in or are you out? Suffice it to say that I encounter many lawyers who give hours they surely do not have or would rather spend with their families, in the preservation of our profession. Our committee is especially grateful to Jeff Bramlett and his firm

who drafted a brief for the real estate section, donated time in large part, for the argument before the Standing Committee on the Unauthorized Practice of Law. Jeff is not a real estate lawyer, nor is anyone in his firm. If he can donate countless hours to support us, can't all of us spend the time it takes to make our profession great rather than the time it takes to erode it? I ask you to go to the State Bar website of the Real Property Section and read the opinion of the Standing Committee, a committee made up of equal numbers of lay people and lawyers. If you do not think contributions such as Mr. Bramlett's matter, think again. Organizations such as GRECCA and the Real Property Section are certainly vehicles in which you can contribute and I hope you will*. However, I am asking each of you to contribute through your actions as you practice each day to aspire to something greater. In your gut are you doing your best job?

I wish I could claim to have the perfect practice, where mistakes were never made and decisions were always good. We strive to eliminate or reduce errors to do the best job possible. I want to always be proud of my practice. I challenge this section's membership to meet the same standard. Let us not compromise this profession and **let us not tolerate and facilitate those lawyers who do.**

* Please see the back cover regarding committee membership and liaison positions to become involved in the section.

UPL UPDATE

On November 10, 2003, the Georgia Supreme Court upheld the Opinion by the Standing Committee of the Unlicensed Practice of Law that real estate 'closings' were the practice of law and could only be done by a licensed attorney at law. For a complete copy of the full decision see: www2.state.ga.us/courts/supreme/index.html.

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SYMPOSIUM ON UNAUTHORIZED PRACTICE OF LAW IN RESIDENTIAL REAL ESTATE TRANSACTIONS

*By Carlton H. Morse, Jr.
Shuping, Morse & Ross, LLP*

On October 17-18, 2003, the American Bar Association's Standing Committee on Lawyers' Title Guaranty Funds sponsored a symposium on non-lawyers performing real estate closings in Eastern and Midwestern states. Attorneys from Florida, Georgia, Virginia, Kentucky, Illinois, Minnesota, Maryland, New York, Massachusetts and Connecticut converged on Arlington, Virginia to discuss the variation of states' responses to the problem, to flush out the Department of Justice position, and to develop an action plan that protects the public in the area of real estate conveyancing. Three lawyers from the Executive Committee of the Real Property Law Section of our State Bar attended: Bruce Cohen, representing Attorney's Title Guaranty Fund, Rachel Iverson, Chair of the Executive Committee, and Carlton Morse, from the UPL subcommittee of the Real Property Law Section. Bruce Cohen also sits on the ABA's Standing Committee on Lawyers' Title Guaranty Funds.

The kick-off was a dinner presentation on Friday night by Renata B. Hesse, one of the section chiefs of the Antitrust Division of the U.S. Department of Justice. The lawyers in attendance got a chance to query Ms. Hesse on the motivations of the FTC, the perspectives of the Department of Justice, and the assumptions on which the Department's attorneys proceed when they file their briefs in support of non-lawyers conducting real estate closings. The interchange was lively and pointed, producing insights on both sides.

The Saturday session began promptly at 8:30 a.m. and continued throughout the day. The agenda was straight-forward: 1) analyze each state, 2) review the DOJ presentation from the night before, and 3) look at a plan of action for the future. First, there was an analysis of the different ways each state addressed the onslaught of non-lawyer entities attempting to practice law and the current status and forums in which the "battles" were taking place. This review provided a groundwork upon which all of the lawyers in attendance could assess the success and failure of different approaches. One obvious touchstone was salient: the states that had mandatory, "integrated" bars could respond to the FTC with much more leverage than those states whose bar membership was of a voluntary or "trade group"-like status.

Next, symposium attendees focused on the FTC argument as expressed in the numerous briefs that the Department of Justice filed in Rhode Island, Kentucky, Georgia, and North Carolina. The crux of the DOJ argument appeared to many to be as follows: that without non-lawyer competition in place, the public will be harmed because prices will rise. The next part of their assertion was that there has been no showing of actual harm when non-lawyers compete with lawyers to conduct real estate closings. Finally, their argument posits that there are less restrictive measures available

to protect the public than an outright ban of lay closers.

Symposium members got a real jolt from the presentations by the Massachusetts attorneys (3) in attendance. They outlined their legal attacks on title examiners who started in Rhode Island, migrated to Massachusetts, and offered to add closing services to their other title offerings. The Massachusetts group was successful in turning back the non-lawyers' attempts. The Massachusetts Conveyancers' Association (MCA) is a voluntary association of lawyers, and they were successful in raising over \$500,000 to conduct their civil actions against lay closers. In addition, MCA hired a leading Washington, D.C. law firm with political contacts to understand the DOJ/FTC response. Additionally, the MCA interviewed a Washington, D.C. think tank whose views were respected by DOJ personnel to come up with the type of data that would be persuasive to the DOJ. After further inquiry, the symposium members were told that the MCA has hired students at the Boston University Marketing Department to help with print media (mostly newspaper) spots on the value of real estate closing attorneys.

After hearing about the Massachusetts example, and cogitating about the FTC position, the attorneys turned their focus on future actions. An early inquiry needed to be answered—where is the data that lawyers cost more? Where is the data that prices will rise if only lawyers are allowed to conduct real estate closings? An interesting tidbit was revealed—the New Jersey litigation allowing non-lawyers to practice real estate law in that state was based on a review of only 25 HUD-1 settlement statements! Suggestions were made to look at the western experience, where the harm is the consolidation of closings into the hands of 3 or 4 providers statewide, where title problems are merely "insured over" as a matter of casualty rather than flushed out and resolved. Discussions included consideration of hiring the Gallup organization for polling services, and developing a method to quantify harm to the public, with the focus on Virginia, where both lawyers and non-lawyers compete for the same market.

The symposium members agreed to establish a list serve, to keep in touch, to build the ties with Ms. Hesse and the Antitrust division at the Department of Justice and to meet again at the ABA mid-year meeting.

NOTICE

If you know someone who has not joined
the Real Property Law Section,
please encourage them to do so.

IMPORTANT NOTICE

TO: All Attorneys licensed to practice law in the state of Georgia.

FROM: The Executive Committee of the Real Property Law Section of the State Bar of Georgia.

ISSUE: "Witness-only" closings by attorneys should not take place in the State of Georgia!!

PREAMBLE: Attorneys all over the state of Georgia are being asked to participate in the process of having residential real estate loans, primarily refinances, closed through a procedure commonly called "witness-only closings" or "signature closings." The attorneys are told that they do not have to have a background in real estate, will have "no liability" from the transaction and that their participation is allowed in this state. This is not a correct position on this very important matter.

WHAT IS A WITNESS-ONLY CLOSING?

The Supreme Court of Georgia has issued opinions that clearly dictate that the conveyancing of title to real estate, the rendering of opinions as to title and the preparing of documents for such purposes constitutes the practice of law and, as such, must be handled by attorneys. In the course of handling such a closing, the attorney is responsible for supervising all elements of the closing, from title exam and title clearance to recording of documents and disbursement of funds. In the process, all lender instructions, contract terms and collateral issues of insurance, termite letters, payoffs and title insurance must be dealt with in a professional and responsible manner. The actual execution of documents at the closing table is but one of many aspects of the attorney's obligations.

However, in a "witness-only" closing, the only action asked of an attorney is to have the documents signed in the attorney's presence – as a "witness." For this he/she gets paid a nominal fee, ranging from \$50.00 to \$150.00. The source of the loan, whether it is a lender or title company or out-of-state entity, is preparing the documents, handling title issues, disbursing funds (including payoffs) and all other phases of a closing that the Georgia Supreme Court has stated should be done only by attorneys. To participate in the execution of documents at a witness-only closing could be construed as aiding non-attorneys in the unauthorized practice of law.

Also, regardless of what you might be told, you do have liability for your actions. If there are title problems, open (unpaid) liens, incorrect payoffs or any of many other post-closing issues, the attorney who signed the documents, as a witness or notary, will be expected to clear the problem. The attorney has obligations that can affect his E&O insurance coverage, create personal liability and possibly subject that attorney to State Bar sanctions.

CONCLUSION: No attorney licensed to practice law in the state of Georgia should participate in a "witness-only" closing.

TITLE STANDARDS SEMINAR

The annual Title Standards Seminar, chaired by Linda Bryant Curry and sponsored by the Real Property Law Section of the State Bar of Georgia and ICLE in Georgia, was held on October 2, 2003, at the Marriott Gwinnett Place Hotel. Total attendance at the seminar was 226, an impressive number for a specialized program. The speakers and the seminar in general were highly rated by the attendees. In addition to a number of speakers who are experienced real estate lawyers, other speakers were chosen due to their expertise on a particular area covered by the Title Standards. For example, Anne Sapp, who specializes in handling condemnation for the Georgia Department of Transportation, spoke on condemnation and eminent domain. Ann Herrera, a probate attorney and Fulton County Administrator and Guardian, spoke on title through decedents' estates. Also, Penni Alper, who provides national bankruptcy representation for lenders and investors nationwide, spoke on bankruptcy. Issues and discussions generated by some of the speeches will be passed on to the Title Standards Committee of the Real Property Law Section for further consideration of revisions to the Title Standards.

If any of you have suggestions for revisions or updates to the Title Standards, please contact Roy Tritt, the Chair of the Title Standards Committee at (706) 722-7543 or e-mail him at rttritt@wts-lawfirm.com.

UPCOMING 2003-2004 CALENDAR DATES EXECUTIVE COMMITTEE, REAL PROPERTY LAW SECTION STATE BAR OF GEORGIA

— 2003 —

NOVEMBER 13th, 2003
COMMERCIAL LAW SEMINAR & DINNER
Chair: Bill Mc Fee
Cobb Galleria Centre
(Executive Committee Meeting before Dinner)

DECEMBER 16th, 2003
**EXECUTIVE COMMITTEE MEETING
AT ATLANTA FINANCIAL CENTER #1600**
4:00 – 6:00 PM

— 2004 —

JANUARY 20th, 2004
**EXECUTIVE COMMITTEE MEETING
AT ATLANTA FINANCIAL CENTER #1600**
4:00 – 6:00 PM

FEBRUARY 6th, 2004
**REAL ESTATE PRACTICE AND
PROCEDURE AT GPTV**

FEBRUARY 12th, 2004
**REPLAY OF R.E. PRACTICE
AND PROCEDURE**

FEBRUARY 17th, 2004
**EXECUTIVE COMMITTEE MEETING
AT STATE BAR OF GEORGIA OFFICES**
4:00 – 6:00 PM

MARCH 16th, 2004
**EXECUTIVE COMMITTEE MEETING
AT ATLANTA FINANCIAL
CENTER #1600**
4:00 – 6:00 PM

APRIL 16th, 2004
FORECLOSURE PRACTICE

APRIL 20th, 2004
**EXECUTIVE COMMITTEE MEETING
AT ATLANTA FINANCIAL CENTER #1600**
4:00 – 6:00 PM

MAY 6th, 7th, & 8th, 2004
**REAL PROPERTY LAW INSTITUTE
AMELIA ISLAND PLANTATION**
Chair: Doug Selph

MAY 8th, 2004
EXECUTIVE COMMITTEE MEETING
1:00 – 2:00 PM (Amelia Island)

HELPFUL HINTS

In early Fall, Steve Greenberg, Chair of the Newsletter Committee, contacted each of the Title Companies requesting that they submit some relevant advice which would be of interest to the members of our section.

*From Robbie Dimon and Viviane Dubuc
of Fidelity National Title*

1. It is imperative to record all documents immediately. Implement a follow up procedure to detect if the recorded documents are not returned in the normal time frame. Deeds establish the rights of parties to a transaction and give notice to the world of those rights.
2. Reconcile Escrow Accounts every month. So many problems can be caught immediately by a proper reconciliation and review of your escrow account. Problems, if detected immediately, may be resolved easily but if not, could cost you and/or your title company significant dollars.

*From David Gordon of
United General Title Insurance Company*

1. Get a written payoff every time (no exceptions) you are paying off any account secured by real property. If you are paying off a revolving line of credit, make sure it is properly paid off and closed out.
2. Reconcile Trust Accounts immediately. Failure to catch errors in a timely manner can result in the attorney having to personally fund shortages caused by bank error, staff error or fraud.

MANUFACTURED HOME TITLE LAW CHANGED

*By Janney E. Sanders, with contribution by Richard V. Bowers,
Sanders & Smith, P.C. Attorneys at Law*

On May 31, 2003, Governor Sonny Perdue signed into law House Bill 506 which amends Article 2 of Chapter 2 of Title 8 of the Official Code of Georgia Annotated (O.C.G.A. §8-2-180, et seq), relating to factory built structures (mobile homes or manufactured homes). This new law provides specific procedures for converting such homes from personal property to real property and vice versa. It also contains provisions relating to the record ownership of such homes, destruction of such homes and makes it a crime to remove without authorization a home that has been converted to real property. (This article shall use the term "mobile home" to also include "manufactured home").

One change from existing law is the new law's provision that a mobile home "shall constitute personal property . . . until such time as the home is converted to real property as provided for in this part." This validates to some extent (at

least prospectively) the practice in some rural counties of including the mobile home as part of the "homestead" along with the real estate it is located on for ad valorem tax purposes as a method of "converting" a mobile home into a fixture on real property. However, this past practice did not alter the requirement that the only way to transfer ownership of the mobile home or perfect a security interest in the mobile home was by way of a certificate of title issued by the office of the Georgia Department of Revenue. This Act changes the certificate of title requirement in certain circumstances.

The new law establishes a detailed procedure which must be followed in order to convert a mobile home to real property: 1) It must be affixed on real property at least partially owned by an owner of the mobile home; 2) A Certificate of Permanent Location must be filed by the owner(s) of the mobile home and holder(s) of any security interests in the mobile home in the real estate records and a certified copy obtained from the clerk of superior court; 3) The certified copy must be filed with the commissioner of motor vehicle safety (Department of Revenue) along with the certificate of title; 4) The commissioner shall issue to the clerk confirmation that these documents have been filed; 5) The clerk shall then provide the Certificate of Permanent Location to the tax authorities. (O.C.G.A. §8-2-181 and 182).

Once this procedure has been followed, it is a crime to remove the home from the real property without following the procedure prescribed for the conversion of the home back to personal property. That procedure requires the following: 1) The home must be removed from the real property; 2) A Certificate of Removal from Permanent Location must be filed by the owner(s) and any security interest holder(s) with the commissioner of motor vehicle safety and a confirmation of filing obtained from the commissioner; 3) The confirmed Certificate must be filed with the clerk of superior court. (O.C.G.A. §8-2-184-186).

When a mobile home that has been converted to real property is destroyed, the following procedure must be followed: 1) A Certificate of Destruction shall be filed by the owner(s) and any security interest holder(s) with the commissioner of motor vehicle safety and a confirmation of filing obtained from the commissioner; 2) The confirmed Certificate must be filed with the clerk of superior court. (O.C.G.A. §8-2-187-189).

At least one form has been created by the Department of Revenue to utilize the procedures described in the Act. Form T-234, Mobile/Manufacturer Home Certificate of Permanent Location, is to be used to convert the mobile home to real property. As yet, a Certificate of Removal and Certificate of Destruction have not been designed and distributed. Instructions have been issued by the Department of Revenue for completion of the T-234 form and the procedures to comply with the Act.

Most real estate attorneys that have had to deal with mobile homes, and the Certificate of Title nightmare, will be happy

Continued...

Manufactured Home Title Law Changed Continued...

to learn that, at least in some instances, the Certificate of Title can finally be eliminated and a mobile home dealt with in the same manner as the real estate on which it is located, which everyone has wanted to do in the past anyway. However, although the procedure for permanently affixing a mobile home to real estate is laid out fairly clearly in the statute, and is simple in concept, it is cumbersome in practice. It is suggested that additional charges will probably be necessary to cover the cost of handling these transactions because of the follow-up time that will undoubtedly be necessary to make sure that the procedure is followed correctly and the mobile home is correctly considered real property. Additionally, each attorney should consult new procedures that may be specified by lenders and title insurance companies as to their underwriting requirements and procedures for handling mobile homes to be affixed to real estate and to be considered real property.

PREDATORY LENDING SEMINAR GENERATES LIVELY DISCUSSION

By: Carol Clark

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The Real Property Law Section sponsored its first Predatory Lending Seminar on August 28, 2003. Chaired by Carol V. Clark, the seminar attracted nearly one hundred registrants who came to understand the new law, as amended this session.

An esteemed panel of former Governor Roy Barnes (now with The Barnes Law Group), William J. Brennan of Atlanta Legal Aid Society, and Richard E. Raymer of McCalla, Raymer, Padrick, Cobb, Nichols and Clark, LLC, representing the point of view of the mortgage banking community, kicked off the day with their diverse perspectives of "What is 'predatory lending' and why did Georgia need a new law?" Following this scrappy session, Loretta Salzano of Franzen and Salzano provided a background on the law as originally passed - the Georgia Fair Lending Law of 2002, sometimes called AGAFLA@.

One of the liveliest presentations was that of Senators Vincent Fort and Casey Cagle who presented opposing views of whether the original law was effective and of those components they felt should be changed or retained. Notwithstanding the passage of the subsequent 2003 amendment, these senators each held tight to their convictions. Senator Fort did not believe the law went far enough, and that the amendments were headed in the wrong direction. He promised more legislation to revisit key issues. Senator Cagle favored the changes made and explained the need for

homeowners to be able to obtain loans in Georgia. The "assignment" issue was a hot topic. Responsibility for construction defects caused by an unscrupulous "remodeler" tied into loans sold into the secondary market triggered disparate views about who should ultimately bear the liability for the default/loss/liability when the loan was sold.

This set the stage for the discussion on the 2003 amendment, which, among other things, expressly limited assignee liability. The changes and nuances of the 2003 amendment were highlighted by Representative Larry O'Neal, of the law firm of O'Neal, Long & Hall, who now serves as Governor Sonny Perdue's floor leader, and Scott Michalove, from McCalla, Raymer, Padrick Cobb, Nichols, & Clark, LLC. How will these changes be enforced? Who will prepare interpretations? That was the province of Leslie Bechtel, Deputy Commissioner for Legal and Consumer Affairs for the Georgia Department of Banking and Finance. The regulation and interpretation is certain to generate litigation, although no cases had been filed as of the seminar date.

Issues which are likely to arise based on the wording and the interplay with other lending issues were presented by Gary Leshaw of Gary Leshaw & Associates, and Terry Franzen, also of Franzen and Salzano.

Senator Don Cheeks used his crystal ball to look ahead into the session as to possible new issues. He plans to introduce a bill to stop "payday lending" in which cash-strapped individuals get the equivalent of an advance against their payday at high interest rates. The day ended with a dramatic comparison of a Raiders of the Lost Ark video with Harrison Ford fighting through the booby traps and obstacles to get to the prize. Dan Diaddigo of Jarvis Street Mortgage and Investment Company who stressed the concern of the industry in working to preserve the ability to make loans and to deter the predators from within.

A special thanks to Scott Coulter and to ICLE for sponsoring the seminar with the Real Property Section, making the arrangements at Colony Square, and coordinating the 6 CLE hours of credit which included 1 trial hour and 1 professionalism hour on a brand new topic.

IT'S THE LAW!!

Georgia Law specifically states that a closing attorney can take a proceeds check from another closing only if it is "a check drawn on the escrow account of an attorney licensed to practice law in the state of Georgia..." This law thereby excludes all other forms of proceeds checks, including non-law firm entities, out of state attorneys and law firms that close in the name of a title company or corporate name other than that of a law firm. Read O.C.G.A. § 44-14-13 very closely; it is the "good funds" law.

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**REAL PROPERTY LAW SECTION • STATE BAR OF GEORGIA
ROSTER OF COMMITTEES AND CHAIRS – 2003 - 2004**

- | | |
|--|---|
| 1. Legislative Committee
Chair: David Burge | 12. Title Standards Committee
Chair: Roy Tritt |
| 2. Nominating Committee
Chair: Rachel K. Iverson | 13. Residential Closing Committee
Chair: Gil Hudnall |
| 3. Finance Committee
Chair: Rachel K. Iverson | 14. Newsletter/Web-Site Committee
Chair: Steve Greenberg
Web Master: Jeril Cohen |
| 4. Pro Bono / Awards Committee
Chair: Michelle Willis | 15. Clerks' Liaison Committee
Chair: Danny Bailey |
| 5. Fall Title Standards Seminar Project (October)
Chair: Linda Curry | 16. Legal Opinion Revisions Committee
Chair: Doug Selph |
| 6. Fall Commercial Seminar Project (November)
Chair: Bill McFee | 17. Fraud Awareness Committee
Chair: Gil Hudnall |
| 7. Spring Practice and Procedure Seminar Project (February)
Chair: Ed Hudson
Vice-Chair: Dennis Helmreich | |
| 8. Real Property Law Institute Project (May)
Chair: Doug Selph | |
| 9. UPL/Ethics/Disciplinary/Professionalism Committee
Chair: John Carlton
Vice-Chair: Carlton Morse | |
| 10. Membership Committee
Chair: Jed Beardsley | |
| 11. Long Range Planning Committee
Chair: Bruce Cohen | |

Liaisons

Clerks Authority – *Danny Bailey*
Title Companies – *Gil Hudnall*
Department of Revenue – *Jed Beardsley*
Insurance Commissioner (title insurance)- *Leon Adams*
Mortgage Brokers and Bankers –
Board of Realtors –
Homebuilders – *Kathryn Zickert*
Dept. of Banking – Mortgage Division –
Tax Commissioners -