

Real Property Law Section NEWSLETTER State Bar of Georgia

A Publication for Real Property Lawyers

Summer 2008

COMMENTS FROM THE CHAIR

By: Edward P. Hudson
Hudson Law Offices, LLC

Our Real Property Law Section has had an outstanding year. I hope that each of you feel that you have benefited from your membership in our section. I am honored to have had the opportunity to serve as Chair of our section this year. Thank you for your support and help during the year.

Often, people ask what our section does. In response, I thought that I would include the following short recap of some of our activities over the past year:

1. Co-sponsored the Real Property Law Institute with ICLE at Sandestin, Florida on May 3-5, 2007.
2. Awarded the Pindar Award to Bill Dodson at the Real Property Law Institute.
3. Held our annual Section meeting at the Real Property Law Institute on May 5, 2007.
4. Held Section's Executive Committee meeting on May 5, 2007.
5. Conducted Executive Committee Planning Retreat at Callaway Gardens September 7-9, 2007.
6. Contributed to the Access to Justice Civil Committee which seeks out and studies areas where there are legal needs for those who can not afford it.
7. Proposed legislation to amend the Georgia "Good Funds" statute, which passed the legislature.
8. Followed our section's proposed legislation regarding cross indexing of the real estate records in Georgia. The Legislature passed this statute.
9. Participated in the Fulton County Land Fraud Task Force.

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2008 REAL PROPERTY INSTITUTE

The Real Property Law Section and ICLE of Georgia presented the 30th annual Real Property Law Institute in Amelia Island on May 8th – 10th at Amelia Island, GA. Susan Elliott, Chair, presided over the 400+ in attendance.

Thursday morning's session began with an interesting history of the Real Property Law Section by Bruce Cohen, followed by Carol Clark's judicial update with trial practice pointers. Following, Bill Dodson presented the Pindar Award to Carol Clark for her outstanding contributions to the Section. After a break there was an ethics update and Ned Blumenthal spoke on "Working with The Georgia Association of Realtors Forms." ICLE hosted a golf tournament in the afternoon.



ED HUDSON, outgoing RPLS Chair, accepts gavel and plaque from Susan Elliott, incoming Chair, with thanks and appreciation for all his hard work this past year.

Friday morning, the parking lot of the Tennis facility was the venue for the 4th annual "Feat for McFee," 5K run and 1 Mile walk, which brought out about 17 runners and walkers at a bright and early 7:00 A.M.

Concurrent sessions for Commercial and Residential Real Estate were on the agenda for Friday morning; The Commercial side enjoying talks on "Sub Prime Meltdown," Stormwater issues, leasing issues in this changing market, "Good Title vs Good Title Insurance" and Construction Issues, while the Residential session listened to topics on "Collected Funds/Good Funds," an update of Practices and Procedures, responsibilities of a closing attorney regarding government reporting, "Drafting

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10. Sponsored Silent Auction Benefit on September 12, 2007 at Callanwolde Fine Arts Center for The Living Room, a non-profit organization that provides housing assistance to individuals and families affected by HIV and AIDS.
11. Submitted request to the UPL Standing Committee for an advisory opinion addressing issues surrounding "witness only" closings in Georgia.
12. Co-sponsored a reception with the Georgia Society of CPA's Real Estate Section on September 25, 2007 in Atlanta.
13. Co-sponsored Title Standards seminar with ICLE on October 4, 2007 in Atlanta.
14. Held monthly meeting of the Section's Executive Committee on October 16, 2007.
15. UPL Committee worked with the UPL coordinator for the State Bar throughout the year to continue our efforts to protect the public from the unauthorized practice of law.
16. Pro Bono Committee worked with the Matchmaker Project to match real estate attorneys throughout the state with pro bono opportunities.
17. Section listserve continued to be active and grow. We now have close to 1,000 members on our listserve.
18. Public Relations Committee undertook a public relations effort to inform the public of the value of attorney involvement in real estate transactions.
19. Newsletter Committee published our newsletter quarterly and initiated distribution to our section members in electronic format.
20. Held monthly meeting of the Executive Committee of the Real Property Law Section on November 8, 2007.
21. Hosted dinner for Commercial Real Estate seminar speakers on November 8, 2007 at the Capital Club.
22. Held Commercial Real Estate seminar at GPTV studios on November 9, 2007 and which was broadcasted throughout the state.
23. Legislative Committee Chair attended the December 5, 2007 public hearing in Dekalb County on the proposed Dekalb County "Inefficient Plumbing Fixtures Replacement Plan."
24. Worked with the Dekalb County Board of Commissioners to revise the proposed "Inefficient Plumbing Fixtures Replacement Plan."
25. Held monthly meeting of the Section's Executive Committee on December 18, 2007.
26. Our section's liaison to the Georgia Association of Realtors participated in the regular monthly meetings of the GAR Forms Committee to offer input and suggestions from our section.
27. Held monthly meeting of the Section's Executive Committee on January 15, 2008.
28. Executive Committee voted to reduce the annual section dues from \$30 to \$25.
29. Implemented an electronic bulletin board for section members to post messages such as job opportunities.
30. Co-sponsored the Residential Real Estate seminar with ICLE in February at GPTV (simulcast throughout Georgia and re-broadcast one week later).
31. Held monthly meeting of the Section's Executive Committee on February 19, 2008.
32. Throughout the legislative session, our section's Legislative Committee actively worked with the State Bar's lobbyists to review and comment on proposed legislation affecting the practice of real property law.
33. Legal Opinion Revisions Committee conducted a survey of section membership to determine the need or desire to replace, revise, or supplement the section's existing Report on Legal Opinions to Third Parties in Real Estate Transactions.
34. Held monthly meeting of the Section's Executive Committee on March 18, 2008.
35. Intangible Recording Tax Committee has worked throughout the year on proposed revisions to the Department of Revenue Intangible Tax regulations.
36. Co-sponsored the Georgia Foreclosure Seminar with ICLE on April 18, 2008.
37. Held monthly meeting of the Section's Executive Committee on April 16, 2008.
38. Awarded scholarships to deserving students in the law schools in Georgia.
39. Contributed \$5,000 to the Georgia Legal Services Program to fund a summer associate.
40. Residential closing committee commenced and continues to formulate comments for submission in response to HUD's proposed RESPA reform regulations.
41. Co-sponsored the Real Property Law Institute with ICLE May 8-10 at Amelia Island, Florida.
42. Held its annual Section membership meeting at the Real Property Law Institute.
43. Presented the Pindar Award to Carol Clark at Institute.
44. Gold Sponsor for the State Bar Annual Meeting Opening Night.

As you can see, this has been a very busy and productive year. I am confident that our section will have an even better year next year under our new Chair, Susan Elliott.

Again, thank you for your support, and thank you for giving me the honor of serving as Chair of our section. I hope that each of you have a great summer.

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the Unbreakable Sales Contract,” and a repeat, but updated presentation of the annual Bill(Dodson) and Danny (Bailey) Show, focused on “Working Through Title Issues At Closing.” A tennis tournament followed the session.

Saturday morning ICLE and RPLS co-hosted a continental breakfast kicking off the final session. At the annual meeting, where Ed Hudson, RPLS Chair passed over the gavel to Susan Elliot, four new Executive Committee members were approved for three year terms. The new board members are: Isabel Maria Garcia, of McLarty, Robinson & Van Voorhies, in Decatur; Monica K. Gilroy of Dickenson, Gilroy, in Alpharetta; Charles Scott Logan, of The Fryer Law Firm in Atlanta, and John E. Taylor, of Carlton Fields in Atlanta.

The new Executive Board officers are: Chair, Susan Elliott, (HD Supply); Chair-Elect, Shelli Willis, (Troutman Sanders) and Secretary-Treasurer, Patrise M. Perkins Hooker, (Hollowell, Foster & Gepp).

Following the annual meeting, attendees listened to a legislative update, a talk on “Novel Legal Defenses To Title Challenges” and a talk on “Harassment In The Closing and Workplace,” after which the 30th annual Real Property Law Institute was concluded.

A complete schedule of the seminar, with names of presenters, can be found at our website: www.garealpropertylaw.com. Many thanks to all the sponsors who supported and helped make this year’s Institute such a success.

CAROL V. CLARK is 2008 PINDAR RECIPIENT

Carol V. Clark, of Carol Clark Law, was presented the George A. Pindar Award at the annual 30th annual Real Property Law Institute in Amelia Island. Bill Dodson, last year’s recipient, presented Carol with this award at the Institute’s opening morning session.



The Pindar Award, of which there have only been 14 recipients since the Real Property Law Section first awarded it in 1965, is presented to a member of the Section whose lifetime contribution has been significant to the practice of real estate. The objective of the award is to honor a member who has unselfishly given their time and talents for the benefit of Georgia real estate practitioners.

CAROL V. CLARK (Carol Clark Law), accepts the Pindar Award from Bill Dodson, last year’s recipient, at ICLE’s 30th annual Real Property Law Institute held May 8th – 10th at Amelia Island. Carol, also a past RPLS Chair, holds the honor of being both the first woman and youngest person to receive this honor, which is the highest award presented by the RPLS to attorneys who have demonstrated a lifetime of the highest quality of legal service, ethics and professionalism throughout their careers.

A former Chair of The Real Property Law Section, Carol’s intense passion for real estate law makes her a role model of the highest order.

Ms. Clark founded Carol Clark Law in 2006 after 24 years as a founding member of the law firm, McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC. Her practice in Sandy Springs concentrates on litigation, real estate, contracts and business.

RPLS Responds to Proposed RESPA Reform Rule

*By: Jeffrey W. Rubnitz
Rubnitz & Clements, P.C.
Savannah, GA*

On March 14, 2008, HUD released a new proposed rule to reform the more than 30-year old rules of the Real Estate Settlement Procedures Act (RESPA). The proposed rule was accompanied by a report detailing the results of its consumer testing of the new disclosures and a nearly 600 page Regulatory Impact Analysis. Additional information, along with copies of the proposed Good Faith Estimate (GFE), a proposed new HUD-1 form, and a proposed mandatory Closing Script introduced by HUD, amongst other items, can be found at:

http://www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm

HUD initially provided for a 60 day comment period as to all aspects of the proposals. Given the volume of paper work and the need for careful review of the proposed changes, numerous legislators and real estate industry professionals requested an extension to the comment period, and HUD granted an extension of an additional 30 days to June 12, 2008.

The currently proposed RESPA Reform contains a number of proposed changes and requirements which will affect mortgage lenders, mortgage brokers, closing attorneys, title insurance companies and other service providers. If adopted, the proposed RESPA Reform would have a significant impact on residential closing attorneys in Georgia, imposing new requirements and obligations on the closing attorney. One of those additional requirements would involve a proposed Closing Script to be read at closing. HUD proposes that settlement agents read a closing script to borrowers at the settlement table and that a copy be provided to each borrower. This closing script is meant to ensure that the settlement agent not only compares the borrower’s estimated and actual charges, but would also detail the key terms of the loan.

The Real Property Law Section’s Residential committee has been busy working on behalf of the Section to review the newly proposed RESPA Reform Rule and to make comments on behalf of

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the Section. Under the Residential Closings committee, a special RESPA Reform committee was established. Although the broad and sweeping changes are quite voluminous, the Section focused its efforts on commenting on our concerns that several of the changes HUD proposes will have the unintended effect of increasing the costs of settlement services and potentially leaving consumers without the ability to make any viable choice if issues arise at the closing table. Further, attorney settlement agents in Georgia would be unduly burdened without any clear guidance from HUD as to how closing issues which arise at the closing table should be handled.

The Section's comments will be published in full on the RPLS web site at <http://www.garealpropertylaw.com>. Please view the entire comments on the Section's web site. Some of the comments raised by the Section include the following:

- (1) The Proposed Closing Script raises more questions than it seeks to answer and is fraught with concerns that must be thoroughly studied and tested.
 - A. The information in the Closing Script comes too late in the process and from the incorrect party (i.e. - the attorney/settlement agent as opposed to the lender). Further, the Closing Script may raise legal and ethical issues for Georgia attorneys who represent the lender in the closing of real estate transactions.
 - B. Reading the Closing Script aloud may violate the Gramm-Leach-Bliley Act's privacy provisions.
 - C. Adoption of the Closing Script will significantly increase time and cost necessary to close real estate transactions.
 - D. More testing of the Closing Script and the evaluation proposal for approaches to addressing deviations from tolerances are necessary.
 - E. Consumers will benefit if consumers receive documentation from lenders earlier.
- (2) The Proposed Tolerances (differentials between estimates on the Good Faith Estimate and actual costs on the HUD-1) are problematic, and the lack of guidance on how to address violations of tolerance limits is troublesome. Closing is simply too late in the process to address settlement cost variations.
- (3) Average Cost and Tiered Pricing may stifle competition, increase settlement costs for consumers and unduly impact certain groups of settlement agents.
- (4) The breakdown of sums received by underwriters and title insurance agents on the HUD-1 is unnecessary and confusing.

The Section is grateful to attorney Nicole G. Iannarone who did

a wonderful job in representing the Section in connection with the review of the proposed RESPA Reform rule and the writing and submission of comments to HUD. Further, our thanks to the RESPA Reform committee, which included Diedra L. Sorohan, Edward Hudson, Rob Brannen, Richard Miller, J. Noel Schweers, III, Gayle Camp Keener, Ned Blumenthal, Josefina Knapp, Jennifer Dickenson and Cate Hoskins.

As the comment period has come to a close, the Section will continue to monitor further developments as to any changes or further information which may be forthcoming in the months to come.

"FEAT FOR MCFEE" – EVERYONE'S A WINNER

The 4th annual "Feat for McFee" 5K Run and 1 Mile Walk was once again held on Friday morning, June 9th, at The Real Property Law Institute. Runners, walkers and volunteers convened about 6:45 A.M. for the 7:00 A.M. start. The event is held annually in memory of Bill McFee, Jr., who was the 2005 RPLS Chair-Elect at the time of his untimely death.



WINNERS of the "Feat for McFee" 1 mile walk are Gary Byrd and Annette McBrayer.



WINNERS of the 4th annual Feat for McFee 5K run are: (l.to r.) Peter Serrano, 2nd place; Steve Peterson, 1st place and Greg Riley, 3rd place. The run was held at the Real Property Law Section's 30th annual ICLE Institute on Amelia Island Plantation, May 8th – 10th in memory of Bill McFee, who tragically passed away right before the 2005 Seminar. It was he who not only had planned the Seminar, but was to have become RPLS Chair that weekend.

CURRENT DECISIONS

By: *Daniel F. Hinkel*
ING Investment Management

Failure to cancel security deed

A lender's failure to cancel a security deed within 60 days after payment in full may subject the lender to liquidated damages. Upon the failure of the grantee or holder of the security deed to so cancel, O.C.G.A. § 44-14-3 (c) authorizes the grantor of a security deed to recover \$500 in liquidated damages upon written demand unless the grantee of the security deed demonstrates reasonable inability to comply.

In a recent decision, the question arose whether this written demand could be given first to the grantee of the security deed as part of a complaint in an action to collect the liquidated damages. The Court of Appeals said no. The Court of Appeals held that if O.C.G.A. § 44-14-3 (c) is to serve any real purpose, it must be construed as a requirement that the grantor make a written demand on the grantee for liquidated damages as a condition precedent to creating the liability that serves as the basis for a lawsuit. The written demand cannot be first given in the complaint in an action to recover the liquidated damages. SunTrust Bank v. Hightower, AO7A 2435 (03/07/08), 08 FCDR 910, 2008 WL 615380.

Eminent domain

In this case a property owner received a letter from the City of Cumming providing notice to her that the City would be entering her property to conduct a survey for the purpose of designing sewer facilities located partly on her property. The letter stated that, incidental to the City's power of eminent domain, the City had the right to enter her property for the purpose of performing the survey. Despite the property owner's resistance in correspondence and in meetings with the City, the City informed her that it would undertake the survey over her objection. The property owner then filed an action seeking a temporary injunction to prevent the survey and a determination under O.C.G.A. § 22-1-11 (the Landowner's Bill of Rights and Private Property Protection Act), whether the City's sewer plan was a lawful exercise of the power of eminent domain for a public use. Upon motion from the City, the trial court dismissed the property owner's action without prejudice, ruling that the property owner lacked standing to proceed under O.C.G.A. § 22-1-11 because the City had not commenced a condemnation action. The owner appealed the trial court's dismissal.

The Court of Appeals agreed there was no justiciable controversy under O.C.G.A. § 22-1-11 because the City had not initiated a condemnation proceeding against the property owner. The Court held that the Landowner's Bill of Rights and Private Property Protection Act applied only to condemnation proceedings when a petition for condemnation had been filed by the condemnor and found that the property owner was not authorized to seek a public use determination under O.C.G.A. § 22-1-11 prior to the filing of a condemnation proceeding by the City. Fox v. City of Cumming, 289 GA App 803.

NOTICE

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

UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION

— 2008 —

SEPTEMBER 12th - 14th, 2008
Fall Retreat
Callaway Gardens

SEPTEMBER 28th, 2008
New Law re: Materialmen's Lien
Georgia State Bar Headquarters

OCTOBER 2nd, 2008
Title Standards Seminar
Georgia State Bar Headquarters

OCTOBER 21st, 2008
RPLS MONTHLY MEETING

NOVEMBER 13th, 2008
Fall Commercial Real Estate
Law Seminar
Georgia State Bar Headquarters

NOVEMBER 13th, 2008
RPLS MONTHLY MEETING
Capital City Club

DECEMBER 16th, 2008
RPLS MONTHLY MEETING

— 2009 —

JANUARY 20th, 2009
RPLS MONTHLY MEETING

FEBRUARY 13th, 2009
Spring Residential Practice Seminar
GPTV - live

FEBRUARY 19th, 2009 - Replay

FEBRUARY 17th, 2009
RPLS MONTHLY MEETING

MARCH 17th, 2009
RPLS MONTHLY MEETING

APRIL 3rd, 2009
Foreclosure Seminar
Georgia State Bar Headquarters

APRIL 21st, 2009
Executive Board Monthly Meeting

MAY 12th - 14th, 2009
Real Property Law Institute,
Amelia Island

MAY 15th, 2009
Construction Materialmen's &
Mechanics' Lien Seminar
Savannah, GA

**COMMERCIAL REAL ESTATE PURCHASE AND
SALE AGREEMENTS:
BASIC PRINCIPLES AND PRACTICE POINTS**

*By: Joe Bartlett and Shannon Sheppard
King & Spalding LLP*

In recent months, members of the Real Property Law Section have requested insight into commercial real estate purchase and sale agreements. Our Section has heard these requests, and in response, over the next several newsletters, the Section will produce a series of discussion and practice points on essential aspects of commercial real estate purchase and sale agreements. We hope that you will find these materials both useful and a great reference for your practice.

This article is an introduction to a series of ten articles discussing issues that are common in purchase agreements for commercial real estate. An outline of basic principles for attorneys representing parties in the acquisition or disposition of commercial real estate is presented below. This outline offers practice tips for purchase agreements for commercial real estate and is not intended to be an exhaustive list of issues that may arise when drafting or negotiating purchase agreements.

The initial nine articles in the series will discuss principles that are applicable to purchase agreements for commercial real estate generally (regardless of its location). The first article in the series will discuss the basic terms of commercial real estate purchase agreements, including the property included in the transaction, the purchase price for the property and earnest money requirements. The second and third articles will focus on physical due diligence, title and survey matters. The fourth article in the series will discuss representations and warranties of the parties, including survival periods and caps on liability for breaches of representations and warranties. The fifth and sixth articles will provide practice points regarding covenants and closing conditions that are common in commercial real estate purchase agreements. The seventh article will discuss defaults and remedies, and the eighth and ninth articles will discuss risk of loss issues and disclaimers and waivers. The final article of the series will discuss purchase agreement provisions that are specific to Georgia transactions.

**OUTLINE FOR COMMERCIAL REAL ESTATE
PURCHASE AGREEMENTS**

1. Agreement to Buy and Sell
 - 1.1. Who are the parties?
 - 1.2. Assignment of Contract Rights
 - 1.3. What property is included?
 - (a) Real Property (air rights? easements? mineral/oil?)
 - (b) Tangible Property
 - (c) Intangible Property
 - 1.4. Purchase Price
 - (a) How is the Purchase Price defined (fixed? acreage? development rights?)?
 - (b) How is the Purchase Price paid (cash? seller financing?)?
 - 1.5. Earnest Money
 - (a) When is it due?
 - (b) When is it at risk?
 - (c) Termination Rights
 - (d) Independent Consideration
 - (e) Escrow Provisions
2. Inspections
 - 2.1. Scope of the Inspections
 - (a) What can the Purchaser and its representatives do?
 - (b) To whom can the Purchaser and its representatives talk?
 - (c) When can the inspections take place?
 - 2.2. Requirements before Inspecting
 - (a) Insurance
 - (b) Separate Access Agreement
 - (c) Approval of inspectors and engineers
 - (d) Indemnifications
 - 2.3. Environmental Testing
 - 2.4. Confidentiality
 - 2.5. Termination Right
3. Title and Survey Matters
 - 3.1. What is the Seller's obligation to cure?
 - 3.2. Timing of Delivery of Objections (extension of free look period?)
 - 3.3. Release of Liens and Mortgages
 - (a) Unlimited Obligation to Remove
 - (b) Disputed vs. Undisputed
 - (c) Capping Exposure / Refund of Out-of-Pocket Expenses
4. Representations and Warranties
 - 4.1. Seller Representations and Warranties
 - (a) Seller Specific
 - (b) Property Specific
 - (c) Knowledge Parties
 - 4.2. Purchaser Representations and Warranties
 - 4.3. Survival/Caps on Damages for Breaches of Representations and Warranties
 - (a) Survival Period
 - (b) Threshold vs. Deductible
 - (c) Basket
5. Covenants
 - 5.1. Ongoing Operation of the Property
 - 5.2. Leases and Service Contracts
 - 5.3. Further Encumbrances
6. Closing Conditions
 - 6.1. Free Look
 - 6.2. Title
 - (a) Clean and Marketable Title
 - (b) Delivery of Owner's Title Policy
 - 6.3. Representations and Warranties True and Correct
 - 6.4. Zoning/Land Use
 - 6.5. Financing Condition
 - 6.6. Estoppels/SNDA's

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7. Remedies
 - 7.1. Purchaser Default
 - (a) Liquidated Damages
 - (b) Cap on Damages
 - 7.2. Seller Default
 - (a) Liquidated Damages
 - (b) Specific Performance
 - (c) Out-of-Pocket Costs
 - (d) Cap on Damages
8. Casualty/Condemnation
 - 8.1. Major vs. Minor Damage
 - 8.2. Termination Rights
 - 8.3. Who controls the decision/process?
9. Disclaimers/Waivers
 - 9.1. As Is, Where Is
 - 9.2. No Reliance on Deliveries
 - 9.3. Releases
10. Georgia Specific Provisions
 - 10.1. Liquidated Damages
 - 10.2. Broker as Seller
 - 10.3. Georgia Residency Affidavit
 - 10.4. Lien Waivers
 - 10.5. Transfer Taxes and Forms

2008 LEGISLATIVE UPDATE

By: Patrise Perkins-Hooker
RPLS Legislative Committee Chair

Real Estate related issues were the subject of several pieces of legislation which were introduced in the 2008 legislative session. The Real Property Law Section's Legislative Committee ("RPLS") worked diligently on behalf of the members in our section to explain and defend the two bills which the section introduced as a part of the State Bar's legislative package. We commented upon 26 other bills that were submitted to the legislature which were deemed to be of interest to real estate practitioners. The following is a summary of some of the legislation which we monitored or commented upon:

Cross Indexing - HB 386 was reintroduced this session as HB 1018. This bill mandates proper recording of cross indexing and cross reference requests by the county clerks' offices and compensates the county clerks' offices for processing such requests at the rate of \$2.00 per cross reference entry. As reported last year, during the 2007 legislative session, this bill passed both houses of the legislature but was vetoed by the Governor due to his objection to an amendment that was attached to our initial draft of the legislation. The amendment sought to extend the sunset date for the collection of additional filing fees by GSCCA to 2014. The version of HB 1018, introduced this year, omitted any reference to the portion to which the Governor

objected. The revised version of HB 1018 passed both houses and was signed into law by the Governor on May 6, 2008. This law is effective as of July 1, 2008. You can obtain a copy of the final version of the bill at http://www.legis.state.ga.us/legis/2007_08/sum/hb1018.htm.

Collected Funds - RPLS proposed legislation through the State Bar to address the crisis created by the default on millions of dollars of checks issued for loan closings that were dishonored by the banks they were drawn upon. The Executive Committee reviewed the status of the Good or Collected Funds legislation in Georgia and the Legislative Committee drafted legislation designed to eliminate various exceptions to the collected funds requirements for closings. Prior to disbursing funds for a residential loan closing, the closing attorney is supposed to have been provided "Collected Funds" (also referred to in some states as "Good Funds") by a lender. Collected funds is defined in O.C.G.A. §44-14-13 as funds deposited, finally settled, and credited to the settlement agent's escrow account. A closing attorney (referred to as the "settlement agent" in the statute) is prohibited from disbursing settlement proceeds unless the same are disbursed based upon "collected funds". The existing law allows certified checks, cashier's checks or treasurer's checks from a federally insured bank, checks issued by a lender qualified to do business in Georgia, and personal checks of not more than an aggregate of \$5,000 to be deemed to be collected funds when they were deposited, regardless of whether they had actually cleared the issuer's account.

SB 355 and HB 918 were the result of the RPLS' efforts to strengthen the Good Funds financing obligations for lenders. Our initial draft of the proposed legislation was designed such that only wired funds would have been considered collected funds for disbursement purposes because the section proposed the deletion of all of the exceptions listed in O.C.G.A. §44-14-13 (c) (1)- (3). After approval by the State Bar Board of Governors, our version of the proposed legislation was introduced into the Senate. From this point forward our proposed bill came under attack by various special interest groups which lobbied vigorously for changes to various provisions of the initial draft. The Senate modified the section's proposed legislation to reinstate cashier's checks allowing them to continue to be deemed collected funds. We faced opposition to the proposed legislation from the banker's association and support from the mortgage lenders' association who were interested in all financial institutions being treated equally with regard to funding obligations for closings. Under either version of the proposed bill, a mortgage company would be required to wire a settlement agent the funds required for a closing because these types of institutions were perceived as being the source of the dishonored and returned checks fiasco. SB 355 passed the Senate February 7, 2008 and it was submitted to the House of Representatives which sponsored a new version of the bill and assigned it a new number of HB 918.

This bill traveled through the House Judiciary Committee and a workshop was held to discuss the same in addition to the committee hearings. The House Judiciary Committee passed the final version of the bill on February 19, 2008 and it passed both

houses after a series of amendments on April 4, 2008. The Governor signed SB 355 into law May 14, 2008. This law will be effective July 1, 2008. If you want a copy of this bill or you want to review previous drafts of the same, you can retrieve copies of the bill at various stages at http://www.legis.state.ga.us/legis/2007_08/sum/sb355.htm.

Other bills which the Real Property Law Section was requested to monitor or comment upon are the following:

HB 271 Ripening of a Tax Deed - proposed shortening the time period by which title under a tax deed ripens. This bill was opposed by the RPLS because it would significantly limit the rights of property owners to hold on to their property. This bill was not approved this legislative session.

HB 974 Disclosure of Mineral Rights in a Deed - would have required every deed that conveys land include a disclosure that the conveyance specifically includes or excludes mineral rights. This bill was opposed by the RPLS because the current law is clear that mineral rights are included in deeds automatically unless the same are specifically reserved or retained by the grantor. This disclosure obligation would have interjected more confusion regarding the transfer of these rights and might have resulted in more litigation about this topic than which exists currently. This bill was not approved this legislative session.

HB 1069 Grantee addresses would have required the county clerks' office to maintain a duplicate database for names of grantors and names and addresses of grantees. This information already exists in the public records on the Transfer Tax Declarations and it is required by state statutes to be included for the grantee on a deed to secure debt. The section felt that this information would be duplicative and expensive for the clerks' offices to maintain. The RPLS opposed this proposed bill. This bill was not approved this legislative session.

SB 374 Modifications to the state's Materialmen's and Mechanics Lien Laws - This bill is a major rewrite and modification of the existing legislation regarding materialmen's and mechanics lien laws. A taskforce comprised of members from the House, the Senate, citizens, realtors, contractors, home owners, home builders, mortgage brokers and real estate professionals was impaneled and charged with reviewing several of the problems associated with the Materialmen's and Mechanics Lien laws in the state. Our section participated in the consensus building effort and we supported the version of the bill that reflected the language recommended by the taskforce. This bill was passed on April 4, 2008 and it was signed by the Governor on May 14, 2008. It was effective immediately upon signing.

Electronic filing - The legislative committee is currently reviewing several proposals for legislation regarding electronic filings and electronic signatures on legal documents such as UETA (Uniform Electronic Transactions Act) and URPEARA (Uniform Real Property Electronic Recording Act).

Homeowner Associations and Covenants - Several bills were introduced this session dealing with homeowner associations and covenants for subdivisions. **SB 217** was proposed to allow one homeowner's association to enforce the covenants of another subdivision. This bill was not approved this legislative session. **HB 422** restricts the ability of homeowner associations to foreclose on property unless the amount of the outstanding liens is greater than \$2,000. This bill passed April 2, 2008 and the Governor signed it into law May 14, 2008. The effective date of this legislation is July 1, 2008.

Although there were more bills impacting real estate introduced in the state legislature and submitted to our committee for comment; we are prohibited from submitting comments on any legislation that is extremely controversial or political (like the current Ad Valorem Tax bills SRs 686 and 796 and HB 1170 which were designed to freeze ad valorem taxes), or not germane to the actual practice of law in our area (like the HB 1043 Childhood Lead Exposure Control Act).

In addition to the legislation that we monitored on behalf of the section on the state level, we also presented comments on legislation that was proposed in Dekalb County which would have imposed criminal sanctions against attorneys who conducted closings on houses in which the plumbing system was not retrofitted to new more water efficient toilets, etc. The Legislative Committee Chair spoke against this measure at public meetings in Dekalb County and the section was effective in eliminating this provision from Dekalb County's plumbing retrofit ordinance.

The members of the Committee for the 2007-2008 year were:

Patrise Perkins-Hooker, Chair

Charles Chacko

Rhonda Carroll

Clara Fryer

David Burge

Dawn Dwyer

Gayle Camp Keener

Janney Sanders

Jeff Greenway

Jeff Schneider

Kaye Ford

Lisa Roberts

Nancy Liu

Peter Lublin

BEWARE OF THE SECRET LIEN

By: *J. Noel Schweers III*
Augusta, Georgia

A recent federal case reminds us of the risks associated with closings involving property sold or recently owned by an estate.

The United States has a lien against assets of decedent's estate to secure the payment of any estate taxes. See 26 USC § 6323. Because no filing is required in the real estate records to perfect, this lien is sometimes referred to as a "secret lien". Often, this issue is addressed at closing by confirming that no estate tax liability exists when the estate or a beneficiary sells the property.

In First American Title Insurance Co.; et al v. U.S., 032708 FED9, 05-35520, the Ninth Circuit Court addressed the question of what happens if a post closing audit of an estate tax return reveals that there are taxes owed. In this case, the IRS determined that the value of certain assets of the estate was substantially understated in the estate tax return. Unfortunately, the parties who should have paid the tax (beneficiary and personal representative) were unable to do so at the time of the assessment. The IRS therefore asserted its lien on certain real estate which had previously been sold to third parties. The Court agreed with the IRS that its liens were valid. Fortunately for the owners, they obtained title insurance on the properties. The Court ruled that the title insurance companies involved did not have standing to challenge the post closing assessment. However, in dicta it went on to point out that the "problem (for the title companies) was that the real estate chain of title included an estate that had not paid its taxes".

The best way to confirm that the IRS will not assert a lien, is to obtain a certificate of discharge for the property from the IRS pursuant to Internal Revenue Code Section 6325 (c). This process may not always be practical and the buyer (its attorney and title insurer) must weigh the risks on a case-by-case basis.

Closing attorneys may consider getting letters or affidavits from any executors, attorneys or accountants stating that no federal estate taxes are or will become due, or that all estate taxes have been paid in full. If any estate taxes are due or may become due, then appropriate steps should be taken to insure that all taxes will be timely paid. In some factual situations the escrow of funds may be appropriate.

In situations with affected property, the buyer and/or lender should be adequately informed of the increased benefit of title insurance. Such policies should not include any exception for estate taxes and the title insurance underwriter should be consulted for any special requirements. In the event a party elects not to obtain title insurance, the closing attorney should consider requiring a written statement that the party has been informed of the risk they are assuming.

WE NEED YOUR EMAIL ADDRESS

The State Bar currently has the capability to do broadcast emails to all members regarding upcoming Bar and Section events and to give other notices. However, only about 50% of the State Bar membership has provided email addresses in their registrations. All Section members are strongly encouraged to provide their email address when renewing their State Bar Membership or by going directly to the State Bar's web site at www.gabar.org. The Real Property Law Section hopes to take full advantage of the broadcast email process in the future and would like to reach as many of our members as possible in doing so.

NEW COMMITTEE MEMBERS ELECTED AT RPLS ANNUAL MEETING

Four new members were elected to the Real Property Law Section Executive Committee at its annual meeting at Amelia Island this past May.

John E. Taylor, a shareholder of the Carlton Fields, P.A. firm, practices in its Atlanta office and is a member of the firm's Real Estate and Finance Practice Group. Mr. Taylor, who has been practicing law for 23 years, obtained his J.D. from the University of Georgia and his undergraduate degree from Valdosta State University.

Scott Logan, a 1976 graduate of Davidson College and a 1982 graduate of the Mercer University School of Law, has devoted his practice exclusively to the closing of residential and commercial real estate transactions. He was with the firm of Weissman, Nowack, Curry and Wilco, P.C. from 1992 – 2001, and started his own firm, Logan & Torres, LLC in 2001. This firm merged with The Fryer Law Firm in 2006, of which he is currently a member.

Since 2003, Mr. Logan has served on the Board of Directors of the Georgia Real Estate Closing Attorneys Association, serving as its President for 2007 – 2008.

A highlight of our other new Committee members will be included in the Fall issue of the RPLS newsletter.

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The Section has a webpage
(<http://www.garealpropertylaw.com/index.html>)
which contains many useful resources, including:

- The Georgia Title Standards
- Prior Section Newsletters
- Section Publications ("Buying a Home" pamphlet and the Report on Legal Opinions to Third Parties)
- Section Membership Roster
- Section Sponsored CLE Calendar
- Pro Bono Opportunities
- Links to other Websites Useful to Real Estate Practitioners
- Section Committee Information

Members are encouraged to provide suggestions on how we can improve the website and other services. Please send comments to the Section Chair (address found on website).