

Real Property Law Section NEWSLETTER State Bar of Georgia

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**REAL PROPERTY
LAW SECTION**

COMMENTS FROM THE CHAIR

Susan Langley Elliott

On behalf of the Executive Committee of the Real Property Law Section, I want to wish each of you a Happy New Year! We are the largest section of the State Bar, with over 2,700 members, and we make a difference as we continue our commitment to education and service.

This winter and spring we will sponsor four CLE seminars, as follows:

1. Spring Practice and Procedure was held on February 13, 2009 with a replay on February 19, 2009 and co-chaired by Jeff Rubnitz and Monica Gilroy;
2. Foreclosure seminar is scheduled for April 3, 2009, with Peter Lublin as chair;
3. 2009 Real Property Law Institute is chaired by Shelli Willis and will be held on May 7 – 9, 2009 at Amelia Island; and
4. Spring Materialmen's Liens seminar is planned for May 22, 2009 in Savannah with Dan Hinkel as Chair.

In addition to planning and sponsoring CLE seminars throughout the year, the RPLS at its discretion, annually awards a \$1,000 scholarship to students at area law schools who exemplify an aptitude and interest in real estate law. The purpose of the Award is to encourage academic excellence in deserving students, and to encourage participation in the Real Property Law Section of the State Bar of Georgia. Throughout the summer and into the fall, our awards and recognition subcommittee, led by Nancy Liu, was busy reviewing the applications. Award recipients are invited to attend our annual Fall Commercial Seminar speaker's dinner, and this year's recipients who attended the dinner also received a full set of the *Pindar* manual. The criteria of the Award are as follows:

- Award granted to 2nd or 3rd year student in each of the accredited Georgia law schools [Emory, Georgia State, John Marshall, Mercer, UGA]
- Student must evidence ties to Georgia

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CONSTRUCTION LIEN LAW: LEGISLATIVE UPDATE SIXTEEN NOTABLE CHANGES TO GEORGIA'S LIEN STATUTES

By: Owen C. Murphy

Inglesby, Falligant, Horne, Courington & Chisholm, P.C.

Introduction

The enactment of Senate Bill 374 brings substantial changes to Georgia's lien laws. While the fundamental protections provided to both lien claimants and property owners remain intact, the procedural landscape will change somewhat dramatically. From the practitioner's perspective, the amendment will impact almost every facet of lien practice including the text of the lien itself, statutory deadlines and notice requirements.

The amendments effectively eliminate several troublesome ambiguities which have plagued lien claimants and property owners alike. However, the statutes, as amended, will in many instances demand an even higher level of precision on the part of the lien claimant and place additional hurdles which must be cleared to ensure the survival of the lien. The amendments strengthen notice requirements in an effort to ensure that the property owner has actual and effective notice of a lien filing as soon as possible. The amendments also endeavor to make the process more efficient by providing for "self-expiring" liens and by creating a statutory "counter-punch" for the property owner or contractor who disputes a lien and wishes to expedite the lien perfection and/or lien invalidation process.

The specific amendments can be organized into the following categories: (1) Statutory Deadlines; (2) Lien Text; (3) Notice Requirements; (4) Lien Waivers; and (5) Notice to Contest Lien.

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- Student must evidence interest in a real estate legal career
- Student must complete biographical paragraph establishing Georgia ties, real estate interest
- Student must have completed at least one upper level real estate course
- Student must have achieved excellent academic performance in upper level real estate course
- Award is not available every year, but is awarded at the pleasure of the Executive Committee
- Award amount determined by the Real Property Law Section, but in no event less than \$1,000.00
- Award is granted without regard to financial need
- Student may only receive the award once

Our pro-bono/volunteer subcommittee, led by Mark Shaffer, has put together a list of over 110 volunteers from our section, and has partnered with local Habitat for Humanity chapters and other non-profit organizations throughout the State. To date, this group of dedicated volunteers has worked on over 15 real estate matters.

And our legislative subcommittee, chaired by John Taylor, has been active and involved so far with House Bill 127 (Uniform Real Property Electronic Recording Act), HB 126 (Uniform Electronic Transaction Act) and HB 40 (requirement for recording deeds under power within stated time after sale). The subcommittee works to be aware of bills that affect the practice of real property law in the state and to assure that the positions of the real property bar are considered, consistent with the legislative and lobbying limitations binding upon mandatory bar organizations. Individuals can also keep up with pending legislation at http://www.legis.ga.gov/legis/2009_10/.

Finally, I am encouraged on a daily basis at the excellent advice and abundant assistance given and received by our members on the Listserve. If you have not signed up yet, please go to our website and follow the link.

Please do not hesitate to contact me or any of the other Executive Committee members if we may be of service to you.

With best regards,
Susan

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I. Statutory Deadlines.

1. The statutory deadline for filing materialmen's liens in Georgia changes from "three months" to "90 days" after the last day that work was done on the project or materials were provided for the project. This change provides more certainty as to the exact deadline for filing liens since different months have different numbers of days. (§44-14-361.1(a)(2)). Further, the lien statute has been amended to provide clarity as to the meaning of the phrase in the text of the lien relating to the date the claim "became due" by expressly providing that this date is the same date as the "last date that labor, services or materials were supplied to the premises." (§ 44-14-361.1(a)(2)).
2. The deadline for filing an action to perfect a materialmen's lien (now called "lien action") is changed from twelve months from the date the claim "became due" to 365 days *from the date the lien is filed for record*. This change effectively extends the deadline for filing a lien action to a maximum of 455 days (approximately fifteen (15) months) after the last day materials or labor were provided on the project. It also provides evidentiary certainty since the date of filing of the lien is a matter of record whereas determining the last day on the job site for purposes of calculating the deadline is sometimes a debatable issue requiring extrinsic evidence. Again, the system is changed to one of counting days rather than months. (§ 44-14-361.1(a)(3)).
3. The number of days in which the lien claimant has to record its notice of commencement of lien action following the filing of a complaint, binding arbitration or proof of claim changes from fourteen (14) days to thirty (30) days. The substance of the notice has not been changed except to accommodate the expanded definition of "lien action." (§ 44-14-361.1(a)(3)). As previously, the failure to timely record this notice in the proper form results in irreversible invalidation of the lien.
4. The amendments add a new code section which mandates that the computation of time for the various deadlines set forth in the lien statutes "shall be determined pursuant to paragraphs (3) of subsection (d) of Code Section 1-3-1." (O.C.G.A. § 44-14-369). This change results in a less stringent standard for computing deadlines. For example, if "day 90" (for purposes of the lien filing deadline) falls on a Saturday, application of § 1-3-1 would result in an extension of the filing deadline to the next business day.



Suzanne Roberts (center), Georgia State University Law School, one of the recipients of the RPLS scholarship award accepts a copy of Pindar from Patrice Perkins-Hooker (left), Secretary-Treasurer of the Section's Executive Board and Nancy Liu, Chair of the Scholarship Committee. The presentation was made at the Speakers Dinner following the Fall Commercial Seminar.



Esther M. Graff-Radford (center), Emory School of Law, another recipient, also attended the Dinner held at the Capital City Club. The Seminar Program was chaired by Patrice Perkins-Hooker.



Another awardee, Nathan C. Johnson, Mercer University School of Law, who also attended the dinner, is flanked by the two RPLS Executive Committee members. The Seminar was held Thursday, November 13th at the State Bar and followed by dinner at the Capital City Club.

II. Lien Text.

5. The substance of the text of the claim of lien must now include a statement of the expiration date of the lien (three hundred ninety-five (395) days from the date of filing of the lien if no lien action and notice of commencement of lien action are filed). The formatting requirements (at least 12 point bold font) and exact language for this notice are provided in § 44-14-367. The exact text required in the body of the lien is as follows:

This claim of lien expires and is void 395 days from the date of filing of the claim of lien if no notice of commencement of lien action is filed in that time period.

The failure to include this language invalidates the lien and prevents it from even being filed. (§ 44-14-361.1(a)(2); § 44-14-367). The new §44-14-367 goes on to provide that “[n]o release or voiding of [expired] liens shall be required,” thus creating the more efficient “self-expiring” lien.

6. Although no recommended or suggested text is given, the amendments provide that the text of the claim of lien shall also contain a notice to the owner of the property that the owner has a right to contest the lien, presumably referring to the new § 44-14-368, which creates the notice of contest of lien which property owners can now file. (Discussed at No. 16, *infra*). **Again, the failure to include this language will invalidate the lien.** (§ 44-14-361.1(a)(2); § 44-14-368).

III. Notice Requirements.

7. The lien statute previously required that a copy of the claim of lien be sent to the owner of the property via registered/certified mail or statutory overnight delivery “at the time of filing for record his claim lien.” This phrase was ambiguous and required interpretation as to exactly what time frame would qualify as “at the time of filing” or how literally such a phrase could be taken. The amendment changes the language to provide that this notice must be sent to the owner no later than “two business days” after the date the claim of lien is filed. (§ 44-14-361.1(a)(2)).

8. Regarding this same requirement of sending a copy of the claim of lien to the owner, the statute has been amended to state that a lien claimant may provide the contractor with the statutory notice, in lieu of the owner, only when the owner’s address “cannot be found.” (§ 44-14-361.1(a)(2)). This restricts the previous rule which allowed the lien claimant the option of providing a copy of the lien to the contractor, as agent for the owner, under any circumstances. The amendment also provides that if the property owner is a legal entity (such as a corporation) then a copy of the claim of lien can be sent to the entity’s address as listed on the Secretary of State or the registered agent’s address. (§ 44-14-361.1(a)(2)).

9. The statute has been amended to require that on all projects where a notice of commencement has been filed with the Superior Court pursuant to § 44-14-361.5, the lien claimant must, in addition to sending a copy of the claim of lien to the owner, send a copy of the claim of lien via registered,

certified or overnight mail to the contractor at the address shown on the notice of commencement. This rule appears to apply regardless of whether the privity position of the lien claimant is such that he would not have been subject to the notice to contractor requirement and therefore might not have previously obtained a copy of the commencement or be aware of its existence. (§ 44-14-361.1(a)(2)).

10. O.C.G.A. § 44-14-361.5, which deals with preliminary notice requirements (i.e., notice of commencement and notice to contractor), has been amended to provide that the notice to contractor must be sent by registered or certified mail or overnight delivery to the owner and the contractor at the addresses set forth in the notice of commencement. Previously, there was no requirement or specification as to the method of delivery of the notice to the owner and contractor.

11. O.C.G.A. § 44-14-364 has been amended to provide that where a claim of lien is discharged by filing a bond, the party filing the bond is now required to send, within seven (7) days of the filing of bond, a notice of filing of bond and a copy of the bond to the lien claimant by registered or certified mail or overnight delivery. This change is somewhat confusing because the amendment goes on to state that if you fail to send the notice and copy of the bond to the lien claimant, such failure does not invalidate the bond for purposes of discharging the lien.

IV. Lien Waivers

12. The form for the “Interim Waiver and Release Upon Payment” has been overhauled with new language which, as specified in the amendment, must be “in boldface capital letters in at least 12 point font.” The most substantial change to the form of the interim lien waiver is to provide a notice that the party executing the interim waiver shall be conclusively deemed to be paid in full in the amount stated in the waiver, even if payment has not actually been received, upon the expiration of sixty (60) days after the date stated in the interim lien waiver. (§ 44-14-366(c)).

13. The language of the final lien waiver form now entitled “Waiver and Release Upon Final Payment,” is also amended by providing the same formatting requirements as the interim waiver and again providing for the expanded sixty (60) day period after which the party will be conclusively deemed to have been paid unless an affidavit of nonpayment or claim of lien has been filed during that time period. (§ 44-14-366(d)).

14. O.C.G.A. § 44-16-366(f)(2)(c) has been amended to specifically provide for this new rule, now referenced in both lien waiver forms, that monetary amounts stated in lien waivers are conclusively deemed to have been paid upon the expiration of *sixty (60) days*, thus expanding the thirty (30) day period provided under the old statute, unless an affidavit of nonpayment or claim of lien is filed within that time period.

15. The amendments overhaul the form of the affidavit of nonpayment which can be filed pursuant to O.C.G.A. § 44-16-366. The new form provides that a copy of the affidavit of nonpayment must be sent to the owner of the property by registered or certified mail or overnight delivery within seven (7) days of being filed. It also provides that if the project has a notice of commencement on file and the party filing the affi-

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davit of nonpayment is not in privity of contract with the property owner, a copy of the affidavit must also be sent to the contractor at the address shown on the notice of commencement. The same new alternative address options for entities on file with the Secretary of State apply here as well.

V. Notice to Contest Lien

16. The new code section 44-14-368 is created and provides that an owner or contractor may challenge a lien and shorten the 365-day time period within which the lien claimant must commence a lien action by filing a "Notice of Contest of Lien" in the Superior Court in the form and format provided in the new code section. The Clerk of Superior Court is required to cross reference this notice with the lien itself. The filing of the Notice of Contest of Lien requires the lien claimant to commence his lien action within sixty (60) days of the receipt of the Notice and to file his notice of commencement of lien action within thirty (30) days of the filing of that action. It further provides that the lien will be extinguished and invalidated as a matter of law upon expiration of ninety (90) days after the filing of the Notice of Contest of Lien if the lien action and notice of commencement of lien action have not been filed within that time period. Again, it is not necessary to record a release of lien or obtain a decree from a judge as to the invalidity of the lien when the deadlines are not met -- it expires automatically.

The owner or contractor filing the Notice of Contest of Lien must send a copy of the Notice to the lien claimant (via registered, certified or overnight mail) within seven (7) days of filing the Notice, service being deemed complete upon mailing.

CONCLUSION

This article is intended to highlight and summarize those changes to the lien laws which will most significantly affect the lien practitioner and his or her client. It is not intended to be an exhaustive list of literally every change to the lien statutes. A copy of the bill amending the statutes, as passed and signed into law by Governor Sonny Purdue on May 14, 2008, can be found at www.legis.state.ga.us/legis/2007_08/versions/sb374_AP_11.htm or on Westlaw.

**THE EFFECTIVE DATE FOR THESE AMENDMENTS
IS MARCH 31, 2009.**

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

*By: John E. Taylor & Angela Ligouri
Carlton Fields, P.A.*

(continued from the Fall, 2008 issue)

4. PURCHASE PRICE

The statute of frauds requires that a written contract for the pur-

chase and sale of real property include the price and the terms of payment.

a. Definition of Purchase Price

The contract must clearly state the purchase price or the criteria by which it is to be determined. *A.S. Reeves & Co., Inc.*, 605 S.E.2d at 859. For example, the price may be determined on a per acre basis (gross acreage or useable acreage). *Ideal Realty Co. v. Reese*, 178 S.E.2d 564 (Ga. App. 1970). If the contract uses a per acre price, and if the method of determining the acreage is not set forth, then acreage will be determined by an accurate survey. *Id.* at 566. In any event, a contract should clearly and definitely specify any applicable method of calculation. For example, a purchase price that is calculated by adding future expenses yet to be incurred by the seller is not sufficiently definite (*Hutson v. Young*, 564 S.E.2d 780, 783 (Ga. App. 2002)) while a purchase price to be determined by an appraisal may be sufficient. *Miller v. McCullough*, 224 S.E.2d 916, 917 (Ga. 1976). The contract may specify alternative prices for the property based on different conditions. See e.g., *Ashkouti v. Widener*, 500 S.E.2d 337 (Ga. App. 1998) (providing for different purchase prices depending on rezoning).

The seller and buyer should consider the value of all the various types of property being transferred, including the personal and intangible property and other rights associated with the land. Occasionally the parties will require, due primarily to tax reasons, that the contract specify the portions of the purchase price attributable to the real estate and to specified personal property.

The purchase price includes the amount secured by any loan that encumbers the property and will survive the sale. If there is such a loan, the contract should make the transaction subject to satisfaction of any requirements imposed by the lender and the loan documents and specify the party responsible for paying any assumption or other fees of the lender. The contract must state the buyer's intention to assume the loan and describe the loan to be assumed in sufficient detail, by stating the names of the parties, the property involved, and the amount and rate of interest or by referencing an existing loan and the parties thereto and the property involved. *Summerlin v. Beacon Investment Co.*, 173 S.E.2d 672, 674 (Ga. 1970); *Marler v. River Creek Associates*, 226 S.E.2d 311 (Ga. App. 1976).

i. Adjustments to Purchase Price

Certain expenses and income of the property may be addressed in the contract as adjustments to the purchase price, although they do not adjust the purchase price *per se*; they constitute an allocation between the parties of the recurring expenses and income of the property, such as taxes, rents and operating expenses. Some properties may require that the contract specifically address other items of expense or income.

The contract should specify that *ad valorem* taxes will be prorated between the buyer and the seller on a *per diem* basis; i.e., each of the buyer and seller is responsible for a day's worth of taxes for each day of its ownership during the tax year. One party or the other will receive a "credit" at closing dependent upon whether the taxes have been paid for the year and when closing occurs.

Likewise, rents should typically be prorated on a daily basis. A frequent negotiation on this point is whether the proration will be based on paid rents or payable rents. Assume that rents are due on the first of the month and that closing occurs sometime thereafter. The proration of rent will result in a credit to the buyer, which will result in a reduction of the funds paid to the seller at closing. The seller therefore wants to prorate only based on rents he has actually received; otherwise, he is “coming out of pocket” and giving the buyer the benefit of rents that the seller has not received. The purchaser would prefer to prorate on rents that are due, thereby getting the benefit of full rent payment for the month and leaving it to the seller to collect past due rent. The direction of compromise will depend largely upon the amount of money at issue. Also in regard to leases, the contract should require that the amount of tenant security deposits held by the seller be credited to the buyer at closing. This credit effectively transfers the deposits to the buyer.

Operating expenses may also be prorated on a straight *per diem* basis. Occasionally the parties may agree to a separate proration formula if, for example, the operating expenses are more seasonal in nature; such as in the case of a property in an area subject to substantial snow, in which case operating expenses may be weighted toward the winter months.

ii. Fairness of Purchase Price

A party attempting to obtain specific performance of a contract must prove that the purchase price is equitable and the contract is “fair, just and not against good conscience.” *Unified Residential Dev.*, 648 S.E.2d at 169; *Hutson v. Young*, 564 S.E.2d 780, 783 (Ga. App. 2002). “Georgia law requires proof that the price is fair so that the trial court may exercise its sound discretion in deciding whether equity should enforce the original contract between the parties. The adequacy of price ‘is measured at the time the parties enter into a contract, not at the time of any alleged breach.’” *Unified Residential Dev.*, 648 S.E.2d at 169 (deciding that the price represented the fair market value of the property under the current zoning).

b. Payment of Purchase Price

The contract must also clearly specify the mechanics for payment of the purchase price. *Estate of Ryan v. Shuman*, 655 S.E.2d 644, 647 (Ga. App. 2007). If the purchase price is not to be paid in full in immediately available funds, then the contract must state the times and amounts of deferred payments. *Muller v. Cooper*, 141 S.E. 300, 302 (Ga. 1928). For example, if the contract calls for seller financing, then the details (such as the interest rate, number of installments, allocation of interest on the payments, and duration of the loan) should all be stated. *A.S. Reeves & Co., Inc.*, 605 S.E.2d at 859 (finding an option to purchase land that stated a per acre price and an interest rate for owner financing was unenforceable because the terms of payment were uncertain); *Crawford v. Williford*, 89 S.E. 488 (Ga. 1916) (finding a contract with a purchase price of ½ cash and the remainder one to four years with interest at 7 percent unenforceable for vagueness in the terms of payment of the balance of the purchase price). The contract may state alternative methods of payment and the buyer will be deemed to have the privilege of electing the method. *Ideal Realty Company*, 178 S.E.2d at 566.

In some situations, the court may imply certain terms of payment where non-essential terms are missing. For example, if a contract does not state the time for payment of a portion of the purchase price, the court may presume a cash payment at closing. *Harrell v. Stovall*, 206 S.E.2d 493 (Ga. 1974) (requiring that price difference resulting from difference in acreage be payable at closing in cash); *Hawkins v. Studdard*, 63 S.E. 852, 855 (Ga. 1909). The Georgia Supreme Court has also held that a loan assumption provision in a purchase agreement is deemed to refer to an existing loan and not a loan to be negotiated in the future, unless the agreement expressly says otherwise. *Summerlin*, 173 S.E.2d 672; see also *Marler*, 226 S.E.2d 311 (stating general rules of construction regarding payment of interest on a note). Thus, the parties should be sure to spell out all the mechanics of payment for their intentions to be enforced by a court.

The seller should also ensure that the buyer provides “good funds” or “immediately-available funds” by a federal funds check or wire transfer, as practical alternatives to actual cash. Payment in one of these forms provides the strongest practical protection against a check being returned for insufficient funds.

5. EARNEST MONEY

An earnest money deposit is not legally required for the purchase agreement to be considered an enforceable contract because an agreement by one party to sell is consideration for a promise by the other to buy. *Magnum v. Jones*, 54 S.E.2d 603, 606 (Ga. 1949). Even so, most purchase contracts require one or more earnest money payments. The purpose of earnest money is generally twofold. First, the seller may see it as evidence that the buyer is “earnest” in making the deal. The seller may also want a source of payment of damages upon default by the buyer. In the contract, the parties may choose to treat the earnest money in any one of the following three ways: (a) as partial payment of actual damages seller can prove; (b) as part payment of the purchase price in a suit by seller for specific performance; or (c) as liquidated damages payable to seller. *Everett Associates v. Garner*, 291 S.E.2d 120, 122 (Ga. App. 1982). Earnest money provisions generally return the earnest money deposit to the buyer if the buyer terminates the contract within a specified period, based on its due diligence or otherwise, or if the seller defaults and fails to close.

If the contract elects to treat the earnest money as liquidated damages in the event of a buyer’s default, the provision will be enforceable only if (a) the damages caused by the breach are difficult or impossible of accurate estimation, (b) the parties intend to provide for damages rather than a penalty and (c) the amount is a reasonable pre-estimate of the probable loss. *Liberty Life Insurance Co. v. Thomas B. Hartley Construction Co., Inc.*, 375 S.E.2d 222 (Ga. 1989). The failure of any of these conditions will render a provision in a purchase agreement that generally states that the earnest money will be forfeited in the event of buyer’s default to be an unenforceable penalty. *Budget Luxury Inn of Dayton, Ltd. v. Kamash Enterprises, Inc.*, 390 S.E.2d 607 (Ga. App. 1990); *Swan Kang, Inc. v. Tae Sang Kang*, 534 S.E.2d 145 (Ga. App. 2000) (stating that the party who defaults has the burden to prove the liquidated damages clause is an unenforceable penalty). Courts favor construction of the contract that finds the provision to be a penalty rather than liquidated damages. *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 227 S.E.2d 340, 344 (Ga. 1976). Thus,

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if the parties want the earnest money to be paid over to seller as liquidated damages in the event of the buyer's default, the contract must clearly and expressly state that the payment is intended to constitute liquidated damages and must specify an amount that is a reasonable estimate of damages. O.C.G.A. §13-6-7; *Southeastern Land Fund, Inc.*, 227 S.E.2d at 342 (“[W]hether a provision represents liquidated damages or a penalty does not depend on the label the parties place on the payment but rather depends on the effect it was intended to have and whether it was reasonable”); *Hawkins v. GMAC Mortgage Corp.*, 526 S.E.2d 421 (Ga. App. 1999) (acknowledging that deposits between 2% and 10% of the purchase price are a reasonable estimate of the loss).

Although a seller may not retain the right to elect between the liquidated damages and actual damages, the parties may retain the right to specifically enforce the contract without invalidating the liquidated damages provision. *Southeastern Land Fund, Inc.*, 227 S.E.2d at 343-44. If the earnest money is not intended to be liquidated damages, or if a liquidated damages provision is held to be an unenforceable penalty, then actual compensatory damages are generally available for breach of contract claims. O.C.G.A. §§ 13-6-1, -2; *Liberty Life Insurance*, 375 S.E.2d at 223. Remedies will be more particularly discussed in subsequent articles.

a. Timing

The earnest money may be deposited in one or more payments. A deposit is typically made simultaneously with, or shortly after, the execution of the purchase agreement. Additional deposits may be made depending on completion of specified events or conditions. For example, an additional deposit may be made after completion of a satisfactory inspection period.

b. When is Earnest Money at Risk?

The earnest money is spoken of as “going hard” or “being at risk” at the point at which it is no longer refundable to the buyer, except for default by the seller or certain other limited occurrences, such as casualty or condemnation, as may be specified in the contract. A contract will often provide for a period of time within which the buyer has the right to inspect the property, terminate the contract if those inspections disclose unacceptable matters and thereupon obtain return of the earnest money. If the buyer does not terminate the contract within the specified period, the earnest money is thereafter “at risk”, or nonrefundable to the buyer, subject to contrary provisions of the contract.

c. Termination Rights

Although independent consideration is not required for a purchase agreement to be valid, an agreement not containing binding mutual agreements (e.g., if one party has an option, but not the obligation, to purchase the property) will require additional consideration for enforceability. As a general rule, if a contract is conditioned on a contingency that is evaluated in the sole discretion of one of the parties, the contract lacks mutuality of obligation and is unenforceable. *Stone Mountain Properties Ltd. v. Helmer*, 229 S.E.2d 779, 782 (Ga. App. 1976); see also *Unified*

Residential Dev., 648 S.E.2d 163; *Black v. Maddox*, 30 S.E. 723 (Ga. 1898). If either party (typically the buyer) may terminate the contract in its sole discretion, then the contract is invalid. Thus, if the purchase agreement grants the buyer a unilateral right to terminate the contract (usually after an inspection period), the buyer must provide independent consideration for this “option period.”

If, in a contract for the sale of real estate, payment of the purchase price is made contingent upon an event which may or may not happen at the pleasure of the buyer, the contract lacks mutuality, and until that contingency has occurred, there is no obligation on the part of the purchaser to purchase or the seller to sell.

Stone Mountain, 229 S.E.2d at 782.

Thus, a sales contract that is conditioned upon a matter's being satisfactory in the sole discretion of the buyer is unenforceable for lack of mutuality. See e.g., *Stribling v. Ailion*, 157 S.E.2d 427 (Ga. 1967) (contract conditioned on satisfactory credit check by seller); *Wehunt v. Pritchett*, 67 S.E.2d 233 (Ga. 1951) (sale of purchaser's property); *Manning v. Sams*, 84 S.E. 451 (Ga. 1915) (buyer's approval of title); *Stone Mountain*, 229 S.E.2d at 782 (buyer's satisfaction with railroad approval of location); *Clayton McLendon, Inc. v. McCarthy*, 186 S.E.2d 452 (Ga. App. 1971) (buyer determination that cost of sewers was reasonable and economically feasible); *Clover Realty Co. v. McLeod*, 183 S.E.2d 33 (Ga. App. 1971) (buyer obtaining loan). This conclusion results regardless of whether the buyer has reasonable and sufficient grounds for being dissatisfied. *Stone Mountain*, 229 S.E.2d at 783. However, the contract will become binding when the buyer, although not required to do so, is in fact satisfied. *Id.* In contrast, where the contract requires the buyer to be “reasonable” in evaluating a discretionary contingency, then the contract does not lack mutuality because it is enforceable if the contingency would satisfy a reasonable person. *Unified Residential Dev.*, 648 S.E.2d at 167.

d. Independent Consideration

However, mutuality is not required where there is other consideration, such as nonrefundable earnest money. *Sheridan v. Crown Capital Corp.*, 554 S.E.2d 296 (Ga. App. 2001); *Brack v. Brownlee*, 273 S.E.2d 390 (Ga. 1980). With other consideration, the mutual promises do not depend solely upon each other for consideration, and a discretionary contingency in a sales contract for the buyer's protection does not alone make the contract unenforceable. *Tuggle*, 282 S.E.2d at 111; *Unified Residential Dev.*, 648 S.E.2d at 167; *Sheridan*, 554 S.E.2d 296. Thus, a unilateral termination right granted to the buyer may be accompanied by a provision that states that upon such termination the earnest money will be returned to the buyer, except for some amount, typically \$100, which shall be paid to the seller. This \$100 constitutes consideration to the seller for agreeing to the buyer's termination right.

e. Escrow Provisions

Customarily, the earnest money is held by a third-party escrow

agent, such as a broker involved in the transaction, the attorney for one of the parties or a title insurance agent or company. At closing, the earnest money is paid to the seller and applied to the purchase price.

An attorney for one of the parties, as well as the parties themselves, should exercise caution in agreeing that the attorney will hold the earnest money. The attorney must consider conflict issues, since she has obligations to her client by virtue of the engagement and to the other party by virtue of holding the escrow and agreeing to disburse it in accordance with the agreement of the parties. The parties are also subject to the possibility, however remote, of the attorneys' absconding with the funds, in which case the parties' recourse will be the attorneys' malpractice insurance, if any. Deposit of the earnest money with a broker raises similar concerns. The most prudent approach is to place the earnest money with a title insurance company or agent. If it is placed with a title insurance agent as opposed to the title company itself, the parties should require an "insured closing letter" from the title insurance company from whom the agent issues title insurance. This letter will identify the agent as an authorized agent of the title company and obligate the title insurance company to indemnify against any failure of the agent to follow the written instructions of the parties or fraud by the agent. The parties will thereby have the credit of the title insurance company behind the obligations of the title insurance agent.

Regardless of the identity of the holder of the earnest money, the parties and the holder should include specific provisions either in the contract or a separate escrow agreement to confirm and limit the role and liability of the holder of the earnest money

MOST IOLTA ACCOUNTS FULLY INSURED BY THE FDIC

*Machelle Redmond
Redmond Law, LLC*

Effective immediately, the FDIC will fully insure client funds deposited in attorney IOLTA accounts. The adopted regulation is a part of the Temporary Liquidity Guarantee (TLG) program, effective through December 2009. The original regulation was written to only include non-interest bearing accounts, (IOLTA funds would have been insured up to \$250,000.00 per client) but the American Bar Association, community and consumer groups, as well as law firms and individual lawyers, organized a nationwide campaign to include IOLTA funds among the fully insured accounts.

Many legal aid groups depend upon the interest from IOLTA accounts for their funding. The old regulation had the potential to be disastrous to these organizations, as it was anticipated that a significant number of attorneys would move their IOLTA accounts to non-interest bearing accounts to protect client funds. In recommending full coverage of IOLTA accounts, the FDIC staff said "Such a transfer would adversely affect funding for law-related public service programs that rely heavily on the interest from IOLTAs and could result in the loss of legal serv-

ice to low-income populations." Since neither attorneys nor their clients receive the interest from IOLTA accounts, the FDIC staff considered it to be reasonable to treat them in the same manner as non-interest bearing accounts.

Banks have an option to opt-out of the TLG program and they do not offer the higher (or fully insured) FDIC limits. For an updated list of Banks that have opted-out, go to the web site located at: <http://www.fdic.gov/regulations/resources/tlgp/optout.html>.

As of February 2, 2009, 165 Georgia institutions have opted out. You may want to check to see if your bank has done so.

We Need Your Email Address

The State Bar currently has the capability to 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 registration forms. All RPLS 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 and reach as many of our members as possible.

NEW FIRST TIME HOMEBUYER TAX BENEFITS

*Drew Marlar
Kutak Rock LLP*

The Housing and Economic Recovery Act of 2008 (HR 3221, PL 110-289) ("HERA") was recently enacted and includes new tax provisions designed to create valuable opportunities for first-time homebuyers.

Property tax deduction

HERA includes a one-year property tax deduction provision that will allow taxpayers who claim the standard deduction an additional deduction of up to \$500 (or \$1000 for joint filers) for state and local property taxes. This provision applies only for the 2008 income tax cycle.

First-time home buyer refundable tax credit

First-time home buyers may also claim a refundable income tax credit (the equivalent of an interest-free loan) of 10 percent of the home purchase price, up to a maximum of \$7,500, for homes purchased between April 9, 2008, and July 1, 2009. Taxpayers are required to repay the credit over 15 years. First-time home buyers are allowed a refundable tax credit on the purchase of a principal residence equal to the lesser of \$7,500 or 10% of the home's purchase price. For married individuals filing separately, the maximum credit is \$3,750. A "first-time home buyer" is an individual who had no present ownership interest in a principal residence during the three-year period ending on the date of the purchase of the principal residence to which the credit applies. The credit is phased out for taxpayers with modified adjusted gross income (AGI) between \$75,000 and \$95,000 (\$150,000 and \$170,000 for joint filers). Taxpayers claiming the credit must repay it over a 15 year period beginning with the second year of ownership. A home buyer claiming a \$7,500 credit would repay the credit at \$500 per year. It is important to emphasize to home owners that this program effectively operates as a 0% loan and must be considered in developing the home owner's overall financial planning. A principal residence is the home where an individual spends most of his/her time (generally defined as more than 50%). The tax credit applies to single-family homes, condos or cooperatives, townhouses or any similar type of new or existing dwelling. If a house is sold before the 15-year repayment period is complete, any remaining amount of the credit that has not been repaid will be due in the year of sale. In the event of the death of the home owner, whatever portion of the credit that has not been repaid will be forgiven.

Frequently Asked Questions

- What if the home buyer's total income tax liability is less than \$7,500?
- This tax credit is a so-called "refundable tax credit." A "refundable" tax credit means that the credit can be claimed even if the taxpayer has little or no federal income tax liability. In this case, the IRS would pay the difference between the amount that could be claimed and the actual tax benefit realized. So, if the individual's tax obligation was \$6,000 the home buyer would receive a tax credit refund of \$1,500 – the difference between the \$7,500 tax credit and the amount of

their tax obligation. Keep in mind, that the individual may have already "paid" their tax liability through withholding or other means.

- Is there an income restriction?
- Yes. Individuals whose Form 1040 filing status is Single or Head of Household are eligible for the tax credit if their income is no more than \$75,000. Individuals who file a joint return may have a combined income of no more than \$150,000.
- Is the amount of the tax credit tied to the price of the home?
- Yes. The credit is for 10 percent of the cost of the home, up to a maximum credit of \$7,500. If a home costs \$65,000 the allowable credit would be \$6,500. If a home costs \$120,000, the maximum allowable credit would be \$7,500. The amount of the credit is the same for all taxpayers, whether married or single.
- Are there restrictions on the location of the property?
- Only that it has to be located in the United States.
- How do I apply for the credit?
- There is no pre-purchase authorization, application or similar approval process. Eligible purchasers will simply claim the tax credit on the appropriate IRS 1040 tax return. In most cases, the IRS will be on notice that a purchase has occurred because the settlement officer at the time of purchase is required to report the transaction.
- What if there's very little gain, or even a loss on the ultimate sale of the house?
- If the gain on the sale of the house is less than the amount that must be repaid, part of the liability is forgiven. For example, if the individual still 'owed' \$4,000 but the gain on the sale was only \$3,500, then the seller would not be required to repay the IRS the \$500 shortfall. If there was no gain, or even a loss, then the remaining \$4,000 would not be repaid.
- Are there any exceptions to the repayment rules?
- Yes. If the person who utilized the credit dies before the full credit amount has been repaid, then any balance that remains unpaid is disregarded. Also, special rules make adjustments for people who sell homes as part of a divorce before the credit has been fully repaid. Adjustments are also made in the case of a home that is part of an "involuntary conversion" (property is destroyed by a natural disaster or subject to condemnation by eminent domain by an authorized agency).
- Will the IRS place a lien on my property if I don't repay this credit?
- It is not clear yet whether the IRS will seek to place a lien on property if the home buyer tax credit is not repaid. Currently, the statute does not grant that authority to the IRS. In the event the IRS does seek to impose a lien, the IRS would need to file a notice of federal tax lien in order to protect their rights. Although the federal tax lien is effective against the taxpayer on the assessment date, the priority right against third party creditors arises at a later time: the date the notice of federal tax lien is filed.

GET INVOLVED IN REAL ESTATE PRO BONO ACTIVITIES

Mark A. Shaffer

MetLife Real Estate Investments

The Pro Bono Matchmaker Project:

The Pro Bono Matchmaker Project (PBMP) has successfully matched several of our Matchmaker volunteers with real estate pro bono needs throughout the state. Over 90 attorneys already volunteered to be a part of PBMP. We continue to seek attorneys to participate in the PBMP and pro bono projects for attorneys who have already agreed to participate in the PBMP.

PBMP Summary:

The Real Property Law Section created the PBMP to increase pro bono participation by real property attorneys by matching attorneys with pro bono opportunities. Numerous attorneys have already volunteered to be a part of the PBMP. Thanks to all of the attorneys who have volunteered to be a part of this project, particularly those who have already agreed to provide legal assistance.

The RPLS Pro Bono Committee has established points of contact with several qualifying organizations that need real property legal services.

Attorneys can simply volunteer to be part of a pool of attorneys available to take on such projects. Once an organization communicates a real property pro bono project to us, we send an e-mail to the pool of volunteer attorneys with a project description. Once volunteer(s) respond to the e-mail agreeing to assist with the project, we put the organization and volunteer(s) in contact with each other to coordinate handling of the project. Potential projects include land closings, declarations, easements, affordable housing, single-family housing, property tax appeals, etc.

How to Join:

If you are interested in joining our pool of volunteers for the Pro Bono Matchmaker Project, please email our new project coordinator, Evan Cohn at evan.cohn@agg.com. It's that easy! Please note that by agreeing to be included in the pool of volunteer attorneys, you are only agreeing to receive e-mails about possible pro bono projects. You are not obligated to take on any projects.

We understand how difficult it can be for attorneys to identify quality pro bono opportunities that involve real estate. This project has been specifically designed to make that process easier. Please consider submitting your name today.

PBMP NEEDS PRO BONO PROJECTS: You can also assist us by identifying projects for our volunteer attorneys. If you become aware of any pro bono needs with which our group of volunteers may be able to assist, feel free to pass such information along to Evan Cohn as well.

UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION

— 2009 —

MARCH 17th, 2009
RPLS MONTHLY MEETING

APRIL 3rd, 2009
Foreclosure Seminar
Georgia State Bar Headquarters

APRIL 21st, 2009
Executive Board Monthly Meeting

MAY 7th - 9th, 2009
Real Property Law Institute,
Amelia Island

MAY 22nd, 2009
Construction Materialmen's &
Mechanics' Lien Seminar
Savannah, GA

NOTICE

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

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**REAL PROPERTY LAW SECTION
REQUESTS NOMINATIONS FOR 2009 PINDAR AWARD**

The Executive Committee of the Real Property Law Section of the State Bar of Georgia is soliciting nominations for the George A. Pindar Award. This award is granted by the Section to honor a member of the Section who unselfishly gives of him or herself for the benefit of the real estate bar and whose lifetime contribution has been significant to the real estate bar. The Executive Committee determines annually whether the award will be granted. Please direct nominations to Nancy Liu by e-mail to nancy_liu@attorneyliu.com or by fax to 770-200-2624. Please provide nominations by February 28, 2009 and include biographical information and support for your nomination.

If you have a resume of your nominee, it would be most appreciated.