

# Real Property Law Section NEWSLETTER State Bar of Georgia

A Publication for Real Property Lawyers

Summer 2011



## COMMENTS FROM THE CHAIR

*Patrise M. Perkins-Hooker  
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As outgoing Chair of the Real Property Law Section, I want to personally thank all of the members of our section for a phenomenal year. I am so proud of the group of dedicated and committed members of this year's Executive Committee, and proud of the outstanding work they have done with our committees. During the year, we handled all of the usual RPLS Executive Committee obligations which included:

1. Sponsoring and promoting our annual seminars including, the Title Standards Seminar (October 2010), the Commercial Real Estate Law Seminar (November 2010), the Foreclosure Law Seminar (November 2010), the Residential Real Estate Law Seminar (February 2011) and the Annual Real Property Law Section Institute held May 2011, in Sandestin, Florida.
2. Conducted an online survey of our membership in November to ascertain information on who our members are, where they are located, how they feel about our programs, along with soliciting suggestions for improvements.
3. Provided scholarships to outstanding real estate law students from the five accredited law schools in the state.
4. Participated in networking receptions to provide opportunities for our members to interact with other lawyers and professionals in Georgia, including a joint reception with the Taxation Section to welcome the new Georgia Commissioner of Revenue, attendance at a luncheon meeting of the Georgia Residential Closing Attorneys' Association, attendance at the Dixie Land Title Association's luncheon meeting, and our joint reception with the Georgia Society of CPA's.
5. Through the work of the Legislative Committee, we participated in, and supported, an incredibly successful legislative session for real estate professionals and citizens in the State of Georgia.

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## CASE-INITIATION CONSIDERATIONS IN COMMERCIAL DISPOSSESSORY PROCEEDINGS

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Commercial dispossession proceedings against tenants failing to pay rent or holding over beyond the terms of their lease are governed by special statutory procedures located in Georgia Code §§ 44-7-49 to -59. Notwithstanding the substance of that statutory scheme, it is well established that parties to a commercial lease may contract around these statutory provisions, and establish alternative rights and remedies pursuant to the terms of a written lease agreement. *Hardwick, Cook v. 3379 Peachtree, Ltd.*, 184 Ga. App. 822, 823-824(1), 363 S.E.2d 31 (1987); *Rucker v. Wynn*, 212 Ga. App. 69, 70(1), 441 S.E.2d 417 (1994). However, there are numerous procedural requirements applicable to a commercial dispossession proceeding that is often not addressed by a written lease agreement. Two examples of such requirements that are contained in the statutory dispossession scheme itself are unique rules affecting jurisdiction and service of process. As such, the case-initiation procedures specific to commercial dispossession proceedings, even those brought pursuant to the terms of a written lease agreement rather than the default provisions of O.C.G.A. §§ 44-7-50 *et seq.*, should be considered carefully by property owners when initiating proceedings to remove commercial tenants.

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6. Continued to provide pro bono services through our Matchmaker Project, the State Bar's ABC program, provided volunteers service to Hands on Atlanta for home construction activities, and provided pro bono services for numerous military enlisted men and veterans through our Military and Veterans Committee.
7. Funded several initiatives with nonprofit organizations including \$5,000 to Georgia Legal Services to help fund the costs of an attorney to assist borrowers with wrongful foreclosure actions throughout the State; \$6,000 to Atlanta Volunteer Lawyers to fully fund the cost of training pro bono magistrate judges to alleviate the tremendous backlog in landlord tenant and eviction cases which existed at Fulton County State Court, and donations to Habitat for Humanity (\$5,500); Service Juris (\$1,000), and GREEPAC \$1,000.
9. Committed to jointly develop, support and promote proposed legislation to address heir property issues in the State of Georgia and the adoption of Uniform Rules on Heir Property by the Georgia Legislature in the next legislative cycle.
10. Developed and submitted a request for a Formal Advisory Opinion on UPL to the Formal Advisory Opinion board and supported a companion request from the Georgia Residential Closing Attorneys' Association for a similar request on UPL.
11. Updated our website and included a secure "members only" section on the site which allows the section to post the form document templates which have been developed by the section as a part of our Forms Library.
12. Continued to administer the ListServ for the section.
13. Held productive, well attended, and engaging monthly Executive Committee meetings to help further the work of the section in executing the plans developed at the retreat in August.
14. Continued to publish an informative quarterly newsletter with well researched articles and topics of interest to our members.

A complete list of our dedicated Executive Committee Members along with the Subcommittee Chairs can be found on our website at [www.garealpropertylaw.com](http://www.garealpropertylaw.com). This has been an outstanding year and all of the individuals on the 2010-2011 Executive Committee worked tirelessly to make our section truly relevant and responsive to our members' interest. It has been a joy to work with this exceptional group of professionals. I am sure that the work of our Executive Committee, on behalf of our section, will continue under the wonderful leadership of J. Noel Schweers. I will be there to assist him as needed, but I promise to stay out of his way! Thank you again for the opportunity to serve.

Patrise

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### Choosing the Court

Dispossessory proceedings are initiated by filing an affidavit in superior court, state court, or magistrate court: "If the tenant refuses or fails to deliver possession when so demanded, the owner or the agent, attorney at law, or attorney in fact of the owner may immediately go before the judge of the superior court, the judge of the state court, or the clerk or deputy clerk of either court, or the judge or the clerk or deputy clerk of any other court with jurisdiction over the subject matter, or a magistrate in the district where the land lies and make an affidavit under oath to the facts. The affidavit may likewise be made before a notary public . . ." O.C.G.A. § 44-7-50(a). A magistrate court has non-exclusive jurisdiction over dispossessory proceedings and has jurisdiction to enter a judgment for all amounts due under the lease without regard to whether the amounts exceed the \$15,000 limitation of Code Section 15-10-2(5), which does not apply to dispossessory proceedings. *Atlanta Js, Inc. v. Houston Foods, Inc.*, 237 Ga. App. 415, 514 S.E.2d 216 (1999); see also O.C.G.A. § 15-10-2(6).

Thus, as is the case in most civil actions, the first decision counsel for a commercial landlord must make is the choice of court in which to initiate the proceeding. A particularly important consideration in making this choice in dispossessory proceedings is the right to a *de novo* appeal of magistrate court judg-

ments (other than default judgments) to superior court or state court for a new trial by jury. See O.C.G.A. §§ 44-7-56, 15-10-41; *Shelley v. Shannon*, 267 Ga. App. 582, 601 S.E.2d 131 (2004); *Hill v. Levenson*, 259 Ga. 395, 383 S.E.2d 110 (1989). In addition, magistrate court proceedings are not subject to the Civil Practice Act. O.C.G.A. § 15-10-42. Code Sections 15-10-40 to -53 govern magistrate court procedure, and magistrate court has its own uniform rules. There are no jury trials in magistrate court. O.C.G.A. § 15-10-41. All of these distinctions should be considered in choosing a court, particularly where efficiency and procedural exactitude are thought to favor one's case.

### Serving the Summons and Affidavit

When an affidavit to commence dispossessory proceedings is filed, the judge or clerk "shall grant and issue a summons to the sheriff or his deputy or to any lawful constable of the county where the land is located. A copy of the summons and a copy of the affidavit shall be personally served upon the defendant. If the sheriff is unable to serve the defendant personally, service may be had by delivering the summons and the affidavit to any person who is sui juris residing on the premises or, if after reasonable effort no such person is found residing on the premises, by posting a copy of the summons and the affidavit on the door of the premises and, on the same day of such posting, by enclosing, directing, stamping, and mailing by first-class mail a copy of the summons and the affidavit to the defendant at his last known address, if any, and making an entry of this action on the affidavit filed in the case." O.C.G.A. § 44-7-51(a). Service by posting and mailing a copy of the summons and the affidavit is sometimes called "tack and mail" service.

### NOTICE

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

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### Personal Service Required for Default Judgment for Money Owed

Relying on the sheriff or marshal to execute service does not guarantee personal service. Code Section 44-7-51 itself does not require the sheriff or marshal to effect personal service, as it allows service on any person residing on the premises and service by “tack and mail.” Although service may thus be “properly” carried out in such manner, it is important to note that, if no answer to the dispossessory affidavit is filed, a landlord *cannot* obtain a default judgment for money owed absent personal service of the summons and affidavit on the tenant/defendant personally, or delivery to any competent person residing on the premises. O.C.G.A. § 44-7-51(c). (The court would nevertheless still be able to enter a default judgment for possession of the premises, and issue a writ for the same.)

In order to protect the landlord’s potential right to a default judgment for money owed, a landlord’s counsel should consider whether to ensure personal service by using a process server. Since the statutory authority to effect service is technically limited to “the sheriff or his deputy or to any lawful constable of the county where the land is located,” in some counties a process server might need to obtain a special appointment to serve a summons and affidavit in a dispossessory proceeding. Such an appointment may be achieved through a simple motion.

### Serving a Corporate Tenant

Commercial property is often leased by a corporate tenant. Corporate tenants (including LLCs) are typically served through their registered agent. O.C.G.A. §§ 14-2-504 (corporations), 14-11-1108 (LLCs). A corporate tenant’s registered agent could very well be located somewhere other than the property in question, and perhaps in another county.

To properly effect personal service on a corporate tenant, a landlord’s counsel must ensure service on the tenant’s registered agent, rather than on an employee of the business or some other individual at the property. In the typical commercial situation, no employee of the tenant actually resides on the premises. Once again, in order to maintain control in this important aspect of the case, a landlord’s counsel should consider whether to ensure personal service by using a process server. At a minimum, counsel should endeavor to make clear that service by the sheriff or marshal is to be upon the tenant’s registered agent at that agent’s specific location, and not simply on someone found at the property.

An unknowing failure to achieve proper service in dispossessory proceedings has important consequences. In *Davis v. Hybrid Indus., Inc.*, 142 Ga. App. 722, 236 S.E.2d 854 (Ga. Ct. App.

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## SUCCESSFUL REAL PROPERTY LAW INSTITUTE HELD

With over 286 attendees, and multiple others viewing the video replay, the Real Property Law Institute, recently held in Sandestin, Florida, was a great success. During the conference, held May 5th through May 7th, at the Hilton Resort, commercial and residential practitioners from around the state came together for many days of education and fun.

Sponsored by the Real Property Law Section of the State Bar, and featuring many members of the RPLS Executive Committee as speakers, during the educational sessions, participants heard from many speakers on a variety of topics. Current commercial and residential trends, real estate litigation, case law and legislative updates, along with multiple specialty topics, were highlighted. Also returning after a short hiatus as speakers, was an informational and jovial presentation by Real Property veterans Bill Dodson and Danny Bailey. The annual golf and tennis tournaments, along with a newly added beach volleyball tournament, were all well received. The annual Feet for McFee was also well attended.

As part of the Institute, the Executive Committee of the Real Property Law Section presented the George A. Pindar Award to Ernest Ramsey. The George A. Pindar Award is the highest award presented by the Real Property Law Section and 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. Executive Committee member Brad Hutchens presented the award to Mr. Ramsey, while his family looked on. Mr. Ramsey is a leading title attorney in the state, having taught many examiners and attorneys the mechanics of core title examinations and is a past Chair of the Real Property Section. His contribution to the section and the real estate bar is well documented and his recognition well deserved.

During the annual section meeting during the Saturday session, outgoing Executive Committee Chairperson, Patrise Perkins Hooker, passed the gavel to incoming chair, J. Noel Schweers of Augusta. Also elected during the annual section meeting as new officers were Chair Elect, Peter Lublin and Secretary/Treasurer, Jeffrey Schneider, both of Atlanta.

All members of the section are encouraged to attend the Institute. It provides a wonderful forum for education, camaraderie and networking. Next year’s Institute will be May 10th through 12th in Amelia Island, Florida.



Members of the RPLS Executive Committee join to honor Ernest Ramsey in winning the Pindar Award.



Perennial Favorite speakers Danny Bailey (left) and Bill Dodson entertain the Institute with their presentation.

Patrise Perkins-Hooker, (left) outgoing RPLS Chair and Noel Schweers, (right) incoming Chair, celebrate with Ernest Ramsey, winner of this year’s PINDAR Award and his family.



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1977), the Court of Appeals affirmed the trial court's set-aside of the trial court's own previous judgment granting a writ of possession. The corporate tenant in the case did not reside at the premises, and it had a different corporate address as well as a registered agent for service of process. Service at the property in question had been insufficient under the circumstances, and the court therefore lacked jurisdiction to grant the writ. Furthermore, the landlord that had acted on the improperly granted writ of possession was found liable to the tenant for conversion of the tenant's property.

### Conclusion

It is important for landlords undertaking commercial dispossessory proceedings to obtain personal service on the proper person, not only to summon the tenant before the court, but also to preserve the landlord's potential to obtain a default judgment for monetary damages. Complications raised by the corporate nature of some tenants and by the "tack and mail" and "person residing" methods of service allowed by the statutes governing dispossessory proceedings create potential pitfalls in achieving proper service. A landlord also has the choice of proceeding in magistrate, state, or superior court – a choice that offers real distinctions in how the case might proceed.

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## 2011 LEGISLATIVE UPDATE

*John E. Taylor*

*RPLS Legislative Subcommittee Co-chair*

### SELECTED CURRENT LEGISLATION

This year was the first session of the 151st General Assembly. Any extant bill not passed or defeated this year remains on the legislative agenda for next year. The text and legislative history of all the bills are available at <http://www.legis.ga.gov/Legislation/en-US/Search.aspx>.

Two bills followed by the Subcommittee are now law. **House Bill 117**, now Act 238, amends subsection (b) of O.C.G.A. §8-7-128 to specify that the person or entity identified as the seller on the settlement statement shall be considered the seller for all purposes regarding withholding of sums due nonresidents. **House Bill 239**, now Act 169, revises to paragraph (5) of subsection (a) of O.C.G.A. § 7-1-1001 to provide that only Georgia licensed attorneys may negotiate loan modifications and short sales. While helpful, this revision does not address the difficulty of the limitation that the work must be "ancillary" to the attorney's representation. Initially, the Georgia Department of Banking and Finance construed this language very narrowly to refer only to attorneys negotiating loan modifications or short sales in connection with a litigation or bankruptcy matter. The Department has moderated its position and now interprets the language to exempt attorneys that do this type of work as part of their regular law practice but do not advertise a loan modification or short sale "mill". Also remaining as an issue is the meaning of "compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of such lender, mortgage broker, or other mortgage loan originator."

These bills of interest remain on the legislative agenda for the next session:

**House Bill 64** proposes to amend O.C.G.A. §13-1-11 to add a new subsection (b) to give a party in a civil action the right to ask the court to determine the reasonableness of fees exceeding \$10,000 computed under paragraph (a) (2). Upon such petition, the court shall determine the fee amount "reasonable and necessary for asserting the rights of the party requesting attorney's fees."

**House Bill 110** intends to regulate foreclosure and vacant property registries implemented by counties and municipalities. This bill, sponsored by Representative Mike Jacobs, turned out to be very contentious. This bill pits the realtors and lending institutions against the local governments.

**House Bill 129** intends to prohibit so-called transfer fee covenants, except in certain limited specified circumstances. This bill is an effort of the State Bar and the Real Property Law Section.

**House Bill 245** would require that any surety or cosigner on a loan obligation be notified of default at the same time that the principal is notified.

**House Bill 465** attempts to specify the proper corporate execution of documents generally and transfers of security deeds specifically.

**Senate Bill 62** would require consent of the General Assembly for any transfer of private property to any other state, territory, or nation, or to the federal government, which would result in an extinguishment or diminution of the exercise of state sovereignty or jurisdiction.

**Senate Bill 117** proposes to increase the amounts of personal exemptions. The sponsors proposed this bill at least in part as an alternative to **Senate Bill 28**, another effort to make available the estate of tenancy-by-the-entireties in Georgia.

**Senate Bill 136** proposes to provide a mechanism for owners under a condominium association to take control ownership of the association upon failure of the declarant to perform certain actions. The bill as originally filed provided that liens under a condominium association or statutory property owner's association would be prior to a security deed to the extent of association fees payable for the 12-month period preceding the foreclosure or deed in lieu of foreclosure. The bankers killed those provisions.

**Senate Bill 234** proposes to require purchasers of tax executions to pursue certain minimum due diligence efforts to locate delinquent taxpayers and to notify taxpayers within thirty days of the transfer. It also provides requirements for cancellation of an execution upon

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determination of error and requires recordation of notice of foreclosure of the right to redeem.

**Senate Bill 284** proposes to update the Georgia Land Bank statutory framework to make available to Georgia land banks powers now provided by subsequent generations of land bank legislation in other states.

#### OTHER ISSUES AND INITIATIVES

The Legislative Subcommittee will monitor the foregoing bills. The Subcommittee will also consider the following issues:

1. Confirming the enforceability of declarations of easements over property of a common owner after *Gilbert v. Fine*, 288 Ga. App. 20 (2007);
2. Requiring that purchasers of tax deeds provide contact information for notice purposes;
3. Requiring that recorded instruments include the name and address of the preparer;
4. Establishing recording and other requirements for water and possibly other utility liens;
5. Considering amendments to O.C.G.A. § 44-14-33 in light of the holding of the Georgia Supreme Court in *U.S. Bank National Association v. Gordon*, which held that a security deed actually filed and recorded, and accurately indexed, does not provide constructive notice to subsequent bona fide purchasers if it lacks attestation by both a notary public and also an unofficial witness;
6. Considering a Georgia version of the Uniform Partition of Heirs Property Act (see [www.nccusl.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act](http://www.nccusl.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act)), which Georgia Appleseed (<http://www.gaappleseed.org>) hopes to introduce next year.

Lastly, Scott Logan (a member of the RPLS Executive Committee and Legislative Subcommittee), Deborah Bailey (a member of the Legislative Subcommittee) and Tim Minors of Old Republic Title Insurance Company are working diligently with the Georgia Superior Court Clerks Cooperative Authority toward implementation of the Authority's efilting initiative. A summary of the initiative is available at <http://www.gsccca.org/efiling/default.asp>. The Authority's efforts have revolutionized the practice of real property law in the State over the past few years, and efilting will only continue that contribution.

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## U.S. BANK NATIONAL ASSOCIATION V. GORDON: A STUDY OF OUTCOMES

*George W. Mize Jr.*  
*Daniel W. Parker*

*Hatcher, Stubbs, Land, Hollis & Rothschild, LLP*

The Supreme Court of Georgia recently answered in the negative the certified question of whether the 1995 Amendment to

O.C.G.A. § 44-14-33 “means that, in absent of fraud, a security deed that is actually filed and recorded, and accurately indexed, on the appropriate county land records provides constructive notice to subsequent bona fide purchasers, where the security deed contains the grantor’s signature but lacks both an official and unofficial attestation (i.e., lacks attestation by a notary public and also an unofficial witness),” in the case of *U.S. Bank National Association v. Gordon*, Bankruptcy No. 07-65231, 2011 (Ga. March 25, 2011).

This case arose out of the Chapter 7 bankruptcy case of Bertha Hagler in which the Chapter 7 trustee sought to set aside the valid first security deed given to the predecessor-in-interest to U. S. Bank because the deed was not properly attested. See *Gordon v. U. S. Bank National Association* (in re: Hagler) 429 Br. 42 (Bankr. N.D. Ga. 2009).

Under Georgia law, in order to admit a security deed to record it shall be properly attested by a notary and an unofficial witness. (See O.C.G.A. § 44-14-61 and § 44-14-33). In 1995, O.C.G.A. § 44-14-33 was amended by adding the following, “[i]n the absence of fraud, if a mortgage is duly filed, recorded and indexed on the appropriate county land records, such recordation shall be deemed constructive notice to subsequent bona fide purchasers” (the “1995 Amendment”). The argued clear intent of the 1995 Amendment was to change the law then in existence, which exalted form over substance, to provide that a deed that is properly filed, recorded, and indexed does what it is intended to do, i.e. give notice to the world of its existence.

In the recent decision, the Court begins with a rejection of Trustee Gordon’s contention that the 1995 Amendment does not apply to security deeds. The Court then refocuses on the certified question. U. S. Bank argued it’s definition of “duly filed, recorded, and indexed” does not ignore the first sentence of O.C.G.A. § 44-14-33, rather, it injects common sense and practicality into the equation. A deed that is filed, recorded, and indexed is actually there for those interested in the title to see and provides not only constructive notice but inquiry notice and actual notice as well. It was argued that it does not make sense that you can ignore an instrument that is there for you to see just because it is not properly attested. Proper attestation is required for recording under state law, but if a deed is recorded without proper attestation, it is still recorded for all to see. The lack of a witness and notary does not make the document invisible.

Further, it was argued equity would require a subsequent purchaser to inquire further. Under the current set of facts, the recorded security deed would have been sufficient to “excite attention” and “put a party on inquiry” such that said party shall have notice of “everything to which it is afterwards found that such inquiry might have led.” O.C.G.A. § 23-1-17. Equity would not allow a subsequent bona fide purchaser, with actual knowledge, to leverage loopholes or take advantage of the mistakes of overworked lawyers, clerks of court, and their staffs.

However, the Court was not persuaded by the argument that that the 1995 Amendment contradicts O.C.G.A. § 44-14-39. The law of statutory construction provides statutes relating to the same subject matter should be “construed together.” *Willis v. City of*  
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*Atlanta*, 285 Ga. 775, 776 (2009). Section 44-14-39 provides that the defect, whether due to improper recording or attestation, must be so defective so as to not give notice to a prudent inquirer. In this case, the security deed in question was properly recorded and indexed and, *in fact*, gave notice to the world of its existence. Arguably, a “prudent inquirer” searching the real estate records for potential liens and encumbrances (as opposed to a bankruptcy trustee seeking to invalidate any and all liens possible) would have found the security deed and dealt with it in the normal course of business (i.e. would have paid it off at closing). It is difficult to argue that a deed, which on its face is not properly attested or acknowledged, is ineligible for recording. However, in the present case, the deed was, in fact, recorded, properly indexed, and could be found through a normal title examination. It was argued that this is precisely the situation in which the 1995 Amendment was intended to operate to “save” an otherwise defective instrument. The Bank argued that the Court’s reliance on the cited commentators was misplaced. However, the Court correctly points out that these commentators did not address the issue of constructive notice of a deed with facial defects that is properly recorded and indexed. Therefore, having failed to address the fundamental issue, these commentators’ views were not supportive and should not have been relied upon at all.

Many may disagree with the Court’s final argument which says that to recognize U.S. Bank’s interpretation of the 1995 Amendment “would relieve lenders of any obligation to present properly attested security deeds” and “would tell clerks that the directive to admit only attested deeds is merely a suggestion, not a duty...” The acceptance of U. S. Bank’s position would not relieve the clerks from following their statutory directive or duty (i.e., to record properly executed and attested security deeds). The results of presenting an improperly executed and/or attested security deed to a clerk would be the same in 999 out of 1,000 cases, before or after the Gordon case; the deed would be rejected for recordation and returned to the lender or closing attorney for correction. Further, many may argue that U. S. Bank’s position does not increase the likelihood of fraud. The recording statutes already prevent deeds secured by fraud from ever prevailing when challenged. O.C.G.A. § 44-14-33. Others may state that to accept U. S. Bank’s position simply provides a safety net for lenders, closing attorneys, superior court clerks, and their staffs,, as this was the intent of the 1995 Amendment, and gives effect to the original intent and agreement of the parties that the U. S. Bank security deed constitute a first lien. After this decision, what does the landscape look like? One can look into the future and see increased costs of title insurance and title searches. We may see closing attorneys, title underwriters, and others interested in title to property perplexed over whether or not the defect in the attestation of a particular security deed is patent or obvious enough to invalidate the deed. Further, some argue there is a potential for a substantial amount of expensive and protracted litigation debating whether or not previous foreclosures of security deeds that were not properly attested were defective or void.

To many, the Court’s decision strikes as elevating “form over substance” and potentially neglecting common sense. This author is reminded of a circumstance that happened 25 years ago while the author was arguing a summary judgment motion before the late

Superior Court Judge, Bobby Johnston. Judge Johnston interrupted the author and said “Mr. Mize, even if that is the law, it ain’t right.” It was never understood what Judge Johnston meant, until today.

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## THE LAW OF FLUIDIC PRECIPITATION A SUMMARY OF GEORGIA LAW REGARDING SURFACE WATER INVASION PART III

*Elizabeth W. Boswell, Esquire  
Carol Clark Law*

*Editor’s Note: this is the final in a series of three articles which  
have appeared in past newsletters*

### E. Injunctive Relief

In surface water invasion cases, the law authorizes a remedy which includes both an injunction and damages.<sup>1</sup> An uphill owner may be enjoined from causing excessive surface water and sediment laden surface water to flow onto the downhill landowner’s property, and the trial court has broad discretion to fashion equitable remedies based upon the exigencies of each case. In *Goode et al. v. Mountain Lakes Investments, LLC et al*, 271 Ga. 722, 524 S.E.2d 229 (1999), downhill owners Goode whose property lay at the bottom of a forty acre drainage basin sued their uphill neighbor for equitable relief, alleging that development on the uphill property had caused excessive surface water and sediment laden surface water to flow onto their property. After the uphill owner constructed a detention pond in accordance with a court-approved plan, but which failed to contain all water flow in excess of that which would occur naturally, the Union County Superior Court judge entered a judgment requiring the uphill landowner to contribute 50% of the reasonable cost to construct a ditch across the downhill landowners’ property, and the downhill owners appealed. The Georgia Supreme Court affirmed the judgment below, finding (a) that whether the uphill owner should be required to bring the water flow back to pre-development levels was within the trial court’s discretion; and (b) that the injunction requiring the uphill owner to contribute 50% of the cost to construct a ditch across the plaintiffs’ property was adequate relief, as the record supported the finding that there were no further reasonable remedies that could be implemented uphill, beyond the court-approved detention pond. Central to this ruling was evidence that drainage ditch which pre-dated the uphill development and which was designed to convey water across the downhill property in a controlled fashion had become clogged and may have contributed to the excessive water flow.<sup>2</sup> In concluding that the trial court had not abused its discretion in granting the injunction at issue, the Supreme Court noted that “a trial court has broad discretion to fashion equitable remedies based upon the exigencies of each case,” and “a trial court should craft an injunction ‘in a manner that is the least oppressive to the defendant while still protecting the valuable rights of the plaintiff.’”<sup>3</sup>

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The fact that a defendant has sold the offending property, remarkably, will not extinguish his liability or a court's ability to enjoin him. "The fact that at the time suit was filed the defendant had sold his property, from which the alleged harm or injury arose, does not absolve him from being a continuing wrongdoer or from the responsibility of remedying its cause."<sup>4</sup> In such an instance, where the evidence showed that the defendant created the nuisance and that it was continuing, injunctive relief has been upheld, notwithstanding the fact that the defendant no longer owned the property causing the problem.<sup>5</sup>

## F. Punitive Damages

A caution about punitive damages: Surface water runoff cases involve an elevated risk of an award of punitive damages.<sup>6</sup> Under O.C.G.A. § 51-12-5.1(b), "Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression or that entire want of care which would raise the presumption of conscious indifference to consequences." Conscious indifference to consequences "relates to an intentional disregard of the rights of another, knowingly or wilfully disregarding such rights."<sup>7</sup> So, for example, an award of punitive damages has been upheld where the plaintiff complained to the defendants at the inception of the project that the development would result in an increased discharge of surface waters and attempted to persuade the defendants to design a sewer system which would route the waters in a different direction. The defendants responded that such a system would cost approximately \$15,000 and would be unnecessary since their architects had assured them that no water run-off problem would result. When the problem did in fact result, the defendants made some effort to alleviate it by installing sedimentation ponds, but at no time did they make any effort to lessen the quantity of water being discharged onto the plaintiff's property. Under these circumstances, the Georgia Supreme Court has held, the jury was authorized to find that the defendants "had acted with 'conscious indifference' to consequences, if not in creating, then in failing to correct a drainage system which was causing damage to appellee."<sup>8</sup>

Punitive damages may therefore be awarded even where the defendant did not specifically intend to create the problem. In *Wildcat Cliffs Builders, LLC v. Hagwood*, 292 Ga. App. 244, 663 S.E.2d 818 (2008), Hagwood sued Wildcat Cliffs Builders for trespass and nuisance arising out of Wildcat's encroachment on Hagwood's property during grading activities and its creation of a runoff and erosion problem. The Gwinnett County Superior Court entered judgment on a jury verdict in favor of Hagwood for \$90,000 in compensatory damages, \$100,000 in punitive damages, and attorneys' fees and expenses of \$14,688.56. Wildcat appealed the verdicts for punitive damages and attorneys' fees. In answering special interrogatories on the verdict form, the jury had "found that Wildcat did not act with a 'specific intent to cause harm by possessing the desire to cause the consequences of its actions,' but did find that Wildcat had acted in such a way as to 'raise the presumption of a conscious indifference to consequences.'" On appeal, Hagwood did not challenge the jury's finding that Wildcat did not act with the intent to cause the damages at issue. "Thus, the question is whether the evidence supports the jury's finding that Wildcat's conduct following its unintentional trespass onto

Hagwood's property showed 'that entire want of care which would raise the presumption of conscious indifference to consequences.' OCGA § 51-12-5.1(b). See also *Hoffman v. Wells*, 260 Ga. 588(1), 397 S.E.2d 696 (1990) (punitive damages may be authorized even in the absence of wilful and intentional misconduct.)"<sup>9</sup>

The Court in *Wildcat* explained:

A party acts with "conscious indifference to consequences" where it acts with a knowing or wilful disregard of the rights of another . . . . The Georgia Supreme Court of Georgia [sic] has specifically held that such a conscious indifference to consequences may exist where a party creates a nuisance that causes a run-off of water and silt onto or from another's property, and thereafter fails to ameliorate or remedy the same. . . . See also *Raymar, Inc. v. Peachtree Golf Club*, 161 Ga.App. 336, 338(1)(e), 287 S.E.2d 768 (1982) (affirming an award of punitive damages where the trial judge had instructed the jury that "a conscious indifference to the consequences may be defined as the failure to correct a silt or drainage problem after receiving notice of the problem causing the damages for which the defendant was responsible"). Thus, even where the defendant did not act with conscious indifference in creating the problem that led to the damage, punitive damages may be justified if the defendant acted with such conscious indifference in failing to correct that problem.<sup>10</sup>

Looking at the evidence adduced at trial, the Court of Appeals observed as follows:

In addition to Wildcat's creation of the problem causing the erosion and run-off problems, factors supporting a finding of conscious indifference to the consequences include its awareness of its conduct and the consequences thereof and its subsequent refusal to take any action either to ameliorate or rectify the problems it created . . . . It is undisputed that Wildcat trespassed on Hagwood's property and created a continuing nuisance thereon, which resulted in the severe run-off and erosion problems at issue. The evidence shows that Wildcat was put on notice of its conduct and continuing consequences thereof. Despite this knowledge, Wildcat made no effort to either remedy or ameliorate the problem.

In this regard, evidence was presented showing that at least some of the factors contributing to the problem – i.e., the improper grading, the construction and position of the retaining wall, and the lack of a drainage system or swells – could have been corrected. Wildcat presented no evidence, however, to suggest that it took steps to correct these problems. In its defense, Wildcat now claims that it could not correct these problems without going onto Hagwood's property and that it did not have permission to do so. This argument, however, ignores the fact that Wildcat never sought permission to go onto Hagwood's property for the purpose of taking remedial measures. . . .

In sum, the evidence showed that Wildcat had no interest in remedying or lessening the run-off problem or compensating Hagwood for the property damage he had sustained. Rather, it was amenable only to paying Hagwood for an easement and a release from all liability arising from the retaining walls it had constructed on Hagwood's property. The foregoing evidence was sufficient to author-

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ize the jury's conclusion that, after it learned of its trespass onto Hagwood's property and its creation of a continuing nuisance thereon, Wildcat acted with a conscious indifference to the consequences of its conduct.<sup>11</sup>

*Sumitomo Corp. of America et al. v. Deal et al.* represents perhaps the most extreme example of a punitive damages award for surface water discharges. *Sumitomo* involved discharges from a manmade detention pond. The jury awarded the Deals \$175,738.98 in compensatory damages, \$42,438.50 in attorneys' fees, and \$275,000 in punitive damages. The punitive damages award was reduced to \$250,000 pursuant to the statutory cap on punitive damages, but the trial court found the \$250,000 award to be unconstitutionally excessive and granted remittitur, reducing the award to \$100,000. The Deals appealed the reduction of the award of punitive damages on various grounds. The Court of Appeals found that the evidence was sufficient to establish that the developer's conduct was sufficiently reprehensible regarding damages done to the downstream property by the manmade detention pond, through surface water runoff from the pond, to support the determination that the award of punitive damages was not unconstitutionally excessive in violation of due process. The testimony established that in the five years between the plaintiffs' notice to the developer and the trial of the case, there was widespread flooding reaching 75 feet at the lower end of the property, steady erosion of the streambed uphill toward the detention pond outlet, undercutting of the streambed from an original depth of one to two feet to a depth of six to ten feet, continuing undermining and exposure of tree roots, and cascading torrents of water scouring the land and causing washouts – conditions of which the developer was aware, but did nothing and maintained that the detention pond was built in accordance with county regulations.<sup>12</sup> Based upon these rather egregious facts, the Court of Appeals remanded the case to the trial court for reinstatement of the punitive damages awarded by the jury, reduced to \$250,000 pursuant to the statutory cap.<sup>13</sup>

As the Georgia Supreme Court has observed, however, “there are situations in which damage from the flow and drainage of water and sediment would not warrant punitive damages”:

In *General Refractories Co. v. Rogers*, 240 Ga. 228, 230(1), 239 S.E.2d 795 (1977), this Court disapproved a punitive damage award because it found no “clear acts” on the part of the defendant which would support “wilful or wanton conduct, malice, oppression, conduct exemplifying conscious indifference to consequences or a succession of tortious acts.” . . . There was no evidence of activity on the defendant's part to cause water to be accumulated in quantities or diverted unnaturally; the plaintiff did not notify the defendant of the complained of activities from the inception; the defendant did not refuse to take action; and there was not a lack of effort on the defendant's part to lessen the quantity of diverted water . . . Similarly, in *Payne v. Carson*, 215 Ga. App. 253, 450 S.E.2d 273 (1994), the Court of Appeals found that the evidence did not support punitive damages because, inter alia, another party was responsible for the actual increase in surface water runoff, and the defendant at issue suffered the same damage to his property from the surface water . . . .<sup>14</sup>

The foregoing quotation by the Georgia Supreme Court, however,

comes from a case in which the Court found that there was sufficient evidence of acts by the defendant developers which could allow a jury to consider a claim for punitive damages:

But, in this case, the Tylers presented evidence of excessive stormwater runoff and sediment deposit, flooding of their property, and pollution of their ponds directly from development of the subdivision; that the developers had not taken adequate soil erosion control measures within the subdivision; that the subdivision drainage system was designed in a manner that would increase the runoff of storm water onto their property; and that they repeatedly asked the subdivision developers to correct the problems, but failed to get them to take any action to remedy the situation and the ongoing damage. What is more, the Tylers presented evidence raising questions about the developers' violations of a county ordinance and state law . . . . Thus, there are material questions of fact regarding the Tylers' allegations of trespass and nuisance, and evidence of acts by the defendant developers which could allow a jury to consider a claim for punitive damages.<sup>15</sup>

Taking all of the above case law into consideration, and given that specific intent to cause harm is not necessary for punitive damages to be awarded, the overall trend in Georgia very much supports punitive damage awards where an uphill property owner creates an artificial increase in stormwater runoff and then, having been put on notice of the problem, fails to correct it.

#### CONCLUSION: Lessons to be Learned

1. Whether you represent a plaintiff or a defendant, visit the property immediately. As Rumpole of the Bailey would say, “Inspect the locus in quo!” A picture is worth a thousand words. A site inspection is worth a million. Not only is it important that you view the property at the outset, it is crucial that you visit the property periodically and that you and your client exercise vigilance in documenting conditions over time and taking all reasonable measures to minimize any damage.
2. By no means should you blindly rely on your client's engineers or their reports. Remember that those engineers have a vested interest and pride in defending the excellence of their designs. A second opinion from a non-interested engineer or hydrogeologist is well worth the cost.
3. Exercise common sense. Look objectively at the property and at photographs. Is there evidence of flooding? Scouring of the surface or of ditches? Deposits of silt or rip-rap? Collapsed siltation fences? Disturbed vegetation or exposed tree roots? If there are before and after photographs, is it possible to date the beginning of any problem or correlate it to any activity on the adjoining property?
4. Assume that the jury will be allowed to view the property. They may not, but jury site inspections have been permitted, in the discretion of the trial judge.<sup>16</sup> If the defendant's expert witnesses contend, as they did in the Ponce de Leon case, that an increase in water runoff is theoretically impossible, how is a jury likely to reconcile that testimony if they see silt deposits, exposed tree roots, and other evidence that the downhill property is in fact receiving large amounts of water, no matter what the engineers have to say? Again, exercise common sense in

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how you view and assess the property, and ask yourself what twelve laypeople may conclude.

5. If you represent a defendant, and if you conclude that the defendant's activities have increased the flow of water, do not be so afraid of liability that you advise your client to stand firm and take no remedial measures. While evidence of subsequent remedial action is generally inadmissible to establish liability, a defendant's remedial measures can either make the problem go away, decrease the damages to the plaintiff, or be used in litigation to defeat any claim that the defendant acted or failed to act with conscious indifference to the consequences. Again, the cardinal rule is to exercise common sense.
6. Lastly, whether you represent a plaintiff or a defendant, document the situation early and thoroughly. Take lots of photographs and videotapes, and keep track of when they were taken and who can authenticate that they are a fair and accurate representation of the property on a date certain. If the flooding is in full swing by the time you become involved, make every effort to obtain photographs of "before" conditions. Obviously if you represent a potential plaintiff, put the defendant on thorough and specific written notice, preferably from the inception of the defendant's activities, of what problems have been experienced for what period of time, and what problems will continue if the defendant does not take action. If your claims are against a county or a municipality, make sure that the proper ante-litem notices have been given. And if you represent a defendant, you should obviously take the greatest care in how you respond to any demands from the plaintiff. Assume that your written response will be the plaintiff's Exhibit A at trial.

Footnotes for Surface Water Article

- <sup>1</sup> *Greenwald v. Kersh*, 265 Ga. App. 196, 593 S.E.2d 381 (2004).
- <sup>2</sup> *Goode et al. v. Mountain Lakes Investments, LLC et al.*, 271 Ga. 722, 524 S.E.2d 229 (1999).
- <sup>3</sup> *Goode v. Mountain Lakes*, 271 Ga. at 724, 524 S.E.2d at 231.
- <sup>4</sup> *McMillen Dev. Corp. v. Bull*, 228 Ga. 826, 828, 188 S.E.2d 491, 493 (1972).
- <sup>5</sup> *Id.*
- <sup>6</sup> See, e.g., *Wildcat Cliffs Builders, LLC v. Hagwood*, 292 Ga. App. 244, 663 S.E.2d 818 (2008)(affirming an award of \$90,000 in compensatory damages, \$100,000 in punitive damages, and attorneys' fees and expenses); *Sumitomo Corp. of America et al. v. Deal et al.*, 256 Ga. App. 703, 589 S.E.2d 608 (2002)(affirming punitive damages award of \$250,000); *Ponce de Leon Condominiums et al. v. DiGirolamo et al.*, 238 Ga. 188, 232 S.E.2d 62 (1977)(affirming punitive damages award notwithstanding expert testimony that defendant's engineering design could not have resulted in excess surface water discharges).
- <sup>7</sup> *Ponce de Leon Condominiums et al. v. DiGirolamo et al.*, 238 Ga. 188, 189, 232 S.E.2d 62, 64 (1977).
- <sup>8</sup> *Id.*, 238 Ga. at 189-90, 232 S.E.2d at 64.
- <sup>9</sup> *Wildcat Cliffs Builders*, 292 Ga. App. at 246, 663 S.E.2d at 821.
- <sup>10</sup> *Id.*, 292 Ga. App. at 246-47, 663 S.E.2d at 821 (some citations omitted, emphasis added).
- <sup>11</sup> *Id.*, 292 Ga. App. at 246-48, 663 S.E.2d at 821-22 (citations omitted).
- <sup>12</sup> *Sumitomo Corp. of America et al. v. Deal et al.*, 256 Ga. App. 703, 569 S.E.2d 608 (2002).
- <sup>13</sup> *Id.*, 256 Ga. App. at 711, 569 S.E.2d at 616.
- <sup>14</sup> *Tyler et al. v. Lincoln et al.*, 272 Ga. 118, 121, 527 S.E.2d 180, 183 (2000)(some citations omitted).
- <sup>15</sup> *Id.*, (citations omitted).
- <sup>16</sup> *Ponce de Leon Condominiums et al. v. DiGirolamo et al.*, 238 Ga. at 191, 232 S.E.2d at 65 (1977); *Payne v. Carson*, 215 Ga. App. 253, 450 S.E.2d 273 (1994).

## THE CASE FOR RECOVERY OF BUSINESS LOSS IN THE TAKING OF REAL PROPERTY

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No single issue can complicate an otherwise routine condemnation case as quickly as a business loss issue. It is not uncommon to see business loss claims well in excess of the value of the real estate when the site upon which the business depends is taken or damaged. With claims of this magnitude, business owners and their counsel must convince courts that a taking or damaging of real property can cause a bona fide loss to intangible aspects of the business, including goodwill and going-concern value; the intangible nature of a business should not preclude recovery because the loss can be properly quantified; and therefore such loss must be a part of the 5th Amendment's mandate that "just compensation" be paid before private property is taken. Some state courts and legislatures have agreed, recognizing business loss as an element of just compensation in different forms, and offering the same possibility to practitioners seeking to change the law in other jurisdictions. However, recovery for business loss in condemnation cases still remains the exception to the rule.

### The General Rule – No Recovery for Business Loss

Despite that business loss is gradually more recognized as part of just compensation, most courts remain reluctant to compensate property owners for business loss that cannot be precisely quantified. The traditional reason for denying recovery is that damage to business is *damnum absque injuria*, a harm without an injury, and thus not compensable.<sup>1</sup> Other common lines of reasoning that courts articulate for denying business loss recovery include:

- Business loss is too speculative to calculate to an acceptable degree of certainty.<sup>2</sup>
- The condemnor has not taken the business from the owner, only the real property.<sup>3</sup>
- The United States Constitution does not grant compensation for the taking of personal or intangible property.<sup>4</sup>

### Exceptions to the General Rule

As a result of the substantial hardship to business owners caused by the exclusion of business loss, some courts have chipped away at the general rule. The United States Supreme Court carved out two major, albeit narrow, exceptions in cases involving businesses taken for government operation, and cases involving temporary takings. In 1893, the Supreme Court first addressed a governmental taking of a business for continued operation in *Monongahela Navigation Co. v. United States*.<sup>5</sup> In *Monongahela*, a company had been granted a state charter to construct and operate locks on the Monongahela River, which the government condemned and continued to operate.<sup>6</sup> The legislation authorizing the taking provided no award of compensation for the loss of the franchise to collect tolls.<sup>7</sup> In holding that the 5th Amendment required that the company be provided with the "full and perfect equivalent" of the appropriated property,<sup>8</sup> the Supreme Court emphasized that the company was entitled to recover compensation for the loss of its franchise because it was an integral part of the property's value to the owner.<sup>9</sup>

In 1949, the Supreme Court addressed the temporary taking of a

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### NOTICE

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

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business in the case of *Kimball Laundry Co. v. United States*, in which the government temporarily occupied and operated the Kimball Laundry plant to serve the members of the Army.<sup>10</sup> The market value of the laundry plant dropped considerably during this time.<sup>11</sup> The district court awarded recovery for the physical takings related to the equipment, machinery, and the like, but wholly denied recovery for the diminution in the value of the business.<sup>12</sup> The Supreme Court held that the intangible nature of a business, in and of itself, does not preclude compensation for its loss when a business is temporarily condemned.<sup>13</sup> The temporary taking effectively eliminated the Kimball's ability to profit from its customer list and customers' loyal patronage during the government's occupancy of the premises.<sup>14</sup> In holding that the government had to compensate the Kimballs for the going-concern value of the lost business, the Supreme Court distinguished between a permanent taking of a fee simple to business property and a temporary taking of the same.<sup>15</sup> In the former, the Supreme Court found it was highly probable that the owner would be able to relocate the going-concern value and that any losses resulting from the owner's inability to do so would be "speculative."<sup>16</sup> In the latter, however, the likelihood that the owner would be able to temporarily relocate was so remote as to give rise to a requirement for compensation.<sup>17</sup>

#### Trend Toward Allowing Business Loss Recovery

More recently, the general rule of no recovery has been the subject of harsh criticism, causing several states to modify or even eliminate the rule, either legislatively or judicially

#### Legislative Recognition of Business Loss Recovery

Several courts have recognized the harshness of the reality of denying recovery to a business owner, but have concluded that the remedy must be legislative, rather than judicial in nature.<sup>18</sup> To date, the following five states have enacted the most comprehensive legislation authorizing business loss recovery:

California and Wyoming: A business owner may recover goodwill by proving (1) the taking of property or injury to the remainder caused the business loss, (2) neither relocation nor other reasonable steps will prevent the loss, and (3) no other statutory or other form of recovery will include compensation for the loss.<sup>19</sup>

Florida: "Where less than the entire property is sought to be appropriated . . . an established business of more than 4 years' standing before January 1, 2005 . . . [or] an established business of more than 5 years' standing on or after January 1, 2005" may recover for business loss.<sup>20</sup> Idaho: A business owner may recover for business loss if: (1) the property sought to be condemned constitutes only a part of a larger parcel; (2) the business has more than five years standing; (3) the taking of the property reasonably caused the business loss; (4) the business is owned by the party whose lands are condemned or located upon adjoining lands owned or held by such party; (5) neither relocation nor other reasonable steps would have prevented the loss; (6) no other statutory or other form of recovery will include compensation for the loss; and (7) the business owner submits the required statutory notice to the condemning authority.<sup>21</sup>

Vermont: Property owners should be compensated for "the direct and proximate decrease in the value" of a business located on property that is to be taken.<sup>22</sup>

#### Judicial Recognition of Business Loss Recovery

Courts in Georgia, Michigan, Minnesota, Wisconsin, and Nevada have all determined that, as a matter of state constitutional law, business loss is compensable to varying degrees. These judicial determinations that recovery of business loss in condemnation cases is mandated by state constitutions, represents a fundamental shift away from the legal reasoning underlying the general rule of no recovery. Georgia: In 1966, the Georgia Supreme Court in the case of *Bowers v. Fulton County* became the seminal state decision requiring compensation for businesses loss as a matter of state constitutional law.<sup>23</sup> In *Bowers*, the Georgia Supreme Court held that a property owner could recover for business loss and relocation expenses as separate items of damage in addition to the value of the property condemned.<sup>24</sup> In so holding, the Georgia Supreme Court expressly overruled numerous earlier cases that disallowed the recovery of business loss and limited evidence of such loss to the purpose of showing the use and value of the property condemned.<sup>25</sup>

In spite of the broad language of the *Bowers* decision, there are several elements of procedure and proof that are required before business loss may be recovered in Georgia:

- A condemnee must plead and prove business loss as a separate element; a condemnor is not required to include business loss in its initial estimate of compensation.<sup>26</sup>
- A condemnee must prove a unique relationship between the business and the property condemned under any one of three tests for uniqueness.<sup>27</sup>
- Evidence of business loss cannot be remote or speculative and the loss must be permanent, not temporary.<sup>28</sup>

A tenant operating the business may recover for either a total loss of or partial damage to a business that continues to operate; a fee owner operating the business must prove a total loss at that location in order to recover business loss as a separate item of damage.<sup>29</sup>

Minnesota: In Minnesota, courts uphold the general rule denying recovery of business loss in condemnation cases, but allow recovery in certain cases.<sup>30</sup> A condemnee can recover loss of going-concern value by showing: "(1) that his going-concern value will in fact be destroyed as a direct result of the condemnation, and (2) that his business either cannot be relocated as a practical matter, or that relocation would result in irreparable harm to the interest."<sup>31</sup>

Michigan: Michigan allows recovery of business losses on a limited basis. Just compensation requires that the condemnee be "in as good a position as was occupied before the taking."<sup>32</sup> Going-concern value and good will are recoverable only if the business is taken for use as a going concern.<sup>33</sup> The rationale is that a successful business may generally be relocated to another location; therefore if the government does not take the business for use as a going

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concern, “the owner of that interest need not be compensated since nothing is taken.”<sup>34</sup>

Wisconsin: Case law in Wisconsin is inconsistent as to whether a business owner may recover for incidental losses. In *Luber v. Milwaukee County*, the Wisconsin Supreme Court had no difficulty in holding that rental income is a property interest for which an owner must receive compensation under the Wisconsin Constitution, noting that the test for determining damages is not what the government has gained, but rather what the owner has lost.<sup>35</sup> The *Luber* Court found that the Wisconsin statute providing for restricted compensation operated not as “a matter of legislative charity but as an unauthorized limit upon recovery.”<sup>36</sup> Therefore, the *Luber* Court explicitly rejected the rule making such consequential or incidental damages *damnum absque injuria*, and invalidated the Wisconsin statute insofar as it limited compensation.<sup>37</sup>

Subsequent cases, however, cast doubt on the *Luber* ruling, thus making the extent of recovery for a business owner in Wisconsin uncertain.<sup>38</sup> For example, in *Hasselblad v. City of Green Bay*, the Wisconsin Court of Appeals concluded that *Luber* “does not constitutionally mandate unlimited recovery for all consequential damages in eminent domain actions.”<sup>39</sup> In *Hasselblad*, the court upheld a statutory limit on business replacement damages, finding no constitutional right to compensation for relocation expenses.<sup>40</sup> The court recognized that *Luber* was a “radical departure” from the prevailing rule that condemnation provides no recovery for consequential or incidental damages.<sup>41</sup> The court also found that there was a rational basis for distinguishing the incidental damages awarded in *Luber* because “[r]ental losses bear a direct relationship to fair market value that business replacement expenses do not.”<sup>42</sup>

Nevada: In *State v. Cowan*, the Nevada Supreme Court held that lessees were entitled to compensation for destruction of their business as an exception to the undivided fee rule.<sup>43</sup> The court also held that business goodwill, rather than lost profits, was the appropriate measure of damages for the complete destruction of the lessees’ business.<sup>44</sup> In *Cowan*, the lessees operated a franchised gasoline station on the condemned property that was completely destroyed.<sup>45</sup> The lessees were unable to relocate their business because oil companies were not extending new leases for gas station franchises in the area, which meant the lease’s value was inextricably tied to the unique location of the condemned property.<sup>46</sup> In this situation, the court concluded that the undivided fee rule would not adequately compensate the lessees for what was taken, and therefore the Nevada Constitution required compensation for the destruction of the business.<sup>47</sup>

## Conclusion

Prohibition of recovery for business loss remains the general rule across the country, thus ensuring continued losses are incurred by business owners when the real estate is taken or damaged. The past few decades, however, have seen an increased trend among states recognizing business loss as an element of just compensation, both legislatively and judicially. An argument can be made that to satisfy the “just compensation” clause of the 5th Amendment, the taking of private property must include business

loss. Despite the intangible nature of a business, such loss can and should be quantified as part of just compensation.

## Footnotes

<sup>1</sup> See, e.g., *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 482-85 (1973) (Rehnquist, J. dissenting); *United States v. General Motors Corp.*, 323 U.S. 373, 383 (1945); *Mitchell v. United States*, 267 U.S. 341, 345 (1925); *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Auth.*, 183 Colo. 441, 445-47, 517 P.2d 845 (1974); *Towaliga Fall Power Co. v. Sims*, 6 Ga. App. 749, 65 S.E. 844, 846 (1909); and *Reymond v. State Through Dept. of Highway*, 255 La. 425, 459, 231 So.2d 375 (1970).

<sup>2</sup> See, e.g., *Banner Milling Co. v. State of New York, LLC et al*, 240 N.Y. 533, 540, 148 N.E. 668 (N.Y. Ct. App. 1925).

<sup>3</sup> See, e.g., *Boynton v. State*, 218 Misc.2d 12, 215 N.Y.S.2d 953 (N.Y. Ct. Cl. 1961).

<sup>4</sup> See, e.g., *Heir v. Delaware River Port Authority*, 218 F.Supp.2d 627 (D.N.J. 2002).

<sup>5</sup> 148 U.S. 312 (1893).

<sup>6</sup> *Id.* at 313.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, at 326.

<sup>9</sup> *Id.*, at 329.

<sup>10</sup> 338 U.S. 1, 3 (1949).

<sup>11</sup> *Id.*, at 8-9.

<sup>12</sup> *Id.*, at 8.

<sup>13</sup> *Id.*, at 10.

<sup>14</sup> *Id.*, at 14.

<sup>15</sup> *Id.*, at 14-15.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 868 P.2d 958 (Ariz. Ct. App. 1993); and *Community Redevelopment Agency of Los Angeles v. Abrams*, 15 Cal.3d 813, 126 Cal. Rptr. 473, 543 P.2d 905 (1976).

<sup>19</sup> Cal. Civ. Proc. Code §1263.510 (West 2007); and Wyo. Stat. § 1-26-713 (1977).

<sup>20</sup> Fla. Stat. Ann. § 73.071 (3)(b) (West 1992).

<sup>21</sup> Idaho Code § 7-711 (2)(b)

<sup>22</sup> Vt. Stat. Ann. Tit. 19, § 501(2).

<sup>23</sup> 221 Ga. 731, 146 S.E.2d 884 (1966).

<sup>24</sup> *Id.* at 738-740.

<sup>25</sup> *Id.*

<sup>26</sup> *Lil Champ Food Stores, Inc. v. Department of Transportation*, 230 Ga. App. 715, 498 S.E.2d 94 (1998).

<sup>27</sup> *DOT v. 2.734 Acres of Land*, 168 Ga. App. 541, 309 S.E.2d 816 (1983).

<sup>28</sup> *DOT v. Dent*, 142 Ga. App. 94, 235 S.E.2d 610 (1977); and *Venable v. State Hwy Dept*, 138 Ga. App. 788, 227 S.E.2d 509 (1976).

<sup>29</sup> *DOT v. Dixie Hwy Bottle Shop*, 245 Ga. 314, 265 S.E.2d 10 (1980).

<sup>30</sup> *State v. Saugen*, 283 Minn. 402, 169 N.W.2d 37 (1969).

<sup>31</sup> *Minneapolis v. Schutt*, 256 N.W.2d 260, 265 (Minn. 1977).

<sup>32</sup> *City of Detroit v. Michael's Prescription*, 143 Mich. App. 808, 811, 373 N.W.2d 219 (1985).

<sup>33</sup> *Id.* at 811, 812.

<sup>34</sup> *Id.* at 812.

<sup>35</sup> 47 Wis.2d 271, 279, 177 N.W.2d 380 (1970).

<sup>36</sup> *Id.* at 280.

<sup>37</sup> *Id.* at 283.

## Footnotes Continued

<sup>38</sup> See, e.g., *Rotter v. Milwaukee County Expressway and Transp. Comm'n.*, 72 Wis.2d 553, 562 241 N.W.2d 440 (1976) (expressly limiting the *Luber* holding to the 12 month limit for rental income losses found in the Wisconsin statute); *Rademann v. Wisconsin Department of Transportation*, 252 Wis.2d 191, 209, 642 N.W.2d 600 (Wis. Ct. App. 2002) (holding that (1) evidence of net income is speculative and therefore ordinarily inadmissible to establish property value in condemnation cases involving commercial enterprises, and (2) expert valuation testimony as to income is inadmissible because the trier of fact cannot be expected to ascertain how much income can be attributed to the owner's management versus consumer goodwill).

<sup>39</sup> 145 Wis.2d 439, 442, 427 N.W.2d 140 (Wis. Ct. App. 1988).

<sup>40</sup> *Id.* at 440-441.

<sup>41</sup> *Id.* at 442-443.

<sup>42</sup> *Id.* at 444.

<sup>43</sup> 120 Nev. 851, 856, 103 P.3d 1 (2004).

<sup>44</sup> *Id.* at 856.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

## SHARE YOUR KNOWLEDGE

If you have encountered an interesting legal development or issue recently which is topical to our section, please consider sharing your knowledge with your colleagues by submitting a piece for potential inclusion and publication in this newsletter. We are accepting articles for this newsletter subject to submission guidelines. Please contact Newsletter Editor, Monica Gilroy, by email at [mkg@dickensongilroy.com](mailto:mkg@dickensongilroy.com) for more information on submission guidelines and newsletter deadlines.

**REAL PROPERTY LAW SECTION**

**2217 Donato Dr**

**Belleair Beach, FL 33786**

**UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION**

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**— 2011 —**

**September 16<sup>th</sup> – 18<sup>th</sup>, 2011**  
Fall Retreat  
(Augusta Marriott) Augusta, GA

**October 5<sup>th</sup>, 2011**  
Title Standards Seminar  
(State Bar Headquarters)

**October 19<sup>th</sup>, 2011**  
RPLS monthly meeting  
(State Bar Headquarters)

**November 4<sup>th</sup>, 2011**  
Real Property Foreclosure Seminar  
(GPTV)

**November 10<sup>th</sup>, 2011**  
Replay of Foreclosure Seminar  
(GPTV)

**November 15<sup>th</sup>, 2011**  
RPLS monthly meeting  
(State Bar Headquarters)

**December 1<sup>st</sup>, 2011**  
Commercial Real Estate Seminar  
(State Bar Headquarters)

**— 2012 —**

**January 17<sup>th</sup>, 2012**  
RPLS monthly meeting  
(State Bar Headquarters)

**February 10<sup>th</sup>, 2012**  
Spring Residential Practice Seminar  
(GPTV)

**February 16<sup>th</sup>, 2012**  
Replay of Residential Practice Seminar  
(GPTV)

**February 21<sup>st</sup>, 2012**  
RPLS monthly meeting  
(State Bar Headquarters)

**March 20<sup>th</sup>, 2012**  
RPLS monthly meeting  
(State Bar Headquarters)

**April 17<sup>th</sup>, 2012**  
RPLS monthly meeting  
(State Bar Headquarters)

**May 10<sup>th</sup> – 12<sup>th</sup>, 2012**  
Real Property Law Institute  
(Amelia Island Plantation)