

# Real Property Law Section NEWSLETTER State Bar of Georgia

A Publication for Real Property Lawyers

Winter 2011



**REAL PROPERTY  
LAW SECTION**

## COMMENTS FROM THE CHAIR

*J. Noel Schweers III, Esquire  
J. Noel Schweers III, P.C., Augusta*

"I will strive to keep our business a profession and our profession a calling in the spirit of public service."

These words taken from the Lawyer's Creed remind us of one of our core professional obligations as Georgia attorneys. This is a key to distinguishing the practice of law from just another business endeavor. As attorneys we serve a critical role in our legal system and must strive to satisfy this obligation.

The Real Estate Section was formed in 1965 with the goal of improving the quality and professionalism of real estate practitioners through education and other membership activities. Over the years many dedicated volunteers have provided the Section with resources such as the Title Standards, the List-Serve and the Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions. We are fortunate to have these tools, as many State Bars do not have these valuable resources.

I am honored to serve as the Chair of the Executive Committee for the Section for the 2011-2012 Bar year. Fortunately, the Section is blessed with an extremely talented and dedicated executive committee. This year we want to continue to find ways to better serve you as a member of the Section. This includes our traditional education opportunities such as the annual Fall Commercial Seminar, the Spring Practice and Procedures Seminar, and the Real Property Law Institute.

We are all well aware that we exist in a time of ever accelerating change. The practice of law, like many other areas of life, is being impacted by significant societal and technological changes. The

drivers of these changes include the prevalence of the internet, social media and other forms of communication. These tools are extremely effective in the dissemination of knowledge and information. In fact, we continue to look for ways to serve the Section with these tools and this year we plan to launch additional web based tools for our members.

Calls for change are happening in many areas of the practice of law, but are most pronounced in the residential real estate closing setting. Some believe that the traditional role of a Georgia attorney in residential closings should be minimized or eliminated. These proponents of change argue that efficiency can be improved through nationwide standardization and the elimination of as much human involvement as possible, including attorney involvement. This can create questions as to the attorney's ethical obligations when they are asked to engage in very limited participation. To clarify the ethical obligations of the attorney in the context of a residential closing, the Section has joined with GRECCA in requesting guidance from the Bar's Formal Advisory Opinion Committee. The Opinion Committee has agreed to study the issue and will proceed through the established procedures of the Bar to ensure a well reasoned opinion is issued. We will share the results of this request as they become available.

I look forward to serving you and welcome any suggestions you may have to improve the practice of real property law in Georgia.

## SOME LESSONS OF THE GREAT RECESSION FOR DIRT LAWYERS

*Chad Henderson, Esquire  
Henderson Legal LLC, Atlanta*

The economy of the past few years has changed the way a lot of lawyers do business, perhaps none so much as real estate lawyers. Some who used to close commercial loans for banks are now advising their REO departments instead. Some who helped developer clients get their projects off the ground a few years ago are now trying to help them through the tangled web of loan modifications and forbearance negotiations. Some who

*Continued on page 2*

### Table of Contents

<i>Comments from the Chair</i> .....	<i>Cover</i>
<i>Some Lessons of the Great Recession for Dirt Lawyers</i> .....	<i>Cover - 3</i>
<i>RPLS Executive Committee Hosts Annual Planning Retreat</i> . . .	<i>Page 3</i>
<i>Dust Off Your Commercial Closing Checklist</i> .....	<i>Pages 3 - 4</i>
<i>Recent RPLS Sponsored Continuing Education Events</i>	
<i>Are Great Success</i> .....	<i>Pages 6</i>
<i>Lenders, Tenants And Snda-Tools For Our Current Economy</i>	<i>Pages 4 - 6</i>
<i>RPLS Seeks Formal Advisory Opinion on the</i>	
<i>Unauthorized Practice of Law Issue</i> .....	<i>Page 7</i>
<i>RPLS Calendar</i> .....	<i>Page 7</i>
<i>RPLS to "Go Green"</i> .....	<i>Back Cover</i>

*Continued from page 1*

used to have high-volume closing practices have shifted to foreclosure work, or estate planning, or family law, collections, criminal defense, anything but real estate.

Whether things have changed a little or a lot in terms of the current state of your practice, you would be remiss to ignore the lessons we have all learned “the hard way” during this downturn. Regardless of our particular specialties or client mix, there are bound to be a few different ways each of us can change how we advise our various clients, some rather basic and others more fundamental.

If you are a residential closing attorney, you may have grown complacent when the real estate market was booming and you were running a volume business. Closing attorneys are often accused of engaging in fraudulent deals and “robo-signing” and the like have made lots of headlines. However, most of the fallout from the mortgage crisis, for lawyers, has been malpractice and title claims arising not from fraud, but from sloppiness. If nothing else changes the way you conduct your closing practice, it should be the awareness that the witness at your closing could end up a witness in court, either for you or against you.

Identifying and avoiding potential title claims is second nature to experienced closing attorneys. Avoiding malpractice claims is equally important, for obvious reasons, but not always as easy or intuitive. One key to avoiding these claims, highlighted by the real estate crash, is to make sure you are clear as day about who your client is in any closing, and to behave accordingly. It is not enough to have all of your non-clients sign a disclosure acknowledging you are not their attorney. You must be assiduous about not advising them, not making gratuitous promises to them, and not completing tasks on their behalf just to ensure the closing will proceed smoothly.

Another byproduct of the mortgage crisis and real estate crash is the government’s regulators now have a renewed vigor to make sure the disclosures given to our borrowers are numerous and thorough. The new HUD-1 we were greeted with in 2010 created new responsibilities for closing attorneys, who are now expected to study those good faith estimates and mind those tolerances. Another new HUD-1 is in the works, and as with each new document added to the stack of paper, the number of opportunities to miss a step at a closing increases. It is more important than ever to ensure you dot your i’s and cross your t’s, if only because there are more i’s and t’s now than ever.

If you specialize in commercial real estate, you may have grown complacent during the unprecedented construction and development boom of the past decade. It was easier during the boom to get a little lazy in your drafting and review of loan documents because the market itself was your lender client’s insurance against default. Its borrowers’ eventual profits were all the moti-

vation they needed to comply with the letter of their loan documents. If they fell into default, your lender client would gladly step in to complete a project and realize those profits for itself. Now that the market no longer provides any margin of error, it may be time to carefully review the default provisions of your loan documents.

For example, your lender client might be interested to know how much authority it has to step in and manage a development project without actually foreclosing (which your client may not be so anxious to do these days). A bank with a construction loan made in 2006, which matured and has been in default since 2009, is holding a loan made at a time when it was unimaginable the bank might some day be holding so much real estate, it would be risking regulatory sanctions by foreclosing even a small loan. A construction loan made in 2012 should be documented with the “new normal” in mind.

Another example has to do with “declarant rights,” which are the broad range of rights, easements, and special privileges, such as exemption from architectural controls, most subdivision developers reserve for themselves in their neighborhood covenants. Many lenders currently find themselves holding large batches of foreclosed lots but not the declarant rights, because no one thought to include those rights in the lender’s collateral. Going forward, it should be routine for your construction and development loan packages to include a collateral assignment of declarant rights, to ensure the foreclosing lender will end up not just with the unsold lots, but also with the special rights necessary to complete the development and to market the lots or homes.

The past few years have forced lenders to change how they think about collateral in other ways you should be aware of as their attorney. Conservative lenders have always pushed for extra protection in the form of cross-collateralization and personal guaranties. But one lesson of this downturn is that the type of collateral matters as much as the amount of collateral. If all of your lender client’s collateral is real estate, each piece of collateral is going to be subject to the same fluctuations and uncertainties as each other piece. Asking for other assets as security could provide something your lender client may have forgotten about during their own boom-time complacency, namely, the importance of hedging against market risk. Knowing how to properly collateralize non-real estate assets may be outside your comfort zone as a real estate attorney, but you should not assume it is outside what your lender client considers your scope of practice. Among other things, now could be a good time to brush up on the UCC, which may have changed a lot since you studied it for the bar exam.

Regardless of whom you may be advising and in what context, the overarching lesson of the past few years is clear: Real estate lawyers should never again premise their advice or decisions on the assumption that the real estate market will continue working the way it “always” has and keep on improving over time. This is a real bummer for those of us who gravitated towards real estate law in the first place because it involves putting deals together and closing those deals, and generally interacting with happy people in various win-win situations.

#### NOTICE

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

*Continued on page 3*

*Continued from page 2*

Sometimes, though, you as the real estate lawyer are the last line of defense against fraud, mistakes, and just plain bad decisions. Sometimes you find yourself the only “buzz-kill” in the room who’s focused on the worst-case scenario. Sometimes (and these are such times), practicing real estate law is not as happy-go-lucky as you thought it might be or remember it being. But if you take notes and apply the lessons of the Great Recession, these times can turn you into a smarter, better lawyer.

## DUST OFF YOUR COMMERCIAL CLOSING CHECKLIST

*Triece Gignilliat Ziblut, Esquire  
Rubnitz, Gerber & Ziblut, P.C., Savannah*

If you were fortunate enough to train under a great transactional lawyer, you learned early on about the benefits of using checklists for projects. A thorough checklist can help you and your client save time, expenses, and avoid pitfalls. With the real estate market being less than robust for a few years now, your commercial closing checklist might have gathered some dust. Now is a great time to revisit your list. Every week we read horror stories in the newspaper or advance sheets about failed transactions or liability that might have been avoided. Some offer great lessons we can incorporate into our checklists and procedures.

**First Things First.** Checklists come in many styles, and can be reformatted to fit the situation. A simple transaction may need only a simple “to do” list, while a complex matter requires a full checklist (and can become the deal book table of contents after closing).

It pays to start the checklist with the basic deal information. List the parties (purchaser, seller, broker, lender, guarantor), the price, earnest money, loan amount, property, inspection deadline and closing date. This makes a great place for your file number, and contact information for the key contacts involved in due diligence

as well. Think of names and numbers you and your staff will need, or that you want to share with a group (if you decide to use a team checklist).

The core of the closing checklist should be organized in whatever way makes the most sense to you. Following the logical progression of the deal can be a great option (starting with the Letter of Intent, Loan Commitment or Purchase Agreement as the first item, and ending with documents executed at closing). Some prefer to start with the key loan documents, and place documents less likely to be reviewed after closing in the back (this provides a great order for the deal book your client may want after closing).

Whatever order you choose, incorporating a few basic elements will make it more functional. Try these tips:

**Use Headings.** Break it up into subsections, such as Due Diligence, Title and Survey, Entity Documentation, Conveyance Documents and Loan Documents. Creating categories helps you think about important questions to ask your client about the property, the loan terms and the client’s overall plans for the property.

*A Checklist Bonus: The checklist can provide another opportunity to demonstrate to your client that you know and appreciate his concerns. Working through a checklist with your client can build a greater understanding of his business plan, and foster your role as his trusted advisor.*

**Number Each Item.** Numbering items on the checklist will help all of the parties using it to keep track of and refer back to key points. Be sure to have someone set up your checklist form to use automatic numbering to avoid wasted time on edits. Include several additional blank lines in each category to make space for matters that come up later. Once you have circulated a checklist, avoid changing the item numbers. You can always fall back on the “Reserved” designation if you decide to remove something, or add a subpart (with a letter behind it) to an item number to keep the list in order.

*Continued on page 4*

## RPLS EXECUTIVE COMMITTEE HOSTS ANNUAL PLANNING RETREAT

The Executive Committee of the Real Property Law Section (“RPLS”) met in Augusta, Georgia, the hometown of Chair J. Noel Schweers, III, for a kick-off planning meeting for the section’s upcoming year. Brainstorming events spanned the weekend, including numerous breakout sessions for subcommittee meetings. Goals and actions for the upcoming year were discussed and debated during the general meeting of the members. Officers for the 2011-2012 term of the Committee, in addition to Schweers, include Chair-Elect, Peter L. Lublin, Norcross, and Secretary/Treasurer Jeffery H. Schneider, Atlanta. A current list of RPLS Executive Committee Members can be found on the section’s website at ([www.garealpropertylaw.com](http://www.garealpropertylaw.com)).

Members of the Real Property Law Section are encouraged to contact members of the Executive Committee with questions, comments or concerns. The purpose of the Executive Committee is to create a board made up of representatives of the RPLS general membership in order to assist in the advancement of the interests of the section with the State Bar, legal community and Legislature.



*Members of the Executive Committee Come Together in Augusta, Georgia for their annual planning retreat.*

*Continued from page 3*

**Identify Responsible Parties, Deadlines and Status.** Include several columns in the checklist to keep track of who will be responsible for obtaining, drafting or reviewing each item, important deadlines and a status. The description of the parties at the beginning is a great place for creating abbreviations to use here.

Space can be an issue when you attempt to gather and track a large amount of information on the checklist. Be brief, and use the landscape format to create more room if you need it. If you plan to use the checklist as a form for a table of contents later, you can simply delete these extra columns and switch it back to portrait.

*Tip: You can assemble a deal book as the deal progresses using the checklist numbers. Keep a separate expandable file with folders for each item number, and fill each item as you go. (For the tech savvy, scan items into electronic folders numbered to match the checklist.)*

**Using the Checklist.** The checklist provides a good tool for organizing pre-closing conference calls and making them productive. Circulate an updated checklist before each scheduled call, and use it as the call agenda. Then send everyone an update after the call as a reminder of the tasks to be accomplished. Consider updating it with a blackline program so the updates stand out.

*Tip: Add your client's logo (along with your own) to the top of the checklist.*

**Caution About Confidentiality.** Bear in mind that parties other than your client may use or see the checklist, and exclude confidential information. Typically, the purchaser and its lender will use a common checklist to prepare for closing. Since this document is shared with a non-client, it may not have the protection of attorney-client privilege.

You may wish to develop a separate checklist to use exclusively with your client to keep track of other details. In that case, be sure to include a prominent reference at the top to remind everyone it is confidential and attorney-client privileged. You also should caution the client about sharing it with third parties, which could remove the privilege.

**Updating Your Checklist Form.** As with any good real estate form, the checklist much change with the time. New trends in the industry can add or remove items on the checklist. For example, several years ago we added a reminder about providing a title search chain sheet to the environmental consultant to address the new environmental site assessment standards.

Without plagiarizing, you also can incorporate ideas from other attorneys as you encounter them in transactions.

**Secure Your Form.** No doubt, each of us has lost a favorite form when someone used it for a project without saving it as a new document. The technical means of protecting documents from accidents like this well beyond the scope of this article, and the author's knowledge. However, some simple measures work

nicely. You can email a copy of the clean form to yourself and keep the message in a forms folder in your email program. You also can set up a forms folder on your desktop (the one on your computer), to keep your go to forms handy.

Organizational tips can make or break a practice. Creating good habits now will lead to successful and organized transactions for many years to come.

---

## RECENT RPLS SPONSORED CONTINUING EDUCATION EVENTS ARE GREAT SUCCESS

The RPLS recently sponsored, in conjunction with ICLE of Georgia, two highly attended real estate educational events. On October 5, 2011, RPLS Executive Committee Member, and Chair of the Title Standards Committee of the RPLS, Scott Logan, hosted the Title Standards Seminar at the State Bar headquarters. This event was attended by over 110 participants, and showcased a number of members of the RPLS, and its Executive Committee, including past Chair, Bill Dodson. Participants were instructed on recent legal and practical developments in the Title Standards area. The Title Standards can be found in a printable version on the RPLS website at [garealpropertylaw.com](http://garealpropertylaw.com).

On November 4th, 2011, the Real Property Foreclosure Seminar was held at the GPTV studios in Atlanta and broadcast throughout the state. The replay on November 10th, 2011, raised the number of participants statewide to over 190. This increasingly popular seminar provided updates on many areas which affect the Real Property foreclosure world. Speakers ranged from real estate agents providing opinions regarding the ins and outs of short sales, to third party investors and practitioners, to the traditional "Foreclosure from A to Z". Attorney Todd M. Westfall was the coordinator and Chair of the event.

---

## LENDERS, TENANTS AND SNDA-TOOLS FOR OUR CURRENT ECONOMY

*Jonathan J. Hunt, Esquire  
McKenna Long & Aldridge LLP, Atlanta*

The importance of a Subordination, Nondisturbance and Attornment Agreement ("SNDA") is well known by most lenders but many tenants have not completely understood the impact such an agreement can have. However, the staggering amount of loan defaults and foreclosures in the current financial climate have raised the awareness of many tenants. When a landlord defaults under its loan and its lender forecloses the property, a tenant's right to possession of, and the protection of its' monetary invest-

*Continued on page 5*

*Continued from page 4*

ment in, the leased premises is often dependent on the existence of an SNDA and the terms contained therein.

The parties to an SNDA often find it very useful as without an SNDA, the priorities of the lender, landlord and tenant would be determined on the basis of a “first in time” priority. The parties can contractually agree in an SNDA, how to control the effects of a foreclosure, refinancing or sale of the secured and leased property based upon their respective business objectives. A tenant that has notice of an existing mortgage (including, constructive notice derived from recordation of the mortgage in the public records) will be subordinate to the lien of the mortgage and lender’s rights. However, a lender which has notice of an existing lease (including, constructive notice derived from recordation of a memorandum of lease in the public records) will be subordinate to the terms of the lease, and therefore a foreclosure will not foreclose the rights of the tenant. As such, without an SNDA in place, the effect of a foreclosure, refinancing or sale of the secured and leased property on the rights and interests of the parties would not be determined by the reasoned business judgment of the parties.

### **I. What Is SNDA?**

An SNDA is an agreement which the lender, landlord and tenant often employ to resolve how their rights will intersect. As its name implies, a SNDA will subordinate a tenant’s lease and leasehold interest to the rights of the lender, provided that tenant’s occupancy of the leased premises will not be disturbed (even if landlord defaults on its loan and the landlord’s lender forecloses the mortgage or deed of trust) and so long as the tenant will attorn to (i.e., confirm privity of contract by agreeing to continue as tenant of the new landlord) the foreclosing lender or a third-party purchaser. Additionally, a SNDA is often used to confirm or modify terms of the lease, which a lender (at the time the lease was executed) may not have had an opportunity to review or comment upon. Below is a brief discussion of the key elements of a SNDA.

#### **A. Subordination**

Subordination is an agreement by a tenant that the lease and its leasehold interest in the leased premises (which is all or a portion of the collateral securing the loan) is junior or inferior to the landlord lender’s mortgage or to the lien of the mortgage. If a tenant subordinates the lease and its leasehold interest to the mortgage itself, then the tenant will be subject to the terms and conditions contained in the mortgage documents, which may be contrary to the negotiated terms of the lease. However, if a tenant subordinates the lease and its leasehold interest to the lien of the mortgage, then only tenant’s possession is subordinated and therefore the negotiated terms of the lease will control, subject to any modifications set forth in the SNDA.

#### **B. Nondisturbance**

This is a contractual agreement by the lender not to disturb tenant’s possession of the premises under the lease in the event of landlord default under the loan and a subsequent foreclosure. Even in the most basic SNDA, tenants should require a nondisturbance agreement from a lender in exchange for the subordination of the lease and tenant’s leasehold interest to the mortgage or the lien of the mortgage. Typically, most lenders will grant nondisturbance to non-defaulting tenants in return for a contractual subordination.

#### **C. Attornment**

An attornment is the process by which the tenant agrees to recognize the lender, foreclosure transferee or other purchaser as the new landlord under the terms of the lease after the foreclosure is completed. The attornment provision of a SNDA creates the direct privity of contract between the lender, foreclosure transferee or other purchaser and the tenant under the lease. Tenants should note that many lenders use the attornment provision as a means to create additional provisions governing the relationship between tenant and lender, a foreclosure transferee or other purchaser. The intent of lenders is, upon a foreclosure, to allow lender (or other purchaser/transferee) to take over landlord’s position in the property without inheriting, needing to account for or risking loss or expense related to problems or obligations of the prior landlord. A list of commonly requested lender SNDA provisions is set forth in Section III of this article. All of these provisions are intended to allow a lender upon foreclosure (or another purchaser at foreclosure or in lieu of foreclosure) to take over the landlord’s position in the property without inheriting the problems or obligations of the prior landlord.

### **II. Why Can’t SNDAs Be Easier?**

Initially, a SNDA may seem to be a relatively intuitive and straightforward agreement. However, the objectives of the parties in a SNDA are often in violent opposition to each other. For instance, a lender’s goal in negotiating a SNDA is to try to limit its lease obligations as much as possible, while the tenant endeavors to protect as many of the rights it negotiated in the lease. Also, typically the parties leave the negotiation of SNDAs to the end of the lease negotiation process or the conclusion of finalizing a commercial real estate loan. As such, the SNDA receives a low level of priority among the parties.

#### **A. Tenant Considerations**

Often, an existing tenant may be asked to execute an estoppel certificate and SNDA that it feels is overreaching. Typically, most tenants want to be left alone to operate their business and are willing to execute any SNDA that confirms any provisions requiring subordination that are already in the lease and in order to ensure the lease will not be disturbed in the event of a foreclosure. Most tenants have no interest in executing most of the waivers or clean-up items set forth in Section III below. However, well-informed tenants understand that the first six items from Section III are commonly included in SNDAs, recognize the same are often already included in the lease if mortgage was in place prior to the lease. Typically, a tenant is being offered a SNDA after the lease has been executed, and the vague or imprecise drafting of SNDA provisions in the lease, related to tenant’s obligation to subordinate and attorn to lender, leaves room for a tenant to argue that all or portions of mortgagee’s form of SNDA is overreaching.

#### **B. Landlord Considerations**

Typically, the landlord’s governing consideration is to get the deal signed, whether it is the lease or the loan. Unfortunately, this creates a posture of the landlord acting as the middle man and landlords often need to “keep the peace” between its lender and tenant during the negotiation

*Continued on page 6*

*Continued from page 5*

of a SNDA. The landlord may be required, by specific loan covenants, to procure prior to funding, certain commitments from its tenant including, among others, obtaining a SNDA and estoppel certificate. Even if the landlord is not required by the loan documents to procure a lender-favoring SNDA from the tenant (or if landlord doesn't currently have a mortgage covering the property), a savvy landlord will include language to address the anticipated requirements of any current or future lender. In this situation, landlords should understand the thought process and considerations of lenders

### C. Lender Considerations

A lender's review of the creditworthiness of the landlord will include a careful examination of the value of the property as collateral. The property's value, in turn, will be determined in large part by the revenues generated from the tenant leases on the property. As such, a lender will take lease revenues into account in the valuation. Additionally, the lender will require assurances that the revenues will both remain in effect for a substantial period of time and will be available to it or a prospective foreclosure purchaser in the event that the landlord defaults in its loan obligations.

In addition to other items, the lender will look for any lease provisions providing for automatic subordination and attornment obligations of the tenants, and for any obligations of the tenants. As such, lenders will require that the landlord procure the tenants' signatures on the lender's own (required or preferred) form of subordination and attornment agreement. One should note that lender's desire is for a "subordination and attornment" and not a "subordination, non-disturbance and attornment".

The lender's goals are to (1) re-prioritize the leases into either fully subordinate or electively subordinate positions relative to the deed of trust to be recorded and any subsequent modifications and/or extensions thereof and (2) ensure that the tenant recognizes the lender or any purchaser at foreclosure or deed in lieu transaction. Lenders often do not offer nondisturbance language as a part of the subordination and attornment agreement unless required to do so by tenant. This sets up part of the tension in the negotiations between the lender and the tenant.

In an effort to expedite matters, landlords and lenders will try to attach a form of subordination, nondisturbance and attornment agreement at the time the lease is executed. Often, the landlord will re-finance with another lender that will not accept the form, the lender's own requirements will change or lender will attempt to have the tenant sign a more pro-lender document than the tenant is required by its lease to sign. Additionally, lenders will have other objectives in modifying the rights of tenants in a SNDA. Most lenders view the attornment components of SNDAs as a method of adding other provisions to control the lender-tenant relationship in the event lender succeeds to landlord's interest following a foreclosure. A list of some commonly requested lender provisions are listed in Section III below.

### III. Commonly Requested Lender SNDA Provisions

1. Tenant waiver of claims against the lender for landlord defaults that occurred under the lease prior to foreclosure;
2. Tenant waiver, as to the lender, of any offsets or defenses that the tenant may have against any prior landlord;
3. An agreement that the tenant will give the lender notice of any default under the lease and will permit the lender some additional time to cure the default (often tenants can successfully limit the cure period to an amount of time that is coterminous with the landlord's cure period in the lease);
4. A prohibition against any assignment or subleasing without the lender's prior written consent;
5. A statement that the lender will not be responsible to return any security posted with the prior landlord unless actually received by the lender; and
6. A statement that the lender will not be bound by lease amendments and rent reductions made without the lender's prior approval (often tenants are able to successfully limit this to amendments that effect base/minimum rent or the term of the lease).
7. Establishing that, notwithstanding any contrary provisions in the lease, all insurance proceeds from a casualty, and/or proceeds from a condemnation, will be applied first to the outstanding loan balance, as provided in the loan documents;
8. Seeking an indemnification from tenant against any liability that the lender may incur by reason of any environmental contamination on the leased premises caused by the tenant;
9. Establishing that tenant waives its right to demand completion of tenant and/or common area improvements or the payment of tenant improvement allowances;
10. Tenant waiving its right to a purchase option or the first right of refusal to lease additional space as set forth in the lease;
11. Tenant waiving its right to rent abatement in specified circumstances, or the right to terminate the lease prior to expiration of the term upon the occurrence of certain events; and
12. Tenant waiving its right to offset rent or raise defenses under its lease, even to the extent these rights against the landlord may arise subsequent to a foreclosure.

In conclusion, in our constantly unpredictable economic times, having the parties to contract keep in control of the terms of their transaction in the event of default is key. A SNDA is a useful tool to insure success for all parties. Clients will benefit from the same on a variety of levels and commercial practitioners will benefit from the protections it affords their clients.

## RPLS SEEKS FORMAL ADVISORY OPINION ON THE UNAUTHORIZED PRACTICE OF LAW ISSUE

Earlier this fall, the Real Property Law Section took steps to clarify the scope of Georgia attorneys' participation in residential real estate closings. Previously, in November, 2010, the Real Property Law Section requested a Formal Advisory Opinion ("FAO") from the State Bar to clarify the proper role of a Georgia attorney in a residential closing. As a follow up to that request, a formal presentation was conducted on October 12, 2011 with the FAO Board.

The FAO Board heard arguments as to whether to issue an advisory opinion on the requests filed by the Georgia Residential Closing Attorney Association (GRECAA) and the Real Property Law Section (RPLS) to clarify and address the professional liability of an attorney who participates in a non-supervisory capacity of a closing, i.e. – "witness only" closing.

Attorney Rob Brannen, Chair of the RPLS Section's Ethics Committee (and former UPL Section Chair), made the oral presentation to the FAO Board on behalf of the Section regarding whether such an opinion was needed. State Bar Past President Jeff Bramlett also made a presentation on behalf of the Georgia Residential Closing Attorney Association (GRECCA). Mr. Brannen did an excellent job explaining the confusion that still exists in the marketplace between attorneys, settlement providers and the public over the role of closing attorneys despite the previous opinions from the State Bar. Mr. Bramlett advocated preserving the attorney-only model that has been created within our state.

John Longstreth made a contrary presentation on behalf of ServiceLink. He argued against the issuance of an opinion. ServiceLink, which conducted over 9,000 closings in Georgia within the past year, argued they operated within the guidelines set forth in Georgia.

The meeting was attended by many RPLS Section and GRECCA members. An opinion addressing the UPL aspects of witness only closings was issued in 2003, but the ethical liability of the attorney was left open by the Supreme Court.

The FAO Board decided to accept the request for the drafting of a proposed opinion. RPLS will continue to monitor and advocate for clarity on this a very important issue and will continue to work to have the attorney's role clarified.

## UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION

— 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)

## 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**

**RPLS NEWSLETTER TO "GO GREEN"**

The Executive Committee of the Real Property Law Section is pleased to announce that beginning with the Summer 2012 Newsletter edition, the RPLS Newsletter will be provided to members solely in electronic format, via the email members have on file with the State Bar. The change from having both a printed paper version sent via mail, along with the electronic blast delivery, will save the section considerable monetary resources, while helping global efforts to conserve natural resources.

Reminders of the conversion will be published in the Fall 2011, as well as the Winter/Spring 2012 edition, of the Newsletter. If you do not receive the RPLS Newsletter electronically now, and wish to continue to receive it via regular mail, you may choose to do so. Simply send a written communication to RPLS Executive Director, Jeril S. Cohen, 2217 Donato Drive, Belleair Beach, Florida 33786, requesting that you continue to have the Newsletter mailed to you. Your request to continue to receive a copy of the Newsletter in written form will be accommodated by Ms. Cohen as a courtesy to you as a section member.

If there are any questions or concerns regarding this change in our procedure, please send them to RPLS Newsletter Editor Monica K. Gilroy, Dickenson Gilroy LLC, 3780 Mansell Road, Suite 140, Alpharetta, Georgia 30022 or via email at [mkg@dickensongilroy.com](mailto:mkg@dickensongilroy.com).