RPLS Newsletter Winter 2016[1]

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Comments from the Chair

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> "To me, a lawyer is basically the person that knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem the lawyer is the only person who has read the inside of the top of the box." -- Jerry Seinfeld [youtube.com]

As we once again come to the beginning of a new year, as real estate lawyers we should take this time to reflect upon one of the core values of our legal training-reading and knowing, as Jerry Seinfeld opines, the "rules of the game". For attorneys, these rules lead us in our profession; I encourage you to take a moment as we begin 2016 and re-read the State Bar Rules of Professional Conduct.

The basic distinction between ethics and professionalism is that rules of ethics tell us what we must do and professionalism teaches us what we should do. You already know from personal experience, unprofessional behavior comes in many different forms. Last year, a lawyer in Illinois was criticized by that state's review board for writing letters to opposing counsel and others using words such as "'fool, idiot, punk, boy, honey, sweetheart, sweetie pie and baby cakes." This same lawyer also

[1] Originally posted online at MyGaLaw, the previous website for RPLS.

asked correspondents to place their letters "'in that bodily orifice into which no sun shines". Clearly, not the way to play the game.

Although the most important rules of our profession, we often take ethics and professionalism for granted. As attorneys, we know they are there and often know a violation when we see one. But, as attorneys, we can never forget we are bound by these rules at the risk of our license. Over the last few years, the Real Property Law Section (RPLS) has worked tirelessly to address one of the most prevalent threats to our profession, the unethical behavior of those who engage in the unauthorized practice of law (UPL). The RPLS Ethics Subcommittee lead by our Chair Phil Wilkins, encourages all members of the section to report acts of UPL to the State Bar through the UPL portal on the RPLS website.

As real estate attorneys, we also need to remember our ethical obligations to zealously represent our clients, yet not lose our ability to be courteous and offer candor to other attorneys. At the Real Property Law Institute, which our Chair Elect Gayle Camp has organized in fine form to be held May 12-14 at the Omni Amelia Island Plantation, we will be privileged to have a national leading expert on Civility and the law present to our section. Civility is professionalism. Both professional and unprofessional behavior can be readily identified when witnessed.

Finally, our ethical and professional obligations as they relate to escrow and other funds must be shared with support staff. For our colleagues in the residential closing world, they have been subjected to the "New World Order" of rules promulgated by the Consumer Financial Protection Bureau (CFPB), the concept of "Know Before you Owe" under the TILA RESPA Integrated Disclosures. This era of "TRID" has pushed many practitioners to their limits, establishing new rules which replace long standing practices and create increasing regulations of our industry. We can never lose sight of how important training is for our support staff in regard to the new and old rules. Always take time to re-read the Ethics and Disciplinary Rules and Georgia Rules of Professional Conduct and discuss the same with your staff and associates.

Finally, let us not ever forget our obligations to the newer members of our profession. So often, the real estate legal world is a draw to young attorneys, hanging out their shingles, and making their way into the legal world on their own. Offer to mentor, formally or informally, new attorneys. Offer to be a sounding board; take them to lunch to offer an ear and don't ever hesitate to offer constructive thoughts to place younger lawyers on the path to ethical and professional success.

As always, I welcome the opportunity to speak with you as to your concerns, comments, suggestions or questions. Please contact me at **mkg@gilroyfirm.com** or call at 678 280-1922.

Thank you for this opportunity to serve you.

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After a wild finish, the Georgia Legislature passed House Bill 202 (HB 202) on the final day of the session, April 2, 2015. Despite a number of last minute add-on provisions to the so-called "Christmas Tree bill," the core of the forty-nine page bill makes a number of important changes to Georgia's real property tax system of assessments and appeals that benefit taxpayers. HB 202 was the result of over two years collaboration among representatives of boards of tax assessors, tax commissioners, county commissioners, and taxpayers' attorneys. The majority of the changes apply to appeals of 2016 property tax assessments and are outlined below.

I. Avenues of Appeal

Currently, appeals of real property tax assessments can be made to the county board of equalization,[1]binding arbitration,[2] a hearing officer for non-homestead properties valued over $1,000,000,[3] or if the taxpayer and board of assessors agree, directly to superior court.[4] There are no filing fees for appeals to the board of equalization or a hearing officer, but appeals to binding arbitration and superior court require the taxpayer to pay the superior court's filing fee for a general civil action.[5]

HB 202 makes several changes that will affect which avenue of appeal a taxpayer can select for the appeal of his 2016 property tax assessment. First, due to a successful constitutional challenge in one Georgia County, binding arbitration will be replaced with non-binding arbitration.[6] Further, the superior court filing fees for non-binding arbitration have been omitted. Second, the valuation threshold for hearing officer appeals has been reduced from $1,000,000 to $750,000 and wireless properties with an aggregate valuation of $750,000 may also take advantage of this appeal method.[7] Lastly, the filing fee for appeals to superior court has been reduced to $25.00.[8]

In addition to the reduction in the filing fee, further changes have been made to appeals to superior court. Most taxpayers file appeals in superior court after an initial hearing with either the board of equalization or a hearing officer.[9] In addition to paying the required superior court filing fees, typically exceeding $200.00 per appeal, the lack of clear deadlines in the statute often left taxpayers waiting months or years for the record of their appeal to be certified by the tax assessor to superior court. HB 202 imposes a new set of events and deadlines for appeals to superior court after January 1, 2016. First, the taxpayer and tax assessors will participate in a mandatory settlement conference within seventy five days of the notice of appeal being filed.[10] Failure to participate in the conference has negative consequence on each party: failure of the tax assessor to participate results in an automatic decision for the taxpayer; failure of the taxpayer to participate bars him from being able to recover attorney's fees later in the case.[11] Second, if the mandatory conference does not result in settlement, HB 202 clarifies that the taxpayer should file his notice of appeal and filing fees directly with the clerk of superior court.[12] Lastly, provisions for attorney's fee have been changed in HB 202. Prior to HB 202, if the appeal to superior court resulted in a final valuation of 80% or less of the valuation set by the board of equalization or hearing officer as to commercial property, or 85% or less of the valuation set by the board of assessors for other property, the taxpayer was entitled to recover reasonable attorney's fees and costs of litigation from the tax assessors.[13] HB 202 standardizes recovery of fees: a taxpayer can recover reasonable attorney's fees and costs of litigation if the final valuation of any property is 85% or less than the valuation set by the board of equalization, arbitrator, or hearing officer.[14]

II. Filing an Appeal

The deadline for filing an appeal of an annual assessment remains unchanged in HB 202: appeals are due within 45 days after the date that the tax assessors issue the annual assessment notice.[15] Beginning with appeals of 2016 assessments, a new optional appeal form will be made available to taxpayers, which will require the taxpayer to make an initial assertion of value of the property under appeal.[16] Such assertion may be amended by the taxpayer at anytime during the appeal process.[17]

Use of this new optional form could be advantageous to the taxpayer given another change in HB 202: new stricter deadlines on the tax assessors to review and timely certify the taxpayer's appeal to the board of equalization through the appeal system. Prior to HB 202, deadlines imposed on the board of tax assessors to review a taxpayer's appeal have been held by the Supreme Court of Georgia to be "directory only."[18] The effect is that some taxpayers wait months or years for their appeals to progress through the appeal system. HB 202 will require the board of tax assessors to adhere to new deadlines and the penalty for failing to make those deadlines is that the taxpayer's appeal is resolved with the taxpayer's asserted value becoming the final value for the tax year under appeal.[19]

Taxpayers with multiple properties may also benefit from a new provision that allows the taxpayer to consolidate all appeals of common ownership to the board of equalization, arbitration or a hearing officer in one hearing.[20] In addition, appeals to the superior court from such consolidated hearing will result in one civil action.[21]

Attorneys, agents and representatives of property owners in appeals will benefit from a stricter provision in HB 202 regarding notice of hearings. Beginning with appeals of 2016 assessments, all notices required under O.C.G.A. § 48-5-311 must be sent to taxpayer *and* his attorney, agent or representative when the taxpayer notifies the board of tax assessors of the representation.[22] Failure to comply with this new provision results in tolling any deadline imposed on the taxpayer until proper notice is given.[23]

III. Obtaining Information from the Board of Tax Assessors

HB 202 broadens the taxpayer's access to the board of tax assessor's information in several ways. First, HB 202 amends the provisions for requesting documents pertinent to property tax records in O.C.G.A. § 48-5-306(d) to include that, at the taxpayer's request, the board of tax assessors is required to give a description of the methodology used by the board of tax assessors in setting the property's fair market value.[24] In addition, actions to enforce this Code Section may be brought in superior court and attorney's fees and litigation costs are recoverable in some situations.[25]

Second, HB 202 gives taxpayers the right to interview an employee of the board of tax assessors regarding the valuation of their property.[26] The taxpayer can record the interview at their expense and the superior court has jurisdiction over enforcement of the new interview provisions.[27]

Lastly, HB 202 makes significant changes to requirements regarding information exchanged between the taxpayer and board of tax assessors prior to appeal hearings. Currently, regulations permit a party (taxpayer or board of tax assessors) to request information relating to the appeal prior to a hearing.[28] The exchange of information is optional and, practically speaking, includes no penalty for failure to provide the information in a timely manner. Beginning with appeals of 2016 assessments, the exchange of information prior to appeal hearings will be statutory and includes

more stringent penalties. For appeals to the board of equalization, parties are permitted (but not required) to request a list of witnesses, documents, or other evidence to be presented at the hearing from the other party.[29] Such information must be provided no less than seven days prior to the hearing and failure to do so results in an automatic continuance of the hearing or exclusion of the evidence.[30] For appeals to a hearing officers and arbitration, a required exchange of documents and evidence must occur at least seven days prior to the hearing to avoid a continuance or exclusion of the evidence.[31]

IV. Effect of Final Valuation from Appeal

HB 202 makes a substantial change to the application of the two-year lock following an appeal found currently in O.C.G.A. § 48-5-299(c). O.C.G.A. § 48-5-299(c) was enacted by the legislature to provide taxpayers relief following an appeal: unless certain factors were met, boards of tax assessors could not increase the valuation of a property above the final value determined as the result of an appeal for two years following the appeal year. The effect is typically a 'lock-in' of the final valuation for three tax years (the tax year appealed plus two additional tax years).

Beginning January 1, 2016, the 'lock-in' relief in O.C.G.A. § 48-5-299(c) will apply not only to any decision of a board of equalization, arbitrator or hearing officer, but also to any agreement or settlement reached by the board of tax assessors and taxpayer.[32] As a word of warning, O.C.G.A. § 48-5-299(c) still does not apply to valuation reductions by the board of tax assessors made after the board's initial review of an appeal and prior to the appeal hearing to the board of equalization or hearing officer.[33]

HB 202 restricts the application of the O.C.G.A. § 48-5-299(c) 'lock-in' in two new ways. These restrictions were implemented to address 'no-show' taxpayers—the problem of taxpayers filing appeals and not pursuing them and not appearing at hearings—and concerns that some taxpayers were abusing the 'lock-in' provision by filing appeals numerous times in successive years to effectively obtain a 'permanent lock-in' of value. First, the O.C.G.A. § 48-5-299(c) 'lock-in' will not apply if the taxpayer or his representative fails to attend the appeal hearing or provide the board of equalization, arbitrator or hearing officer with some written evidence supporting the taxpayer's opinion of value.[34] Second, if a taxpayer files an appeal within the O.C.G.A. § 48-5-299(c) 'lock-in' period of a previous appeal, the board of equalization, arbitrator or hearing officer may increase the valuation based on evidence presented by the parties at the hearing.[35]

Following a final determination of value, HB 202 will benefit taxpayers who owe additional property taxes to the county or municipal tax commissioner. Currently, taxpayers who elect to pay a temporary tax bill while their appeal is pending (typically 85% of the tax due as opposed to 100%), are charged interest of 1% per month, which begins accruing on November 15 of the taxable year, and was capped at $150.00 for homestead property at $5,000.00 for non-homestead property.[36] Taxpayers often complained to their county tax commissioner that the interest charges were unfair because there was little a taxpayer could do to expedite the board of tax assessors' review or setting of an appeal hearing. As a result of these concerns, HB 202 omits interest charges for taxpayers while their appeal is pending.[37]

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[1] O.C.G.A. §§ 48-5-311(e)(1)(A)(i), 311(e)(2).

[2] O.C.G.A. §§ 48-5-311(e)(1)(A)(ii), 311(f).

[3] O.C.G.A. §§ 48-5-311(e)(1)(A)(iii), 311(e.1).

[4] O.C.G.A. § 48-5-311(g)(1).

[5] As to appeals to arbitration, see O.C.G.A. § 48-5-311(f)(3)(A). As to appeals to superior court, see, e.g., Fitzpatrick v. Madison Co. Bd. of Tax Assessors, 292 Ga. 74, 76, 734 S.E.2d 397, 399 (2012).

[6] 2015 Ga. Laws Act 193 (HB 202), § 16 (to be codified as O.C.G.A. § 48-5-311(f)). See Lake Park Ltd., LP v. Lowndes Co. Bd. of Tax Assessors, CAFN 2013-CV-2313, in which the Chief Judge of the Southern Judicial Circuit held the binding arbitration procedure in the property tax Code to be unconstitutional.

[7] 2015 Ga. Laws Act 193 (HB 202), § 14 (to be codified as O.C.G.A. §§ 48-5-306(b)(2)(A)(iii)), and § 15 (to be codified as O.C.G.A. §§ 48-5-311(e)(1)(A)(iii), (iv), (e.1)(1)).

[8] 2015 Ga. Laws Act 193 (HB 202), § 16 (to be codified as O.C.G.A. § 48-5-311(g)(2)).

[9] After HB 202, appeals to arbitration will be nonbinding and dissatisfied parties may appeal to superior court.

[10] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at O.C.G.A. § 48-5-311(g)(1)(2).

[11] Id.

[12] The question of where to file fees, how much, and when has been litigated in a number of cases. See Fitzpartick, 292 Ga. 74, 734 S.E.2d 397 (2012); Fayette Co. Bd. of Tax Assessors v. Oddo, 261 Ga. App. 707, 583 S.E.2d. 537 (2003) *partially overruled by* Newton Timber Co., LLLP, v. Monroe Co. Bd. of Tax Assessors, 295 Ga. 29, 755 S.E.2d. 770 (2014).

[13] O.C.G.A. § 48-5-311(g)(4)(B)(ii).

[14] 2015 Ga. Laws Act 193 (HB 202), § 16 (to be codified at O.C.G.A. § 48-5-311(g)(4)(B)(ii)(III).

[15] As to appeals to the board of equalization, see O.C.G.A. § 48-5-311(e)(2)(A); as to appeals to an arbitrator, see 2015 Ga. Laws Act 193 (HB 202), § 16 (to be codified at O.C.G.A. § 48-5-311(f)(3)(A)); as to appeals to a hearing officer, see O.C.G.A. § 48-5-311(e.1)(4).

[16] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at O.C.G.A. § 48-5-311(e)(1)(A.1)).

[17] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at O.C.G.A. § 48-5-311(e)(1)(B.3)).

[18] See, e.g., Pope v. Bd. of Comm'rs of Fulton Co., 276 Ga. App. 121, 125, 622 S.E.2d 471, 475 (2005).

[19] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at O.C.G.A. § 48-5-311(e)(3)).

[20] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at O.C.G.A. § 48-5-311(e)(1)(B.4)).

[21] Id.

[22] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at O.C.G.A. § 48-5-311(o)).

[23] Id.

[24] 2015 Ga. Laws Act 193 (HB 202), § 14 (to be codified at O.C.G.A. § 48-5-306(d)(1)).

[25] 2015 Ga. Laws Act 193 (HB 202), § 14 (to be codified at O.C.G.A. § 48-5-306(d)(3)).

[26] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at O.C.G.A. § 48-5-311(h)).

[27] Id.

[28] Ga. Comp. Rule & Reg. 560-11-12-.02 (as to board of equalization appeals); Ga. Comp. Rule & Reg. 560-11-13-.02 (as to hearing officer appeals).

[29] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at OCGA § 48-5-311(e)(6)(A)).

[30] Id.

[31] For appeals to a hearing officer, 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at OCGA § 48-5-311(e)(6)(A)); for appeals to arbitration, 2015 Ga. Laws Act 193 (HB 202), § 16 (to be codified at OCGA § 48-5-311(f)(3)(C)(iii)).

[32] 2015 Ga. Laws Act 193 (HB 202), § 16 (to be codified at OCGA § 48-5-311(g.1)). The taxpayer and board of assessors may agree to waive this provision in writing. Id.

[33] Boards of tax assessors notify taxpayers of these reductions in value by what is commonly called a "30-day notice," called such because the taxpayer must respond to accept or reject the change in value within 30 days. Failure of the taxpayer to respond results in the reduced value becoming the final value for the appealed tax year—a final value to which O.C.G.A. § 48-5-299(c) does not apply. See O.C.G.A. § 48-5-311(e)(2) for board of equalization appeals. See O.C.G.A. § 48-5-311(e.1)(5) for hearing officer appeals.

[34] 2015 Ga. Laws Act 193 (HB 202), § 12 (to be codified at O.C.G.A. § 48-5-299(c)(1)).

[35] 2015 Ga. Laws Act 193 (HB 202), § 12 (to be codified at O.C.G.A. § 48-5-299(c)(3)). The valuation may also be decreased based on the evidence. Id.

[36] O.C.G.A. § 485-311(m)(2).

[37] 2015 Ga. Laws Act 193 (HB 202), § 15 (to be codified at O.C.G.A. § 48-5-311(m)(2)). Under HB 202, taxpayers will have an initial 60-day period to make their interest-free payment following the final determination of value. Once the initial 60-day period has expired, interest accrues from the original billing due date. Id.

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The Servicemembers Civil Relief Act (the “SCRA”), 50 U.S.C. App. § 501 *et seq.*, was enacted “to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.” 50 U.S.C. App. § 502(2). The SCRA is an expansion of the original Soldiers’ and Sailors’ Civil Relief Act (the “SSCRA”), and much of the case law interpreting the SSCRA is still applicable to the SCRA today. It applies to members of the armed forced and uniformed services who are currently on active duty, called to active duty for over 30 consecutive days to respond to a national emergency, in active service, or absent from such duty due to sickness, wounds, or leave. 50 U.S.C. App. § 511. It also applies the dependents and legal representatives of those protected by the SCRA. 50 U.S.C. App. § 519. Real estate attorneys should thus be mindful of the many provisions which can impact their practice.

The SCRA contains several provisions affecting mortgages. First, under 50 U.S.C. App. § 527, when a mortgage obligation was incurred before active duty, the interest rate is reduced to 6% during the period of military service and for the following year. To receive this reduction, the servicemember must provide written notice to the creditor, along with copies of the military orders, within 180 days of the end of the service period. The SCRA provides a mechanism by which the creditor can challenge this interest rate reduction, by showing that the servicemember’s ability to meet the interest obligation “is not materially affected by reason of the servicemember’s military service.”

Additionally, 50 U.S.C. App. § 533 provides protections against enforcement of mortgage obligations when they are secured by a security instrument, originated prior to the military service, and where the servicemember remains obligated. If the servicemember’s ability to meet its mortgage obligation is “materially affected by military service,” the court *shall* (if upon application by the servicemember) or *may* (if upon the court’s own motion) “stay the proceedings for a period of time as justice and equity require,” or “adjust the obligation to preserve the interests of all parties.” Such an action is required to be filed either during or within one year of military service. The SCRA expressly provides that a foreclosure instituted as a result of default of a mortgage obligation protected under this section is only valid “upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court,” or alternatively, upon a written waiver by the servicemember, subject to the requirements of 50 U.S.C. App. § 517(a). The SCRA provides for criminal penalties for violations of this section.

When civil litigation is filed involving any party that is protected by the SCRA, and the servicemember has received notice of the pending litigation, the court *shall* (upon application by the servicemember) or *may*(upon the court’s own motion) stay the litigation for a minimum of 90 days, subject to the conditions in 50 U.S.C. App. § 522. The court has some discretion in determining whether the military service does “materially affect” the servicemember’s ability to participate in the litigation. *Cox v. Yates*, 96 Ga. App. 466, 466, 100 S.E.2d 649, 651 (1957); *see also Mays v. Tharpe*

& Brooks, Inc. "As a general rule, however, the trial court should grant a stay unless something appears sufficient to show that the rights of the serviceman, as a litigant, will not be materially affected by a determination of the pending litigation." *Shelor v. Shelor*, 259 Ga. 462, 462, 383 S.E.2d 895, 896 (1989) (citing *Parker v. Parker,* 207 Ga. 588, 589(2), 63 S.E.2d 366 (1951)).

Once the court has determined that the servicemember is "materially affected" by their military service as to compliance with a civil court judgment before, during, or within 90 days of the period of military service, the court *shall* (upon application by the servicemember) or *may* (upon the court's own motion) either stay or vacate such judgment, pursuant to 50 U.S.C. App. § 524. A stay under the SCRA may be ordered for the duration of the period of military service and the following 90 days, or set for a timeframe within that period. 50 U.S.C. App. § 525(a). The SCRA also mandatorily tolls applicable statutes of limitation by expressly stating that "[t]he period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court . . ." as well as other legal proceedings. 50 U.S.C. App. § 526(a); *see Newman v. Newman*, 234 Ga. 297, 298, 216 S.E.2d 79, 80 (1975).

Furthermore, 50 U.S.C. App. § 521 specifically protects servicemembers from default judgments. When civil litigation is commenced and the defendant servicemember fails to make an appearance, the plaintiff is required to file an affidavit either with factual support to show whether or not the defendant is currently in military service, or stating that the plaintiff is unable to determine whether the defendant is in military service. If the court is unable to determine whether the defendant is protected by the SCRA, it may require the plaintiff to file a bond to indemnify the defendant against loss or damage as a result of an adverse judgment. If the court determines that the SCRA applies, the court must appoint an attorney to represent the servicemember. In the event that the court-appointed attorney is unable to locate the servicemember, the actions taken by the attorney do not bind the servicemember, nor do they waive any available defenses. Furthermore, under 50 U.S.C. 525, the court-appointed attorney or the court itself may move for a minimum 90-day stay, upon the court's determination that a defense may exist which requires the presence of the servicemember, or that the court-appointed attorney either has not been able to reach the servicemember or determine whether a defense exists. The court may also vacate a default judgment entered during a period of military service, or within 60 days thereafter, if "was materially affected by reason of that military service in making a defense to the action; and the servicemember has a meritorious or legal defense to the action or some part of it." The servicemember (or his court-appointed attorney) must move to vacate or set aside judgment within 90 days of the end of the period of military service.

In sum, while the SCRA has limitations in its applicability, the overarching purpose and guiding principles call for it to be construed in favor of the protected individuals. Thus for litigation and foreclosure related purposes, it is imperative to determine whether the SCRA is applicable to any affected parties, in order to avoid the high costs of violating the Act. Additionally, it is recommended to seek a waiver or agreement from the servicemember when possible to avoid the high costs and lengthened timelines triggered by SCRA protections.

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Restrictive covenants on the use of land, contractual in nature, govern a wide array of land use issues, some mundane, some going to the heart of fundamental property rights, and many others falling on the spectrum between. The covenants which govern a community association are typically found in a declaration which has been recorded in the county land records. They may dictate, for example, whether commercial activity is permissible within a residence, whether, how and when leasing of a home is allowed, and whether firearms may be used under any circumstances in a neighborhood. Covenants frequently restrict the number of occupants who may reside at a private residence, and the types of structures that may be erected or installed on the land. These restrictive covenants also commonly dictate everyday residential matters: the permissible locations of trash cans and garden hoses. They control aesthetic matters: acceptable exterior paint colors, window dressings, fences, and building materials. They typically also indicate the general maintenance requirements of the exterior of the residence and the land.

A community association's Board of Directors is charged with enforcement of the restrictions, and generally has the power to levy fines against offenders. The Board will collect on the fines in the manner of collecting assessments, but the statute of limitations on enforcement of the underlying covenant violation is relatively brief, at only two years. Consequently, when a Board seeks to enforce these restrictive covenants, it must develop a theory of the inception of any such violation. To benefit from the longest possible window of time to enforce a covenant, the critical analysis concerns the accrual of the two-year statute. However, case law providing guidance on the accrual of the statute of limitations is scant and conflicted. The judiciary has struggled to carve out exceptions which will lengthen the accrual of the two-year statute and which can be applied coherently to the myriad fact patterns provided by restrictive covenants.

The statute of limitations, which is set forth at O.C.G.A. § 9-3-29, is clear enough. It provides as follows:

> (a) All actions for breach of any covenant restricting lands to certain uses shall be brought within two years after the right of action accrues, excepting violations for failure to pay assessments or fees, which shall be governed by subsection (b) of this Code section. This Code section shall apply to rights of action which may accrue as a result of the violation of a building set-back line.
>
> (b) In actions for breach of covenant which accrue as a result of the failure to pay assessments or fees, the action shall be brought within four years after the right of action accrues.
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> (c) For the purpose of this Code section, the right of action shall accrue immediately upon the violation of the covenant restricting lands to certain uses or the violation of a set-back line provision. This Code section shall not be construed so as to extend any applicable statute of limitations affecting actions in equity.

The language is seemingly unequivocal: "the right of action shall accrue immediately upon the violation of the covenant restricting land to certain uses."[1] Thus, we would expect that the right of action accrues when the violation first occurs (after all, the statute says, "immediately"), and expires two years later. Under this straight-forward approach, suits brought any later than two years from the inception of the violation would be time-barred.

The Georgia Court of Appeals, however, has construed the statute in a more nuanced fashion. The Court has essentially created two categories of covenant violations for purposes of determining the

accrual of the statute of limitations. If the covenant violation involves the erection of a "permanent fixture," the unequivocal language of O.C.G.A. § 9-3-29(c) will apply, and the cause of action will accrue immediately upon the erection of the violating fixture.[2] Note that "anything which is intended to remain permanently in its place even if it is not actually attached to the land is a fixture which constitutes a part of the realty and passes with it."[3] By purported contrast, if the covenant is violated through "separate and distinct repetitive acts," the cause of action does not accrue immediately upon the first instance of the violation.[4] Instead, the "continuing violation" rule is employed, in which the cause of action accrues *each time* the distinct act occurs that violates a covenant. As a result of this binary system of classifying restrictive covenant violations, litigants have been forced to shoehorn any particular covenant violation they wish to challenge or assert into one of the two categories. Hybrid and outlier fact patterns, unfortunately, have eluded predictable outcomes.

Several hypotheticals demonstrate the difficulty in applying the current law.

1. A condominium association limits the types of animals that may be kept as pets to cats, dogs, and "generally recognized household pets." John Smith has kept a capybara at his unit since January 1, 2012, in violation of the covenant. Bringing home a capybara is not the same as erecting a permanent fixture. However, the presence of the pet is not exactly a "separate and distinct repetitive act" either. As neither category is apt under these facts, when does the statute of limitations on the violation accrue? (Note that the same analysis should apply to leasing violations).
2. A group of townhomes with a homeowners association requires each owner to maintain and repair his or her portion of the roof as necessary. A hail storm occurred in February of 2011, damaging Jane Doe's roof, which remains in disrepair to date. The violation does not concern the *erection* of a permanent fixture, though the roof itself may be a fixture. Does Jane's *failure* to act to repair the roof over time amount to "separate and distinct repetitive acts?"
3. A homeowners association prohibits the erection of signs without prior written approval of the Board, other than "for sale" signs and signs with political content. On March 1, 2012, without approval of the Board, Dan Jones erects a sign in his front yard that says "Apocalypse Ahead." Initially unsure whether the sign amounts to political content, the homeowners association fails to send a notice of violation until March 1, 2015. The sign is not a legal fixture. However, the presence of the sign is not a "separate and distinct repetitive act," either. Has the statute run? (Note that the same analysis would apply to abandoned personal property, such as a trailer or inoperable vehicle).

How did these awkward categories concerning "permanent fixtures" and "distinct repetitive acts" evolve out of seemingly plain statutory language? The Court of Appeals initially rejected application of the continuing violation theory to restrictive covenants in *Helmley v. Liberty County*,[5] In that case, a property owner, Huey Jeffers, began a commercial fishing operation on his property within months of the purchase. He operated the business without any complaint for twenty years. Following a rezoning decision by the county which expressly permitted commercial activity, Jeffers' neighbors filed suit against Jeffers and the county, challenging the zoning decision and seeking to enforce a covenant restriction against commercial use found in the deed transferring title to Jeffers. [6] The neighbors contended that the on-going fishing business represented a continuing violation of the restrictive covenant, but the Court disagreed, found that the claim was time-barred, and held that the continuing tort theory was inapplicable.[7] In so holding, the Georgia Court of Appeals pointed to the Supreme Court of Georgia's precedent, which holds that "the continuing tort theory . . . is not applicable to cases which involve only property damage." [8]

The currently employed binary classification of covenant violations began with the case of *Black Island Homeowners Ass'n v. Marra.*[9] In *Black Island*, a homeowners association had promised, through a restrictive covenant, to set aside certain areas on an island to remain pristine and undeveloped.[10] A property owner sued the association for repeatedly mowing those areas which it

had promised to leave undisturbed. The association argued that the mowing began in the 1970s, and the statute had run. The Court disagreed with the association, and held that each instance of mowing was a distinct breach each time it occurred, thus each instance triggered the running of the statute of limitations anew. The *Black Island* court characterized the fishing operation in *Helmley* as "a permanent fixture," and contrasted it with a covenant violation, such as repeated mowing, that involves "distinct acts." [11]

A hybrid fact pattern was presented in *Marino v. Clary Lakes Homeowners Ass'n.*[12] In Marino, a homeowners association sued to enforce a covenant which prohibited owners from using a garage for storage rather than parking vehicles. The homeowners had used their garage for storage since the time they moved into the home; the covenant restricting the use was adopted subsequently, and the lawsuit was filed five years after the adoption of the covenant. The question presented was whether the use of the garage for purposes other than parking (which the previous homeowners had also done), was akin to the use of the property for commercial purposes as in *Helmley*, thus, triggering the statute of limitations immediately upon the violation, or, whether each distinct act of parking a car in the driveway was akin to the distinct acts of mowing present in *Black Island,* allowing the continuing violation rule to apply. The Court of Appeals ruled that because the case did not involve a "permanent fixture" the continuing violation rule applied. The cause of action accrued anew each time "an owner fails to park his vehicles in his garage under circumstances where storage prevents garage parking." [13]

The reasoning in *Marino* is notable in that it appears to have transformed the continuing violation rule from the exception into the general rule. Whereas *Black Island,* as guided by the holding in *Helmley*, demonstrated that the application of the continuing violation rule would be the exception and not the norm, *Marino* turned such an assumption on its head. *Marino* limited the clear statutory language of O.C.G.A. § 9-3-29(c) -- which plainly requires that a cause of action accrue "immediately" upon a covenant violation -- to those covenant violations concerning "permanent fixtures." In other words, following *Marino*, it appears that if a covenant violation does not clearly involve a permanent fixture, the continuing violation rule will extend the accrual of the statute of limitations.

The aptness of applying the continuing violation theory in the context of restrictive covenants was questioned in *S-D RIRA, LLC v. Outback Prop. Owners' Ass'n*,[14] In that case, S-D RIRA ("RIRA"), a property owner, used the association's private roads to access its own land, in alleged violation of a restrictive covenant. The association sued for an injunction to prohibit the use, which the trial court granted. RIRA argued on appeal that because it had used the road since 2008, the statute of limitations on enforcement of the covenant had run. The association cited the continuing violation theory employed in *Black Island* and *Marino*, and argued that each time the road was used, the statute began anew.

The majority opinion, written by Judge Elizabeth Branch, cited reservations about the use of a concept rooted in tort law to restrictive covenants which are contractual in nature, and noted that *Black Island* and *Marino*represented both a departure from previously established law and a conflict with the express language of O.C.G.A. § 9-3-29(c). The majority opinion advocated overruling *Black Island* and *Marino* insofar as they apply the continuing violation theory to restrictive covenants. But the opinion received only six votes, one short of the necessary concurrence of a majority to overrule a previous decision. Thus, the continuing violation theory remains good law in this context, and the special concurrence, written by Judge Anne Barnes (who also wrote the majority opinion in *Marino*)*,* is the portion of the opinion most likely to be quoted for the root concepts in this area of the law.

As in *Marino*, the special concurrence in *S-D RIRA* states as the starting point for the analysis the notion that "a right of action based on a covenant violation caused by a permanent fixture accrues when the violation first results."[15] The corollary which next flows from this premise is asserted as follows: "where the right of action is based on a covenant violation caused by distinct and separate repetitive acts rather than by a permanent fixture … the right of action 'accrues each time the distinct and separate act that constitutes an alleged breach occurs.'" [16] Thus, the special concurrence seems to cement the notion established in *Marino*that the continuing violation theory, which extends the accrual of the statute of limitation, despite the plain language of O.C.G.A. § 9-3-29(c), applies to all covenant violation cases except those in which the violation is "caused by a permanent fixture."

Applying the *Marino* majority and the *S-D RIRA* special concurrence analysis to our hypotheticals shows how far the case law has reached beyond the plain language of the statute. No longer does the right of action "accrue immediately upon the violation of the covenant."[17] More likely, each day that the capybara stays in John's unit, each day that Jane allows her roof to remain in a state of disrepair, and each day that Dan's doomsday sign remains in his yard, the statute begins anew. That is because none of those fact patterns squarely involve violations "caused by permanent fixtures." Even Jane's unrepaired roof which itself is a fixture fails to fit the mold. It was not the erection of a new fixture that caused the violation, as occurred in *Helmley*, but Jane's inaction as to a pre-existing fixture that is the violation. Yet, none of these covenant violations truly concern the "separate and distinct repetitive acts" like the mowing of land found in *Black Island* that first justified the application of the continuing violation theory in this context.

Boards of Directors of associations and their attorneys may applaud the apparent expansion of their enforcement powers, all the while struggling to make the very common outlier fact pattern make any sense under the law. *Marino* and *S-D RIRA* have firmly planted the artificial binary between "permanent fixtures" and "separate and distinct repetitive acts." Moreover, under those precedents, the exception has fully swallowed the rule. Thus, in applying the law, we must torture our powers of description and shoehorn nearly any condition or thing on or in one's property – a pet, a tenant, a sign, a playset, a garden hose – except those that meet the definition of a legal fixture -- into an expression of "separate and distinct repetitive acts."

However, in *Marks v. Flowers Crossing Cmty. Ass'n, Inc.,*[18] the Court of Appeals subtly recast the special concurrence in *S-D RIRA*, and thus restored some of the pre-*Marino* balance to the original rule and its exception. The *Marks* case involved assorted covenant violations by a homeowner, including the erection of a fence and the installation of a new garage door without prior Board approval, failure to maintain window screens, and various other maintenance failures. The homeowner argued that the garage door and window screen violations were time-barred, while the association argued that the violations were chronic and repeated, and subject to the continuing violation theory. The Court of Appeals agreed with the homeowners. The *Marks* opinion cites the special concurrence of *S-D RIRA* with approval, noting that it, along with *Marino*and *Black Island* are good law. However, the *Marks* opinion carefully construes the *S-D RIRA* special concurrence to mean that the continuing violation rule applies *only* where there are separate and distinct repetitive acts giving rise to the cause of action, just as indicated by *Black Island*. "Thus, the continuing violation rule *does not apply in cases* involving fixtures*,* or *where no separate and repetitive act constituting the violation is shown*.[19] The original exception is once again the exception.

Though explicitly overruling nothing, *Marks* closes a gap, revealing the limits of the binary approach to classifying covenant violations. Indeed, following *Marks,* the statute has run on our Jane Doe's failure to repair her roof. *Marks* clarifies that violations involving the erection of a new fixture (such as the fishing operation in *Helmley*), as well as violations which merely "involve" an existing fixture (such as Jane's unrepaired roof), and violations involving something "in the nature of a fixture" (such as the window screens in *Marks*) all require application of the plain language of O.C.G.A. § 9-3-29(c), in which the statute accrues immediately upon the violation.[20] Moreover, under *Marks*,

covenant violations involving fact patterns with neither fixtures nor separate and distinct repetitive acts should also accrue immediately upon the violation. Thus, because the association has sat on its hands, John Smith will happily keep his capybara, and Dan Jones' neighbors must continue to consider, after all, the Apocalypse Ahead.

Correction: April 11, 2016 The author would like to thank L. Kelly Davis, Esq., who clarified Liberty County's involvement in *Helmley v. Liberty County*; the article has been edited to reflect that input.

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[1] O.C.G.A. § 9-3-29(c).

[2] *Black Island Homeowners Ass'n v. Marra*, 263 Ga. App. 559, 588 S.E.2d 250 (2003).

[3] O.C.G.A. § 44-1-6(a).

[4] *Black Island*, 263 Ga. App. 559.

[5] *Helmley v. Liberty County*, 242 Ga. App. 881, 883 (2), 531 S.E.2d 756, 759 (2000).

[6] *Id.*

[7] *Id.* at 883-84

[8] *Helmley,* 242 Ga. App. at 561; *see also, Corp. of Mercer Univ. v. Nat. Gypsum Co.,* 258 Ga. 365, 366 (2) (368 S.E.2d 732) (1988).

[9] *Black Island Homeowners Ass'n v. Marra*, 263 Ga. App. 559, 588 S.E.2d 250 (2003).

[10] *Id.*, at 561.

[11] *Id.*

[12] *Marino v. Clary Lakes Homeowners Ass'n.*, 322 Ga. App. 839, 747 S.E.2d 31 (2013), *rev'd in part on other grounds*.

[13] *Id.,* at 844.

[14] *S-D RIRA, LLC v. Outback Prop. Owners' Ass'n*, 330 Ga. App. 442, 765 S.E.2d 498 (2014).

[15] *Outback Prop. Owners' Ass'n.*, 330 Ga. App. at 514.

[16] *Id., citations omitted.*

[17] *See,* O.C.G.A. § 9-3-29(c).

[18] *Marks v. Flowers Crossing Cmty. Ass'n, Inc.*, 333 Ga. App. 476, 773 S.E.2d 814 (2015), *cert. applied for*.

[19] *Id.,* at 481, *emphasis added.*

[20] *Id.*

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Harris v. West Cent. Georgia Bank, A15A0819 (December 4, 2015) Boggs, J. writing for Doyle, C.J. and Phipps, P.J.

- Quiet Title Actions by LENDERS still ok; No word on quiet title actions by *pro se* debtors (so no hints on *Johnson, Ames* and *Montgomery*)
- Presenting the "Next Great Last Best Hope" of pro se debtors: deeds to secure debt without an underlying indebtedness are clouds on title.
- Reformation of a deed to secure debt on the basis of a mistake requires a mutual mistake common to both parties.

Have you ever had the experience that there you were, seated at church/temple/synagogue/mosque/wiccan circle and it seemed like the Preacher/Minister/Priest/Father/Rabbi/Imam/Good Witch was speaking directly to you with a special message tailored expressly for you? If a case was ever written, packed so full of tidbits to draw my interest, I've never seen one more full of title-related issues, subplots and *leitmotifs* than *Harris v. West Cent. Georgia Bank*. Indeed, this case is so full of sub-plots of undiluted clarity, it is my first-ever article to contain THREE titles (actually four if you count the first title like an interrogatory and include the subparts).

Likewise, if you are a *pro se* or a Debtor's counsel looking for the Next "Last Great Hope" to walk away with a free house (or at least stay in a free house as long as possible by escaping a motion to dismiss), *Harris v. West Cent. Georgia Bank* will give you a fleeting sense that "this might just actually work. There just might be a chance.[1]"

Standard Facts

Andy Harris, Philip Adcock and a third party (interestingly, not named in the opinion but from the looks of things, his or her first name probably began with the letter "W") formed APW Group, LLC and took out a loan from AgSouth Farm Credit. To get the AgSouth loan, the members of the LLC "could each put up property worth a hundred and [sic] fifty thousand dollars apiece." *Id*. at 4. However, according to Harris, only Harris actually pledged any property to secure the loan because Adcock and the third member "couldn't do that…[Harris] was the only one that had property that was paid for. So [Harris] put [his] property up to--to get this deal done." *Id.* So, Harris took back a deed to secure debt from Adcock to secure the $150,000 that Adcock *should have* put up for the loan. The Adcock to Harris deed to secure debt references that it is to secure a promissory note from Adcock to Harris in the amount of $150,000.00.

Non-Standard Facts

No money was exchanged between Harris and Adcock and there was no promissory note evidencing an underlying indebtedness for the security deed. Harris testified that the purpose of the deed to secure debt was to secure Adcock's performance to support Harris' pledge of collateral to AgSouth (remember the terms that AgSouth sought were either (i) that each of the three members would pledge $150,000 in property or (ii) that somebody would pledge $450,000 worth of property

and they didn't care who). A cancellation of the Adcock to Harris deed to secure debt was subsequently recorded although Harris claimed it was a forgery. In March, 2008, Adcock borrowed money from United Bank against Adcock's property and a security deed was recorded in April, 2008.[2] Adcock subsequently refinanced the United Bank loan with a loan from West Central Georgia Bank.[3] Adcock defaulted on the loan.[4]

After Adcock's default, West Central began foreclosure proceedings against the Adcock property. Harris sued to enjoin West Central and to set aside the allegedly forged cancellation of the Adcock to Harris deed to secure debt. West Central counterclaimed to quiet title and to have itself declared to be a first priority holder of a deed to secure debt.[5]

The Trial Court granted West Central's Motion to Dismiss Harris' complaint and granted West Central's counterclaim to cancel the Adcock to Harris Deed to Secure Debt as a cloud on West Central's title.

Adcock raised three issues on appeal:

First, that West Central could not bring an action to quiet title because failure of consideration is a defense to an action in contract and West Central was not a party to the contract between Harris and Adcock.[6]

Second, Harris argued that as a stranger to the contract between Harris and Adcock, West Central lacked standing to attack the contract between Harris and Adcock. If a light bulb just turned on over your head labelled *JOHNSON*, you get a gold star for paying attention. This is EXACTLY the question in *Johnson…*and *Montgomery…*and *Ames.*

Third, Harris argued that his "mistake" in identifying the "consideration" for the Adcock to Harris deed to secure debt should not invalidate the deed. To me, this argument misses the point as the deed almost certainly said it was for and in consideration of ten dollars and other good and valuable consideration. Georgia courts have repeatedly held that recited consideration is sufficient to support a contract. Thus, failure of consideration (or the misidentification of consideration), in my opinion, was not a clear winner. The better argument in my opinion, although it did not win the day, was that a deed to secure debt can secure PERFORMANCE of a contract and need not be used solely to secure the payment of a CASH indebtedness.

The Court of Appeals began the opinion by resorting to the Institutional Memory of Modern Real Property Law in Georgia, Dan Hinkel. "]A] deed purporting to secure a debt which never existed or which has been discharged is not a valid instrument and may be regarded as no more than a cloud on the title." *Id.* at 5-6 quoting 2 Daniel F. Hinkel, Pindar's Georgia Real Estate Law & Procedure, § 21:28 (6th e. 2004)(hereinafter referred to as "Hinkel's Pindar"[7]).[8] However, the statement, which is crystal clear in the undiluted clarity of its precise text, is pregnant with disaster for those who misread it.[9] Note very carefully that in this absolutely sublime and flawless work of art,[10] the sentence nowhere uses the words "nullity" or "ignored." Thus, it would be a serious mistake to read this quote to say "A deed purporting to secure a debt which never existed or which has been discharged is not a valid instrument and may be regarded as a nullity and ignored." The scourge of open loan deeds is still with us and was not done away with by this opinion.

Second, the Court of Appeals dealt with the issue of whether a deed to secure debt can be supported by only cash consideration or can a deed to secure debt secure the performance of a contract for some purpose other than the repayment of cash indebtedness. Going again to The Source,[11] the Court noted that while "the secured indebtedness is almost invariably a sum of money advanced by the grantee to the grantor," there are exceptions, as in the case of a deed to secure the performance of a lease or contract." *Id.* at 6 quoting Hinkel's Pindar, at § 21:29.

And thus we reach the reason that the Court opened the opinion with a reference to the standard of appeal following a bench trial. "On an appeal from an entry of judgment following a bench trial, we apply a de novo standard of review to any questions of law decided by the trial court, but will defer to any factual findings made by that court if there is any evidence to sustain them. [Nevertheless], if the trial court makes a finding of fact which is unsupported by the record, that finding cannot be upheld and any judgment based upon such a finding must be reversed." *Id.* at 1 quoting *Central Mortgage Co. v. Humphrey*, 328 Ga. App. 474, 475, 759 S.E.2d 896 (2014)(editing as in original).

Adcock testified that there was no note even though one was referenced in the deed to secure debt as the purpose for the deed to secure debt. In fact, there was no secured debt and the deed to secure debt was not to secure Adcock's performance under any contract with Harris. Harris, on the other hand, testified that the purpose of the deed to secure debt was to secure Adcock's performance under the APW operating agreement for each member of the LLC to pledge $150,000 worth of property for the AgSouth loan.

Judge Boggs replied to Harris' argument with undiluted clarity. "Had the parties intended the performance of obligations under the APW operating agreement to constitute consideration for the grant of a security interest in the property, they could have so provided." Id. at 6. We, at Undiluted Clarity, absolutely LOVE it when Judges talk like that.

The Court closed out the consideration/contract performance act in the play by noting that equity can reform contracts where there is a mutual mistake; but here there was not a mutual mistake. In fact, the exact opposite was true. The "mistaken consideration" issue was actually a material question of fact for determination by the fact finder.

Finally, the Court turned once again to the *Johnson/Montgomery/Ames leitmotif* in response to Harris' claim that as a stranger to the Harris-Adcock contract, West Central had no standing to assert a quiet title action.[12]Here, at Undiluted Clarity, we think that the Court of Appeals got it exactly right. A deed to secure debt which was an invalid instrument constituted a cloud on the Bank's title as first priority deed to secure debt holder. Thus, the Bank *did* have standing, not to challenge the underlying contract between Harris and Adcock as *pro se's* try to do under the *Johnson* ruling[13]. Rather, the difference between what the Bank did here and what the pro se's want to do under *Johnson*, is that here the Bank was attacking the actual deed that constituted a cloud on the Bank's title. What the *pro se's* want to do under *Johnson* is to attack the ASSIGNMENT between lenders and the FDIC (a contract to which the *pro se* is a stranger and therefore lacks standing to challenge) dressed up as a quiet title action. See *id.* at 7 directing the reader to see O.C.G.A. § 23-3-40 (proceeding to quiet title is sustained where any instrument casts a cloud over complainant's title). To be the same issue here, West Central would have had to have been attacking the operating agreement of APW (which the Bank here was not doing nor did the Bank here seem to consider to be relevant).

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[1] Lloyd: You mean "not good" like "one out of a hundred?" Mary Swanson [Samsonite]: I'd say more like "one out of a million." Lloyd: [grinning widely] So you're telling me there's a chance." *Dumb and Dumber*, New Line Cinema (1994)

[2] At this point, Dear Reader, you are right to wonder "How?"

[3] Again, Dear Reader, you are right to wonder "How?" Pure speculation: Remember at this point, the Adcock to Harris Deed to Secure Debt would have appeared to have been cancelled and thus no one would have contacted Harris to tell him anything about the Adcock to West Central closing

because there would have been no reason to.

[4] Actually, a standard fact, but it flowed better to put it here.

[5] This is NOT an equitable subrogation case as United Bank's deed to secure debt would have had the same problem.

[6] We do not know from reading the opinion whether West Central actually argued failure of consideration or whether they actually argued failure of indebtedness to support the deed to secure debt. These are two very different arguments at their core although they do have some similarity on the surface.

[7] Dan is a very gracious and modest person and no doubt winces at the title Hinkel's Pindar; but if we can have *Kaplan's Nadler*, we definitely should have *Hinkel's Pindar*. Plus, since I'm the one defining the Defined Terms...

[8] Dan graciously insists that this language was indeed George Pindar's and notes that the record should properly reflect that he has credited George Pindar with penning these exact words.

[9] That's why we are here at the Real Property Law Section Newsletter; to stop you from misreading things.

[10] "The first Matrix I designed was quite naturally perfect, it was a work of art, flawless, sublime…" Colloquy between The Architect and Neo, *The Matrix* , Warner Brothers (1999).

[11] While some saw the role of The Architect in the third film of the Matrix Trilogy as a "bad guy" character, I did not. Rather than the other characters who spoke in puzzles and riddles (the red pill or the blue pill?)(is Neo "The One" or is he not?), it was The Architect, who, with undiluted clarity, told us the number of The Ones there had been prior to "Neo" (5), why the original Matrix crashed (it was too perfect and did not allow humans some level of free will even at a subconscious (or unconscious) state), the purpose of The One (to disseminate code into the Main Frame) and who summarized The One's choice in the most clear terms possible (either (i) saving "Trinity" with the resultant extinction of all humans (including presumably both Neo and Trinity) or (ii) saving "Zion" and letting "Trinity" die). "Thus, either way, she is going to die." Accordingly, for fans of undiluted clarity (or for those who were hopelessly confused at this point in the third Matrix), The Architect should be viewed as a beacon of enlightenment rather than a "bad guy."

[12] For a thorough treatment of this issue, see our article in the Real Property Law Section Newsletter from Summer, 2015 *Johnson*: It's like *Reese* déjà vu all over again.

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You get what you pay for and don't get what you don't pay for; but if the borrower is willing to pay for it, why in the world wouldn't you get it?

Hines v. Holland, A15A1068 (October 30, 2015) Barnes, P.J. writing for Ray and McMillan, JJ.

Standard Facts

A non-attorney title examiner missed a loan deed in favor of Bank of North Georgia. Accordingly, the closing attorney did not pay off the Bank of North Georgia loan at closing. Bank of North Georgia started foreclosure. First American Title Insurance Company, which had issued a lender's and an owner's policy on the property paid off the loan.

First American then sued the closing attorney for malpractice. The closing attorney sought to "third party in" the non-attorney title examiner for contribution and indemnification.

The case took a very interesting twist when the non-attorney title examiner filed a motion to dismiss on the ground that since the title examiner was not an attorney, the title examiner could not be liable for any portion of the legal malpractice claim against the closing attorney. The trial judge granted the motion to dismiss. The Court of Appeals AFFIRMED the trial court's grant of the non-attorney title examiner's motion to dismiss.

The Court opened the opinion by explaining a central point, to wit **-** the closing attorney did not make a claim that the closing attorney was vicariously liable for the title examiner's omissions. Rather, the closing attorney claimed that the title examiner's error caused him to be professionally negligent and therefore the title examiner was subject to a claim for indemnity.

The Court clarified that while non-attorneys have an express statutory right to examine titles, only attorneys are allowed to render legal opinions as to the status of the title to real or personal property. *Id.* at 10 citing O.C.G.A. § 15-19-53. "Thus, an action for legal malpractice will lie against an attorney or law firm who issues a defective title examination or report, and this is true even when the defendant attorney does not personally perform the search, but merely reviews or approves the results." *Id.* citing *Old Republic National Title Insurance Co. v. Attorney Title Svcs., Inc.*, 299 Ga. App. 6, 682 S.E.2d 132 (2009).

The Court then issued two sentences of Undiluted Clarity: "[I]t is 'the attorney receiving the information or services [who] shall [at all times] maintain full professional and direct responsibility to his clients for the information and services received.'" *Id.* at 10-11 quoting O.C.G.A. § 15-19-54. **"Whether [the closing attorney] bases [the closing attorney's] opinion on information supplied to [the closing attorney] by non-attorneys or garners the information himself, [the closing attorney] is directly, rather than vicariously, liable for any claim of professional negligence arising out of the title examinations."** *Id.*at 11 (emphasis supplied).

The Court made special effort to explain that it was not putting non-attorney title examiners out of business. The Court also made special effort to explain that this particular non-attorney title

examiner was not putting all non-attorney title examiners, including themselves, out of business by "skating free" on this one claim. The Court noted that the closing attorney might have asserted a claim based on the existence of a warranty. *Id.* at 12, ft. 7. The Court specifically cautioned that its opinion "should not be read as holding that [the closing attorney] has no viable claims against [the title examiner] based on the title examination and report at issue…" *Id.* at 13. Indeed, the Court specifically stated that "we expressly decline to address this issue." *Id.*

The Court gave three examples of actions that might be brought against the non-attorney title examiner, to wit -breach of warranty, breach of contract as to the title examination and breach of contract as to the title report. In this case, the closing attorney did not appear to have had a written contract with the non-attorney title examiner (the Court mentioned it but did not dwell on the fact that there was only a verbal contract); but no one denied that the non-attorney title examiner had been paid a fee on the basis of some understanding between the closing attorney and the non-attorney title examiner. The Court ruled that the closing attorney in this action improperly sought to tender a substitute defendant by making a third party claim rather than asserting an independent action against the non-attorney examiner and then moving to consolidate the two separate actions into one in the interest of "judicial economy." In essence, the attorney should have asserted "liability over" against the non-attorney title examiner rather than attempt to "third party in" the non-attorney title examiner.

Lessons For Closing Attorneys

1. If a closing attorney uses a title examiner who is an attorney, you become the client and the title attorney becomes liable to the closing attorney for professional malpractice. Thus, for the difference in cost between the attorney title examiner and the non-attorney title examiner, the closing attorney is getting coverage under the attorney title examiner's malpractice policy that the closing attorney does not get using a non-attorney title examiner. Since this cost is usually passed directly to the customer, by using non-attorney title examiners to get a lower price, the closing attorney is taking on additional risk in order for SOMEBODY ELSE to get a cost savings. This does not seem to make good sense.
2. Non-attorney title examiners are going to have to come up with some sort of arrangement to protect their closing attorneys (and fast); go out of business, or rely on a steady supply of closing attorneys who don't keep up-to-date on the latest court opinions. As mentioned in number 1 above, the closing attorney gets no benefit from using a cheaper non-attorney title examiner at the risk of having to protect the non-attorney title examiner with the closing attorney's own malpractice policy. Thus, the non-attorney examiner is either going to have to (i) come up with some sort of contractual indemnification to give comfort to the closing attorney that the closing attorney is not going to be left all alone to face a claim based on the non-attorney title examiner's error; or (ii) go out of business.

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Congress Enacts Changes to the FIRPTA Rules

On December 18, 2015, President Obama signed into law a bill that reforms the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). “The Protecting Americans from Tax Hikes Act of 2015” (H.R. 2029), is being warmly received by tax experts as good news for REITS and non-U.S. investors because it facilitates foreign investment in U.S. real estate. Among other things, Section 324 of that Act reforms FIRPTA and increases the rate of withholding of tax on dispositions of U.S. real property interests. This provision affects the closing practice or those classified as “withholding agent” under Internal Revenue Service rules. The withholding rate will increase from 10% to 15% for all dispositions 60 days after the enactment of this Act or after February 16, 2016. Of interest to commercial practitioners, are a number of changes to real estate investment trusts (REITs) including significant restrictions to REIT spinoff transactions.

Geographic Targeting Order on Miami-Dade County, FL and New York City, NY

On Wednesday, January 13, 2016, the Financial Crimes Enforcement Network (FinCEN) issued a geographic targeting order (GTO) that temporarily requires U.S. settlement agents to identify the natural persons behind companies purchasing for cash real property for a price of $1,000,000 or greater in Miami-Dade County, Florida and $3,000,000 or greater in New York City, NY. This GTO imposes additional record keeping and reporting requirements on settlement agents operating in these markets for the stated purpose of combating money laundering in the real estate sector. This GTO will be in effect for 180 days beginning March 1, 2016 and expiring on August 27, 2016. Although Georgia is not within the geographic targeting area, settlement agents should view this GTO as providing a great opportunity to revisit their reporting, recordkeeping, and customer identification obligations on all parties to real estate transactions specifically transactions involving legal persons described as the broader group of individuals, such as trustees, companies, or other entities that have legal rights and obligations.

CFPB Issues Compliance Bulletin 2015-05

On October 8, 2015, the Consumer Financial Protection Bureau (CFPB or Bureau) issued Compliance Bulletin 2015-05, which serves as a strong reminder to participants in the mortgage industry of the prohibition on kickback and referral fees under the Real Estate Settlement Procedures Act (RESPA). In the bulletin the Bureau stated that they have received numerous

inquiries and whistleblower tips from industry participants describing the harm that can stem from the use of marketing services agreements (MSAs). The bulletin did not per se rule that MSAs are illegal but the Bureau strongly hinted at its dislike of MSAs and reminded participants of the significant legal and compliance risks created by MSAs. In this shifting regulatory environment, market participants involved in MSAs or other similar arrangements may take the issuance of this bulletin as an opportunity to revisit their agreement and seek legal counsel on the legality of their particular agreement in light of this bulletin. This issue should be monitored because, among other things, RESPA prohibitions are not intuitive and this increases the risk of infractions when you factor in the new reality that we are dealing with a regulatory agency that seems willing to go against established precedents in its regulation of the mortgage industry.

Secondary Market giving TRID Loans an initial Chilly Reception

It is now over three months since the effective date of the Know Before You Owe or TILA-RESPA Integrated Disclosure (TRID) rules, and there is mounting data to support the fact that although many of the industry's worst fears about the rules were not initially realized, secondary market purchasers of mortgage loans are giving TRID loans a less than warm reception. The secondary market's chilly reception can be attributed to lender concerns about TRID liability. The high rejection rates by the secondary market may have prompted CFPB Director Richard Cordray to issue a letter on December 29, 2015, in response to concerns raised by the Mortgage Bankers Association (MBA) regarding violations of the CFPB's Know Before You Owe rules. Director Cordray's letter did not address the fears of secondary market purchasers that compliance issues, no matter how minor or technical will be deemed by CFPB to be a violation of the rule. He expressed hope that the issue will dissipate. Time will be the final arbiter and secondary market investors are deciding to err on the side of caution in the purchase of TRID loans. For additional information about Commissioner Cordray's letter, please visit the CFPB's website at https://www.cfpbmonitor.com/2015/12/30/cfpb-responds-to-industry-concerns-about-trid-rule-liability/.

RESPA experts recently joined forces to create a list of 10 common TRID violations, and their findings were summarized in a recent American Land Title Association article titled "10 Reasons Why Secondary Market is Rejecting Purchase of TRID Loans." The full article can be accessed at http://www.alta.org/advocacy/news.cfm?newsID=30153.

Each year, the Real Property Law Section offers scholarships of $1,000 each to law students identified by their schools as showing a high level of interest and aptitude in real property law.

Scholarship Award Winners for 2015

RPLSAwardsBanquet.jpg2591x1944 2.48 MB

(Pictured from left to right: Chad Henderson, Ben Williams, Elizabeth Verner, Josh Joel, and Monica Gilroy)

Candidates are asked to demonstrate their intentions and interest in practicing real estate law in Georgia. The 2015 scholarship recipients were honored at our annual banquet in November, where they each were presented with a set of Pindar's treatise thanks to the generous donation of the same from Thomson Reuters. The scholarship recipients were:

Elizabeth Verner, 2015 graduate of UGA Law School who now practices with Bouhan Falligant in Savannah.

Ben Williams, 2015 graduate of Emory Law School, who has opened a practice in Duluth called Bross McAllister & Williams.

Josh Joel, 2015 graduate of GSU Law School, who is now a staff attorney at the U.S. Court of Appeals, 11th Circuit, in Atlanta.