

CHAPTER 1

THE TITLE EXAMINER

1.1 Examining Attorney's Attitude

The purpose of the examination of title and objections, if any, shall be to secure for the examiner's client a title which is in fact marketable and which is shown by the record to be marketable and subject to no other encumbrances than those expressly provided for by the client's contract. Objections and requirements should be made only when the irregularities or defects reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation.

Comment: Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misapprehension of the law. The examining attorney, by way of a test, may ask after examining the title, what defects and irregularities have been discovered by the examination, and as to each such irregularity or defect, who, if anyone, can take advantage of it as against the purported owner, and to what end. For example, the omission of the zip code of the property in the description thereof in a conveyance is not a material defect for which an objection should be raised. To enter an objection of such nature is considered to be "fly specking" or to be over-meticulous in the examination of the title. Title Standards, if properly utilized, should reduce to a bare minimum, if not eliminate, "fly specking and over-meticulousness.

1.2 Prior Examination

When an attorney discovers a situation which the attorney believes renders a title defective and he/she has notice that the same title has been examined by another attorney who has passed the defect, it is recommended that the attorney communicate with the previous examiner, explain the matter objected to, and afford an opportunity for discussion, explanation, and correction. The attorney contacted should cooperate fully and promptly in investigating his/her records and taking whatever steps are necessary to explain and/or correct the title defect complained of.

Comment: It is ethically incumbent upon the attorney raising the objection, prior to discussing the objection with the client, to locate the prior attorney, to discuss same with that attorney in order to afford that attorney an opportunity to explain what steps, if any, had been taken to clear the objection

and to offer the prior attorney the opportunity to clear the objection. In discussing the objection with the prior attorney, the current policy had been issued insuring against any loss by reason of such defect. If the title company will insure the purchaser against any loss by reason of such defect, should the transaction involve a purchase, or if the title company will insure the lender against any loss by reason of such title defect, should the transaction involve only a loan, the attorney might consider recommending the purchase of the title insurance as a solution to the title objection. However, the attorney should counsel his/her client as to the distinctions between marketable title and insurable title and the possible consequences of failing to obtain a marketable title.

Under the provisions of the 1994 amendment to O.C.G.A. Section 44-2-14, any affidavit, prepared under O.C.G.A. Section 44-2-20, and any instrument by which the title to real property or any interest therein is conveyed, created, assigned, encumbered, disposed of, or otherwise affected, which is executed on or after July 1, 1994, shall not be entitled to recordation unless the name and mailing address of the natural person to whom the affidavit or instrument is to be returned is legibly printed, typewritten or stamped upon the document at the top of the first page thereof. If any instrument or affidavit is titled or recorded without compliance with this amendment, such noncompliance does not alone impair the validity of the filing of recordation of or the construction notice imparted by filing or recordation.

1.3 Reference to Title Standards in Sales Contract

An attorney drawing a real estate contract is urged to recommend that the terms of the contract provide that marketability be determined in accordance with Georgia Law as supplemented by Title Standards then in force and that the existence of encumbrances and defects, and the effect to be given to any found to exist, be determined in accordance with such Standards. An attorney drawing a real estate sales contract is urged to recommend inclusion of the following clause or its equivalent:

It is understood and agreed that the title herein required to be furnished by the seller shall be good and marketable and that marketability shall be determined in accordance with Georgia law as supplemented by the Title Standards of the State Bar of Georgia. It is also agreed that any defect in the title which comes within the scope of any of said Title Standards shall not constitute a valid objection on the part of the buyer provided the seller furnishes the affidavits or other title papers, if any, required in the applicable Standard to cure such defect.

CHAPTER 2

USE OF THE RECORD

2.1 Period of Search

A record title covering a period of 50 years or more is considered sufficient to determine marketability; provided that the basis thereof is a warranty deed, one or more quitclaim deeds supported by a reasonable proof that they convey the full title, or a grant from the state, a probate proceeding in which the property is reasonably identifiable, a security deed if subsequently regularly foreclosed or any other instrument which shows of record reasonable probability of title and possession thereunder; provided further that the period actually searched does not refer to or indicate prior instruments or defects in title, in which case such prior instruments may be used in turn as a start, and that the period actually searched discloses instruments which confirm and carry forward the title to be established.

This Standard, however, shall not prevent an attorney from certifying a title as marketable based upon a search for a period of less than 50 years where the parties involved agree and accept less than 50 years, in which even the attorneys' title certificate shall state the period covered thereby.

As a result of the recording process, the effective date of the various indices examined may not coincide with the date the record examination is conducted. The period between the record effective date and the examination date or document filing date of a subsequent transaction is commonly referred to as the "gap period." This gap period varies by county and by indices within a county and in some instances this interim period may be substantial. When examining title and computing dates referred to in these Standards, the effect of the gap period must be taken into consideration. The oldest effective date of all record indices examined should be reported as the effective date of the attorney's title certificate unless a report of the effective date of such record index is requested by the client or is of particular significance to the transaction upon which the record search will be relied.

Comment: In applying this Standard, it is necessary to trace the record title back to a "root" or "start," which may be, and generally is, more than the 50 years back. Any defects in the record title subsequent to the date of recording of the "root" or "start" must be considered by the examiner. Thus, suppose the record shows a warranty deed from A to B in fee simple, recorded in 1914. The next instrument in the chain of record title is a conveyance of an

easement across the land from B to X, recorded in 1916. The next instrument is a warranty deed from B to C in fee simple, recorded in 1954, in which the easement is not mentioned. In 1993, D who has contracted to purchase the land from C, employs an attorney to examine the title. The title examiner will have to go back to the deed of 1914 and will have too report that the record title is subject to the easement in favor of X created by the deed of 1916.

In situations in which the parties engage and direct the attorney to certify title for a period less than 50 years, the attorney's certification should contain a disclaimer to the following effect:

THIS CERTIFICATE OF TITLE IS BASED UPON A LIMITED EXAMINATION OF RECORD TITLE AND DOES NOT PURPORT TO CERTIFY THOSE MATTERS WHICH A FULL EXAMINATION OF RECORD TITLE WOULD REVEAL.

2.2 Extent of Search

In examining a title, the examiner is required to search only for properly indexed and recorded instruments in the chain of title. For this purpose the following instrument is outside the chain of title: (A) An instrument from a person in the chain of title filed for record after the date of filing for record of another instrument from the same person purported to part with the same interest; (B) An instrument from a person in the chain of title recorded prior to the date of the deed conveying title into that person in the absence of other circumstances which point to the existence of the instrument. The starting date for the search in the name of each new record title holder should be the date of the vesting instrument rather than the filing date.

Comment: The following example will illustrate the factual situation set out in example (A) of this Standard: A, having a good record title, conveys a tract of land to B in 1955. In 1956, A conveys the land to C, who at once records. C has actual notice of the Deed to B. In 1957, B records. In 1958, C conveys the land to D, who pays value and has no actual notice of the Deed to B. D at once records. D's title is good. The title examiner is under no duty to search for the Deed to B.

The following example will illustrate the factual situation set out in example (B): A, who anticipates purchasing a tract of land from B executes a Security Deed conveying the said tract in favor of C to secure a loan made by C to A. The Security Deed is dated November 15, 1985 and recorded December 15, 1985. A acquires title to the tract from B by warranty deed dated January

15, 1986 and recorded January 20, 1986. On February 20, 1986, A conveys the tract to D who pays value and has no actual notice of the Security Deed to C. D at once records. D's title is good. The title examiner is under no duty to search for the Security Deed to C.

Comment: See Insilco Corp. v. Carter, 245 Ga. 513, 265 S.E.2d 794 (1980); Middle Ga. R. Co. Inc. v. IDS Homes Inc., 231 Ga. 57, 200 S.E.2d 141 (1973).

2.3 Instruments by Strangers to the Record Chain of Title

An instrument executed by a person who is a stranger to the record chain of title at the time such instrument is recorded does not of itself make title unmarketable; however, such an instrument should give rise to additional investigation. Although the instrument from the stranger to the record chain of title does not necessarily render the title unmarketable, the attorney is under a duty to disclose this information to the client.

Comment: The record shows that in 1950, a tract of land was conveyed by X to Y in fee simple. X is connected with a record chain of title running back to a grant from the state. A deed of the same tract from A to B, neither of whom appeared in the record chain of title, was recorded in 1955. The deed from A to B does not of itself make the title unmarketable. However, an investigation should be made to determine the reason for the stranger's deed and the attorney has the duty of reporting this matter to the client.

Record title is vested in the husband but the lender has consistently required the wife to join with the husband in executing all security deeds pertaining to the property. In examining title for a sale of the property by the husband, a title examiner should require a quitclaim deed from the wife for the purpose of divesting any and all interest which she might have or claim to the property by reason of having executed said security deeds.

2.4 Record of Expired Leases

In the absence of notice of renewal arising from possession, record, or otherwise, an examiner may omit from his opinion reference to a record lease or memorandum of lease when the term expressed in the lease has expired. It is not the function of the title examiner to certify as to possession. HOWEVER, the certifying attorney should always make exception in his opinion to rights of tenants in possession, if any, unless he is called upon to certify as to possession also. If asked to certify to possession and rights of

tenants in possession, then proper inquiry should be made with present record owner and proper affidavits taken from him and any tenant actually in possession. If the purpose of the examination is related to concerns about environmental liability, an examiner should report all leases, whether expired or unexpired.

Comment: In an environmental study, it is helpful to know the identities of lessees in both expired and unexpired leases, and the purposes for which the premises have been leased, since past or present uses may be associated with environmental problems, such as dry cleaners, service stations and the like.

2.5 Record of Expired Contract or Options

An examiner should report any and all contracts, options or memorandums thereof whether or not they appear to have expired and the closing attorney should decide whether to rely upon the record or seek additional proof.

Comment: It is recommended that proof of expiration be obtained at closing. Where the expiration date is more than one year prior to closing, an affidavit of the seller may be adequate. Where the expiration date is one year or closer to the date of the closing, additional proof of expiration should be obtained. It is better practice that this proof be in the form of a quitclaim deed from the optionee.

2.6 Age of Instruments

In determining whether to recommend that a corrective document be filed with respect to an instrument in the chain of title, the examiner should take into consideration, in addition to the other matters treated in these Standards, the period of time the instrument has been of record, applicable statutes of limitation, whether (subsequent to the recordation of the instrument in question) the property has been conveyed without (as far as the record title shows) correction or objection, and the practical feasibility of obtaining required signatures.

Comment: Although not statues of limitation, O.C.G.A. Section 44-5-163 provides that the period of possession for prescriptive title through adverse possession is twenty years and O.C.G.A. Section 44-5-164 provides that the period of possession for prescriptive title under color of title is seven years. The true owner may be barred by laches in applying for a cancellation of a cloud

upon his/her title where the adverse claimant is in possession. Pierce v. Middle Ga. Land & Lbr. Co., 131 Ga. 99, 61 S.E. 1114 (1908). The seven-year limitation placed upon an action to set aside or cancel a deed by a court of equity is analogous to the period required for prescriptive title under color of title. Payton v. Daughtry, 223 Ga. 438, 156 S.E.2d 29 (1967).

CHAPTER 3

NAME VARIANCES

3.1 Rule of Idem Sonans

Differently spelled names are presumed to be the same when they sound alike, or when their sounds cannot be distinguished easily, or when common usage by corruption or abbreviation has made their pronunciation identical. A greater degree of liberality should be indulged with the greater lapse of time and in the absence of circumstances causing any reasonable doubt as to the identity of the parties.

3.2 Use or Nonuse of Middle Names or Initials

In all instruments or court proceedings the use on one occasion and the nonuse in another of a middle name or initial ordinarily does not create a question of identity affecting title, unless the examiner is otherwise put on inquiry.

3.3 Abbreviations, Derivatives, and Nicknames

All customary and generally accepted abbreviations, derivatives, and nicknames of first names and middle names should be recognized as the equivalent thereof.

3.4 Recitals

In the absence of special circumstances creating suspicion, recitals with respect to names and identity in recorded documents should be relied upon without requiring additional proof.

3.5 Effect of Suffix

Although identity of name raises the presumption of identity of person, the addition of a suffix such as "Jr." or "II" to the name of a subsequent grantor may rebut the presumption of identity with the prior grantee.

3.6 Variance Between Signature and Name in Body of Deed

Where the given name or names or the initials as used in a grantor's signatures on a deed vary from their name as it appears in the body of the deed but the name as used in the signature is the same as that in whom record title then exists, the signature should be accepted as providing adequate identification.

3.7 Name Changes

Where a person's surname is changed, such as through marriage, divorce or other legal proceeding, after the person has acquired title, and the person then conveys in the former name with the new surname added, such a recital is sufficient. A better practice, however, is to set out the new name and recite formerly known as the prior name. If the person's new name does not include the old one, a recitation of the new name formerly known as the old name is sufficient.

3.8 Variance in Name of Wife

If the grantees in one instrument of conveyance are "John Smith and Mrs. John Smith," and the grantors in a succeeding instrument in the chain of title are "John Smith and Mary Smith," further evidence should be required to show that Mrs. John Smith is the same person as Mary Smith. The same conclusion should be reached if the grantees were "John Smith and Mary Smith" and the grantors in a succeeding instrument in the chain of title were "John Smith and Mrs. John Smith." Conveyances should not be prepared using a wife's name as "Mrs. John Smith" as there could be a former deceased or divorced Mrs. John Smith different from the party in the proposed conveyance.

3.9 Variance in Indication of Sex

If a recorded instrument contains one or more personal pronouns indicating that a person named therein is of a certain sex, and a subsequent instrument in the chain of title contains one or more personal pronouns

indicating that such person is of a different sex, such variances do not make the title unmarketable.

3.10 Correct Name of Grantee

If the given name of grantee is changed in a subsequent instrument from the original grantor expressly purporting to correct an error in the given name in the original instrument, such a recital may be relied upon unless the corrected name is distinctly dissimilar to the original or where special circumstances put the examiner on inquiry.

3.11 Correcting Designation of Plat

An error in a conveyance with respect to the name or designation of a recorded plat may be corrected by a certificate of the Clerk of the Superior Court when the nature of the error is reasonably clear.

Comment: John Doe conveyed land describing it as Lot 1, Block A of Blackacres, Plat Book 5, Page 3 of Blank County, Georgia, instead of the correct description of Plat Book 5, Page 31. The Clerk of the Superior Court of Blank County may issue a certificate stating that the only plat of record in Blank County under the name Blackacres is one recorded in Plat Book 5, Page 31, of said county.

3.12 Indexing Notation

If at the end of any conveyance and following the execution thereof, there is set forth an "indexing Notation" which contains a recital identifying the surname of any grantor or grantee therein, such designation shall be used by the Clerk in indexing said conveyance and any title examiner shall only be obligated to search under such name. However, any ambiguity or confusion about the correct surname requires a search under all possible names.

Comment: This Standard is intended to address those situations in which the surname of the party is not the last name found in a group of names. For example, in the name Pi Yong Si, if Pi is the surname this Standard will assist in having the document indexed as Yong Si Pi.

3.13 Name Variances for Corporations and Partnerships

Corporations chartered under the laws of the State of Georgia and partnerships formed under the laws of Georgia are satisfactorily identified although their exact names are not used and variations exist from instrument to instrument if, from the names used and other circumstances of record, identity of the corporation or partnership can be inferred with reasonable certainty. Among other variances, addition or omission of the word "the" preceding the name; use or nonuse of the symbol "&" for the word "and;" use or nonuse of the abbreviations for "company," "limited," "corporation" or "incorporated" ordinarily may be ignored. Affidavits and recitals of identify are encouraged to explain variances and good practice dictates that they be recorded to assist future examiners

Comment: This Standard has been adopted to assist attorneys in dealing with the problem of name variances as to recorded instruments. It is recommended that greater care be exhibited in the use of the exact and correct name of the corporation or partnership in the preparation of instruments to be recorded so as to eliminate the necessity for this Standard as to such instruments.

This Standard is based upon original Standard 9.1, which was cited In the Matter of Neal Gray, 7 B.R. 535 (N.D. Ga. 1980).

CHAPTER 4

EXECUTION, ATTESTATION, ACKNOWLEDGMENT AND RECORDING

4.1 Date Omissions and Inconsistencies

Omission of the date of execution from a conveyance or other instrument affecting title does not, in itself, impair marketability. Even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support that presumption.

Inconsistencies in recitals, or indications of dates of execution, attestation, acknowledgment, or recordation, do not, in themselves, impair marketability. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.

4.2 Delivery Delay in Recordation

Delivery of instruments attested or acknowledged and recorded is presumed in all cases in which the instrument appears to be the result of an arm's length transaction. Specifically, delay in recordation does not customarily dispel the presumption. However, a deed recorded after the death of the grantor which does not appear to reflect an arm's length sale transaction is not entitled to the presumption and necessitates inquiry.

4.3 Georgia State Transfer Tax

Whether or not the Georgia state transfer tax was in fact paid on any deed filed or recorded on or after March 16, 1983 shall not impair marketability or constructive notice.

Any deed dated on or after January 1, 1968 and filed or recorded prior to March 16, 1983, which appears upon its face to have been conveyed for a monetary consideration in excess of \$100.00, and which does not have any certificate of the Clerk of the Court affixed or stamped to the same might be ruled by the Courts to be a violation of O.C.G.A. Section 48-6-4, before its 1983 amendment, and that it affords no constructive notice. The deed must be inquired into and corrected.

Comment: In Higdon v. Gates, 238 Ga. 105, 231 S.E.2d 345 (1976), the Supreme Court, in reviewing this Code Section prior to its 1983 Amendment, held that a recorded deed on which the required tax had not been paid did not constitute constructive notice. Until and unless the Court holds that the 1983 Amendment retroactively affected deeds filed or recorded prior to March 16, 1983, care must be taken to determine that the requisite amount of tax has been paid on the transfer recorded during the period from January 1, 1968 to March 16, 1983.

As a practical matter the Clerk of the Superior Court is not required to accept for filing and recording purposes a conveyance deed if the deed is not accompanied with the Transfer Tax Declaration, signed by purchaser and seller, reflecting the consideration for the conveyance, along with payment of the transfer tax due based upon the Declaration. Certain grantors and grantees are exempt from the tax, but the Declaration form must still be submitted with the consideration or value shown, and the Clerk will stamp such deeds "No Tax due." the Clerk's certificate of tax paid or "No Tax Due" may be relied upon by subsequent purchasers or lenders as evidence that the proper tax has been paid. However, as this Standard provides, whether or not

the transfer tax was in fact paid on any deed filed or recorded after March 16, 1983 shall not affect marketability or constructive notice.

If a quitclaim deed contains a recital regarding the release of property from the lien of a creditor's such as, for example, a security deed, assignment of rents, U.C.C. financing statement, judgment or mechanics' and materialmen's lien or any claim of similar nature, no declaration form is required and no tax is due.

4.4 Internal Revenue Service Real Estate Reporting

The failure to report a real estate transaction subject to the federal Tax Reform Act of 1986 to the Internal Revenue Service does not impair marketability of title to real estate.

Comment: See 26 U.S.C. Section 60445. Although failure to report a transaction subject to the Act on an IRS 1099 will subject the closing attorney to penalties, such failure does not impair marketability of title to the property.

CHAPTER 5

DESCRIPTIONS

5.1 When Defective Descriptions Do Not Impair Marketability

Errors, irregularities, and deficiencies in property descriptions in the chain of title do not impair marketability unless, after all circumstances of record are taken into account, a substantial uncertainty exists as to the land which was conveyed or intended to be conveyed, or the description falls beneath the minimum requirements of sufficiency and definiteness which is essential to an effective conveyance. Lapse of time, subsequent conveyances, the manifest or typographical nature of errors or omissions, accepted rules of construction, and other considerations should be relied upon to approve marginally sufficient or questionable descriptions.

Comment: It is good practice to state the source of title as part of the legal description. A suggested form for this statement would be as follows; "being all of the property obtained by Grantor herein under Warranty Deed dated _____, recorded _____, in Book ____, Page ____, _____ County, Records." It is also good practice to record, where possible, all surveys which are used to describe the property. If this is not possible for whatever reason, including failure to comply with the survey

statute, (see Standard 26.2, infra), it is highly desirable that the description refer to the plat as fully as possible, i.e., Lot 5, Block "A," Blackacre Subdivision, Property of Tom Smith, Blank City, Any County, Georgia as prepared by John Doe on _____ (date) which is unrecorded, so that further inquiry can be made.

Discrepancies between a current survey and the record description whereby perimeter distances reflected by the survey are less than the recorded description do not customarily require any curative steps, provided that all lines are within the bounds of the prior legal description. The new description in accordance with the current survey should contain a reference to the source of title, as suggested above, along with proper reference to the new survey, which should be recorded either as an exhibit to the deed of conveyance or as an independently recorded plant in the Plat Book.

Discrepancies between a current survey and the record description whereby the survey reflects the lengths of one or more perimeter descriptions to be greater than the recorded counterpart, where the extremities of the boundary are not marked by existing monuments, should be addressed by properly-executed boundary-line agreement(s) with the adjoining neighbor(s) whose property(ies) might be affected by the increased measurement(s). The boundary-line agreement should contain the current survey as an Exhibit or the survey should be recorded in the Plat Book and appropriate reference to it should be made in the boundary-line agreement. Instead of a boundary-line agreement a corrective deed into the present owner may be sufficient to cure this matter, depending upon the particular facts.

CHAPTER 6

AFFIDAVITS AND RECITALS

6.1 Affidavits in General

(a) Utilization of affidavits is an acceptable practice and reasonable reliance may be placed thereon. Proper and recorded affidavits constitute notice of the facts recited therein and create a rebuttable presumption that such facts are true and correct. However, absent extraordinary circumstances, affidavits should not be utilized in lieu of normal conveyancing, probate or judicial procedures.

Comment: Certified copies of certificates of death, birth and marriage are preferable to affidavits to establish the facts of death, birth and marriage,

respectively. However, such certified certificates may best be incorporated in an affidavit in order to facilitate introduction into the chain of title.

(b) Affidavits should reference the current property owner and a recorded instrument in the chain of title. Affidavits should address the entire issue which is the subject of said affidavit, state facts rather than conclusions, and not be worded so as to mislead or leave unanswered questions.

(c) Affidavits may be made by any person, even those connected with the chain of title, and should set forth information within the personal knowledge of the affiant.

Comment: The affidavit may set forth in the body of the document that affiant is acting in some capacity which is a source of authority or insight as to the facts set forth therein. However, the facts recited are to be those personally known to the affiant and not to a corporation, grantor of a power of attorney or other represented person or entity, and no corporate title or other representative designation should be indicated for the signatory.

(d) Affidavits should be given under oath before and attested by a notary public or other official authorized to take an oath.

6.2 Recitals

Factual recitals in conveyances are widely utilized but such recitals do not comply with the statutory requirements of an affidavit. Generally, such factual recitals should be for purposes of information and not in lieu of an affidavit. However, certain conclusive presumptions of law arise regarding recitals in conveyances as against the grantor and those claiming under said grantor, and regarding recitals in ancient deed and other instruments more than thirty years old. Recitals are most useful when supported by matters of public record other than the deed records.

6.3 Affidavits of Possession

Affidavits of the history of the possession of the property should set forth the period of time with which the affiant has been familiar with the property, the names of those current and prior owners of the property of which the affiant has knowledge, and the indicia of ownership upon which such knowledge is based. Affiant may be a party in interest or a disinterested party.

Comment: The underlying purpose of such affidavit being to establish adverse possession, affiant should normally be familiar with the history of the property for not less than seven years, although circumstances may dictate a still longer period. Although affiant may be a party in interest, preference should be given to one having no interest in the property.

6.4 Affidavits of Descent

Documentation of the family history of a deceased holder of record title and potential heirs thereof establishes that all parties have been or should be properly divested. Such affidavit should state the residence, date of death and testacy or intestacy of the deceased, identify all spouses, indicate death with or without issue, identify children and grandchildren, and disclose respective dates of death or addresses, and disabilities, as applicable. The affidavit should identify the number of marriages including date, place and evidence thereof, i.e., marriage record in court records or lack of knowledge, how marriages are terminated, i.e., death or divorce including style of case, decree date, case number, from which court obtained and any other relevant information; issue by birth or adoption and if adopted such information as can be obtained including birth certificates. The affidavit should indicate whether all debts including estate or inheritance taxes have been paid.

Comment: Affidavits of Descent will almost always need to be from someone in the family of the decedent and therefore very well could be a party in interest. This fact should not detract from the reliance placed upon the affidavit.

6.5 Scrivener's Affidavits

Scrivener's affidavits may be utilized by the preparer of a document, or other party in a valid position to know, to correct clerical errors when the original parties are unavailable. Such corrections should be unquestionably the original intention of the parties, minimal in extent, and supportable by extrinsic evidence if called into question and should be recorded.

CHAPTER 7

CO-TENANCIES

7.1 Conveyances by Co-tenants

Where title is in two or more persons, including spouses, in any form of co-tenancy, an otherwise effective conveyance by them without reference to the tenancy is sufficient. An erroneous reference to the type of tenancy, or an indication of a mistaken impression as to the type of tenancy is unobjectionable. After all co-tenants have effectively conveyed, all questions as to the type of tenancy which existed are moot, and any indication of a mistaken impression by the co-tenants or their grantor as to the type of tenancy which existed is unobjectionable.

7.2 Conveyances by Survivor of Joint Tenancy with Right of Survivorship, or Surviving Grantee in Survivorship Deed

The survivor of a joint tenancy with right of survivorship, or the surviving grantee in a survivorship deed, can convey good title to the property so owned without the necessity of probate or administration of the estate of the deceased co-tenant by:

- (a) Proof in the case of a joint tenancy created subsequent to The Joint Tenancy Act of 1976 (Ga. Laws 1976, Page 1388; O.C.G.A. Section 44-6-190), that there has been no severance by lien or conveyance of record; and
- (b) Proof, in recordable form, of the death of the deceased joint tenant or co-tenant, as the case may be, which includes, (i) probate or administration of the decedent's estate, (ii) certified copy of Georgia death certificate, or (iii) affidavit of proof of death by a disinterested third party;
- (c) The survivor in both of the above circumstances may cause the proof of death to be recorded at any time after the death, or at the time of a conveyance, at which time such proof may be more difficult to obtain by virtue of the passage of time.

Comment: Prior to The Joint Tenancy Act of 1976, there was no joint tenancy in Georgia by operation of law. Questions may still exist as to the possibility of a severance, but it is felt that the amendment of 1984 (Ga. Laws 1984, Page 1335) protects bona fide purchasers from a severance by any lifetime transfer which is unrecorded. A survivorship deed is not subject to such severance problems, and has been upheld by case law. (Epps v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979); see Pindar and Pindar, Ga. Rel Est. Law, Sections 19-13, -13.1 (4th Ed.). The importance of title examiners and closing attorneys diligently resolving any questions of the legitimacy of the proof of the putative decedent's death cannot be overemphasized.

7.3 Recitals as to Percentage of Interest Being Conveyed

A recital that a conveyance is intended to convey all of the grantor's interest in the real estate controls over an inconsistent specification of the percentage of undivided interest being conveyed.

CHAPTER 8

TRANSFERS AND AGENTS

8.1 Effect of Designation "Trustee," "Agent," .c. "Nominee," or "Custodian"

(1) Subject to the provisions of O.C.G.A. Sections 14-05-46 through -50, when the sole word "Trustee" follows the name of a party to an instrument, and no trust is declared and no beneficiary is named either in this instrument or in any other recorded instrument in the chain of title, the word "Trustee" is mere surplusage and the named person takes title for his own use free from any trust; and a title from such person can be approved without investigation of the capacity of such person to convey. However, when the words "as Trustee" follow the name of a party to an instrument, this Standard does not apply and investigation should be made as to any trust under which such person is acting. The trust instrument or order of Superior Court must authorize sale or conveyance of trust property.

Comment: If, however, a purchaser has notice that a trust exists, he is bound by its terms and cannot take a good title in violation of such terms. Andrews v. The Atlanta Real Estate Company, 92 Ga. 260, 18 S.E. 548 (1893); Brenner v. Wright, 185 Ga. 280, 194 S.E. 553 (1937); O.C.G.A. Section 53-12-257.

Even if there is in fact no trust, Code Sections 14-5-46 through -50 have the effect of creating a legal entity when a deed to named trustees of an unincorporated church or other unincorporated society, such as a labor union, has been recorded in the Clerk's Office. See Crumbley v. Solomon, 243 Ga. 343, 254 S.E.2d 330 (1979), Smith v. International Ladies Garment Workers Union, 58 Ga. App. 26, 197 S.E. 349 (1938).

(2) When the sole word "Agent" follows the name of a party to an instrument and no agency is declared and no principal is named either in this instrument or in any other recorded instrument in the chain of title, the word "Agent" is mere surplusage and the named person takes title for his own use free from any agency; and a title from such person can be approved without

investigation of the capacity of such person to convey. However, when the words “as Agent” follow the name of a party to an instrument, this Standard does not apply and investigation should be made as to any agency under which such person is acting.

Comment: If, however, a purchaser has notice that an agency exists, he is bound by its terms and cannot take a good title in violation of its terms.

(3) When the sole word “Nominee” follows the name of a party to an instrument, the word “Nominee” is mere surplusage and a title from such person can be approved without investigation of the capacity of such person to convey. However, when the words, “as Nominee” follow the name of a party to an instrument, this Standard does not apply and investigation should be made as to any agency under which such person is acting.

Comment: If, however, a purchaser has notice that an agency exists, he is bound by its terms and cannot take a good title in violation of such terms.

(4) When the sole word “Custodian” follows the name of a party to an instrument, the word “Custodian” is mere surplusage and a title from such person can be approved without investigation of the capacity of such person to convey. However, when the words “as Custodian” follow the name of a party to an instrument, this Standard does not apply and investigation should be made as to any custodianship under which such person is acting.

Comment: See The Georgia Transfers to Minors Act, O.C.G.A. Section 44-5-110, et seq. If, however, a purchaser has notice that a trust or agency exists, he/she is bound by its terms and cannot take a good title in violation of such terms.

8.2 Termination of Trust

A deed from the trustee to the beneficiary of a trust under a recorded instrument at the time such trust terminates by its terms on a fixed date or upon the happening of a named event is unnecessary. Verification, however, must be made of the happening of the named event. It is, however, recommended that attorneys make every effort to place such instrument on record in the future as will aid title examiners in ascertaining the facts.

8.3 Deeds Executed in Representative Capacity

Generally, the word "as" indicates and shows that the instrument is executed in a representative capacity. If "as" is omitted after the signature of grantor, the error is cured if the heading of the conveyance or recitals within the conveyance clearly show that the deed is being executed in a representative capacity rather than an individual capacity.

8.4 Formality Necessary to Create or Exercise an Agency

Unless a contrary intent is expressly stated in the document creating the agency, when an agency is created by written instrument it is conclusively deemed to authorize execution by the agent of instruments with the formalities necessary or appropriate to accomplish the purposes for which the agency was granted, regardless of the formality with which the document creating the agency was executed. When an agency is exercised by written instrument, it must also be created by written instrument. Thus, an investigation should be made to determine the existence of a written grant of agency and that the exercise of the agency is reasonably within the purposes for which the agency was granted. If a document is executed under seal by an agent and the grant of agency is not under seal, the document executed by the agent is also deemed not under seal.

Comment: The source of this Standard is Georgia Laws 1993, Page 457; (O.C.G.A. Section 10-6-2). This statute, which repealed the so-called "Equal Dignity Rule," became effective July 1, 1993. Under prior law, documents executed by agents having greater formality than that of the document creating the agency were void. See, e.g., Thomason v. Wilson, 127 Ga. 141, 56 S.E. 302 (1906); Byrd v. Piha, 165 Ga. 397, 131 S.E. 48 (1927). Prior law was modified effective July 1, 1991 to provide that documents executed by an agent under seal were not invalid merely because the agency grant was not under seal (Ga. Laws 1991, Page 410).

8.5 Power of Attorney

If the execution of any document in the chain of title is made by an attorney-in-fact, it is better practice that the title examiner be able to verify that: the power of attorney is dated, properly executed, witnessed and recorded; empowers the attorney to execute the document; refers to the real property as specifically as possible; and at the time the attorney executed the document, the power of attorney had not been terminated of record by the principal, nor was there any evidence of record that the principal was deceased or mentally incompetent at that time, if the power of attorney provides that it terminates in the event of mental incompetency. A power of

attorney is not terminated and it remains durable if the principal becomes mentally incompetent, unless the power of attorney provides to the contrary. If the examiner is dissatisfied with any or these facts surrounding the power of attorney, then the examiner should raise his/her objections to the client to permit the closing attorney to resolve the matter.

Comment: See the Comment above to Standard 8.4.

CHAPTER 9

INSTRUMENTS EXECUTED BY CORPORATIONS

9.1 Name Omitted from Signature

The signature to a corporate instrument is sufficient notwithstanding the omission of the corporate name over the signatures of the signers, if the corporation appears as the party to the instrument and the instrument is otherwise properly executed.

Comment: This Standard is based upon prior Standard 9.2 as now amended by Georgia Laws 1992, Page 1180 [O.C.G.A. Section 14-5-7(a)], effective July 1, 1992.

9.2 Authority of Officer to Execute Instruments

When a corporate instrument is either (i) executed by a corporate officer, that person's signature is attested by the secretary or assistant secretary (or other officer authorized to authenticate corporate records), and the corporate seal or a facsimile thereof is affixed, or (ii) executed by the president or vice president and that person's signature is attested by the secretary or assistant secretary (or other officer authorized to authenticate corporate records), a title examiner may assume that the officer executing the document in fact holds the position indicated, that such person is authorized to execute the document, and that the officer's signature is genuine.

Comment: Source — O.C.G.A. Section 14-2-151. See also O.C.G.A. Section 14-5-7, Clause (ii) above became effective July 1, 1992.

The Examiner should bear in mind that the evidentiary presumption afforded by O.C.G.A. Sections 14-2-151 and 14-5-7 do not establish recording requirements. Recording is governed by O.C.G.A. Section 44-2-14, which

requires, with respect to execution, a signature, two witnesses, and an attestation or acknowledgment. Neither the presence of a corporate seal, nor the signature of an officer specified in O.C.G.A. Section 14-5-7, is required for recording.

9.3 Evidence of Corporate Authority

There exists a conclusive presumption of corporate authority to execute an instrument conveying an interest in real property when the documents executed by the president or vice president and attested by the secretary or an assistant secretary or the cashier or assistant cashier of the corporation. For other corporate instruments, the title examiner may assume that corporate authority exists if the document is either executed by a corporate officer, that person's signature is attested by the secretary or assistant secretary (or other officer authorized to authenticate corporate records), and the corporate seal or a facsimile thereof is affixed, or executed by the president or vice president and that person's signature is attested by the secretary or assistant secretary (or other officer authorized to authenticate corporate records).

Comment: The first sentence is based upon O.C.G.A. Section 14-5-7 and the second sentence is based upon O.C.G.A. Section 14-2-151. Both of these Sections were effective July 1, 1992. Under prior law, a document executed by the president or vice president and attested by a secretary or assistant secretary required the presence of a corporate seal to create the presumption of authority. Note that O.C.G.A. Section 14-5-7 provides that a corporation may by proper resolution authorize the execution of instruments of conveyance by other officers of the corporation.

9.4 Corporate Existence

Where an instrument of a private corporation appears in the chain of title and has been of record for a period of at least seven years, and the instrument is executed in proper form, the examiner may assume that the corporation was legally in existence at the time the instrument took effect, and that the officers who executed such document were authorized to do so.

Comment: This is the same as former Standard 9.4. It appears that the seven-year measurement is based upon the period used in the Statute of Limitations for adverse possession under color of title or for an action for fraud or forgery in procuring title to land, although the Statute does not

commence until the fraud is or should have been discovered. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977).

9.5 Foreign Corporations

When an instrument of a corporation organized in and doing business in another state appears in the chain of title, an examiner need not inquire whether such corporation was authorized to do business in this State.

Comment: The failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts. O.C.G.A. Section 14-2-1502(d).

9.6 Transfer or Satisfaction of a Security Deed by a Corporate Grantee

(a) A transfer of a security deed from a corporate grantee does not impair marketability if executed, without a corporate seal, by one corporate officer or by a person so authorized by corporate resolution and witnessed in the same manner as required for recording a deed.

Comment: This is based upon O.C.G.A. Section 14-5-7(b) which requires less formality for the execution of corporate transfers than does O.C.G.A. Section 14-5—7(a) for other corporate instruments. See Standards 9.2 and 9.3, supra.

(b) A satisfaction of a security deed by a corporate grantee does not impair marketability if executed, without a corporate seal, by one corporate officer or by a person so authorized by a corporate resolution in any of the three ways approved by Standard 14.7, infra. All approved methods for satisfaction, other than that of an entry on the face of the original security deed itself, must be witnessed in the same manner as required for recording a deed.

Comment: This is based upon O.C.G.A. Section 14-5-7(b).

9.7 Other Useful Provisions of the Georgia Business .c.Corporation Code

In appropriate circumstances, the examiner should also take into consideration the following provisions of the Georgia Business Corporation Code:

(a) If the valid filing of an instrument with the Secretary of State is relevant to the examination, the examiner should take into consideration O.C.G.A. Section 14-2-127, which provides that copies of documents filed with the Secretary of State are "prima-facie evidence that the original document has been filed with the Secretary of State."

(b) If in an examination a question arises as to the authority of the directors of a corporation, the examiner should take into consideration, in addition to the presumptions provided by other Standards, O.C.G.A. Section 14-2-801, which provides that "no limitation upon the authority of the directors, whether contained in the articles of incorporation, bylaws, or an agreement among the shareholders, shall be effective against persons, other than shareholders and directors, who are without actual knowledge of the limitation."

(c) If the authority of the chief executive officer of a corporation (or the president of the corporation if no person has been designated as chief executive officer) is relevant to the examination, the examiner should take into consideration, in addition to the other Standards, O.C.G.A. Section 14-2-841, which provides that such person "shall have authority to conduct all ordinary business on behalf of such corporation and may execute and deliver on behalf of a corporation any contract, conveyance, or similar document not requiring approval by the board of directors or shareholders as provided in this chapter."

(d) If the effect on title of a merger of a corporation appearing in the title is relevant to the examination, the examiner should take into consideration O.C.G.A. Section 14-2-1106(a)(2), which provides that "when a merger takes effect: . . . (2) the title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment."

(e) If the validity of acts taken by a corporation that was dissolved by expiration of its period of duration or that was administratively dissolved, but that in either case subsequently was reinstated, is relevant to the examination, the examiner should take into consideration the effect of O.C.G.A. Sections 14-2-1409 and -1422, which provide, in general terms, that the reinstatement of such a corporation relates back to the date of dissolution or expiration and that the corporate existence continued without interruption.

(f) If the execution of deeds or other transfer instrument after the dissolution of a corporation is relevant to the examination or is a matter that the examiner must pass upon in connection with the execution of an instrument, the examiner should take into consideration O.C.G.A. Section 14-

2-1408(c), which provides that “deeds or other transfer instruments requiring execution after the dissolution of a corporation may be signed by any two of the last officers or directors of the corporation” (without need of a corporate seal) “and shall operate to convey the interest of the corporation in the real estate or other property described.”

9.8 Alien Corporations

When an instrument of an alien corporation as defined in O.C.G.A. Section 16-14-93(1) appears in the chain of title, the examiner must require that proper certification be furnished that the corporation has complied fully with the requirements of O.C.G.A. Section 16-14-15(h) of the Georgia RICO Act which provides:

“Each alien corporation that fails to file [with the Secretary of State] a report as required by subsection (c) of this Code section or fails to maintain a registered office and a registered agent as required by subsection (a) of this Code section shall not be entitled to own, purchase, or sell any real property and shall not be entitled to bring an action or defend in the courts of the state until such requirements have been complied with.”

Comment: An “alien corporation’ means a corporation organized under laws other than the laws of the United States or the laws of any state of the United States.” (O.C.G.A. Section 16-14-93).

CHAPTER 10

CONVEYANCES INVOLVING LIMITED PARTNERSHIPS

10.1 Governing Law

Georgia has three limited partnership statutes in effect. O.C.G.A. Sections 14-9A-110 through -130 govern limited partnerships formed prior to February 5, 1952, that have not selected to be governed by one of the other statutes, O.C.G.A. Section 14-9A-1 through -99 govern limited partnerships formed after February 15, 1942, and before July 1, 1988, that have not elected to be governed by the Georgia Revised Uniform Limited Partnership Act (“GRULPA”). GRULPA (O.C.G.A. Sections 14-9-100 through -1204) governs limited partnerships formed on or after July 1, 1988, and those formed earlier that have elected to be governed by GRULPA. To the extent the law governing a limited partnership with an instrument in the title affect

matters of title, the examiner should first determine which law governs the limited partnership.

10.2 Authority

The statute governing limited partnerships formed prior to February 15, 1952, does not address in detail the authority of partners to act for the partnership. O.C.G.A. Section 14-9A-123(a) provides that “only the general partners shall be authorized to transact business, sign for the partnership, and bind the partnership.” It may generally be expected that, in cases not expressly provided for in a limited partnership statute, the provisions of the general partnership statute (O.C.G.A. Sections 14-8-1 through -43) would govern. Accordingly, the examiner should consider the agency powers of general partners discussed in Chapter 11 of these Standards.

(b) The statute governing limited partnerships formed between February 15, 1942, and July 1, 1988, expressly provides (O.C.G.A. Section 14-9A-70) that each general partners of such a limited partnership has all of the rights and powers, and is subject to all of the restrictions and liabilities, of a partner in a general partnership, although these provisions may be altered by the terms of the Limited partnership agreement. Accordingly, the examiner should consider the agency powers of general partners discussed in Chapter 11 of these Standards. The examiner should take note, however, that O.C.G.A. Section 14-9A-70 requires the written consent or ratification of all of the limited partners in order for any general partner or all of the general partners to have authority to “do any act which would make it impossible to carry on the ordinary business of the partnership.” If the examiner is unable to establish to the examiner’s satisfaction, through affidavit or otherwise, that the conveyancing of the real property at issue would not have such effect, the examiner may reasonably require evidence that all of the limited partners have so consented.

(c) GRULPA also refers to the general partnership statute to supplement the powers of general partners expressly stated in GRULPA (O.C.G.A. Section 14-9-403(a)). Accordingly, the examiner should consider the agency powers of general partners discussed in Chapter 11 of these Standards.

10.3 Conveyancing by Limited Partnerships

(a) The statute governing limited partnerships formed prior to February 15, 1952, does not address directly the manner in which such limited partnerships may hold or convey title to real estate. Accordingly, the

examiner should consider the agency powers of general partners discussed in Chapter 11 of these Standards as well as former Standard 10.1, which was to the effect that real property acquired by a general partnership and held in the general partnership name should be conveyed in such name by an instrument executed by all general partners or joint venturers unless otherwise provided by recorded instruments executed by all partners or joint venturers.

(b) The statute governing limited partnerships formed between February 15, 1952, and July 1, 1988, provides that "a limited partnership may acquire property of any nature and take title thereto in the name of the partnership." (O.C.G.A. Section 14-9A-21).

(c) GRULPA (O.C.G.A. Section 14-2-106) provides in relevant part as follows:

"Any estate in real property may be acquired in the name of a domestic limited partnership or of a foreign limited partnership (whether or not such foreign limited partnership has procured, or is required under the provisions of Code Section 140-9-902 to procure, a certificate of authority to transact business in this state), and title to any estate so acquired shall vest in the domestic or foreign limited partnership itself rather than the partners individually

"Instruments executed by a domestic or foreign limited partnership conveying an interest in real property located in this state, when signed on behalf of such limited partnership by a person purporting to be a general partner of such limited partnership, shall be presumed to have been duly authorized by and binding upon such limited partnership unless contrary limitations on the authority of the general partner are set forth in the certificate of limited partnership and a copy of the certificate of limited partnership certified by the Secretary of State is filed in the office of the clerk of the superior court of the county where the real property is located and recorded in the book kept by such clerk for statements of partnership pursuant to Code Section 14-8-10.1."

Accordingly, subject to the other provisions of these Standards, the signature of only one general partner of a GRULPA-governed partnership is required on a conveyancing instrument.

(d) If a limited partnership governed by GRULPA improperly executed an instrument in the chain of title and the partnership has terminated and a certificate of cancellation has been filed with the Secretary of State, the examiner should consider O.C.G.A. Section 14-9-805, which

provides that “deeds or other transfer instruments requiring execution after the filing of a certificate of cancellation by a dissolved limited partnership may be signed by any person who had authority to wind up the dissolved partnership under the provisions of subsection (a) of Code Section 14-9-803.”

10.4 Foreign Limited Partnerships and Foreign General Partners

Foreign limited partnerships transacting business in this state on or after July 1, 1988, are governed by the foreign limited partnership provisions of GRULPA. O.C.G.A. Section 14-9-907 provides that “the failure of a foreign limited partnership to obtain a certificate of authority does not impair the validity of any contract or act of the foreign limited partnership.” Accordingly, there should be no need for the examiner to establish whether a foreign limited partnership was qualified to do business in this state at the time it acquired or conveyed real property. If a general partner or a limited partnership with an instrument in the title is a foreign corporation, the examiner should take note of O.C.G.A. Section 14-2-1501(b)(14), which provides that “acting as a general partner of a limited partnership organized under this title or qualified to do business within this state as a foreign limited partnership” is an activity that does not constitute transacting business for purposes of requiring the foreign corporation to qualify to do business in this state.

10.5 Mergers

If the effect on title of a merger of a GRULPA-governed limited partnership appearing in the title is relevant to the examination, the examiner should consider O.C.G.A. Section 14-9-206.1(f), which provides in part as follows: “When the certificate of merger required by subsection (b) of this Code Section is effective, then for all purposes of the law of this state: (1) the surviving domestic or foreign limited partnership shall thereupon and thereafter possess all of the rights, privileges, immunities, franchises and powers of each of the merging partnerships, and all property, real, person and mixed . . . shall be taken and deemed to be transferred to and vested in the surviving domestic or foreign limited partnership without further act or deed; and the title to any real estate, or any interest therein, vested in any of the merged partnerships shall not revert or be in any way impaired by reason of such merger.”

CHAPTER 11

CONVEYANCES INVOLVING GENERAL PARTNERSHIPS

11.1 General; Authority; Execution

The Uniform Partnership Act (“UPA”) as adopted in this state went into effect on April 1, 1985. UPA Section 10 (O.C.G.A. Section 14-8-10) contains specific rules regarding the manner in which real property of a general partnership may be conveyed, depending in part on whether it is titled in the name of the partnership or in the names of the partners. UPA Section 9 (O.C.G.A. Section 14-8-9) deals with the authority of general partners to act on behalf of the partnership and, in general, establishes that each partner is an agent of the partnership and that the act of every partner, including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership, binds the partnership. The examiner should note, however, that less than all of the partners do not have authority to “do any other act which would make it impossible to carry on the ordinary business of a partnership.” (O.C.G.A. Section 14-8-9(3)(C)). Accordingly, if the examiner is unable to establish to the examiner’s satisfaction, by affidavit or otherwise, that the conveyance of the real property at issue would not have such effect, the examiner may reasonably require execution by all of the partners. The examiner also should be aware that UPA Section 4 (O.C.G.A. Section 14-8-4) provides that “the validity of an instrument executed on behalf of the partnership by a partner shall not be affected by the formality with which the partnership contract was executed.”

11.2 Statements of Partnership

UPA Section 10.1 (O.C.G.A. Section 14-8-10.1) authorizes the filing by a general partnership of a “statement of partnership” in the office of the clerk of the superior court of any county. Among other things such a statement may disclose limitations on the authority of one or more partners to act on behalf of the partnership. The existence of facts disclosed in a statement of partnership are conclusively presumed in favor of the partnership and against the grantee from the partnership, or a person claiming through such grantee, of partnership real property located in a county in which a statement of partnership or a certified copy thereof has been recorded. Accordingly, the examiner should determine whether a statement of partnership has been recorded by any partnership with an instrument in the title in the county in which the real property is located. If a statement of partnership has been so recorded, the examiner should consider the effect of the facts stated therein. Facts stated in a statement of partnership are conclusively presumed against the partnership if the statement has been recorded in any county.

Accordingly, the examiner may wish to establish, by affidavit or otherwise, whether a partnership with an instrument in the title has filed a statement of partnership in a county other than the county in which the real property is located. Similarly, the examiner may wish to establish, by affidavit or otherwise, whether an affidavit of the kind authorized by O.C.G.A. Section 14-8-10.1(f) (which in some circumstances can negate the conclusive presumptions against a partnership established by a statement of partnership) has been recorded.

11.3 Vesting of Property of Dissolved Partnerships

If a partnership with an instrument in the title is dissolved, the examiner should consider the provisions of O.C.G.A. Section 14-8-38.1 and -38.2, which provide, respectively, as follows:

“When a partnership is dissolved for any reason, either pursuant to the provisions of this chapter or the partnership agreement or otherwise, and the business is continued as a partnership, the title to any real property or other property vested in such dissolved partnership shall, by operation of law, be vested in the partnership continuing the business without reversion or impairment and without further act or deed or other instrument of transfer or conveyance.”

“In every instance prior to July 1, 1989, where a partnership has been dissolved for any reason, either pursuant to the provisions of this chapter or the partnership agreement or otherwise and the business is continued as a partnership, but no deed or other instrument of transfer or conveyance for any real property or other property to the partnership continuing the business has been duly executed and properly recorded, title to such real property or other property, shall, by operation of law, be vested in such partnership continuing the business without reversion or impairment and in as valid and effectual a manner in every case as if a deed or other instrument of transfer or conveyance from such dissolved partnership to such partnership continuing the business had been duly executed and properly recorded.”

11.4 Conveyances of Real Property Prior to UPA Held in Partnership Name

Prior to UPA, real property acquired by a partnership and held in the name of the partnership generally could be conveyed, in such name, only by an instrument executed by all general partners unless otherwise provided by recorded instrument executed by all partners.

Comment: See Hammond v. Chastain, 230 GA. 747, 199 S.E.2d 237 (1973).

11.5 Conveyances of Real Property Subsequent to UPA Held in Name of Partnership Formed Prior to UPA

Subsequent to UPA (April 1, 1985) a conveyance of real property acquired prior to UPA and held in the name of a partnership formed prior to UPA can be conveyed in such name only by an instrument executed by all general partners unless otherwise provided by recorded instrument executed by all partners.

CHAPTER 12

CONVEYANCES INVOLVING LIMITED LIABILITY COMPANIES

12.1 General Authority

Limited liability companies may be created under the laws of this state from and after March 1, 1994. With respect to third parties, the articles of organization, which are filed with the Secretary of State, establish whether the limited liability company is managed by its members or managed by managers. If the articles of organization do not state that the limited liability company is managed by managers, then it is managed by its members. The examiner should consider the agency powers of members and managers as set forth in O.C.G.A. Section 14-11-301. In general, in a member-managed limited liability company, every member is an agent of the limited liability company, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business and affairs of the limited liability company, binds the limited liability company. If a limited liability company is manager-managed, no member has such agency powers and every manager has such agency powers.

12.2 Recorded Copies of Articles of Organization

O.C.G.A. Section 14-11-302 authorizes the filing of a copy of the article of organization certified by the Secretary of State in the office of the superior court of a county where real property owned by the limited liability company

is located. Any limitations on the authority of any or all members or managers that are set forth in articles of organization so filed shall be conclusively presumed in favor of the limited liability company and against a grantee of the limited liability company, or a person claiming through such grantee, with respect to real property of the limited liability company located in that county. Accordingly, the examiner should determine whether a limited liability company with an instrument in the title has recorded a copy of its articles of organization in the county in which the real property is located. If a copy of the limited liability company's articles of organization has been so recorded, the examiner should consider the effect of any limitations on authority stated therein.

12.3 Mergers

If the effect on title of a merger of a limited liability company appearing in the title is relevant to the examination, and if the limited liability company was the surviving entity in such merger, the examiner should consider O.C.G.A. Section 14-11-905, which provides that "if the surviving entity is a limited "liability company, when a merger takes effect . . . the title to all real estate and other property owned by each constituent business entity is vested in the surviving limited liability company without reversion or impairment."

12.4 Terminated Limited Liability Companies

If a limited liability company with an instrument in the title has terminated and a certificate of termination has been filed with the Secretary of State, the examiner should consider O.C.G.A. Section 14-11-611, which provides that "deeds and other instruments requiring execution after the filing of a certificate of termination by a dissolved limited liability company may be signed by any person who had authority to wind up the dissolved limited liability company under the provisions of subsection (a) of Code Section 14-11-604."

12.5 Foreign Limited Liability Companies

O.C.G.A. Section 14-11-711(b) provides that "the failure of a foreign limited liability company to procure a certificate of authority does not impair the validity of any contract or act of the foreign limited liability company." Accordingly, there should be no need for the examiner to establish whether a foreign limited liability company was qualified to do business in this state at the time it acquired or conveyed real property.

CHAPTER 13

TITLE THROUGH DECEDENTS' ESTATES

13.1 Judgments Against Heirs or Devisees

Where a will authorized the executor to sell real estate and such sale is made to parties other than the heirs or devisees, judgments against the heirs or devisees do not constitute a lien on the land so sold, and the examiner need not conduct a search therefor.

13.2 Surviving Widow, Widower or Minor Children

Where facts show that a decedent has left a surviving widow, widower or minor children, inquiry and examination should be made concerning the application for year's support by said widow, widower or minor children and in case of intestacies, inquiry should be made concerning the application of widow or widower for a child's part in said estate.

Comment: Pursuant to O.C.G.A. Section 53-5-1, any person who becomes widowed is entitled to a year's support from the estate of the deceased spouse. The surviving spouse, whether husband or wife, is entitled to obtain this support. Hunnicutt v. Hunnicutt, 180 Ga. App. 798, 350 S.E.2d 770 (1986).

O.C.G.A. Section 53-4-2 states the intestate succession rules for children when a parent dies leaving a surviving spouse. These rules would govern the application for a child's share by a widow or widower.

13.3 No Will, No Administration, Death Within Twelve Months

Where a decedent leaves no will and there has been no administration on his estate and death has occurred within twelve months, a marketable title may be conveyed by : (1) proof showing the death intestate, identifying the decedent's heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heir at law as identified by the proof, provided that they are of age and of sound mind, (3) the entry of an order from the Probate Court dispensing with the administration upon the

estate of the decedent, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.4 No Will, No Administration, Death From One to Three Years Past

Where a decedent leaves no will and there has been no administration on his estate and death has occurred from one to three years past, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent's heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) either the entry of an order from the Probate Court dispensing with the administration upon the estate of the decedent or an indemnify agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.5 No Will, No Administration, Death More Than Three Years Past

Where a decedent leaves no will and there has been no administration on his estate and death has occurred more than three years past, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying decedent's heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance form the above heirs at law a identified by the proof, provided that they are of age and of sound mind, (3) proof being furnished that all debts of the estate of the decedent have been fully paid, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.6 No Will, Administration Pending on Estate — Public Sale by Administrator

Where decedent leaves no will and where there is an administration pending on his estate, a marketable title may be conveyed by: (1) a deed from the decedent's administrator to the highest bidder at a regular public sale after due advertisement upon the usual order of the Probate Court, (2) a determination that no application for year's support has been made, and (3) proof that federal estate taxes cannot result in a lien against the property.

Comment: A surviving spouse or minor child cannot attach a lien for a year's support to property that is conveyed by the executor or administrator in an authorized sale. O.C.G.A. Section 53-5-14. O.C.G.A. Sections 53-8-20 through -29 govern the requirements for a public sale.

13.7 No Will, Administration Pending on Estate — Private Sale by Heirs at Law with Disclaimer by Administrator

Where a decedent leaves no will and there is an administration pending on his estate, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent's heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) a conveyance from the Administrator to disclaim any administrative rights therein, (4) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (5) proof that federal estate taxes cannot result in a lien against the property.

13.8 No Will, But Administrator Discharged Prior to Sale

Where a decedent leaves no will and there has been an administration on his estate but the administrator has been discharged, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent's heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, and (3) proof that federal estate taxes cannot result in a lien against the property.

13.9 Will Probated in Solemn Form Authorizes Sale — Executor Qualified Within Past Six Months

Where a decedent leaves a will which has been probated in solemn form and the executor has qualified within the past six months and the will authorizes sale, a marketable title may be conveyed by: (1) a deed from the executor containing recitals showing that it is made pursuant to the power of sale conferred under the terms of the will of the decedent, joined in by the beneficiary of any specific devise of the land to be conveyed, (2) a

determination that no application for year's support has been made, and (3) proof that federal estate taxes cannot result in a lien against the property.

Comment: A surviving spouse or minor child cannot attach a lien for a year's support to property that is conveyed by the executor or administrator in an authorized sale before the year's support is set aside. O.C.G.A. Section 53-5-14.

13.10 Will Probated in Solemn form Does Not Authorize Sale — Executor Qualified Within Past Six Months

Where a decedent leaves a will which has been probated in solemn form and the executor has qualified within the past six months but the will does not authorize a sale, a marketable title may be conveyed by: (1) a deed from the executor and all devisees of the property to be conveyed, (2) a determination that no application for year's support has been made, (3) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (4) proof that federal estate taxes cannot result in a lien against the property.

Comment: O.C.G.A. Section 53-5-14 was not intended to exempt devises and legacies from year's support. Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978).

13.11 Will Probated in Solemn Form Authorizes Sale — Executor Qualified More Than Six Months — No Assent to Devise

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified more than six months and the will authorizes a sale, a marketable title may be conveyed by: (1) a deed from the executor containing recitals showing that it is made pursuant to the power of sale conferred under the terms of the will of the decedent, (2) a determination that no application for a year's support has been made, (3) proof in the form of an affidavit recordable under O.C.G.A. Section 44-2-20 that the executor of the will has not assented to any general devise of the property under the will and that the property now remains in his hands for administration, (if the land to be conveyed is the subject of a specific devise, the devisee(s) should join in the deed) and (4) proof that federal estate taxes cannot result in a lien against the property.

13.12 Will Probated in Solemn Form Authorizes Sale — Executor Qualified
More than Six Months — Deed From Executor and All Devisees

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified for more than six months, and the will authorizes a sale, a marketable title may be conveyed by: (1) a deed from the executor in which all of the devisees of the property to be conveyed join as grantors, (2) a determination that no application for year's support has been made, (3) proof that all debts of the estate have been fully paid, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.13 Will Probated in solemn Form Does Not Authorize Sale —
Executor Qualified For More than Six Months

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified for more than six months and the will does not authorize a sale, marketable title may be conveyed by: (1) a deed from the executor and all devisees of the property to be conveyed under the will, (2) a determination that no application for year's support has been made, (3) proof that all debts of the estate have been fully paid, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.14 Will Probated in Common Form

Where a decedent leaves a will which has been probated in common form on or after July 1, 1984, it is conclusive after the passage of four years except as against minor heirs. Minor heirs have four years from the later of (a) coming of age with no other disability, or (b) four years after probate of the will in common form, within which to contest the will. Where a decedent leaves a will which has been probated in common form before July 1, 1984, it is conclusive after the earlier of July 1, 1988 or the expiration of seven years from the date of probate except as against minor heirs. Minor heirs have four years from the later of (a) coming of age with no disability, or (b) the date which is the earlier of July 1, 1984 or seven years after the date of the probate. Title which is obtained through the probate of a will in common form should not be accepted unless proof is obtained that all heirs were of age at the time of the probate and four years have passed. The probate of the will in solemn form should be required where four years have not elapsed or proof should be obtained as to the identity of all heirs and the appropriate deeds should be obtained from all heirs.

Comment: Pursuant to O.C.G.A. Section 53-3-12, when a will is probated in common form and is not attacked for four years, it is conclusive against all parties except minor heirs. Prior to the 1984 amendment of this

Code Section, the period required for conclusiveness of the probate was seven years, but minors coming of age with no disability had four years after reaching maturity in which to interpose a caveat to the probate. See Anderson v. Green, 46 Ga. 361 (1872); Churchill v. Corker, 25 Ga. 479 (1858).

This Standard was cited in Alston v. Stubbs, 170 Ga. App. 4417, 317 S.E.2d 272 (1984), in supporting a claim for cost of litigation in defending third-party action as a result of negligence of attorney in failure to comply with this Standard.

NOTE: Testamentary trusts are dealt with in Chapter 29 on Trusts.

CHAPTER 14

DEEDS TO SECURE DEBT (SECURITY DEEDS)

14.1 Security Deed Recorded Prior to Deed by Which Ownership Acquired

The validity of a security deed is not impaired by the fact that it is filed for record prior to the filing for record of the instrument by which ownership is acquired, except to the extent that rights of third parties may have intervened.

The recordation of an affidavit pursuant to O.C.G.A. Section 44-2-20 giving notice of a security deed recorded prior to the date of the deed into the grantor will place the security deed in the chain of title of the grantor as to parties acquiring interests from the grantor subsequent to the recordation of the affidavit.

Comment: If A has conveyed to B by warranty deed, and B thereafter has executed a security deed to A or a third party, the validity of the security deed is not affected by its being filed for record prior to the filing for record of the conveyance. Further, after recordation of the conveyance, the security deed is in the line of search unless it was filed for record prior to the indicated date of the conveyance. Of course, rights may have intervened between recordation of the security deed and recordation of the conveyance.

14.2 Deed from Owner to Holder of Security Deed

(a) Marketability is not impaired by the fact that title is derived through a conveyance from an owner to the holder of a security deed. In the absence of a statement in such conveyance that it is in lieu of foreclosure, the

examiner should consider any other facts available from the record and should make further inquiry if indicated, to determine whether the conveyance was in fact in lieu of foreclosure, or whether it was given merely as further security for the debt. In addition, if the record shows or the examiner has knowledge of the act that the mortgagor has or claims grounds for setting aside the conveyance or that a petition for bankruptcy has been filed by or against the owner prior to or within twelve months following the conveyance, further inquiry is necessary, whether title is held by the mortgagee or by a grantee from him.

(b) Marketability is not impaired by an undischarged security deed where an unqualified conveyance has been made by a person who was both record holder of the security deed and record holder of equitable title. Inquiry, or discharge of the security deed is unnecessary unless the record affirmatively discloses an intention that the security deed continue in effect.

Comment: A conveys to B, the holder of a security deed, with a recital that no merger was intended; and B thereafter conveys to C and the deed is silent as to the security deed. No cancellation of the security deed is required although the better practice would have been the inclusion of recital in the deed from B to C that a merger was intended at that point in time.

14.3 Satisfaction of Assignment of Rents

Failure to release an assignment of rents does not impair marketability, if from the record it can be determined or inferred with reasonable certainty that the assignment was given as additional security for an obligation secured by a security deed which has been discharged of record. Otherwise, the assignment of rents must be satisfied in the same manner as a security deed.

14.4 Releases Corrective or Re-recorded Security Deed

Where a security deed is followed by another which can be determined from the record to have been given to correct or modify the former, or to be a rerecording of the former, or to secure the same obligation, if the cancellation of one of the security deeds contains recitals which make it clear that no debt remains between the grantor and the grantee, failure to cancel the other security deed does not impair marketability.

Marketability is not impaired by a failure to discharge a modification agreement where the original security deed so modified has been canceled

and satisfied of record. However, it would be better practice to have both instruments canceled of record.

14.5 Reference to Unrecorded Security Deed

A reference in an instrument in the chain of title to a security deed which cannot reasonably be identified with any security deed in the chain of title impairs marketability and necessitates corrective action.

14.6 Reversion of Property Conveyed to Secure Debt

Title to real property conveyed to secure debt reverts to the Grantor:

(a) Where the maturity of the debt is stated in the record of such conveyance, and the indebtedness has not been renewed, seven years from such maturity; or

(b) Where no maturity is stated, and the conveyance does not contain any affirmative statement as to the establishment of a perpetual or indefinite security interest (as specified in subparagraph (c), infra), seven years from the date of the conveyance provided the affidavit specified in subparagraph (f), infra, has not been recorded; or

(c) Where no maturity is stated but the conveyance contains an affirmative statement that the parties intend to establish a perpetual or indefinite security interest in the real property conveyed to secure a debt or debts, twenty years from the date of the conveyance, provided that the affidavit specified in subparagraph (f), infra, has not been recorded; or

(d) If no maturity is stated nor is there a date shown for the conveyance, at the expiration of seven years from the date the conveyance is recorded, provided the affidavit specified in subparagraph (f), infra, has not been recorded; or

(e) Where there is a dated written renewal of the indebtedness signed by the original grantor or grantor's heirs, personal representative, or successors in title to the real estate conveyed, either seven or twenty years from the date of the renewal according to the appropriate reversion period set out above; or

(f) If grantee or grantee's personal representatives, heirs, successors, or assigns, or any of them if more than one, or an officer of a corporation having an interest files of record an affidavit in accordance with

the provisions of O.C.G.A. Section 44-14-80 (c) specifying the maturity date of the indebtedness secured, and if the debt has been renewed or extended, the terms thereof, either seven or twenty years from the maturity date specified in the affidavit according to the appropriate reversion period set out above.

Comment: O.C.G.A. Section 44-14-80 provides very specific rules for the application of the reversion. Specific reference should be made to this section before passing title based on the reverter. Deeds executed prior to the passage of this original section (March 27, 1941) are not affected by the section. See Smith v. Merchants & Farmers Bank of Milledgeville, 226 Ga. 715, 177 S.E.2d 240 (1970); Drake v.. Barrs, 225 Ga. 597, 170 S.E.2d 684 (1969); Todd v. Morgan, 215 Ga. 220, 109 S.E.2d 803 (1959). Prior to the 1994 amendment this code Section established a 20 year reverter following maturity of the debt or recording or delivery if no maturity was stated. This Code Section, as amended, should not be relied upon as to security deeds executed prior to the effective date, April 19, 1994, of the 1994 amendment.

14.7 Satisfaction of Deeds to Secure Debt

Deeds to secure debt may be satisfied of record in any one of the following three ways:

(1) By written order of the record holder of the deed to secure debt, entered on the face of the deed, directing that the deed be canceled and that the Clerk enter it satisfied in the appropriate deed records.

(2) By quitclaim deed containing a reference to the security deed and reciting that the quitclaim deed is given for the purpose of either: (a) satisfying of record the security deed, the debt secured thereby having been paid in full, or (b) releasing the described property from the lien of the security deed. The Grantee in such quitclaim deed should be one of the following:

- (A) The current holder of record title, or
- (B) The person into whom title is to be conveyed, or
- (C) The original Grantor in the security deed.

(3) In instances in which the original security deed has been lost, stolen, or otherwise mislaid, by document in substantially the following form, executed by the owner of the security interest and who swears in such document, which document shall be recorded:

____ County, Georgia

The indebtedness referred to in that certain deed to secure debt from
to

____, dated ____, and of record in Deed Book ____, Page ____, in the office of the clerk of the Superior Court of _____ County, Georgia, having been paid in full and the undersigned being the present record owner of such secured interest by virtue of being the original grantee or the heir, assign, transferee, or devisee of the original grantee, the clerk of such Superior Court is authorized and directed to cancel that deed of record as provided in Code section 44-14-4 of the O.C.G.A. for other mortgage cancellations.

In witness whereof, the undersigned has set his or her hand and seal,
this day of , 19 .

(SEAL)

Signed, sealed, and delivered Signature
on the date above shown

Unofficial witness

Notary Public (SEAL)
My commission expires:

Comment: The three methods of cancellation are based upon O.C.G.A. Section 44-14-67. The absence of a recital identifying the security deed in the quitclaim deed suggested in (b) above does not render the quitclaim deed ineffective provided that there is no limitation on the grant. However, a recital specifying the security deed to be canceled is preferable practice in that it gives rise to the possibility that the Clerk will in fact satisfy the security deed by virtue of O.C.G.A. Section 44-14-67(b)(2) or at least cross reference the quitclaim deed on the record of the security deed.

14.8 Failure to Pay Intangible Recording Tax

Although failure to pay intangible recording tax pursuant to O.C.G.A. Section 48-6-60 et seq. constitutes a bar to collection of the indebtedness secured by a mortgage, deed to secure debt or other form of security instrument, an instrument otherwise in a form sufficient for recording and actually recorded by the Clerk of Superior Court in the appropriate county is effective as legal notice of the interest of the secured party, even if the intangibles tax has not been paid. [O.C.G.A. Section 48-6-62(a)(2)].

14.9 Waiver of Borrower's Rights

It is recommended that at closing the borrower execute a Waiver of Borrower's Rights. this will allow the loans to be sold in any market, However, the failure of such waiver to be attached to the security deed as recorded shall not invalidate the security deed nor prevent the exercise of an otherwise proper power of sale.

Comment: Prudent closing procedure since 1973, following the decision of Law v. United States Dept. of Agriculture, 366 F. Supp. 1233 (N.D. Ga. 1973), has included the use of the Borrower's Waiver in conjunction with the execution of the deed to secure debt containing the power of sale by non-judicial foreclosure. It is settled that state action is not involved in the exercise of the private power of sale by a private lender and therefore there can be no violation of the due process requirements of the fourteenth Amendment [Global Industries, Inc. v. Harris, 376 F. Supp. 1379 (N.D. Ga. 1974); Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1973)], and likewise it is settled that federal action is not involved in the exercise of the power of sale by a private lender in a mortgage financed under a federal loan program and therefore there can be no violation of the due process requirements of the Fifth Amendment [Roberts v. Cameron Brown, 556 F.2d 356 (5th Cir. 1977)]. However, prudence dictates that the execution of such a waiver at closing is one more indication that the borrower understands that he/she will not be sued on the note prior to the exercise of the private non-judicial power of sale.

CHAPTER 15

MECHANICS' AND MATERIALMEN'S LIENS

15.1 Scope of Search

The examining attorney is not required to examine the records of the Clerk of Court of the County in which the property lies in the names of any party other than that of the record title holder of the interest being examined.

Comment: While the scope of a record search need not be expanded to include the name of the general contractor, it is suggested that should the examination be for a leasehold interest, the name of the fee holder, as well as the tenant, should be searched.

15.2 Inchoate Nature of Lien Right

Mechanics, contractors, subcontractors, materialmen, laborers, architects, registered foresters, registered land surveyors, and suppliers of rental tools possess a special statutory lien upon the real estate for their effort or materials furnished to improve the real estate, but the statutory requirements for the perfection of said lien are strictly construed. The term "mechanics' and materialmen's lien" as used herein refers to the statutory lien provided to the above named parties as set forth in O.C.G.A. Sections 44-14-361 and 361.1.

15.3 Priority of Mechanics' and Materialmen's Liens

Mechanics' and materialmen's liens are inferior to liens for taxes, to the general and specific liens of laborers, to the general lien of landlords of rent when a distress warrant is issued out and levied, to claims for purchase money due persons who have only given bonds for titles, and to other general liens when actual notice of the general lien of landlords and others has been communicated before the work was done or materials or services furnished. Properly perfected mechanics' and materialmen's liens are superior to all liens which are not enumerated in the previous sentence.

Comment: See O.C.G.A. Section 44-14-361.1(c).

15.4 Recitals of Ownership

The mere statement of ownership in a mechanics' and materialmen's lien does not create a cloud on title. Where such a lien is filed against someone who does not have record title to the subject property, the lien and the statement of ownership may be disregarded by a title examiner. Also, a Notice of Commencement filed by an owner or general contractor shall not constitute a cloud, lien or encumbrance upon or defect to the title of the property described within the Notice of Commencement.

Comment: Source - Old Title Standard 13.2; O.C.G.A. Section 44-14-361.5(d).

15.5 No Release of Lien Necessary

In order for a mechanics' and materialmen's lien to be perfected, it must be filed within three months after the completion of work. Failure of a lienholder to commence an action within twelve (12) months from the time his claim became due and failure of the lienholder to file the statutory notice

of filing of suit to collect the claim in the county wherein the property is located, renders the claim of lien unenforceable. The notice of filing of suit is to be cross-indexed by the Clerk of Court. A mechanics' or materialmen's lien may be disregarded once it is determined that no notice of suit was filed within the period of twelve months plus two weeks from the time in which suit must be filed. No release of such lien shall be required by the title examiner.

Comment: Source — O.C.G.A. 44-14361.1(a)(2). The examining attorney may rely on the dates set forth in the lien and to consider that the lien has terminated automatically after twelve months plus two weeks if no notice of filing suit has been filed.

15.6 Release of Lien

A properly filed mechanics' or materialmen's lien before or during the institution of foreclosure proceedings may be discharged by filing a bond in the Office of the Clerk of the Superior Court of the county in which the lien was filed. The form and sufficiency of said statutory bond must be approved by the Clerk of the Court and upon the filing of the bond, the real estate shall be discharged from the lien.

Comment: Source — O.C.G.A. 44-14-364(a). The examining attorney may rely upon the appearance of a property bond or cash bond as evidence of the discharge of the lien only if said bond has been recorded in the correct county and if said bond clearly shows that it has been accepted by the Clerk of Superior Court. Mere recordation of a bond without the clerk's statutory approval appears to negate the validity of the bond. The examining attorney must always look for this approval. The Code appears silent as to the method of releasing a bond. Until otherwise established, the examining attorney must require formal petition and order of court to release the bond rather than relying upon an automatic release as would have occurred under the original lien.

15.7 Preliminary Notice of Liens and Liens of Persons Without Privity of Contract with the Contractor

The examining attorney must inspect the deed records or the Index of Preliminary Notice of Lien Rights or such separate index as established by the Clerk of Court to ascertain the identity of potential lien claimants. Upon discovery of such filings, statutory releases must be obtained and recorded.

Comment: Source — O.C.G.A. Sections 44-14-361.3, -361.4 and -361.5.

15.8 Satisfaction of a Mechanics' and Materialmen's Lien

- (a) Mechanics' and materialmen's liens may be satisfied of record as follows:
1. By written order of the mechanic or materialman or its attorney upon the original lien directing that the instrument be satisfied and that the Clerk enter it satisfied; or,
 2. By Quitclaim Deed from the mechanic or materialman to the current holder of record title or the Grantee to whom title is being conveyed. Said Quitclaim Deed should set forth the specific purpose of releasing the property described therein from the specific lien.
- (b) Should there be a Preliminary Notice of Lien Rights filed, the examining attorney may rely upon a cancellation form which substantially conforms to the Code.

Comment: Source — O.C.G.A. Section 44-14-362(b).

15.9 Affidavits to Dissolve Mechanics' and Materialmen's Lien Rights

A mechanics' and materialmen's lien "shall be dissolved if the owner, purchaser from the owner, or lender providing construction or purchase money or any other loan secured by real estate shows that: ... (A) They or any of them have obtained the sworn written statement of the contractor or person other than the owner at whose instance the labor, services, or materials were furnished, or the owner when conveying title in a bona fide sale or loan transaction, that the agreed price or reasonable value of the labor, services, or materials have been paid or waived in writing by the lien claimant; and

"(B) When the sworn statement was obtained or given as a part of a transaction:

- (i) Involving a conveyance of title in a bona fide sale;
- (ii) Involving a loan in which the real estate is to secure repayment of the loan; or

- (iii) Where final disbursement of the contract price is made by the owner to the contractor where there was not of record, at the time of the settlement of the transaction a valid preliminary notice or claim of lien which had not been previously canceled, dissolved, or expired.” (O.C.G.A., Section 44-14-361.2). This Code Section provides that the term “Person other than the owner” shall not include a subcontractor and that the term “Final Disbursement” of the contract price “means payment of the agreed price between the owner and contractor for the improvements made upon the real estate or the reasonable value of the labor, services, and materials incorporated in the improvements upon the real estate and includes payment of the balance of the contract price to an escrow agent.”

Comment: See Pindar and Pindar, Ga. Real Est. Law, Sections 26-99 and 28-72 (4th ed.).

CHAPTER 16

MISCELLANEOUS

16.1 Failure to Release Notice of Lis Pendens

An unreleased notice of the pendency of proceedings does not impair marketability after the noticed proceedings have terminated in the Court where pending.

Comment: If the lis pendens is for an action in a Court other than the Superior Court of the County in which the real estate lies, the better practice is to evidence the termination of the proceedings on the record.

16.2 Quitclaim, Limited Warranty, Executor's and Administrator's Deeds

The fact that a conveyance necessary to the chain of title, including the conveyance to the proposed grantor, is a quitclaim, limited warranty, executor's or administrator's deed does not impair marketability or necessitate full inquiry or corrective action.

Comment: "If the grantor has title to or an interest in land, a deed of quitclaim is just as effective to pass that title as a deed with covenants of warranty." McDonald v. Dabney, 161 Ga. 711, 714, 132 S.E. 547 (1926). It is good practice to include within a quitclaim deed a recital as to the purpose for which the deed is given.

Good and marketable title to real estate owned by the decedent may be conveyed by an administrator's deed. Smith Realty Company v. Hubbard, 124 Ga. App. 265, 183 S.E.2d 506 (1971). "The recital contained in the administrator's or executor's deed of a compliance with legal provisions shall be prima-facie evidence of the facts stated." O.C.G.A. Section 53-8-50.

16.3 Judgments and Executions

Judgments, decrees, orders and writs of fieri facias issued pursuant to any judgment, decree or order do not become a lien upon the title to real property until said judgment, decree or writ of fieri facias is entered in proper indices in the applicable records in the Office of the clerk of the Superior Court of the county in which the real property is located. However, this section does not apply if the parties have actual notice of the existence of a judgment, decree or order or a fi fa issued on same.

Comment: O.C.G.A. Section 9-12-86(b). "The purpose of the statute is to protect third persons acting in good faith and without notice by requiring that any judgment, decree or order must be recorded before it will in any way affect or become a lien on title to real property...The period between the taking of the judgment and its recording is merely a period of dormancy. When the judgment is recorded as provided for in the Code, the dormancy ends and the judgment becomes effective as a lien on real estate. We hold that for priority purposes, the judgment then relates back to the date of its rendition and shall be considered of equal date with other perfected liens arising from judgments on verdicts rendered at the same term of court." National Bank of Georgia v. Morris-Weathers Co., 248 Ga. 798, 800, 286 S.E.2d 17 (1982).

16.4 Dormancy of Judgments

Judgments (except Federal liens in certain situations) become dormant after seven years from their being indexed in the General Execution Docket. In the absence of an entry upon the judgment showing levy or nulla bona and re-recording of same in the General Execution Docket, the judgment is not effective for an additional seven year period. Thus, judgments which were

entered seven years prior to the date of examination and which have not been re-filed and re-indexed in the General Execution Docket do not affect marketability of title (O.C.G.A. Section 9-12-60). The same rule applies for State, County and City tax executions (O.C.G.A. Section 48-3-21).

16.5 Cancellation of General Execution Docket Recordings

General Execution Docket recordings may be satisfied of record as follows:

1. By written order of the Plaintiff in execution or its attorney upon the original instrument directing that the instrument be satisfied and that the Clerk enter it satisfied.
2. By Quitclaim Deed from the Plaintiff to the current holder of record title or the Grantee to whom title is being conveyed. Said Quitclaim Deed should set forth the property described therein from the lien of the specific General Execution Docket recording.

16.6 Liens Arising from the Uniform Commercial Code

Marketability of title is adversely affected by (1) any UCC financing statement filed prior to 1995 which purports to cover fixtures, crops, minerals or any other real estate related collateral, (2) any deed to secure debt or mortgage filed as a fixture filing, and/or (3) any UCC financing statement filed on or after January 1, 1995 if a UCC-2 Real Estate Related Notice Filing (as hereinafter defined) has been filed in the real estate records affecting the subject property. Marketability of title continues to be affected until the statement and any notice filing made in connection therewith have been terminated or cancelled or the subject property has been released from the lien of the statement and any notice filing. In order to discover any UCC financing statements or deeds to secure debt filed as fixture filings which may affect title, the examiner currently must search (i) the indexes in which pre-1995 UCC statements would have been filed, (ii) the new central indexing system (as described below) and (iii) the real estate records. Any UCC statements, deeds to secure debt filed as fixture filings and/or notice filings which purport to affect the real estate must be reported to the client as an exception to title to enable the closing attorney to have both the statement and the notice filing terminated of record. The examiner is not required to examine title to personal property unless specifically directed to do so by the client.

Comment: See generally O.C.G.A. Section 11-9-401 - Section 11-9-409. The new Uniform Commercial Code ("UCC") Central Indexing and Local Filing System for Georgia, which became effective on January 1, 1995, creates a new "file anywhere" system for UCC financing statements and a new Georgia Superior Court Clerks Cooperative Authority (the "Authority") to administer and regulate the new system (O.C.G.A. Section 11-9-407). The local indexing system, which was in use in Georgia until the new law became effective on January 1, 1995, will continue for UCC filings filed prior to January 1, 1995. Thus, until all pre-January 1, 1995 financing statements have lapsed or been terminated, examiners will have to search both systems. It is difficult to state at what point the dual indexing system will terminate, since it will exist until all pre-January 1, 1995 real estate deeds to secure debt filed as fixture filings are released or satisfied of record or until their effectiveness otherwise terminates as to the real estate.

*In order to preserve this new "file anywhere" system for financing statements, yet still maintain the integrity of the real estate records such that a secured party may obtain priority over conflicting interest of other encumbrances or owners of real estate, a notice filing is required to be made in connection with security interests in related real estate collateral [i.e. fixture filings and financing statements covering crops, minerals or the like, including oil and gas and accounts resulting from the sale of minerals and the like (including oil and gas) at the wellhead or minehead (hereinafter referred to as "UCC Related Real Estate"; said notice filing being herein referred to as either a "UCC-2 Real Estate Related Notice Filing" or a "notice filing"). In order for a secured party to have a perfected interest in Real Estate Related Collateral, this UCC-2 Real Estate Related Notice Filing must be made **in addition to** and **not in place of** a financing statement otherwise required to be filed. The notice filing must be made notwithstanding the fact that the financing statement covering the collateral was filed in the county in which the real estate is located or elsewhere as permitted under the "file anywhere" rule [O.C.G.A. Section 11-9-402 and Section 11-9-403(7)]. Security deeds filed on or after January 1, 1995 can no longer serve as fixture filings [O.C.G.A. Section 11-9-403(6)]*

Notice filings must be made in the real estate records in the county or counties where the relevant UCC Related Real estate is located [O.C.G.A. Section 11-9-403(7)].

If the UCC Related Real Estate is located in multiple counties, separate notice filings must be made in each county in which the UCC Related Real Estate is located. A notice filing will be deemed filed upon presentation to the clerk for filing and tender of the filing fee [O.C.G.A Section 11-9-403(1)]. Notice filings will be indexed in the grantor/grantee index of the real estate records under

the name of any owner or lessee of record shown on the notice filing. If no name is shown, the notice filing will be indexed under the name of the debtor as if the debtor were the mortgagor in a mortgage of the real estate described. There will not be a separately maintained local index for notice filings, nor will the Authority maintain a central index for notice filings.

16.7 Methods of Canceling UCC Financing Statements and Notice Filings

1. All UCC-1 financing statements may be terminated or released by filing a UCC-3 statement of termination. This form is prescribed by the Authority. For pre-1995 financing statements, the UCC-3 termination statement must be filed in the county in which the original statement was filed (if the original UCC-1 was filed in multiple counties, the termination need only be filed in one of the original counties).
2. Releases and terminations (as well as amendments and assignments) of notice filings may be on forms prescribed by the Authority or may be in the same form as "comparable instruments" used to release or terminate (amend or assign) mortgages in the real estate records.

Comment: See O.C.G.A. Section 11-9-403(7). It appears that a secured party may cancel both its security deed and notice filing in the same document. While the law states the releases or terminations of notice filings need not be attested or acknowledged, it is silent regarding whether the documents nonetheless need to be in recordable form. Until the issue is clarified, prudent practice would dictate having any release documents other than that prescribed by the Authority properly witnessed and notarized. Amendments, releases, assignments and terminations must be filed in the county or counties in which the original notice filing(s) were recorded.

CHAPTER 17

FORECLOSURES

17.1 Foreclosure in General

Foreclosures in Georgia may be conducted in equity; pursuant to statutory procedures; by execution, levy and sheriff's sale; and by non-judicial power of sale. The non-judicial power of sale is the most common method of foreclosure in Georgia. The most common security instrument in Georgia is the deed to secure debt also referred to as a security deed.

When a foreclosure appears in the chain of title, an examination of the security instrument which was foreclosed is necessary. The security instrument and succession of transfers to the current holder authorized to conduct the sale should be recorded. A foreclosure sale conducted after the statute of limitations has run on the security instrument is void. Failure to pay intangible recording tax applicable to the security instrument constitutes a bar to foreclosure. Such bar to foreclosure may be removed by payment of the tax plus penalty and interest. Since non-judicial power of sale is a contractual remedy, the terms and procedures for conducting the foreclosure sale must be set forth in the security instrument to be foreclosed. The instrument must also contain a valid power of attorney empowering the grantee to conduct the foreclosure sale and execute the deed under power of sale as the attorney in fact for the grantor.

While there is no statutory procedure for conducting non-judicial foreclosure sales, it is required that a non-judicial foreclosure sale be advertised and conducted in the same manner as sheriffs' sales. If all or a part of the property to be foreclosed was to be used as a dwelling place of the debtor at the time the security instrument is entered into, written notice of the sale must be given to the debtor by registered or certified mail sent no later than 15 days prior to the foreclosure sale date.

Comment: For a comparison of security deeds with other security instruments, see Pindar and Pindar, Ga. Real Est. Law, Section 21-4 (4th ed.).

Security deeds and transfers recorded after July 1, 1989, should include the mailing address of the grantee or transferee. However, failure to include the mailing address is not a defense to foreclosure (O.C.G.A. Sections 44-14-63 and 64). A foreclosure sale by a holder of a security instrument pursuant to an unrecorded transfer is valid. [Burgess v. Simmons, 207 Ga. 291, 61 S.E.2d 410 (1950)]. However, failure to record the transfer would require future examiners to inquire as to the authority of the party executing the deed under power of sale. [Pindar and Pindar, Ga. Real Est. Law, Section 21-46 (4th ed.)].

O.C.G.A. Section 44-14-80 establishes a 7-year reverter following maturity of the debt or recording or delivery if no maturity is stated and a 20-year reverter from the date of the conveyance if no maturity is stated and the conveyance contains an affirmative statement that the parties intend to

establish a perpetual or indefinite security interest in the property conveyed to secure a debt or debts. (See Standard 14.6). Prior to the 1994 amendment, this Code Section established a 20-year reverter following maturity of the debt or recording or delivery if no maturity was stated. The amended Code Section should not be relied upon as to security deeds executed prior to the effective date, April 19, 1994, of the 1994 amendment. O.C.G.A. Section 44-14-81 bars a foreclosure after the reversion period. The expiration of the statute of limitations on a note secured by a security deed does not bar foreclosure (O.C.G.A. Section 44-14-43).

O.C.G.A. Section 48-6-61 imposes a tax of \$1.50 for each \$500.00 or fraction thereof of the face amount of a long-term note secured by real estate as defined at O.C.G.A. Section 48-6-60 (2). O.C.G.A. Section 48-6-77(a) bars foreclosure unless applicable intangible recording tax is paid. This same Code Section imposes a penalty of 50% of the amount of the tax plus interest if such tax is not paid within 90 days of the date of the instrument.

For standards regarding powers of attorney see Standard 8.5.

See O.C.G.A. Section 23-2-114 for power of sale in deed to secure debt and O.C.G.A. Section 44-14-162 for conducting as a sheriff's sale.

See O.C.G.A. Sections 44-14-162.1 through 162.4 for notice requirements to debtor and deed recitals.

17.2 Deed Under Power of Sale

A deed under power of sale executed by the grantee of a security instrument or any subsequent assignee thereof pursuant to a valid power of attorney contained in the security instrument conveys marketable title (provided title was marketable at the time the security instrument was given) to the property described therein if the deed under power of sale contains recitals as to the security instrument containing the power of sale, default, proper legal advertisement, the time, place and results of the sale and compliance with notice requirements of O.C.G.A. Section 44-14-162.2 or facts which render such notice inapplicable. All such recitals in a deed under power of sale may be relied on if there is no irregularity on its face and no other matters appear of record which would render any such recital questionable and necessitate further inquiry. The deed under power of sale should be cross-referenced to the foreclosed security instrument.

Inconsequential scrivener's errors in the legal description in the security instrument can be corrected in describing the property in the deed

under the power of sale. However, an invalid legal description in the security instrument cannot be corrected by a foreclosure sale.

A deed under power of sale resulting from the foreclosure of a junior security instrument should reference senior security instruments. If a deed under power of sale of a junior security instrument does not reference senior security instruments, it should be established that reference to such senior instruments in the foreclosure advertisement was made and a corrective deed under power of sale required. Such inquiry and corrective work is not necessary if in the opinion of the examiner sufficient time following the foreclosure sale has elapsed to render an action to set aside the foreclosure sale unlikely.

Comment: The deed under power of sale should be executed by the holder of the security instrument as attorney in fact for the debtor. However, a deed under power of sale executed by the holder in its own name will not render title unmarketable if sufficient recitals in the deed indicate that it was executed in representative capacity of the debtor. [Garrett v. Crawford, 128 Ga. 519, 57 S.E. 792 (1907)]. Unless expressly prohibited by the security instrument, successors may exercise the power of sale. (O.C.G.A. Section 23-2-14). For requirements of transfers see O.C.G.A. Section 44-14-64.

The foreclosed security instrument should be notated as "foreclosed" and reference should be inserted to the deed book and page of the deed under power of sale. See O.C.G.A. Section 44-14-160.

O.C.G.A. Section 9-13-140 requires the legal advertisement to give a full and complete description of the property to be sold. [Shantha v. West Georgia National Bank, 145 Ga. App. 712, 244 S.E.2d 643 (1978)].

Failure to include existence of senior security interests creates a question of fact as to chilling of the bidding. [Smith v. Citizens & Southern Financial Corporation, 245 Ga. 850, 268 S.E.2d 157 (1980)].

The 20-year statute of limitations found in O.C.G.A. Section 9-3-23 has been conversely applied to actions for breach of covenants against the holder of a security deed. [Brice v. National Bondholders Corporation, 187 Ga. 511, 1 S.E.2d 426 (1939)]. Other factors such as subsequent sales to bona fide purchasers may reduce this period. [O.C.G.A. Section 9-3-3].

17.3 Effect of Foreclosure Sale

A valid foreclosure sale terminates the debtor's interest in the property sold at the foreclosure sale and there is no right of redemption in favor of the debtor or junior lienholders, except those of the United States as discussed herein. A foreclosure sale does not require judicial confirmation in order to convey marketable title. However, if a confirmation action is pending or subject to appeal, title is considered to be unmarketable. Except as noted herein a foreclosure sale eliminates all interests and liens against the property which were junior to the interest being foreclosed, unless the purchaser at the foreclosure sale is the debtor.

Comment: See Mutual Loan & Banking Co. v. Haas, 100 Ga. 111, 27 S.E. 980 (1896).

Confirmation is a prerequisite to seeking a deficiency following a foreclosure sale. [O.C.G.A. Section 44-14-161].

Repurchase, even after intervening third party owners, by the debtor promotes the priority of liens from the debtor which were junior to the foreclosed security interest. [Bowlin v. Hemphill, 180 Ga. 435, 179 S.E. 341 1935)]. Purchase money security interests used by the debtor to repurchase the property may be afforded priority over pre-existing junior liens. [Federal Land Bank of Columbia v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d (1941)].

17.4 Federal Tax Liens

An exception of the effect of a foreclosure sale of a senior security interest exists with respect to federal tax liens. If a federal tax lien is properly filed more than 30 days prior to the foreclosure sale date, written notice of the foreclosure sale must be given to Internal Revenue Service at least 25 days prior to the sale date. If such notice is not given, a federal tax lien is not eliminated by the foreclosure sale of a senior security interest. If a junior federal tax lien is of record more than 30 days prior to a foreclosure sale date, the better practice is to record evidence of proper notice to the Internal Revenue Service. If a federal tax lien is eliminated by the foreclosure sale, the United States has a period of 120 days from the date of sale to redeem the property. If foreclosed property to which a junior federal tax lien attached is sold by the purchaser at the foreclosure sale within 120 days following the foreclosure sale within 120 days following the foreclosure sale date, evidence of waiver of the right of redemption by the Internal Revenue Service should be recorded.

Comment: Federal tax liens are established pursuant to 26 U.S.C. Section 6321. Federal tax liens are perfected against real property by filing

pursuant to 26 U.S.C. 6323(f) and O.C.G.A. Sections 4-14-571 through 574. See 26 U.S.C. Section 7425(b), (c) and (d). See Chapter 31 of these Standards.

17.5 Other Governmental Liens and Interests

Rights similar to those afforded the Internal Revenue Service are provided to the United States and federal governmental agencies. When property is foreclosed and the record indicates, or the examiner has actual knowledge, that the property was owned or a junior security interest held by the United States or a federal agency at the time of such foreclosure, inquiry as to rights and enforcement policy of the United States or the federal agency with regard to notice, consent to the foreclosure sale and right of redemption must be made. If it is determined that the agency owning the property or holding a junior security interest claimed any such rights, satisfactory evidence should be of record indicating that any required notice was given and, if applicable, consent to the foreclosure sale was obtained and, if applicable, the right of redemption must have been waived or the redemption period must have expired.

Comment: 28 U.S.C. See 2410(c) provides a one year right of redemption to the United States where real estate is sold to satisfy a lien prior to the lien held by the United States other than a federal tax lien.

12 U.S.C. Section 1825(b) provides that when acting as a receiver no property of the Corporation (FDIC) shall be subject to foreclosure without the consent of the Corporation. Pursuant to 12 U.S.C. Section 1441a(b)(1) the Resolution Trust Corporation has the same power and status of the FDIC.

It appears that various divisions of the United States and federal agencies do not consistently or uniformly interpret or enforce rights under 28 U.S.C. Section 2410 and 12 U.S.C. Section 1825. For example, FDIC and RTC have published policy statements on Foreclosure Consent and Redemption Rights. These policies differ in certain respects and enforcement varies depending on the capacity in which property or security interest are held by FDIC or RTC and the type of senior security interest being foreclosed. FDIC, RTC and other agency regulations and policies are published in the Federal Register and the Code of Federal Regulations.

17.6 Deed in Lieu of Foreclosure

A conveyance of property in lieu of a foreclosure sale may be made by quitclaim deed, limited warranty deed or general warranty deed. Unless a

contrary result is intended by the parties, the doctrine of merger terminates the security interest in the property. Since merger is a question of intent of the parties, it is better practice to express the parties' intent on merger in the deed. Upon subsequent conveyance of the property by a secured creditor who acquired title by a deed in lieu of foreclosure, satisfactory evidence should be placed of record that the secured creditor no longer claims an interest in the property pursuant to the security instrument unless a conveyance subject to such security interest is intended.

A deed in lieu of foreclosure to the holder of a senior security interest does not eliminate junior security interests. Unless lack of merger is shown, acceptance of a deed in lieu of foreclosure by the holder of a senior security interest promotes the priority of junior security interests.

Comment: If a mortgagee enters possession of property without a deed, the debtor retains the right to redeem the property for a period of ten years. (O.C.G.A. Section 44-14-42.1).

For merger, see O.C.G.A. Section 44-6-2; Fraser v. Martin, 195 Ga. 683, 25 S.E.2d 307 (1943) and Ashburn Bank v. Reinhardt, 183 Ga. App. 292, 358 S.E.2d 675 (1987). See also Standard 14.2, supra.

If the secured indebtedness has not been fully discharged, a release or quitclaim deed may be used to release the property rather than the presentment of the original security instrument or a cancellation indicating that such indebtedness has been paid. (O.C.G.A. Section 44-14-67).

See Kidd v. Kidd, 158 Ga. 546, 124 S.E. 45 (1924) for the basis of the last paragraph of this standard.

CHAPTER 18

TRANSACTIONS UNDER FEDERAL TRUTH-IN-LENDING AND REGULATION Z

18.1 Right of Rescission

Where the attorney is certifying to the creditor or its assigns as to the priority of a security deed given to the creditor in a transaction subject to the right of rescission of the Truth-in-Lending Act and Regulation Z, and the attorney is unable to verify that the right of rescission has been legally terminated, the attorney may take exception to any violations affecting the

enforceability of the security deed as a result of Truth-in-Lending and Regulation Z.

Comment: Not all transactions subject to the Federal Truth-in - Lending Act (15 U.S.C. Sections 1601 et seq.) and Regulation Z (15 U.S.C. following Section 1700) are subject to the right of rescission. The right now applies only to those transactions in which (a) an existing indebtedness on the consumer's dwelling is being paid off by the proceeds of the new loan from a different creditor, (b) a second or junior lien is being placed on the consumer's existing dwelling, (c) an existing loan is being increased in amount or the terms thereof are being amended (but the loan is not subject to the right of rescission if the "amount financed" of the new loan does not exceed the unpaid principal balance, any unearned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation; but the right of rescission extends only to any additional sums advanced by the creditor) and (d) the consumer who holds title to the dwelling free and clear is placing a lien in favor of the creditor as security for the transaction.

In a transaction subject to the right of rescission, the creditor is required to furnish the consumer the notice of the right of rescission along with "material disclosures" which are the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. The period for rescission runs until midnight of the third business day following the later of consummation of the transaction or delivery of the notice of the right of rescission and all "material disclosures." If the required disclosures are not given, the right of rescission terminates three years from the date of consummation or upon the sale or transfer of all of the consumer's interest in the property, whichever occurs first, provided, that the consumer has not already elected to exercise the right of rescission during this period. A sale or transfer of the property need not be voluntary to terminate the right of rescission. For example, a foreclosure sale would terminate an unexpired right to rescind." See Commentary, Reg Z Section 226.23(b).

CHAPTER 19

PLANNED UNIT DEVELOPMENTS

19.1 In General

Where title to real estate purports to be affected by a declaration of covenants, conditions, and restrictions the title examiner must ascertain that the declarant submitting the property was the owner of the property at the

time the property was submitted, or that the owner consented in writing to the submission of the property.

19.2 Condominiums - Georgia Condominium Act

(a) Where property has been submitted to a declaration of condominium which creates a condominium under the Georgia Condominium Act, O.C.G.A. Section 44-3-70, et seq. ("GCA"), the examiner must ascertain that the declaration, plats, and plans for the condominium meet the requirements of the GCA.

Comment: O.C.G.A. Section 44-3-77(a) requires that the declaration contain the following as to all condominiums:

- a. *Name of the condominium including the word "condominium" or "a condominium";*
- b. *Name of the county or counties in which the condominium is located;*
- c. *A metes and bounds legal description of the submitted property, including horizontal, as well as vertical, boundaries;*
- d. *A description of the boundaries of the unit, including horizontal, as well as vertical, boundaries;*
- e. *A description of any limited common elements designating the unit or units to which they are assigned;*
- f. *A description of all common elements which may be assigned limited common elements;*
- g. *The allocation to each unit of an undivided interest in the common elements, a number of votes in the association, and a share of the liability for common expenses;*
- h. *Limitations or restrictions on the powers of the association or board of directors;*
- i. *Name and address of the person who prepared declaration; and*
- j. *A statement of use restrictions or that there are no such restrictions.*

(b) If the condominium is an expandable condominium that is still subject to expansion, then, the examiner must ascertain that the declaration (or the plats or plans) contain the information required by O.C.G.A. Section 44-3-77(b).

Comment: O.C.G.A. Section 44-3-77(b) requires that the declaration (or the plats and plans) contain the following information as to an expandable condominium:

- a. An option to expand the condominium;
- b. A time limit for expansion of the condominium, not to exceed seven (7) years, and a statement of any other circumstances which will terminate the expansion option;
- c. Any limitations on the option or that there are no limitations;
- d. A legal description by metes and bounds of the additional property, including any horizontal, as well as vertical, boundaries;
- e. A statement as to whether portions of the additional property may be added to the condominium at different times, any limitation on the boundaries of the portions setting forth the boundaries of those portions or the order in which the portions may be added, or that there are no limitations;
- f. The maximum units to be created on the additional property, on each portion, if applicable, and if boundaries are not fixed for each portion, then the maximum average number of units per acre that may be created on any portion added to the condominium;
- g. A statement as to whether any additional units may not be restricted exclusively to residential use, and, if so, the maximum extent of non-residential use;
- h. A statement as to the extent to which structures erected on any portion of the additional property added to the condominium will be compatible with structures on the submitted property (quality of construction, principal materials, architectural style) or a statement that no such assurances are made;
- i. A description of all other improvements to be made on any portion of the additional property, or any limitations on other improvements, or that no assurances are made;
- j. A statement that any units created on the additional property will be substantially identical to the units on the submitted property, or a statement of any limitations as to what types of units may be created, or that no assurances are made;
- k. A description of the declarant's right, if any, to create limited common elements within any portion of the additional property, or to designate common elements that may be subsequently assigned as limited common elements, or a statement that no limitations are placed on that right; and
- l. A statement as to a formula, ratio, or other method whereby upon expansion the undivided interests in the common elements, votes in the association, and liability for common expenses are to be reallocated.

(c) If the condominium is an expandable condominium that contains convertible space, it must be ascertained that pursuant to the provisions of O.C.G.A. Section 44-3-77(c), the declaration contains a statement of a formula, ratio, or other method whereby, upon conversion of all or a portion of the convertible space, there shall be allocated among the units created therefrom the undivided interests in the common elements, the number of votes in the association and the liability for common expenses as previously pertained to such convertible space.

(d) If the condominium is a leasehold condominium, it must be ascertained that the declaration contains the information required by O.C.G.A. Section 44-3-77(d).

Comment: O.C.G.A. Section 44-3-77(d) requires that the declaration contain the following:

- a. *The county or counties of recordation and deed book and page number for each ground lease, other lease, or other instrument creating an estate for years, the termination of which may terminate or reduce the condominium;*
 - b. *The date on which the lease or estate for years will expire;*
 - c. *A statement of whether any property will be owned in fee simple by the owners, and, if so, a metes and bounds legal description of such property and a statement of any rights the owners have to remove such improvements at the end of the lease or estate for years, or that they have no such rights;*
 - d. *the name and address of the person or persons to whom rent payments must be made by the owners unless such rent is collected as part of the common expenses; and*
 - e. *A statement of the share of liability for payments under the lease which are chargeable against each unit.*
- (e) The title examination must ascertain that prior to the first conveyance of a condominium unit one or more plats of survey have been prepared in accordance with the requirements of O.C.G.A. Section 44-3-83(a) and have been recorded in the county records.

Comment: O.C.G.A. Section 44-3-83(a) requires the plat of survey to show the following:

- a. *Location and dimensions of submitted property;*
- b. *Location and dimensions of all structural improvements located on any portion of the submitted property tied down to a fixed locatable point on the boundary line of the property;*

- c. *the intended location and dimensions of all contemplated structural improvements committed to be provided by the declaration on any portion of the submitted property;*
- d. *The location and dimensions of all easements appurtenant to the submitted property or otherwise submitted as common elements;*
- e. *Structural improvements not yet constructed labeled "NOT YET BEGUN;"*
- f. *Leasehold and estate for years portions leased labeled "LEASED LAND;"*
- g. *If non-contiguous parcels, plats are to indicate approximate distances between such parcels (unless disclosed in Declaration);*
- h. *All easements to which any portion of the submitted property is subject;*
- i. *All encroachments by or on any portion of the submitted property;*
- j. *Any portion of vertical boundaries of units lying outside structure as shown on plans must be shown with identifying number of unit;*
- k. *Certificate of compliance with section by a registered land surveyor as follows:*

*I, _____,
Georgia Registered Land surveyor No. _____,
do hereby certify that this plat is accurate and
complies with the provisions of Section 44-3-83(a)
of the Georgia Condominium Act.*

- l. *All other items customarily shown or required by law to be shown for land title surveys; and*
- m. *A statement on the plat as follows:*

*The condominium declaration for
_____ Condominium is recorded
in Deed Book ____, Page ___, of the
Superior Court of _____ county, Georgia records.*

(f) The examiner must ascertain that prior to the first conveyance of a condominium unit one or more plans for the units have been prepared in accordance with the requirements of O.C.G.A. Section 44-3-83(b) and have been recorded in the county records.

Comment: O.C.G.A. Section 44-3-83(b) requires that the plans show the following:

- a. *Prepared signed and sealed by a registered architect or registered engineer;*
- b. *Plan of every structure which contains or constitutes all or part of a unit which show:*

- (1) *Location and dimensions of exterior walls and the height and location of the roof;*
- (2) *the walls, partitions, floors, and ceilings constituting the horizontal boundaries, if any;*
- (3) *vertical boundaries (including convertible space) to the extent such boundaries lie within or coincide with the boundaries of the structure; and*
- (4) *the identifying numbers of all units.*

c. *The following certification of the floor plans is required which must be signed and dated by the same engineer or architect;*

The undersigned, a registered architect or engineer has visited the site known as _____ a Condominium and viewed the property and to the best of his (her) knowledge, information, and belief: (i) the exterior walls and roof of each structure are in place as shown on the plans; and (ii) such walls, partitions, floors and ceilings, to the extent shown on said plans, as constitute the horizontal boundaries, if any, and the vertical boundaries of each unit (including convertible pace) have been sufficiently constructed so as to establish clearly the physical boundaries of such unit.

- d. *Convertible space labeled "CONVERTIBLE SPACE;" and*
 e. *A statement on the plans, as follows:*

A condominium declaration for _____ Condominium is recorded in deed Book ___, Page ___ of the Superior court of _____ County, Georgia records.

O.C.G.A. Section 44-3-115 provides that the provisions of the GCA and the condominium instruments are to be construed in favor of the valid establishment of a condominium and that substantial compliance with the requirements for establishing a condominium are sufficient to bring the property described in the condominium instruments within the purview of the Georgia Condominium Act. The examining attorney must analyze any defects in the declaration, plats, or plans for the condominium in order to determine whether, in spite of technical defects, the condominium instruments are sufficient to meet the substantial compliance requirements.

- (g) A lien for assessments under the GCA arises automatically, and the recording of the declaration constitutes record notice of the lien; a physical lien is not required. [O.C.G.A. Section 44-3-109(a)].

Comment: The GCA provides that an owner, mortgagee, purchaser under contract, or prospective lender may request a statement from the

association or its management agent of all past due assessments, late charges, and interest applicable to a unit. The request must be in writing, delivered to the registered office of the association, and include an address for response. If no response is sent within five business days, the lien is extinguished and no longer effective as to title. The information contained in such a statement is binding on the association. [O.C.G.A. Section 44-3-109(d)]. All assessments owed to the association as of the date of closing must be paid at closing. The owner's affidavit signed by the seller at closing should contain a statement that all assessments owed to the association are paid in full.

- (h) Any right of first refusal or other restraint on the free alienability of condominium units under the GCA requires that the condominium instruments make provision for furnishing, upon request, to a unit owner or person who has executed a contract for the purchase of a unit a recordable statement certifying any waiver or refusal to exercise such rights whenever such waiver or failure has occurred. Failure or refusal to furnish such a statement within 30 days or such lesser period provided in the condominium instruments renders the rights or restraint inapplicable to that unit. [O.C.G.A. Section 44-3-110].

Comment: As in any other transaction involving a right of first refusal or restraint on alienation, it is recommended that a release of such rights be recorded simultaneously with the warranty deed.

- (i) A legal description of a unit submitted to the GCA is sufficient if it sets forth the number of the unit, the name of the condominium, the county or counties in which the condominium is located, and the deed book and page number where the first page of the declaration is recorded. [O.C.G.A. Section 44-3-73].

- (j) An examiner should consider the provision of O.C.G.A. Section 44-3-95(a), (b), (c) and (d) when evaluating the applicability and relative position of liens for labor or services performed or materials furnished recorded upon the submitted property as follows:

- I. Liens for labor or services performed or for materials furnished in the improvement of property (either before or after it becomes submitted property) recorded upon the submitted property as a whole after the recordation of the declaration are subordinate to the declaration. [O.C.G.A. Section 44-3-95(a)].

- II. Liens for labor or services performed, and for materials furnished for the improvement of property (either before or after it becomes submitted property), either performed or used in the original construction of any portion of a condominium, or additional property of an expandable condominium may be recorded against the property as a whole; however, such a lien is valid only as to units which have not been conveyed by the declarant to a person in a bona fide sale and purchase transaction prior to the recording of the lien. Such a lien is inapplicable and unenforceable as to units so conveyed. [O.C.G.A. Section 44-3-95(b)].
- III. After the condominium is created, no lien shall arise or be effective against the submitted property as a whole (except as provided in II above). Liens or encumbrances shall arise or be created or effective only against each condominium unit in the same manner and in the same condition as against any other separate parcel of real property. However, labor or services performed or materials furnished for improvement of the common elements, if authorized by the association (subject to other provisions of law), creates a lien against all of the condominium units. Any unit owner may have such a lien removed from his or her condominium unit and released of record by payment of the amount attributable to the unit (based on its liability for common expenses) [O.C.G.A. Section 44-3-95(c) and (d)].

19.3 Condominiums - Apartment Ownership Act

- (a) Some condominiums created prior to October 1, 1975 are still governed by the Apartment Ownership Act, Chapter 85-16(b) of the Code of Georgia of 1933 ("AOA"). Where property is submitted to the AOA, it must be ascertained that the declaration and plans meet the requirements of the AOA.

Comment: The AOA in Section 85-1602b requires that a declaration be executed and recorded which contains the following:

- a. *Description of the land and whether is leased or fee simple;*

- b. *Description of the building (number of stories and basements, number of units, and principal materials);*
- c. *Number of each unit and statement of its location, approximate area, number of rooms, and immediate common area to which it has access;*
- d. *Description of the common areas and facilities, stating to which units their use is reserved;*
- e. *Value of the property and each apartment and the percentage of undivided interests in the common area and facilities appertaining to each apartment;*
- f. *Statement of the purposes for which the building and each unit are intended and restricted;*
- g. *Name of person to receive service of process and the residence or place of business for such person which must be within the city or county in which the building is located;*
- h. *Percentage of votes necessary in order to determine whether to rebuild, repair, restore, or sell the property in the event of damage or destruction of all or a part of the property; and*
- i. *Method for amending the declaration.*

Simultaneously with the recording of the declaration, floor plans were required to be recorded showing the layout, location, apartment numbers and dimensions of units, stating the name of the building and bearing a verified statement by an architect or engineer certifying that it is an accurate copy of the plans approved by the city or county; or prior to the first conveyance of a unit an amendment to the declaration must be filed containing a verified statement of a registered architect or licensed professional engineer certifying that the plans accurately depict the layout, location, apartment numbers and dimensions of the unit, as built. [Code of Georgia of 1933, Section 85-1612b].

(b) In the examination of property subject to the AOA, the examiner should refer to the following provisions as to assessments:

- I. A lien for assessments under the AOA does not arise automatically and the recording of a physical lien in the county records is required. AOA condominium liens are superior to all other liens except: (i) liens for ad valorem taxes on the unit; (ii) the lien of any first priority mortgage covering the unit; (iii) rental due under lease of the property to which the declaration is subject. [Code of Georgia of 1933, Section 85-1621b(a)].
- II. The AOA provides that a purchaser of a unit is entitled to a statement from the manager or board of directors

setting forth the unpaid assessments against the grantor and unit, and the purchaser is not liable for and the unit is not subject to liens for any amounts in excess of those set forth in the statement. [Code of Georgia of 1933, Section 85-1622b].

Comment: Good practice requires that the closing attorney should request and obtain a statement from the association as to all past due assessments owed on the unit in order to insure that the new owner is not subject to liability for unpaid assessments, and to avoid the possibility of a lien being filed by the association during the "gap" period. The owner's affidavit signed by the seller at closing should contain a statement that all assessments owned to the association have been paid in full.

(c) Legal descriptions of units contained in deeds are required to include a description of the land of the condominium or its post office address, the deed book, page and date of the recording of the declaration, the unit number, the use of the unit and any restrictions on use, and the undivided percentage interest in the common areas appertaining to the unit. [Code of Georgia of 1933, Section 85-1611b].

(d) The following provisions of Section 85-1608b(a) and (b) of the Code of Georgia of 1933 as to liens should be considered in the examination: After the condominium is created, no lien shall arise or be effective against the submitted property as a whole. Liens or encumbrances shall arise or be created or effective only against each condominium unit in the same manner and in the same condition as against any other separate parcel of real property. However, labor or services performed or materials furnished for improvement of the common areas, if authorized by the association, subject to other provisions of law, creates a special lien against all of the condominium units. Any unit owner may have such a lien removed from his or her condominium unit and released of record by payment of the amount attributable to the unit (based on its liability for common expenses) or by filing a bond.

19.4 Time-Share Estates

(a) Where property has been submitted to the Georgia Time-Share Act, O.C.G.A. Section 44-3-160, et seq., ("TSA"), it must be ascertained that the project instruments for the development in which the property is located do not prohibit a time-share program. [O.C.G.A. Section 44-3-165(a)].

Comment: TSA provides that a time-share estate is an estate in real property with the characteristics of an estate in fee simple at common law or an estate for years, if a leasehold. [O.C.G.A. Section 44-3-163(a)]

(b) The examination of title must ascertain that the project instruments and time-share instruments creating the time-share estates are recorded in the county in which the project is located and contain the information required by O.C.G.A. Section 44-3-166.

Comment: O.C.G.A. Section 44-3-166 require that the project instruments and time-share instruments contain:

- a. *Name of the county in which the property is located;*
- b. *The legal description, street address, or other description sufficient to identify the property;*
- c. *Identification of time periods by letter, name, number or combination thereof;*
- d. *Identification of time-share estates and, where applicable, the method whereby additional time-share estates may be created;*
- e. *The formula, fraction, or percentage of the common expenses and any voting rights assigned to each time-share estate and, where applicable, to each unit in a project that is not subject to the time-share program;*
- f. *Any restrictions on the use, occupancy, alteration, or alienation of time-share intervals; and*
- g. *The ownership interest, if any, in personal property and provisions for care and replacement.*

19.5 Property Owners' Association — Not Subject to Statute

Where title to real estate is affected by a declaration of covenants, conditions, and restrictions, all conveyances which occur after such covenants are of record must meet the requirements of the recorded declaration and bylaws (if recorded), and any liens for assessments recorded by the association must be paid in full and satisfied at closing.

Comment: Good practice requires that, if covenants create a mandatory membership homeowners association, the closing attorney should request and obtain a statement from the homeowners association as to all past due assessments owed on the lot in order to insure that the new owner is not subject to liability for unpaid assessments, and to avoid the possibility of a lien being filed by the association during the "gap" period. The owners

affidavit signed by the seller at closing should contain a statement that all assessments owed to the association have been paid in full.

19.6 Property Owners Associations — Georgia Property Owners' Association Act

(a) Where property has been submitted to the Georgia Property Owners' Association Act, O.C.G.A. Section 44-3-220, *et seq.* ("POA"), it must be ascertained that the declaration or an amendment to the declaration meets the requirements of the POA. The property owners association must be incorporated and the corporate name must include the word or words "homeowners," "property owners," or "association," [O.C.G.A. Section 44-3-227]. In addition, the association of owners must be subject to a recorded declaration of covenants upon property, which covenants are administered by a mandatory membership association. [O.C.G.A. Section 44-3-235(a)].

(b) The following provisions of POA pertaining to assessments should be referred to wherever property is subject to POA:

- I. Grantees of Property in the association are jointly and severally liable with the grantor for unpaid assessments levied against the property up to the time of the conveyance; however, a holder of a first or secondary purchase money mortgage of record (other than a previous owner) or any other person who acquires title to a condominium unit as a result of foreclosure of a first or secondary purchase money mortgage (other than a previous owner) is not liable for any assessment chargeable to the unit prior to the acquisition of title. [O.C.G.A. Sections 44-3-225(c) and (d)].
- II. A lien for assessments under the POA arises automatically, and the recording of the declaration constitutes record notice of the lien; a physical lien is not required. Association liens are superior to all other liens except: (i) liens for ad valorem taxes on the unit; (ii) the lien of any first priority mortgage covering the unit and of any mortgage filed prior to the recording of the declaration; and (iii) the lien of any secondary purchase money mortgage covering the unit unless the grantee or successor grantee on the mortgage is the seller of the unit. [O.C.G.A. Section 44-3-232(a)].

III. The POA provides that an owner, mortgagee, purchaser under contract, or prospective lender may request a statement from the association or its management agent of all past due assessments, late charges, and interest applicable to a lot. The request must be in writing, delivered to the registered office of the association, and include an address for response. If no response is sent within five business days, the lien is extinguished and no longer effective as to title. The information contained in such a statement is binding on the association. [O.C.G.A. Section 44-3-232(d)].

Comment: The closing attorney must obtain from the association a statement of all assessments owed to the condominium association as of the date of closing must be paid at closing. The owner's affidavit signed by the seller at closing should contain a statement that all assessments owed to the association are paid in full.

The effective date of POA is July 1, 1994.

CHAPTER 20

MEMORANDUM OF LEASE OR CONTRACT

20.1 In General

Where a memorandum of lease or contract or short form lease of record identifies the parties, the terms of the lease, and the property covered, the title examiner should report this information to his client. The examining attorney is not required to ascertain all pertinent facts and conditions of the lease or contract, unless specifically requested to do so by the client.

Comment: However, as a matter of course, the examiner should examine both the Lessor's chain and the Lessee's chain whenever a ground lease creating an estate for years is discovered in the examination of title to the captioned property.

CHAPTER 21

BANKRUPTCY

21.1 Scope of Record Search

The examining attorney is not required to examine the records of the Clerk of the United States Bankruptcy Court for the District in which the real property is located. However, if the examining attorney has notice of any proceeding in bankruptcy, he is required to report to his client the effect the bankruptcy has upon marketability of title.

Comment: The examining attorney should routinely require proof at closing that no bankruptcies are pending which may affect title to the property conveyed, and should also include an exception in his certificate.

21.2 Title Through Bankruptcy Debtor or Bankruptcy Estate

(a) Proper Conveyancing Party

The Bankruptcy Code (11 U.S.C. Section 101, *et seq.*) is divided into various chapters. Chapters 7, 11, 12 and 13 relate to liquidation or reorganization cases filed by individuals or other entities. The examining attorney should first determine that the proper party has executed the conveyancing document in question. Under Chapter 7 and Chapter 11 (in cases where a Chapter 11 trustee has been appointed), the trustee is the proper conveyancing party unless the Chapter 7 trustee has abandoned his interest in the subject property. In Chapter 7 cases where the trustee has abandoned the property, Chapter 11 cases (where no trustee has been appointed) and Chapters 12 and 13 cases, the debtor would be the proper conveyancing party.

NOTE: It is also considered good title practice to have the U.S. Trustee, in the case of a Chapter 11, or the Chapter 12 or 13 trustee consent in writing to the sale.

(b) Chapter 7 - Trustee's Sale

Where a Chapter 7 trustee has conveyed title to subject property, a marketable title subject to general state rights and remedies may be conveyed if there is: (1) an order authorizing the sale of the property properly filed in the bankruptcy case showing that notice was given to all creditors and an opportunity for a hearing to object to the sale was offered; (2) an order appointing an interim trustee by U.S. Trustee or order showing creditors' election of trustee; (3) proof showing that subject property was "property of the estate" and not otherwise exempted from the "bankruptcy estate."

Comment: In some Chapter 7 cases it may be possible for the debtor to receive a discharge, but for the bankruptcy estate to remain open as the trustee continues to liquidate assets to which he/she still holds legal title.

Although it is considered good title practice to record all relevant bankruptcy court orders, the marketability of the title in the subject property is not affected if such orders or copies thereof are otherwise available to the examining attorney for a period of seven (7) years from the date of the conveyancing document in question.

(c) Chapter 7 - Property Abandoned by Trustee

Where a trustee has abandoned the debtor's real property to the debtor because the property was burdensome to the estate or of inconsequential value and benefit to the estate, the debtor may convey it to a third party. A marketable title, subject to general state rights and remedies, may be conveyed by the debtor upon: proof showing that the trustee has abandoned the property after notice and hearing and has entered a notice of an abandonment in compliance with Bankruptcy Code rules and local rules, where applicable.

Liens which attached to the abandoned property prior to the filing of the Bankruptcy proceeding remain a lien upon the property and must be paid or satisfied or released.

Comment: Many trustees simply make this abandonment part of the taped record of Section 341, First Meeting of Creditors, so it is considered good title practice to formalize the abandonment by written notice which provides creditors and other parties in interest an opportunity to object within a specified time period after the filing of the notice, usually fifteen (15) days.

(d) Chapter 11 - Plan of Reorganization

Marketability is not otherwise impaired by the fact that a debtor's plan of reorganization contains provisions in it for the sale of real property provided that such plan is confirmed and it authorizes the transaction being reviewed by the examining attorney. Marketability is also not otherwise impaired where a Chapter 11 debtor sells property prior to the confirmation of a plan of reorganization when procedures specified in the Bankruptcy Code and local rules have been followed, including obtaining an order of sale with the requisite prior notice to creditors and an opportunity for hearing.

Comment: Cases filed under Chapter 11 of the Bankruptcy Code, tend to be more complex than cases filed under other Chapters. Consequently, it is

difficult and almost impossible to provide an examining attorney with specific rules that can be used when conveyances involve a Chapter 11 case.

(e) Chapters 12 and 13

Marketability is not otherwise impaired where a Chapter 12 or 13 debtor has conveyed title to property if: the debtor has obtained a final order authorizing the sale after notice to creditors and the opportunity for hearing. In the event of any objections to the sale, the marketability is also not impaired if the bankruptcy court actually conducted a hearing and issued an order approving the sale over any objections and the ten (10) day time period for filing an appeal has expired.

Comment: In Chapter 12, a trustee will be appointed or in some districts there is a standing Chapter 12 trustee. In Chapter 13 cases in Georgia, there is a standing Chapter 13 trustee in each district. It is considered good title practice for conveyances out of either a pending Chapter 12 or 13 estate to include the written consent of the trustee to the sale.

(f) Discharges

The bankruptcy proceeding typically “discharge” individual debtors from certain types of debts, the actual effect of which is to render certain debt unenforceable against the debtor personally. A discharge does not eliminate the lien on any property not otherwise avoided during the pendency of the estate and thus the marketability may be affected. A discharge has no effect on an unavoidsed lien or co-signer’s liability on the debt.

Comment: The examining attorney should be mindful that the debtor may be discharged from the obligation but if the final order authorizing a sale does not contain the language “free and clear of all liens,” the lien could remain against the property and affect the marketability of title.

(g) Dismissal

It is possible that a bankruptcy case could be dismissed prior to a discharge of a debtor. When this occurs, the property generally reverts to its pre-filing status and marketability is generally not impaired where a conveyance is taken from the debtor subject to general state rights and remedies.

Comment: The examining attorney should routinely require proof at closing that no bankruptcies are pending which may affect title to the property conveyed.

21.3 Title Through Stay Relief Provisions

(a) Express Order

Marketability is not impaired by the fact that title is derived through the foreclosure of a security instrument if it can be determined that: (1) the court ordered stay relief and authorized foreclosure; (2) the creditor, in conducting the foreclosure, complied with the terms of such order; (3) the stay relief order expressly contained the language that the automatic stay is "vacated," "terminated," "annulled," "modified," or "lifted."

Comment: Court ordered stay relief can generally take one of two forms: either there was an express order authorizing the sale or provisions were set forth in a confirmed plan of reorganization which may trigger the lifting of the stay automatically upon the happening or nonhappening of an event such as the failure to make scheduled payment.

(b) Plan of Reorganization

Marketability is not impaired by the fact that title is derived through the foreclosure of the security instrument if a confirmed Chapter 11 bankruptcy plan provided that the real property could be foreclosed under certain terms and conditions and the examining attorney can verify that these terms and conditions were satisfied.

Comment: The examining attorney should be aware of the constant evolution of bankruptcy law.

CHAPTER 22

MINERAL RIGHTS

22.1 In General

The title examiner should carefully review and, where still in effect, disclose the existence of:

- (1) Instruments that reserve or except mineral interests;
- (2) Instruments that sever surface and mineral rights;
- (3) Mineral Leases.

Where the mineral interest has been completely separated from the remainder of the fee simple estate, it should be excepted from the legal description.

Comment: Fee simple title to land includes ownership of all minerals located thereon. A conveyance of real estate transfers the mineral interest unless rights are reserved or there has already been a severance of the surface and mineral estates.

22.2 Rights of Ingress and Egress

Instruments granting or reserving mineral interests often include rights of ingress and egress and possession of so much of the surface as may be necessary for prospecting, extraction, and removal. Even if such rights are not expressly conveyed, they may be implied as necessary to the use and enjoyment of the estate conveyed and should always be identified and disclosed to the owner of the surface estate.

22.3 Non-Use of Mineral Rights

Mineral interests conveyed or reserved by deed or other instrument are not normally lost by mere non-use, regardless of the period of time, and adverse possession of the surface alone will not bar outstanding claims to minerals. However, O.C.G.A. Section 44-5-168 provides a statutory bar of mineral rights where the mineral owner or such owner's assigns have neither worked nor attempted to work the mineral rights nor paid taxes due thereon for a period of seven years if a civil action has been filed in accordance with this Code Section and has been successfully concluded in favor of the petitioner.

Comment: The Georgia Mineral Lapse Statute, O.C.G.A. Section 44-5-168, is not an automatic remedy for outstanding mineral interests. A legal proceeding is required. Where a judgment or decree terminating a mineral interest is found, thorough examination of the case is necessary in order to ascertain that all statutory requirements have been satisfied. The statutory bar does not apply to a mineral lease for a specific number of years nor can it affect a lease to a "licensed mining operator."

CHAPTER 23

LAND REGISTRATION PROCEEDINGS

23.1 In General

Where the examining attorney finds marketability of title dependent on a land registration proceeding, he must check the proceeding to see that it strictly complies with the Code provisions. If after careful examination, the examining attorney is satisfied that all such requirements have been complied with, such registration may be relied upon as a root or start for the title search.

Comment: The purpose of the Land Registration Law enacted in 1917, (O.C.G.A. Sections 44-2-40 through 253) (the "Act"), sometimes referred to as the Torrens Act, is to provide a vehicle whereby an owner can judicially establish the marketability of the title to the owner's land. One unique provision of the original Act is that once registered, all transactions relating to the ownership of the registered land are to be entered upon the "Certificate of Title" by the Clerk of the Superior Court, rather than in the real estate indexes and other dockets maintained by the Clerk. By Georgia Laws 1952, Pages 164, 165, (O.C.G.A. Section 44-2-144) a decree of registration rendered on or after February 15, 1952, shall operate to free the registered land from further registration unless the decree expressly provides that the land shall remain subject to the Act.

Consequently, as to decrees of registration entered prior to February 15, 1952, the examiner must first examine the "Register of Decrees of Title" to determine the beginning link in the chain of title and the "Title Register" to determine all subsequent transactions involving the land. If the decree of registration is subsequent to February 15, 1952 and provides that the land is freed from further registration, the examiner must examine the general real estate indexes and other applicable dockets forward from the date of the decree.

By Georgia Laws 1989, Page 563 (O.C.G.A. Section 44-2-141), effective April 4, 1989, registered land and ownership therein "shall be subject to the same rights, burdens, and incidents as unregistered land ..." and registered land may be dealt with by the owner "in the same manner as if it had not been registered." The examiner must examine the general real estate indexes and other applicable dockets forward from April 4, 1989 in addition to the Register of Decrees of Title and Title Register as to any registered title which has not been freed from further registration.

As in any judicial proceeding, to establish marketability of title to land, the examiner is cautioned that the interest of a person who was not a party to a land registration proceeding or who did not receive legal notice of such proceeding is not divested, and such fact should be reported.

CHAPTER 24

OPINIONS AND CERTIFICATES OF TITLE

24.1 Opinion as a Duty of Title Attorney

Under the laws of Georgia, one of the functions of an attorney and one of the definitions of the “practice of law” is the rendering of opinions as to the validity or invalidity of titles to real or personal property derived and concluded from the examination of necessary records made, or caused to be made by the attorney. This does not necessitate the title attorney personally examining the record books, but does necessitate the attorney’s responsibility for all record searches authorized by or purchases by said attorney in the fulfillment of said attorney’s title opinion contract with the client. No person under the laws of Georgia, other than an attorney at law, may express, render or issue any legal opinion as to the status of the title to real or personal property.

Comment: See O.C.G.A. Sections 15-19-50, -53 and -54.

24.2 Duty to Inform Client of Certificate Exceptions Which Can be Insured Over by Title Insurers

Exceptions in title certificates such as indexing errors of governmental personnel, forgeries, non-record violations of truth-in-lending laws, matters of survey and actual notice of title defects to owners of record, should be brought to the attention of the client in order that the client may make the decision to obtain title insurance in addition to the certificate of title or to waive same.

24.3 Actual Knowledge of Title Defects Which Do Not Appear on Court or Government Records

Any actual knowledge the examining attorney may have of a title defect such as a fence encroachment, occupancy and possession of the property involved, or adverse claims made to the attorney orally or in writing, take precedence over non-record notice, and the title opinion or certificate must reflect these exceptions resulting from actual knowledge of the title attorney.

24.4 Mistakes of Court Record Clerks

The title opinion or certificate should except to errors and omissions of court clerks and court employees and as to matters incorrectly indexed or incorrectly recorded in the public records.

Example: This certificate excepts to errors and omissions of court clerks and court personnel and matters incorrectly indexed or incorrectly recorded in the public records.

24.5 Title Rejection or Turning Down the Title as Not Being Marketable or Insurable

The title opinion which rejects a title or turns one down as being unmarketable or uninsurable should be backed up with citations from the O.C.G.A. or from Georgia case law that pertains to the defect to marketability or insurability. This is essential for the attorney's own protection. Statements that the title is unmarketable without legal support would be unprofessional.

CHAPTER 25

ENVIRONMENTAL ISSUES

25.1 In General

The title examiner must review the index for state environmental matters related to real property as well as federal environmental liens. The following matters discussed in Sections 25.2 and 25.3 affect the marketability of title.

25.2 The Hazardous Site Response Act

The Hazardous Site Response Act (O.C.G.A. Section 12-8-90 et seq.) requires the Georgia Environmental Protection Division of the Department of Natural Resources to inventory all known or suspected sites where hazardous wastes, hazardous constituents or hazardous substances ("Hazardous Materials") have been disposed of or released. This inventory is known as the Hazardous Site Inventory. The Georgia Environmental Protection Division is required to annually send a copy of the inventory of sites listed by county

to the clerk of each superior court of the state. A copy of the most current inventory is maintained in the room in which the deeds of records of the county are kept.

Comment: O.C.G.A. Section 12-8-97(a) requires the annual filing of the Hazardous Site Inventory to begin July 1, 1994.

The Hazardous Site Response Act requires that the owners of any property listed on the Hazardous Site Inventory that is designated as having a known release and needing corrective action due to the presence of Hazardous Materials provide record notice of this fact. Notice must be provided on the deed, mortgage, deed to secure debt, lease, rental agreement, or other instrument given by the property owner which creates an interest in or grants a use of the property. The owners of property are also required to file a recordable affidavit (pursuant to O.C.G.A. Section 44-2-20) with the Clerk of the Superior Court of each county in which the property or any part of the property is located. This affidavit will include a statement that the property has been listed on the Hazardous Site Inventory that is designated as having a known release and needing corrective action due to the presence of Hazardous Materials.

Comment: Neither the notice nor the affidavit of the property owner has to be filed until any contest under O.C.G.A. Section 12-8-97(f) has been resolved adversely to the property owner. See O.C.G.A. Section 122-8-97(c).

25.3 Comprehensive Environmental Response, Comprehensive, and Liability Act of 1980

Section 107(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA;” 42 U.S.C. Section 9607) provides that the United States Environmental Protection Agency can file a notice of a lien on all real property belonging to an “owner” or “operator” for all costs and damages for which the “owner” or “operator” is liable to the United States. The notice of the lien is filed in the clerk’s office in the superior court in the county where the property is located and recorded in the same manner as deeds.

CHAPTER 26

SURVEYS

26.1 In General

Surveys, whether recorded or not, are very helpful aids in title examination and every reasonable effort should be made by the examining attorney to obtain copies of unrecorded surveys mentioned in deeds. Frequently, surveys reveal matters existing on the property which are not apparent from an examination of the instruments in the chain of title. For example, surveys may reveal the existence of fences which do not follow boundary lines, the existence of cemeteries, the existence of roadways and easements crossing the property which were not dedicated or deeded by instruments in the chain of title and the location of the improvements on the property or adjoining properties which may create encroachments and give rise to adverse possession claims. In addition to the platted boundary lines, surveys often contain notes and comments by surveyors which are helpful in ascertaining matters of title which may not appear in recorded documents in the chain of title.

Comment: Sometimes notes and comments made by surveyors are ambiguous and the surveyor should be consulted, if possible, to clarify the meaning of any notes or comments. For example, a survey containing the comment "title matters excluded" gives rise to the question as to whether the surveyor has fully revealed all easements and encroachments which may actually exist on the ground and would be observable by the surveyor.

26.2 Surveys Which Meet Minimum State Requirements for Recordation

____ O.C.G.A. Section 15-6-67 sets forth the statutory requirements for recordation of maps and plats in the State of Georgia. In summary this Code Section deals with the size and quality of maps and plats. For example, the Act requires that maps and plats bear a title or name in the caption, a statement as to the county, city, town, land district, land lot and subdivision in which the property lies, the date of plat preparation, the scale of the plat, the name of the land surveyor and registration number, the reference to a monumented point of beginning and like matters. These standards are helpful in judging the quality of surveys in general and if surveys being reviewed by an examining attorney do not meet these standards, then it may suggest additional inquiry of the surveyor.

26.3 As-Built Surveys

Surveys which are labeled "as-built" generally purport to show in great detail the location of all improvements located on the surveyed property. A survey which does not bear the designation "as-built" does not necessarily

purport to show these matters and would suggest additional inquiry as to the location of improvements which might be located on such property.

Comment: Certain minimum standard requirements have been jointly developed by the American Land Title Association and the American Congress on Surveying and Mapping. If title insurance is being obtained in connection with a title examination and a survey made in connection with the purchase or mortgaging of the property, then these standards should be consulted. Copies of these standards can be obtained from all title insurance companies. Title insurance companies customarily require surveyors to answer questions on a form called "Surveyor's Inspection Report" in those cases in which the title insurance company is being asked to insure as to matters of survey.

26.4 Composite Surveys

Surveys which are labeled “composite surveys” or “composite plats” or like terminology do not purport to be surveys made in the field. Such surveys are maps prepared by a surveyor based on other surveys and/or deed descriptions for the purpose of showing an assembly of properties. These surveys are extremely helpful to an examining attorney in examining title to multiple contiguous properties, but should not be relied upon as to matters actually existing in the field and on the ground.

CHAPTER 27

MARITAL RIGHTS TO REAL PROPERTY

27.1 In General

The marital relationship creates an equitable interest in both spouses in all property accumulated during the marriage regardless of how it is titled. [Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d 169 (1980)]. Marital property is to be distinguished from separate property, which is defined as that brought into the marriage, or gifted, inherited, bequested or devised. Georgia has no statute which specifically addresses the issue of when rights to marital property vest.

27.2 Third Party Interests

_____(a) As to third parties, the doctrine of equitable distribution of marital property should be construed as creating no interest or title in property until an order is entered defining such interest or approving a separation agreement which defines such interest or until a petition for divorce or separate maintenance is filed with a notice of lis pendens, as provided for by Code Section 44-14-610, being filed in the office of the clerk of superior court of the county in which the real property is situated and recorded by the clerk in a book kept by him for that purpose. A husband or wife may alienate real property any time prior to entry of an order as defined above, prior to recordation of a notice of lis pendens, or prior to the filing of a suit for divorce or separate maintenance.

Comment: See O.C.G.A. Section 19-5-7; Goodman v. Goodman, 254 Ga. 703, 334 S.E.2d 179 (1985); Goodman v. Goodman, 253 Ga. 281, 319 S.E.2d 455 (1984). A divorce decree declaring title to be vested in the husband or wife is sufficient to vest title without the need of a deed provided the decree contains a sufficient description of the property. If the decree calls for a deed, but does not contain vesting language, then one must be obtained.

(b) Even absent recordation of a lis pendens, one should obtain both spouses' signatures on real property transfers which occur during the pendency of a divorce or separate maintenance action.

Comment: Georgia law provides that "pending final determination by the court of the right of either party to alimony, neither party shall make any substantial change in the assets of the parties' estate except in the course of ordinary business affairs and except for bona fide transfers for value." See O.C.G.A. Section 19-6-1(e).

CHAPTER 28

REAL PROPERTY FORFEITURE

28.1 "Relation Back"

An examiner's certificate of title should take exception to any possible future forfeiture of title as a result of any possible prior criminal act under federal or state law by any party in the chain of title.

Comment: Real property which is the "proceed" of certain federal and/or state criminal activity or which is used to "facilitate" certain federal and/or state criminal activity does at the occurrence of this criminal activity

become the property of the federal and/or state government under a legal fiction called “relation back.”

This fiction can place the interests of the federal and/or state government prior to the interests of lienholders or transferees of real property interests without the recordation of the government’s interests on the Record. Statutes, case authority and government policy, however, provide a measure of protection to “innocent owners” and/or bona fide purchasers for value.

See: 18 U.S.C. Sections 2253(b) and 2254(g) (sexual exploitation of minors); 18 U.S.C. Sections 981(f) and 982(b)(1) (money laundering/FIRREA violations); 21 U.S.C. Sections 853(c) and 881(h) and O.C.G.A. Section 16-13-49(e)(5) (controlled substance violations); and 18 U.S.C. Sections 1961, 1962 and 1963(1) and O.C.G.A. Section 16-14-7 (racketeer influenced activities and/or corrupt organizations).

The vesting of title under this doctrine is not self-executing. [United States v. A. Parcel of Land (92 Buena Vista Avenue)], 113 S. Ct. 1126 (1993). The claimant who has failed to record his lien may have “hard sledding” but he is not as a matter of law foreclosed from pursuing his claim. [Hallman v. State, 141 Ga. App. 527, 528, 233 S.E.2d 839 (977)].

CHAPTER 29

CONVEYANCES BY AND TO TRUSTEES

29.1 Verification of Existence of Trust and Authority of Trustee

When title comes out of a conveyance by a trustee, reference should be made to the trust indenture, in order to verify that the trust is not fully executed or otherwise terminated, and that title therefore continues to reside in the trustee, and has not passed from the trustee to the beneficiary or other party.

Reference must also be made to the trust indenture to verify that the trustee is in fact duly appointed and qualified, and that he/she has the authority to execute the particular instrument in question. The examiner must further ascertain the ability of the named trustee to serve as a trustee under Georgia law.

Generally, such verification as to existence of the trust and authority of the trustee must be made by reference to facts or documents outside the

record. It is recommended, therefore, that attorneys make every effort to place such instrument on the record in the future as will aid title examiners in ascertaining the facts.

Comment: See Pindar, Ga. Real Est. Law, Sections 26-57 through -63 (4th ed.); Sanders v. Hinton, 171 Ga. 702, 156 S.E. 812 (1930); and Avera v. Avera, 253 Ga. 16, 315 S.E.2d 883 (1985).

29.2 Effect of Designation “Trust” and “Trustee”

A deed or other instrument of conveyance must state that title is conveyed to a “party, as trustee,” and not to the “trust” in and of itself, as only a trustee, and not the trust, is authorized to hold legal title. A deed or instrument must state that title is conveyed to a “party, as trustee,” and not to a “ party, trustee.”

*Comment: “Georgia Trust Act,” O.C.G.A. Sections 53-12-1 *et seq.* [See in particular: definitions of “Trust” and “Trustee” at Section 53-12-2, “Capacity of Trustee” at Section 53-12-24, and “Creation of Beneficial Interest in Property by Deed” at Section 53-12-51]. See Standard 8.1, *supra*.*

29.3 Trust Established In Accordance With Provisions of “Testamentary Additions to Trust Act”

In reviewing marketability of conveyances by trustees, an examining attorney must keep in mind where applicable the provisions of the “Testamentary Additions to Trusts Act” (O.C.G.A. Sections 53-14-1 through -5).

Comment: Under the provisions of this Act, a devise or bequest in a will of a testator dying on or after May 31, 1968, may be made to the trustee or trustees of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons, if the trust is identified in the testator’s will and its terms are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator’s will or in the valid last will of a person who has predeceased the testator. The devise or bequest will not be invalid because the trust is amendable, revocable, or both or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator’s will provides otherwise, the property so devised or bequeathed shall not be deemed to be held under a testamentary trust of the testator but shall be

administered and disposed of in accordance with the provisions of the instrument or trust setting forth the terms of the trust.

CHAPTER 30

ASSESSMENTS FOR GOVERNMENTAL IMPROVEMENTS AND SERVICES

30.1 Equal Rank With Ad Valorem Tax Liens

Service assessments for governmental improvements (paving, sidewalk, curbing, etc.) or services (water, sanitation, sewer, etc.) have equal rank with ad valorem tax liens and are not extinguished by foreclosure.

Comment: See O.C.G.A. Section 36-39-20; Bowery Savings Bank v. DeKalb County, 240 Ga. 528, 242 S.E.2d 50 (1978); City of Atlanta v. Burton, 90 Ga. 486, 16 S.E. 214 (1892); Dodd v. City of Atlanta, 154 Ga. 33, 113 S.E. 166 (1922); Paulk v. City of Ocilla, 188 Ga. 69, 2 S.E.2d 642 (1939); Harrison v. Jones, 226 Ga. 344, 175 S.E.2d 26 (1970).

30.2 Lien Against Property Served

A supplier of water, gas, sewerage or electricity shall not impose a lien against real property for unpaid charges unless the owner is the person who incurred the charges. These special assessments are chargeable only against the property served or benefited and are not general liens against the owner.

Comment: The first sentence is based upon O.C.G.A. Section 36-60-18, which became effective April 19, 1994. See Clarke v. Mayor and Council of Millen, 187 Ga. 185, 200 S.E. 698 (1938); Brumby v. Harris, 107 Ga. 257, 33 S.E. 49 (1899); Norman v. City of Moultrie, 157 Ga. 388, 121 S.E. 391 (1923).

30.3 Date of Attachment

Subject to specific legislation, assessments for improvements attach from the date of adoption of the ordinance authorizing the improvement.

*Comment: See O.C.G.A. Section 36-39-20; City of McRae v. Folsom, 191 Ga. 272, 11 S.E.2d 900 (1940); Paulk v. City of Ocilla, *supra*; Atlanta Title & Trust Company v. Inman, 42 Ga. App. 191, 155 S.E. 364 (1930); Herring v. Citizens Bank of Cairo, 45 Ga. App. 646, 155 S.E. 838 (1932).*

30.4 Expiration

In the absence of an entry upon the General Execution Docket, the assessments expire seven years after attachment.

Comment: See O.C.G.A. Sections 48-3-21 and -22; City of McRae v. Folsom, supra; Sharpe v. City of Waycross, 185 Ga. 208, 194 S.E. 522 (1937).

CHAPTER 31

FEDERAL TAX LIENS

31.1 In General

Marketability of title is adversely affected by the General Federal Tax Lien, which is discussed in Sections 31.2 through 31.11, the Federal Estate Tax Lien, discussed at Section 31.12(a) and the Federal Gift Tax Lien, discussed at Section 31.12(b).

31.2 Applicability of Federal Tax Lien

The federal tax lien arises under Section 6321 of the Internal Revenue Code (hereinafter, the “Code”). The federal tax lien may be imposed against any “person”: (whether an individual, trust, estate, partnership, association, company or corporation) with respect to unpaid federal taxes.

Comment: When used in this Chapter, “federal tax lien” refers to the “general” federal tax lien imposed with respect to income taxes, employment taxes and various excise taxes. The Code is codified at 26 U.S.C. Section 1 et seq. “Person” is defined in Section 7701(a)(1) of the Code, and includes the categories listed in the above parenthetical. Although a general or limited partnership, as well as a Subchapter S corporation can have no liability for unpaid income taxes, such entities may be liable for failure to pay employee withholding taxes or excise taxes and, consequently, can be subject to federal tax liens.

31.3 Creation and Attachment

The federal tax lien is created by Section 6321, which provides that:

“If any person liable to pay any tax neglects or refused to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be alien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”

The above Section 6321 language can be broken down into three separate components, as follows: (a) assessment of an unpaid tax liability (I.R.C. Section 6203), (b) notice and demand for payment (I.R.C. Section 6303) and (c) non-payment by the Taxpayer (I.R.C. Section 6321).

The first requirement, “assessment,” is the simple administrative act by the Service of entering in its records that a particular liability is due and payable from a Taxpayer. (I.R.C. Section 6203). The second element, notice and demand, is governed by Section 6303, which requires that the Service must, as soon as practicable within 60 days after an assessment is made, notify each person liable for the unpaid tax of the amount due and make formal demand for payment. Despite the 60-day grace period, notice of an assessment is generally given at the same time as the effectiveness of the assessment. A Form 4340 (Certificate of Assessments and Payments) is typically used by the Service. The third element, non-payment, is addressed by Section 6321 itself, as set forth above. No time period for payment is set forth in the statute.

The lack of a time period for payment is irrelevant in light of section 6322, which provides that the tax lien attaches “at the time the assessment is made.” This date is reflected on both the Certificate of Assessments and Payments (Form 4340) and the Notice of Federal Tax Lien (Form 668(Y)). Because of its capacity to “relate back” to a date prior to notice and demand for payment, the federal tax lien is sometimes referred to as the “secret lien.”

Comment: The term “Service” is used generically in this Chapter to refer to the Internal Revenue Service or the Secretary of Treasury (or his designate). The Code often empowers the Secretary of Treasury or his designee to perform various acts which, as a practical matter, are performed by the Internal Revenue Service.

There are a number of cases which address the sufficiency of notice and demand under Section 6303. In general, courts have been extremely pro-Service with respect to what constitutes sufficient notice and demand for payment.

31.4 Perfection

(a) Notice of Federal Tax Lien. The federal tax lien is choate and valid against the interest of the Taxpayer as soon as the elements discussed above (i.e., assessment, notice/demand and non-payment) have been completed. Pursuant to Section 6323(a), however, the federal tax lien is not valid against a “purchaser, holder of a security interest, mechanic’s lienor or judgment lien creditor” until a Notice of Federal Tax Lien (an “NFTL”) has been filed of record in the appropriate office. The NFTL filing requirement is consistent with the general rule of “first in time, first in right” with respect to competing interests in property. The form which is currently used by the Service is Form 668(Y) (Notice of Federal Tax Lien under Internal Revenue Laws).

Comment: The required elements of the above categories are set forth in Section 6323(h) of the Code and are discussed in Section 31.8, infra.

(b) Place of Filing. With respect to real property, the location for filing the NFTL is governed by state law. Section 6323(f)(1)(A)(1) provides that the state in which real property is located must designate the appropriate location for filing of the NFTL. Federal tax lien filing procedures in Georgia are governed by O.C.G.A. Sections 44-14-570 through 574. Georgia NFTLs are filed with the Clerk of the Superior Court for the county in which the property is located, in either a special lien book or in the general execution docket (O.C.G.A. Section 44-14-571).

(c) Contents of NFTL. Section 6323(f)(3) provides that the Service may prescribe the proper form and content of an NFTL. Such form is deemed to be valid, notwithstanding any other provision of law regarding the required form or content of a notice of lien. Accordingly, a properly completed and recorded Form 668(Y) is effective to perfect the federal tax lien.

The NFTL need not (and does not) identify particular property interests to be attached. With respect to Georgia real property, the filing covers all real property and interests in real property of the Taxpayer located in the county in which the NFTL is filed.

Comment: Litigation has arisen over inaccuracies in the name of the taxpayer as the same appears on the NFTL. Minor discrepancies, such as the failure to include a full name or errors, omissions or substitutions in a name are not fatal. See e.g., U.S. v. Sirico et al., 247 F. Supp. 421 (D.C. N.Y. 1965). The test is whether there is substantial compliance sufficient to give constructive notice. Id. at 422.

31.5 Property To Which Lien Attaches

The lien attaches to “all property and rights to property, whether real or personal, belonging to (the Taxpayer).” (I.R.C. Section 6321). With respect to real property interests, state law determines whether the Taxpayer has property or property rights to which the lien may attach. Moreover, any property acquired by the Taxpayer after the date of the assessment is immediately attached by the lien, without the need for further action by the Service.

Comment: See Acquilino v. U.S., 363 U.S. 509 (1960); Texas Oil & Gas Corp. v. U.S., 466 F.2d 1040 (5th Cir. 1972).

With respect to joint tenancies, the federal tax lien attaches only to the taxpayer’s interest in the property, not to the property itself. With respect to joint tenancies with right of survivorship, the death of the taxpayer/joint tenant extinguished the general federal tax lien.

Comment: See Schmidt v. U.S., 896 F.2d 352 (9th Cir. 1989); U.S. v. Ridley, 120 F. Supp. 530 (N.D. Ga. 1954); Parsons v. Anglim, 143 F.2d 534 (9th Cir. 1944); Fecarotta v. U.S., 154 F. Supp. 592 (D.C. Ariz. 1956).

In Georgia, general partners are jointly and severally liable for all debts and obligations of a general partnership (O.C.G.A. Section 14-8-15, as well as a limited partnership [O.C.G.A. Section 14-9-403(b)]). Accordingly, federal tax liens for the tax liability of a Georgia general or limited partnership attach not only to partnership property, but also to property owned individually by the general partner. To take advantage of the foregoing provisions, partnership NFTL’s generally also list the names of all known general partners.

Comment: The general partner’s liability, however, only extends to liabilities which arose when the general partner was a general partner of the partnership. See Lidberg v. U.S., 375 F. Sup. 631 (D.C. Minn. 1974); In re: Robby’s Pancake House of Florida, Inc., 24 B.R. 989 (Tenn. 1982).

31.6 Duration of NFTL Filing

The NFTL must be refiled during the one-year period ending on the date which is ten years and 30 days after assessment of the tax on any assessment made on or after November 5, 1990. Any lien which had not expired on November 5, 1990 will be effective for ten years and 30 days after

the date of assessment [I.R.C. Section 6323(g)(3)]. The last day of the refiling period is specified on the NFLT form.

Form 668(Y) provides on its face that, unless the NFLT is refiled by the required date, the form serves as a Certificate of Release pursuant to Section 6325(a) and the lien is automatically released (but see the preceding paragraph concerning extension of certain liens). The NFLT must be refiled in the place where it was originally filed. (I.R.C. Section 6323(g)(2)(A)]. If the Taxpayer has notified the Service of a change of address at least 90 days prior to the actual refiling of the NFLT, the Service must also refile the NFLT in the appropriate place for the taxpayer's new address [I.R.C. Section 6323(g)(2)(B)].

31.7 Limitation, Release and Satisfaction of Lien

The federal tax lien may be limited, released, satisfied or subordinated by the following certificates, all of which should be filed in the same county office where the NFLT was initially filed. All such certificates are conclusive as to the matters set forth therein [I.R.C. Section 6325(f)(i)].

(a) Certificate of Release. When the tax liability has been satisfied or an appropriate bond has been issued, the Service is required pursuant to Section 6325(a) to issue a Certificate of Release of Lien. The form currently used by the Service is Form 668(Z). In addition, if a NFLT has been erroneously filed, a Certificate of Release of Lien may be obtained by the Taxpayer pursuant to Section 6326(b).

(b) Certificate of Nonattachment. When an NFLT identifies the wrong person as the Taxpayer, the incorrectly identified person may seek issuance of a Certificate of Nonattachment pursuant to Section 6325(e). The certificate provides that the lien does not attach to the property of such person.

Comment: The most typical instances are when two people have the same name or when a general partner is being charged for liabilities of a partnership incurred after his withdrawal as general partner.

(c) Certificate of Discharge. In certain situations, the Service may elect to release particular property from a federal tax lien, without extinguishing the lien itself. In such situations a Certificate of Discharge is filed pursuant to Section 6325(b). The Service currently uses Form 669-A, Certificate of Discharge of Property from Federal Tax Lien.

(d) Certificate of Subordination. In certain situations, the Service may agree to subordinate its federal tax lien on specific property, Section 6325(d) sets forth the limited situations in which the Service may take such action. The forms currently used by the Service for subordination are Forms 669-D, 669-E, and 669-F.

31.8 Priority

As discussed above, Section 6323(a) provides that the federal tax lien is not valid against purchasers, holders of security interests, mechanic's lienholders or judgment lien creditors until the NFTL is properly filed. These four categories of interest must be "perfected" pursuant to applicable Code definitions in order to have priority over the federal tax lien. Applicable Code requirements are as follows:

(a) Purchaser. A purchaser is defined as a person "who, for adequate and full consideration in money or money's worth acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice." [I.R.C. Section 6323(h)(6)]. Adequate and full consideration is consideration which bears a reasonable relationship to the true value of the acquired interest. [Treas. Reg. Section 301.6323(h)-1(f)(3)]. An "interest" in property expressly includes (i) a lease, (ii) a written executory contract to purchase or lease, (iii) an option to purchase or lease and (iv) an option to renew or extend a lease [I.R.C. Section 6323(h)(6)].

(b) Mechanic's Lienor. Section 6323(h)(2) defines a mechanic's lien as a lien which arises under local law on real property for services, labor or materials furnished for the construction, improvement or demolition of the property. The mechanic's lien attaches on the earliest date on which the lien was valid under local law against subsequent purchasers of the property who lack actual notice of the lien, but not before the date on which the services, labor or materials were supplied [I.R.C. Section 6323(h)(2)].

Under Georgia law, a properly and timely filed mechanic's lien "relates back" to the date on which services were commenced, even if the lien is subsequently filed (See O.C.G.A. Section 44-14-361]. Accordingly, an NFTL which is filed before a mechanic's lien, but after the effective date of the mechanic's lien (i.e., the date on which services were commenced or materials were provided) does not prevail over the mechanic's lien.

(c) Holders of a Security Interest. Section 6323(h)(1) defines a security interest as any interest in property which is acquired by contract for the purpose of securing payment or performance of an obligation or for

indemnifying against loss or liability. The definition is broad enough to include a Georgia security deed.

In order to be entitled to priority against a subsequently filed federal tax lien, all of the following events must have occurred prior to the filing of the NFTL: (i) a written contract regarding the security interest must have been executed; (ii) the holder of the security interest must have parted with money or money's worth, (iii) the property must be in existence and the interest must be protected under local law against a subsequently perfected judgment lien arising out of an unsecured obligation [I.R.C. Section 6323(h)(1); Treas. Reg. Section 301.6323(h)-1(a)(1)].

Accordingly, so long as the secured party has “parted with money or money’s worth,” a properly filed and recorded Georgia security deed will have priority over a federal tax lien evidenced by a subsequently filed NFTL.

(d) Judgment Lien. The regulations define a “judgment lien creditor” as a person who has “obtained a valid judgment in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money.” The Regulations also require that the judgment lien must meet the following three part test: (1) the identify of the lienholder must be certain; (ii) the identity of the property subject to the lien must be known; and (iii) the demand of the lien must be established. In addition, the lienholder must record the judgment if such action is required for perfection under local law [Treas. Reg. Section 301.6323(h)-1(g)].

31.9 “Semi-Super” Priority

Four types of security interests have priority over previously filed federal tax liens in certain limited circumstances. Two of the four types of security interests can relate to real estate, as follows:

(a) Real Property Construction or Improvement Financing Agreements. A “real property construction or improvement financing agreement” is an agreement to make cash disbursements to finance the construction or improvement on real property, or to finance a contract for such work [I.R.C. Section 6323(c)(3)]. In order to qualify, (i) the financing agreement must be a written agreement which was entered into prior to the filing of the NFTL, [I.R.C. Section 6323(c)(1)(B)], and (ii) the security interests claiming semi-super priority must be protected under local law against a judgment lien arising out of an unsecured obligation as of the time of the NFTL filing. [I.R.C. Section 6323(c)(1)(B)]. The property covered by the priority is limited to the property being constructed or improved [I.R.C. Section 6323(c)(3)(B)].

(b) 45-Day Disbursements. Section 6323 also gives protection to a security interest created by disbursements made within 45 days after the filing of the NFLT in property existing at the time of the NFLT filing. As with the real property improvement exception, (i) the financing agreement must be a written agreement which was entered into prior to the filing of the NFLT [I.R.C. Section 6323(c)(1)(B)] and (ii) the security interest must be protected under local law against a judgment lien arising out of an unsecured obligation as of the NFLT filing [I.R.C. Section 6323(c)(1)(B)].

31.10 Super Priorities

Certain interests are entitled to priority over the federal tax lien regardless of when such interest arises. Of these various “super priority” exceptions, only two are relevant to Georgia real property, as follows:

(a) Unpaid State Taxes and Assessments. Section 6323(b)(5) grants priority over perfected federal tax liens to certain real property law liens which, under local law, have priority over senior perfected security interests in the same property. The liens eligible for this super priority status are limited to those which secure (i) tax of a general application based on the value of real estate, (ii) a special assessment on the property to cover the cost of public improvements or (iii) charges for utilities or public services furnished to the property by a governmental instrumentality [I.R.C. Section 6323(b)(6)].

(b) Residential Property Improvements. There is a limited super priority exception for mechanic’s liens up to \$1,000 relating to work on residential property. To qualify for the exception, (i) the property must be occupied by the owner and must not contain more than four dwelling units, (ii) the lien must arise from the repair or improvement of the property and (iii) the contract price must be less than \$1,000 [I.R.C. Section 6323(b)(7)].

31.11 Special Rules Relating to Foreclosure of Real Property Encumbered by Federal Tax Lien

SEE SECTION 17.4 SUPRA FOR PROCEDURE FOR DIVESTING
PROPERTY IN FORECLOSURE OF FEDERAL TAX LIEN.

31.12 Special Rules for Estate Tax Lien and Gift Tax Lien

(a) Estate Tax Lien. The estate tax lien is a special lien which secures the payment of federal estate tax obligations and is administered pursuant to Section 6324(a). The estate tax lien attaches at the date of the decedent's death to all of the gross estate and remains in effect for a period of ten years from the date of death. The estate tax does not require an assessment prior to attachment. The Service need not file a notice of estate tax lien to make the estate tax lien effective against most interests. Section 6324(a) affords protection to "purchasers" and "holder(s) of a security interest" in the liened property by providing that the lien is divested upon transfer to either such entity. The lien thereafter attaches to the property of the transferor. The estate tax lien is not valid against mechanic's liens or the "super priority" liens discussed in Section 31.10, supra.

(b) Gift Tax Lien. The gift tax lien attaches (to the property transferred) at the time of the gift and exists for a period of ten years, unless the tax is satisfied or becomes unenforceable by the lapse of time. As with the estate tax lien, notice of the lien need not be filed in order to perfect the lien against most interests. The gift tax lien is not valid against mechanic's liens or the "super priority" liens discussed in Section 31.10, supra. The gift tax lien is subject to divestment upon transfer of the gifted property to a purchaser or the holder of a security interest. The lien, however, then becomes a lien on all of the donee's property.

CHAPTER 32

COMMERCIAL REAL ESTATE BROKERS' LIENS

32.1 Examiner's Exception for Brokers' Lien for Commercial Property

Absent (i) proof in affidavit form from both the seller and the purchaser identifying all agreements with commercial real estate brokers for management, sale, lease or other licensed services with respect to the subject property, and (ii) receipt of lien waivers from each identified commercial real estate broker, a title examiner should reflect an excepting for liens arising under the "Commercial Real Estate Broker Lien Act" (O.C.G.A. Section 44-14-600, et seq.).

Comment: "Commercial real estate" is defined as "...any real estate other than real estate containing one to four residential units; real estate on which no buildings or structures are located and which is not zoned for nor available for commercial, multifamily, or retail use; or real estate classified as agricultural for tax assessment purposes. Commercial real estate shall not include single-family residential units such as condominiums, townhomes,

mobile homes, or homes in a subdivision when sold, leased, otherwise conveyed on a unit by unit basis even though these units may be part of a larger building or parcel of real estate containing more than four residential units.” O.C.G.A. Section 44-14-601(3).

32.2 Escrow Funds to Dissolve Lien

A claim for lien filed within one year prior to the date of certification of title for which no lien waiver has been obtained, must be handled by an escrow or other procedure if sufficient proceeds from the instant transaction will be available to transferor, whereupon the lien of the broker shall dissolve, without the need for further lien waivers.

Comment: See O.C.G.A. Section 44-14-604.

CHAPTER 33

RTC TITLE ISSUES

Introductory Comment: This Chapter is applicable only to title issues relating to real property assets of a failed federal savings and loan association (“Failed Association”) in which the Resolution Trust corporation (“RTC”) has been appointed as the receiver or conservator by the Office of Thrift Supervision, U.S. Department of Treasury (“OTS”), by operation of law pursuant to the provisions of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989, enacted August 9, 1989 (“FIRREA”). The appointment of the RTC as conservator or receiver is documented by OTS Orders, which Orders also evidence the transfer of assets, by operation of law, from the Failed Association to RTC, as receiver for the Failed Association, and, in a majority of instances, evidence the creation of a pass-through receivership, whereby a newly-chartered federal association (a “Bridge Association”) is formed by OTS; simultaneously therewith, the OTS will appoint the RTC as conservator for the newly-chartered Bridge Association, into which the assets of the Failed Association are transferred by virtue of a Purchase and Assumption Agreement (“P&A Agreement”). In rare circumstances, certain assets acquired by the Failed Association may not be transferred to the Bridge Association by virtue of the P&A Agreement. In almost all circumstances, the P&A Agreement will not provide a specific itemization of those assets being transferred from the Failed Association to the Bridge Association. The Bridge Association normally will remain in existence until the RTC disposes of some or most of the assets, whereupon the RTC will

dissolve the Bridge Association and will appoint RTC as receiver for the Bridge Association. The RTC is required to file OTS Orders in the county deed records only of the location of the principal place of business of the Failed Association and is not required by law to file OTS Orders in the county deed records in which real property assets of the Failed Association are located. This Chapter is not applicable to title issues arising from failed national banks, or failed state banks, state trust companies, or state savings banks. Inquiry should be made to the governmental agencies having authority over said banks, trust companies, and savings banks, inasmuch as the rules and regulations regarding transfers of title are in many cases in conflict to those rules and regulations applicable to the RTC.

33.1 Chain of Title of Ownership of Real Property Assets of Failed Association

To establish the proper chain of title to real property assets of a Failed Association, all applicable OTS Orders should be recorded in the deed records of the county in which the real property interest is located. It is preferable also to record the P&A Agreement. If either originals or certified copies of the OTS Orders, etc., are not available for recordation; then, in such event, the instrument to be executed by the RTC regarding a real property interest should specifically recite all OTS Orders and the P&A Agreement, if applicable, and copies of all unrecorded Orders and Agreements should be retained by the title agent or closing attorney. It also is preferable to place the specific recitals regarding Orders and Agreements in the instrument even if the Orders, etc., are otherwise properly recorded. The requirements of this standard apply to an instrument evidencing any type of real property interest to be recorded, including without limitation, warranty and quitclaim deeds, deeds under power of sale, transfers and assignments of deeds to secure debt, loan modification agreements, cancellations of deeds to secure debt, etc., as well as foreclosure advertisements.

33.2 Sales of Real Property Interests Held by RTC

RTC policy and practice has evolved from the execution by RTC of only quitclaim deeds in the early years of FIRREA to evidence sales of real property owned by RTC, to the use of limited warranty deeds in standard sales of real estate owned properties. RTC has reserved the right to insist on the use of a quitclaim deed to transfer title on a case-by-case basis. RTC normally will execute only a "bare bones" seller's affidavit. The RTC's seller's affidavit, however, should contain appropriate affirmations that will dissolve, by operation of Georgia law, involuntary liens, such a materialmens' liens

and real estate brokers' liens; or, in the alternative, independent verification should be made that would establish that no lien rights exist.

33.3 Use of Powers of Attorney by RTC

RTC normally will appoint an individual to act on its behalf as attorney in fact to execute instruments regarding a real property interest, via power of attorney. The power of attorney should either be recorded separately in the county deed records in which the real property interest is located, or a copy of the power of attorney should be affixed to the instrument transferring title itself and be recorded as an exhibit to the instrument. The power of attorney should be reviewed carefully to determine any specific limits or exceptions to the authority granted to the attorney in fact. In rare circumstances, a corporate officer of the RTC will execute an instrument, in which case a power of attorney is not applicable; however, evidence of the appropriate delegation of authority to the corporate offices so executing the instrument should be obtained.

33.4 Pass-Through Receivership Title Issues

To eliminate a perceived gap in the chain of title in a pass-through receivership created by : (a) a lack of reference to specific assets being transferred from the Failed Association to the Bridge Association, or (b) the instance in which the conveyance or transfer occurs after dissolution of the Bridge Association, either: (a) a release of the interest being transferred should be obtained not only from the Association immediately transferring title, but also from the initial Failed Association; or (b) the applicable OTS Orders should be recorded, which Orders should recite or confirm the transfer of the assets of the Failed Association to the Bridge Association, as supported by the P&A Agreement. The RTC, on a case-by-case basis, will execute joinder quitclaim and/or warranty deeds, joinder releases, and joinder transfers and assignments, or separate release instruments, to release any residual rights possibly retained by any such Associations. Use of the joinder or separate release instruments by the RTC has been a common practice only since late 1992.

33.5 Validity of Foreclosure Conducted by Holder of Superior Interest of Property in which RTC as Receiver of a Failed Association Holds an Interest

To determine the validity of foreclosures of involuntary, non-consensual liens, i.e., tax sales, materialmens' liens, superior in priority to an

interest of RTC, as receiver, or RTC in its corporate capacity, a determination must be made whether required legal notice by the foreclosing lienholder was given to the RTC, and whether the RTC expressly gave its consent to the foreclosure or acquiesced in the request for consent by allowing more than sixty (60) days to pass from the date of receipt of the notice to the date of foreclosure.

A non-judicial foreclosure of a consensual, bona fide deed to secure debt superior in interest to an interest of the RTC in its receivership or corporate capacity shall be assumed valid and shall be assumed to terminate any rights of redemption of the RTC in and to the foreclosed property, without the requirement of providing notice or obtaining consent from the RTC, if the interest being foreclosed is held by the RTC by virtue of a security instrument. If RTC actually holds legal and equitable title to the property being foreclosed, however, consent is deemed given by the RTC only if the foreclosing mortgage holder gives the RTC proper notice of intent to foreclose.

Comment: This standard highlights only a few of the many provisions of Section 219 of FIRREA, as codified at 12 U.S.C. Section 1825(b)(2), as clarified by RTC's Interim Statement of Policy on Foreclosure Consent and Redemption Rights, effective May 7, 1992, 57 Fed. Reg. 19,651. A supplemental statement issued by RTC on June 23, 1992, 47 Fed. Reg. 27,990, set forth the central address for foreclosure notices and requests for consent. In circumstances in which RTC holds an interest, whether as a security interest holder, or as a title holder, to real property which is being foreclosed by a superior holder of either a consensual or non-consensual lien, the applicable provisions of the above-referenced section of FIRREA, together with the RTC Interim Statement, should be reviewed carefully. The provisions of Section 219 requiring notice and consent are not applicable to situations in which RTC serves as conservator for an Association, but only situations in which RTC either serves in its corporate capacity or as receiver for an Association.

CHAPTER 34

ZONING

34.1 Title Opinion

(a) A title examiner must be careful to disclaim in his/her opinion any coverage as to the applicability or effect of zoning, subdivision, or building codes or regulations, whether state, county or municipal, which govern the use and occupancy of real property, since it is settled in Georgia that such matters do not implicate the locus or quality of title.

Comment: Title insurance companies operating in Georgia are not permitted currently to issue insurance as to such "zoning matters," broadly conceived. Hence, title opinions should not refer to "zoning matters" as exceptions, just as, properly speaking, "zoning matters" do not constitute "exceptions" to the coverage of title insurance in Georgia.

(b) By reason of the confusing similarity between "title matters" and "zoning matters," any attorney representing a purchaser or lender in connection with a real estate transaction, including, where applicable, the examining attorney, should point out that notwithstanding the absence of restrictive covenant or easements or other private "title matters" imposing use limitations on property or set-back requirements, such limitations may still exist as a result of public "zoning matters."

Comment: Even if a survey relied upon by an examiner ostensibly reveals that a building violates a "zoning" set-back line, the examiner may currently ignore the conflict on the theory that "zoning matters" are not title matters, and, besides, the structure may be a "grandfathered" nonconforming use or the beneficiary of an official "variance," etc. Examiners may continue to certify such titles as marketable provided that the foregoing disclaimer is clearly made.

The complexities of zoning law, including state and local procedural requirements and "standing" limitations on who may challenge substantive and procedural defects in zoning enactments, mean that any effort by the Bar to lower the theoretical barrier between "title matters" and "zoning matters" will open Pandora's Box. Even so simple a step as requiring a zoning status report on the property from local officials may be very difficult and time-consuming, especially in smaller jurisdictions, and unreliable, even when readily available. Cf. Corey Outdoor Advertising, Inc. v. Atlanta board of Zoning Adjustment, 254 Ga. 221, 327 S.E.2d 178 (1985). The universal doctrine of "grandfathered" nonconforming uses would assure a predictable number of false "positives."

One of the best protections may be an express warranty in the purchase contract as to zoning status, coupled with common sense and careful inquiry with local zoning, planning and building department officials.

As a "legislative enactment," local zoning and subdivision laws import notice to all the world, so that both the buyer and seller of land are "presumed to know what zoning regulations do or do not permit." Sachs v. Swartz, 233 Ga. 99, 102-103, 209 S.E.2d 642 (1974); Gignilliat v. Borg, 131 Ga. App. 182, 183, 203 .E.2d 479 (1974); Maloof v. Gwinnett County, 231 Ga. 164, 200 S.E.2d 749 (1973); Flannigan v. Clark, 207 Ga. 345, 61 S.E.2d 485 (1950).

Moreover, a general warranty of title in deeds in Georgia, as codified by O.C.G.A. Section 45-5-62, which otherwise encompasses the grantor's right to convey and the absence of encumbrances, does not extend to "zoning matters." Barnett v. Decatur, 261 Ga. 205, 403 S.E. 2d 46 (1991), reversing Decatur v. Barnett, 197 Ga. App. 459, 398 S.E.2d 706 (1990). By "zoning matters," the courts refer not only to traditional zoning regulations, but also subdivision regulations and analogous land use and building restrictions. And neither zoning, subdivision, or building restrictions that theoretically limit future activity on property, nor active and on-going zoning or subdivision violations that prohibit the current use, existence, or conveyance of a parcel of land constitute a title "encumbrance" that triggers a breach of the warranty of title. Id.

By the same token, however, such "zoning matters" do not constitute a title defect requiring written notice under the standard "title examination" paragraph in purchase contracts. Accordingly, where a seller expressly warrants that property will be zoned in a certain fashion, that warranty (which is equivalent to a guarantee that the property either is appropriately zoned now or will be appropriately zoned by the time of the closing) will support a subsequent rescission of the sale, notwithstanding a failure to list such "zoning matters" as title defect.. See Sachs v. Swartz, supra, 233 Ga. at 102-103.

Of course, the presumed knowledge of the contents of the zoning and subdivision regulations has generally involved facial issues, such as the zoning classification of property, e.g., whether it is residential or commercial, rather than more discrete administrative issues, involving application of the finer points of a zoning or subdivision regulation to a particular property. Where a broad issue (like that of the applicable zoning classification) is in dispute, the courts find that, notwithstanding the seller's representations and assurances as to the zoning classification, the buyer may not justifiably rely thereon because the means of knowledge are readily at hand and equally available to both parties. See Hill v. Century 21 Max Stanzel Realty, Inc., 187 Ga. App. 754, 371 S.E.2d 217 (1988). But where a seller has some "special knowledge," which pertains to how the local zoning, subdivision, or building regulations apply to his property, then passive concealment thereof may well constitute actionable fraud. Wiederhold v. Smith, 203 Ga. App. 877, 418 S.E.2d 141 (1992).

In Wiederhold v. Smith, the Court of Appeals found that there was sufficient evidence to support a jury verdict of fraud, where a seller sold a home within a subdivision knowing that the local Public Works Department had placed a hold on the lot because of subdivision problems which

*necessitated an expenditure of roughly \$34,000.00 before a home could be constructed. In short, there is “an exception to the general rule of caveat emptor in cases involving passive concealment by the seller of defective reality.” 203 Ga. App. 879. As a result, a seller has a duty to disclose regulatory defects here he or she has “special knowledge” not apparent to the buyer and where the buyer is acting under a misapprehension as to the facts which would be important to the buyer and would probably affect his decision to buy—even where the information is located “in a file that is open to the public,” since such regulatory problems are not disclosed by the deed records, and it is “not common for potential buyers of lots to ask to see the files maintained in subdivisions . . . before purchasing property.” *Id.**

CHAPTER 35

FEDERAL STATUTES WHICH DO NOT AFFECT TITLE

35.1 Americans with Disabilities Act (“ADA”)

There are no peculiar aspects of the ADA (42 U.S.C. Section 12101 et seq.) which affect title. If a judgment is entered against the owner of a property in an ADA suit, the judgment lien will not be entitled to any unusual priority.

35.2 Bank Bribery Act.

There are no peculiar aspects of the Bank Bribery Act (18 U.S.C. Section 215) which affect title.

35.3 Home Mortgage Disclosure Act (“HMDA”)

There are no peculiar aspects of the HMDA (12 U.S.C. Sections 2801 et seq.) which affect title.

35.4 The Real Estate Settlement Procedures Act (“RESPA”)

The closing attorney should be acquainted with RESPA (12 U.S.C. Sections 2601 et seq.) and Regulation X (12 U.S.C. following Section 2617) in order to comply with the disclosure requirements for closing a transaction subject to RESPA. However, there are no peculiar aspects of RESPA which affect title.

CHAPTER 36

GEORGIA STATUTES WHICH DO NOT AFFECT TITLE

36.1 Georgia Residential Mortgage Act ("GRMA")

There are no peculiar aspects of the GRMA (O.C.G.A. Sections 7-1-1000 through -1020) which affect title.

36.2 Georgia Withholding Tax on Sale or Transfer of Real Property by Nonresidents of Georgia

There are no peculiar aspects of O.C.G.A. Section 48-7-128, which imposes a withholding tax on the sale or transfer of real property by nonresidents of Georgia, which affect title.

CHAPTER 37

CONDEMNATIONS — THE RIGHT OF EMINENT DOMAIN

37.1 In General Right of Eminent Domain — Its Power and Exercise Thereof

Where the examining attorney finds a right of eminent domain proceeding relevant to the examination of title, the examiner should bear in mind the general principles set forth in this Chapter.

"The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good." O.C.G.A. Section 22-1-2.

This right is a right of the United States of America and its authorized agencies to exercise (40 U.S.C. Section 257).

Comment: The taking of property for public use is legislative, and not judicial in function. State Highway Dept. v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

Eminent domain statutes of the State of Georgia are to be strictly construed. Botts v. Southeastern Pipeline Co., 190 Ga. 689, 10 S.E.2d 375(1940).

Except in cases of extreme necessity and great urgency, the right of eminent domain cannot be exercised without first providing for just compensation to the owner for the interference with the owner's exclusive rights. (O.C.G.A. Section 22-1-5).

37.2 Title Examination for Condemnor or Person Exercising Condemnation Right

Title examination, opinion and certificate of title to the condemnor or the entity exercising the right of eminent domain does not differ in theory from contracts of title examination for any purchaser. However, the consequences of failing to report a record owner of any interest in subject property (including owners of leaseholds of record, lien holders and owners of uncanceled judgments) can have extensive remedial consequences due to condemnor's failure to serve said parties as a result of the title examiner's negligence.

37.3 The Right of Eminent domain is Statutory in Nature Involving .c.Statutory Civil Procedure

The right of eminent domain is set forth in Chapter 22 of O.C.G.A. and is constitutionally and legislatively authorized. The title attorney should examine all court condemnation proceeding documents for proper service upon all parties, and look for all procedural requirements of the particular eminent domain proceeding elected to be followed by the condemnor under the Code.

37.4 Rights of Reversion in Condemnee or Successors in Title to Condemnee

Many condemnation proceedings have reversion rights of fee simple title to the land from which same was taken once the condemnor's use has been abandoned or extinguished. These are set forth in the particular condemnation proceedings or in the deeds from condemnees to condemnors and are usually in the granting and habendum clauses of said deeds.

Some forms of condemnation, namely the original form of condemnation, vested title in the condemnor for only so long as the public use

was continued. This method is still Georgia law in O.C.G.A. 22-2-85. The Code Section states that upon condemnor's ceasing to use the property for the purposes of condemnor's business, the property shall revert to the person from whom taken, his heirs or assigns. There are exceptions to this rule and most condemnor now follow a condemnation method in which they obtain fee simple title to said property exclusive of reversion upon non-use.

Comment: Where a grantor made to a railroad company a warranty deed conveying only an easement or right-of-way, due to conditions of reversion on abandonment in the habendum clause, neither the grantee in a successor railway company deed nor the railway company itself had any title or interest which it could convey after it had abandoned its easement obtained by condemnation. Byrd v. Goodman, 195 Ga. 621, 25 S.E.2d 34 (1943).

37.5 Just Compensation Awarded in the Form of Future Uses

The examining attorney should read the condemnation decrees in detail in that just compensation of money could be low due to contracts for condemnee to have rights for future benefits, such as utility hook up, sewage access, curb cuts or other access from the property remaining in said owner's possession after condemnation, plus the right in and to retaining walls or property line fencing.

37.6 Rights Lost to the Property Remaining after Condemnation Paid for as Consequential Damages

In reading plats of record subsequent to condemnation and condemnation proceedings, the title examiner should be aware of remaining property access rights, new building lines for construction of improvements, limitation of air or mineral rights to remaining property and temporary or permanent construction or maintenance easements, and flood easements.

37.7 Condemnation of Air Rights by Government Condemnor

Full ownership of real property includes owning not only the land and its improvements and fixtures thereon, but all the appurtenances thereto (easements serving said property) and also extends downward and upward indefinitely. (O.C.G.A. Section 44-1-2).

Upward limits of ownership do not extend above an altitude representing the reasonable possibility of a man's occupation and dominion and legality of flight over such lands can be the subject of condemnation or

right of eminent domain by government authorities. All properties near airports should be carefully examined for the taking of air rights over said properties which would govern the height of any trees or buildings constructed thereon.

37.8 Condemnation of Rights Less Than Fee Simple Title Rights in Addition to Air Rights

Many condemnor have power to condemn temporary construction easements, permanent construction easements, temporary flood easements and permanent flood easements in the taking. Any reference to such easement takings will appear in the court decree or deed from the condemnee, who will have been compensated justly therefor, and such takings will be a future right of the condemnor upon the remaining land of the condemnee.

37.9 Property Exempt from Condemnation or Eminent Domain Laws of Georgia

Georgia law exempts from the exercise of eminent domain by a person operating, constructing or preparing to construct a plant for generating electricity, all cotton mills, factories, or any plant engaged in furnishing electric power to the public. This does not exempt condemnation by governments. (O.C.G.A. Section 22-3-20 and 22-3-22).

Comment: All other properties appear to be subject to condemnation. Municipal property may be condemned by the Federal government.

37.10 Property Conveyed from Condemnor to Private Individuals

Conveyances from condemnors to private parties are based upon corporate resolutions or governing authority resolutions that said property is surplus property as to the use intended by the condemnor and that the use thereof is considered abandoned. This can also be set forth in a quitclaim deed from the condemnor.

The method of discontinuing a county road is prescribed by statute, O.C.G.A. Section 32-7-2.

The governing authority of a county must determine that all or any part of a road has ceased to be used by the public so as to no longer serve any substantial useful purpose, and a certification must be recorded on the

minutes with a plat of the road after notice to property owners located thereon.

The procedure for the disposition of property of a county or a municipality that has been condemned and acquired for public road purposes must follow the procedures set forth by O.C.G.A. Sections 32-7-3 and -4. This procedure requires public notice by advertisement in the newspapers or other county legal publications and must be offered to the owner of the property at the time of the acquisition. If said owner has subsequently sold said property, then the same must be offered to the owner of the abutting land holding title through the owner from whom the condemnor acquired the property.

37.11 Adverse Possession Cannot Be Obtained Against Certain Condemnors

Adverse possession or title by prescription does not run against the state nor any property owned by the state or subsidiaries of the state, whether same is used for governmental or for proprietary purposes.

Comment: See: O.C.G.A. Section 44-5-163; Grand Lodge of Ga. IOOF v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612 (1970).

This has been extended to include a county, a municipal corporation or any public corporation created by the state or the United States as to property held for public purposes.

37.12 Condemnation — Plats Involved

Plats involved in the condemnation proceedings, or referred to in conveyances of record, should be carefully examined in that they alone could show important easements reserved across remaining property and other matters not shown in the general conveyance description.

CHAPTER 38

EASEMENT TITLE ISSUES

Introductory Comment: This Chapter is applicable only to appurtenant easement interests which benefit real property. In many ways, determining the nature and extent of appurtenant easement interests poses a much more difficult problem for closing attorneys and title examiners than does the examination of title to the fee simple interest involved in a conveyance or other real property closing transaction. There are also significant distinctions

between residential and commercial properties when easements are involved. In most residential transactions in metropolitan areas of the state, due to subdivision and platting regulations, it is likely that all necessary easements were established by the developer when the property was subdivided. However, this may not be the case with planned commercial developments such as shopping centers, office parks and industrial or warehouse projects, since many such projects are developed over much longer periods of time than is typical with residential subdivisions, and in many instances the examiner must use special care to insure that easements for shared facilities, such as storm water drainage and retention ponds, have been properly established, and released from any tract financing or other debt encumbrances. In metropolitan and urban areas where land costs are high, commercial shopping centers and similar developments are likely to have shared storm water drainage systems necessitated by governmental regulations that require storm water run off to be managed on site, private easements for water and sewer lines within the boundaries of the overall commercial development, cross access easements to access curb cuts [which tend to be limited, especially in retail shopping centers which are generally located on major thoroughfares under the control of the DOT, which limits access rights to certain designated points] and also grants of easements for "vehicular parking" (which are often found related to shopping center out-parcels, to meet zoning requirements.)

38.1 Nature and Extent of Title Examiner's Duties with Respect to Appurtenant Easements

The closing attorney should furnish the title examiner a copy of the real estate sales contract, loan commitment, or some other source material containing an adequate legal description of the property interests as to which title is to be examined. The closing attorney and title examiner should work as a team where the closing attorney does not examine title. The examining attorney should, unless otherwise instructed by the client, verify that the property has direct access to a public road, or to a valid access easement allowing ingress and egress to the real property. The examining attorney is not required to verify access for utility services such as gas, electricity, water, sewer or cable television unless specifically requested to do so by the client. If, however, the examiner in the course of examining title becomes aware of the fact that the property in question is served by an easement of which the client may be unaware, the examiner should so advise the client and determine if the client requires certification as to such interest.

Comment: Under many circumstances, the title examiner is likely to find information pertaining to easements in the deed records, which may not otherwise come to the attention of the closing attorney, or client, unless

specifically disclosed by the title examiner. Likewise, the closing attorney is more likely than the title examiner to have the benefit of unrecorded plats, appraisals, or other materials in the loan and/or closing package which may disclose that the property is served by appurtenant easements which will not, in the ordinary course of examination, come to the attention of the title examiner. This is due to the means by which easements are created, and the fact that appurtenant easement interests need not necessarily be specifically described in the deed in order to pass with the conveyance. There are four (4) methods by which easements may be created under Georgia law: (i) express grant, (ii) prescription, (iii) implication, and (iv) condemnation.

- A. Express Grant. An easement which arises from an express grant is the least troublesome from the standpoint of the title examiner or closing attorney. Express grants of easements include those specifically described in warranty deeds conveying the appurtenant property in fee, recorded grants of easements or easements which are shown on a recorded plat and incorporated by reference into the warranty deed. Title to the property described in such easements should be examined, and conveyed, on the same basis as the fee.
- B. Prescription. Since an easement constitutes an interest in real property, the statute of frauds (O.C.G.A. Section 13-5-30) usually applies (Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977); however, an exception to the requirement for a writing exists with regard to parol licenses and easements by prescription or implication. The problem posed for an examiner, and closing attorney, is that since such easements are not specifically described in a grant or writing, the nature and extent of such easements may be unclear, especially to an examining attorney who relies almost exclusively on the record. It is in the nature of an easement by prescription, or parol license, that same do not initially appear of record (although these may be later included in a description after having become valid easements as allowed by law), and it is probably better practice for the closing attorney to incorporate a specific description of such rights into the Deed, once the nature and extent of such easements (derived from a parol license or prescription) are determined. An easement by prescription requires twenty years under O.C.G.A. Section 44-5-163. In Richard Row v. John Doe, 233 Ga. 691, 212 S.E.2d 854 (1975), involving an alleged prescriptive title to maintain a garage that encroached on the property of the Plaintiff in Ejectment, it was held that the Defendant could not claim prescriptive title by adverse possession for twenty years, where the

undisputed evidence established that the garage had been in place for no longer than seventeen years. Note that the Plaintiff in Row must have had actual notice of the garage, which did not create an estoppel. Although prescription under color of title only requires seven years, to have color of title the easement must be specifically described in a document of record. (Gilbert v. Reynolds, 233 Ga. 488, 212 S.E.2d 332 [1975]). Even if prescription had commenced, an inchoate easement can not be passed to a grantee (Olsen v. Nobel, 209 Ga. 899 76 S.E.2d 775 [1953]). An inchoate prescriptive (fee) title may be transferred by the possessor to a successor; but inchoate rights to an easement do not pass by deed unless specifically described therein. Therefore an examiner cannot rely simply on the passage of time, without more, in cases where a prescriptive easement is involved.

- C. Implication. Easements by implication are not favored under Georgia law, and can only arise in favor of those claiming under a common grantor (see Burk v. Tyrell, 212 Ga. 239, 91 S.E.2d 744 [1956] and Farris Construction Company, Inc. v. 3032 Briarcliff Road Associates Ltd., 247 Ga. 578, 277 S.E.2d 673 [1981]). Easements by implication, under Georgia law, can only arise in favor of the Grantee (since easements must be expressly reserved in the grant if they are to be retained by grantor). Easements by implication are not always readily detectable by a title examiner.¹ Where easements are not created by express grant, same pose great dangers for both examiners and closing attorneys. Therefore, due to the fact that there may be nothing of record to indicate the existence of the easement to the examiner, it is important for the examiner to adequately define the extent and nature of the easement in order to run title, which may require affidavits and will require a current survey.
- D. Condemnation. Easements acquired by condemnation are similar to those obtained by express grant in that same are specifically described in a recorded document, only in this instance the "grant" is involuntary. Locating easements acquired by condemnation may be a problem for the examiner if the party acquiring same fails to cause a copy of the decree to be recorded in the deed records as the standard docket search period used by most examiners is seven to ten years. Most easements acquired by condemnation will not be appurtenant easements, as the power of condemnation is largely limited to governmental entities and certain classes of utilities, except that any land owner otherwise

lacking access may condemn a private way for access to a public road, in accordance with applicable statutory procedures.

38.2 Merger

One problem encountered when examining title to easements is the doctrine of merger. Unlike ownership of property in fee, special care needs to be taken by the examiner to verify that existing easements which may have merged if the property comes under common ownership after the establishment of same, have been properly re-established if the tract is later divided.

Comment: Wherever a greater and lesser estate meet in the same owner, the lesser estate is merged into the greater (O.C.G.A. Section 44-6-2). It is axiomatic that one cannot have an easement upon his own property, for the lesser estate, represented by the easement, will be merged into the greater fee. In Burk v. Tyrell, 212 Ga. 239, 91 S.E.2d 744 (1956), it was held that unity of possession of both the dominant and servient estates is inconsistent with adverse use, and therefore prescriptive use would be terminated until after the severance of the two estates. Thus, an examiner should use special care where there is an unrecorded easement, parol license, or rights of prescription, to confirm that the property has not come under common ownership. In Muscogee Manufacturing Company v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028 (1906), it was held that if two estates in the same property unite in the same person, and it is contended that no merger took place, the person making such contention must allege and prove facts negativing the existence of such merger.

38.3. Debt Encumbrances

The examiner should in all cases verify that, when the easement interest was created, any existing security deed on the property over which the easement lies was released, or a consent was obtained from the lender to avoid termination of the easement by a later sale under power.

Comment: A valid foreclosure sale under power in a security deed is equivalent to a judicial sale under decree of a Court of Equity and not only extinguishes the right of redemption, but divests all junior encumbrances on the property and also terminates the interests of persons claiming under the grantor (Federal Land Bank of Columbia v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941).

38.4 Effect of Deed Recitals on Easement Rights

Many deeds contain recitals relative to "easements and restrictions of record". Such "subject to" recitals do not in and of themselves create easements, as these are only limitations on the grantor's warranty. Valid appurtenant easements existing as of the date of the conveyance are automatically conveyed with the fee simple parcel as appurtenances; however, for the reasons set forth in this title, it is the better practice to specifically describe all easements in the deed whenever possible to avoid problems with identification and also to alert future examiners.

*Comment: Recitals in deeds bind only the parties to such conveyances and their privies; and are not evidence for or against anyone not claiming under the said deed (Tift v. Golden Hardware Company, 204 Ga. 654, 51 S.E.2d 435 [1949]). In accord is Muscogee Manufacturing Company v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028 (1906) wherein it was held that "a mere grant of property will not create any appurtenances" (*Id.* at page 227). In Barton v. Gammell, 143 Ga. App. 291, 238 S.E. 2d 445 (1977), it was held that an "easement can be created only by grant, or by implication or prescription...whereas a license may be created by parol, or by an act of the licensor sufficient to show his consent" (*Id.* at page 293). The Court went on to note that since an easement created by agreement constitutes an interest in land, it required a writing under the Statute of Frauds, and was otherwise subject to the rules governing the construction of deeds.*

38.5 Parol Licenses

Parol licenses might also be termed easements by estoppel. The classic example of a parol license arises when an adjoining land owner authorizes his neighbor to construct and pave a driveway on the corner of his property, and then tries to block the neighbor from use of the driveway after said neighbor had expended funds in improving the driveway based on the parol license. However, parol licenses are not favored and are very difficult to prove.

Comment: In Berolzheimer v. Taylor, 230 Ga. 595, 198 S.E.2d 301 (1973), the Court held that a statute making irrevocable parol licenses where the licensee has incurred expense in exercising the license would not apply in the case of a mere implied license. The facts, as developed, showed that the Berolzheimer family had been using the dock in question for over 60 years, had assisted in maintaining the dock, and had even re-built same following its destruction by Hurricane Dora in 1964 at a cost of \$1,592.65. The Court ruled that all that activity was not sufficient to establish an interest in the land of

Taylor since there was no evidence that a parol license was ever granted, and it was not possible to establish irrevocable property rights in another's land under an implied license.

38.6 Notice

Notice has no applicability until a valid easement is first established. The issue of notice only relates to such rights as the adverse party has already acquired. There is no authority for the proposition that notice, in and of itself, creates rights where none are shown to have been established by some method allowed by law.

Comment: If mere notice, without more, established easement rights, then the more egregious the trespass by which the claimed easement was created, the more notice would have to be presumed. But were this the case, all rules by which an easement may be established become meaningless, and title by conquest would be the method of choice.

38.7 Charges Imposed for Use of Easements

If appurtenant easements are found, the examiner should attempt to determine if any formal arrangements have been made for repair of the easement, and if so, if there are established charges and a mechanism for collecting the charges.

Comment: In most cases where an easement is established by a written grant (such as a construction operating and reciprocal easement agreement for a shopping center), the nature, extent and liability for charges for the maintenance of the easement will be addressed therein. However, there are many other circumstances in which easements can exist, where no such guidelines exist for the examiner or the closing attorney. As a general rule under Georgia law, each party must pay to maintain the easement in proportion to such party's usage. However, this is easier to state than to determine. In any event, the examiner and closing attorney should be alert to these issues and should advise the client if the duty to maintain the easement is unclear.

38.8 Real Estate Taxes on Easements

The examining attorney should verify that real estate taxes have been paid currently through the year in which the easement is created. Once the examining attorney has determined that a valid easement exists burdening

adjacent property, it is not necessary to check the status of either taxes, or security deeds, affecting the adjacent property upon which the easement is located, as any such rights would be subject and subordinate to the previously created easement.

38.9 Environmental Issues Relating to Easements

If the examining attorney determines that the property is benefitted or burdened by a retention pond or similar facility, the client should be advised that in circumstances where the pond or similar facility becomes contaminated, the governmental entity seeking to enforce the environmental laws generally presumes

that the owner of the land on which the pond or like facility is located the party primarily responsible, and that the users of the easement are secondarily responsible for the clean up. The client should be advised of such potential problems.