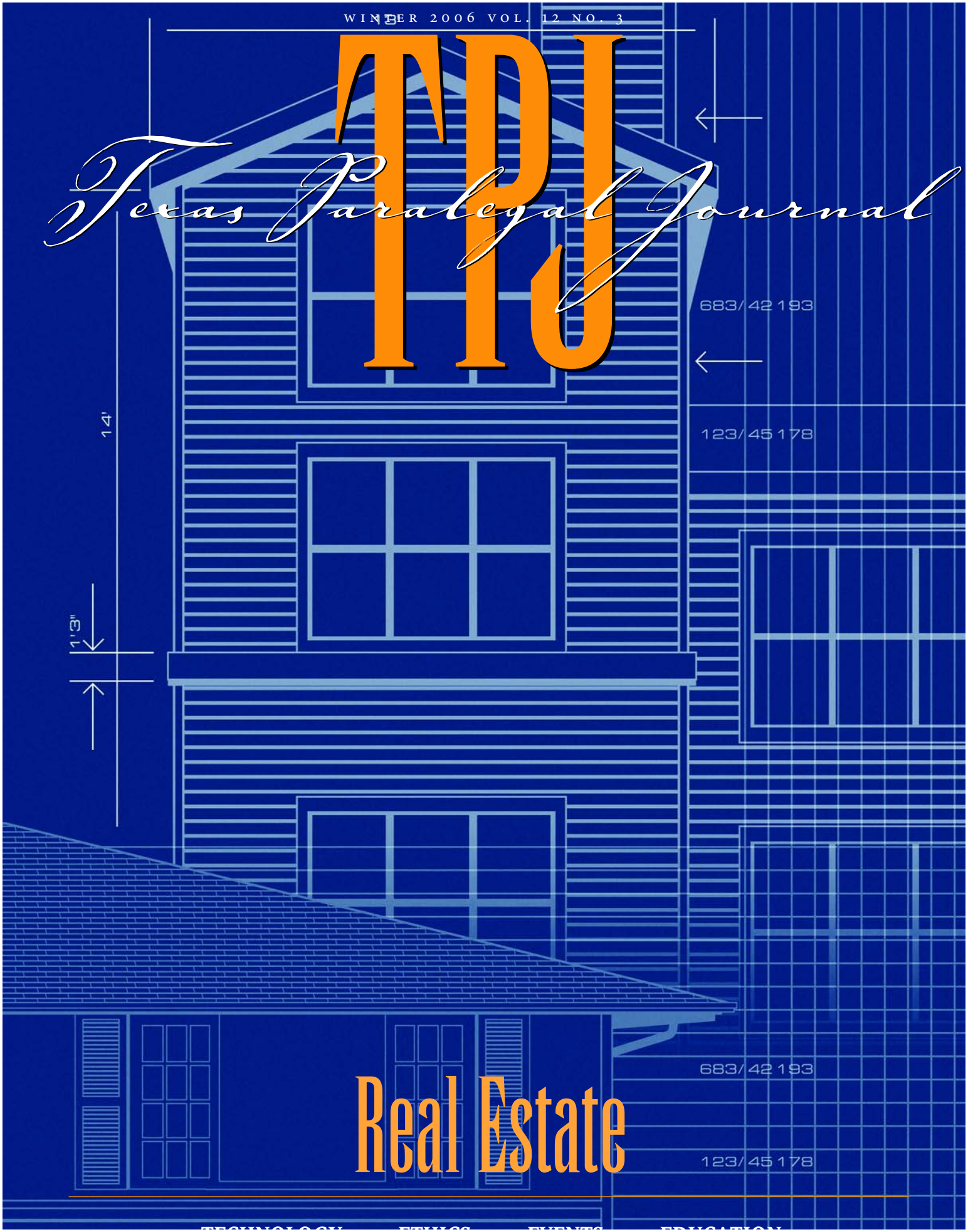
WINTER 2006 VOL. 12 NO. 3

TPJ

Texas Paralegal Journal



Real Estate

PRESIDENT'S *Message*

Javan Johnson, ACP, TBLS, Board Certified Legal Assistant, Civil Trial Law, Texas Board of Legal Specialization

We all experience magic moments in life. Unfortunately many people have more tragic moments instead of magic moments. Sometimes people are just keeping their heads above water reacting to the constant demands of everyday life. Many people are stopped by the illusions (ie. fear and self-doubt) they create in their own life. Therefore, people end up living in need and obligation as opposed to fulfilling their true wants and desires.

Many of us have just experienced some magic moments through this holiday season and new year – the excited faces of children opening gifts, precious time spent with friends and family, wonderful food and treats that sometimes we only experience once a year.

There are also many of our members that have been going through various tragic moments with family illnesses, deaths, job struggles, family struggles, and such; we can still take time to revel in some of the magic moments that life brings. The Paralegal Division has experienced two very magic moments in the past few months - the new standards which the State Bar has approved, and which has breathed new life into the meaning of "professional" for paralegals in the State of Texas. The other magic moment has been the milestone of our 25th anniversary, and especially the final celebration of that silver magical

moment during TAPS in September. As I have traveled across Texas during the past several months spreading the word about both of these great events, I am seeing and experiencing an excitement among our members that is overwhelming. There have been so many wonderful celebrations of Texas Paralegal Day, with the word being spread about the new standards. We are beginning to see progress with law firms adopting the standards as the basis for hiring paralegals.

Whatever people desire there is a magic wand that can fulfill their desires-

(Continued on page 2)

NOTICE OF NOMINATIONS/ELECTION OF PRESIDENT-ELECT

Pursuant to Standing Rule XIV of the Paralegal Division of the State Bar of Texas, notice is hereby given of an election for the office of 2007-2008 President-Elect. This election will be held by mail during the month of January 2007 by the Board of Directors.

Qualifications for serving as President Elect of the Paralegal Division are contained in Standing Rules XIV as follows:

XIV. OFFICERS

B. ELIGIBILITY

1. Any current or past Director who is currently an Active member of the Division is eligible to be elected as President or President-Elect.

Any qualified individual who is interested in running for office of President Elect should forward a one-page resume, together with a letter of intent to run, to the nominations committee at the following address **NO LATER THAN JANUARY 15, 2007**.

Ginger D. Williams, ACP
Sheldon, Dunham & Edwardson, L.L.P.
905 Orleans
Beaumont, Texas 77701
(409) 835-3322 - phone (409) 835-0992 - fax gwilliams@sdellp.com

In the event the Board elects an individual who is currently serving as a Director, a vacancy will be declared in the district in which that individual serves. An election will be held to replace the outgoing Director (President Elect) at the time the elections for the Board of Directors are regularly scheduled.

(Continued from page 1)

and that wand is their mind. The great minds that continue to work hard for our Division, as well as those that saw our Division come to fruition have helped create this magic in the Paralegal Division. Success and happiness are not accidents, but rather they are developed by fundamental ways of thinking, feeling and acting. Everything starts in the mind and once people start to use their mind effectively to change their thoughts, emotions, perceptions and attitudes then ultimately they change their destiny.

Use *your* great mind as you enter this new year, with renewed hope in each of your lives to make each day the best day ever. Ask yourself what do you want or desire out of your life? Is your own behavior getting you closer or farther away from where you want to be? Are you willing to change and do what it takes to get what you want? How will you know when you have achieved what you want?

Socrates said "Know thy self." Set your goals high. Goals are defined as a mark to reach and have purpose. Goals allow people to have direction in life. All people have desires and wants and goals create motivation so people can purposely channel their desires and wants. **You** have the power to choose and to make your goals a reality. Create your own magic during this new year of 2007, and make it the best year ever!

PARALEGAL DIVISION NOTICE OF UPCOMING BYLAW ELECTION — SPRING 2007

Effective date of bylaw, if approved, is the date of approval by the Board of Directors of the State Bar of Texas

Amendment I:

No current bylaw; addition to the Bylaws of the Paralegal Division.

ARTICLE I
Name, Purpose, and Definition
Section 4. Paralegal Standards
The Division adopts those certain Paralegal Standards as adopted and set forth by the State Bar of Texas on April 21, 2006, or as amended thereafter.

Reason for Amendment:
This amendment is necessary to include the new Paralegal Standards as approved by the State Bar of Texas Board of Directors into the By-laws.

Amendment II:

ARTICLE III.
Section 4. Board of Directors, Districts
Current Bylaw:

(11) **District #11** Andrews, Coke, Concho, Crockett, Ector, Glasscock, Howard, Iron, Loving, Martin, Midland, Mitchell, Nolan, Pecos, Reeves, Runnels, Schleicher, Sterling, Sutton, Taylor, Terrell, Tom Green, Val Verde, and Winkler.

(12) **District #12:** Archer, Baylor, Camp, Clay, Collin, Cooke, **Crane**, Delta, Denton, Fannin, Foard, Franklin, Grayson, Hardeman, Haskell, Hopkins, Hunt, Jack, Knox, Lamar, Montague, Rockwall, **Reagan**, Red River, Throckmorton, Titus, Wichita, Wilbarger, Wise, and Young.

(14) **District #14:** Anderson, Angelina, Bowie, Cass, Cherokee, Freestone, Gregg, Harrison, Henderson, Houston, Kaufman, Leon, Limestone, Madison, Marion, Morris, Nacogdoches, Navarro, Panola, Rains, Rusk, Sabine, San Augustine, Shelby, Smith, Trinity, Upshur, **Upton**, Van Zandt, **Ward**, and Wood.

Amendment to Bylaws:
Article III.
Section 4. Board of Directors, Districts
The following three Districts of the Division shall be comprised of the following counties:

(11) **District #11:** Andrews, Coke, Concho, **Crane,** Crockett, Ector, Glasscock, Howard, Iron, Loving, Martin, Midland, Mitchell, Nolan, Pecos, **Reagan,** Reeves, Runnels, Schleicher, Sterling, Sutton, Taylor, Terrell, Tom Green, **Upton,** Val Verde, **Ward** and Winkler.

(12) **District #12:** Archer, Baylor, Camp, Clay, Collin, Cooke, Delta, Denton, Fannin, Foard, Franklin, Grayson, Hardeman, Haskell, Hopkins, Hunt, Jack, Knox, Lamar, Montague, Rockwall, Red River, Throckmorton, Titus, Wichita, Wilbarger, Wise, and Young.

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Reason for Amendment:
This amendment is necessary to move Crane, Reagan, Upton, and Ward counties into District 11. These counties were listed in District 12 and District 14, respectively, on the November 2005 bylaws ballot.

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Texas Paralegal Journal

Focus on . . .

Hot "Cites"

Columns

Et Al.

Misc.

EDITOR'S *Note*

by Rhonda J. Brashears

With this issue of the *Texas Paralegal Journal* we do something we have not done in quite a while, which is focus all of our articles on a specific substantive area. We had several great real estate articles and decided maybe it was time for a crash course in this area.

It is a busy time for the Division. You will notice several items will that need the attention of the voting members, such as Notice of Nomination for the President-Elect, Notice of Nomination for District Directors and bylaw amendments. Please read over these and respond where and when needed. It is very important for you to take an active role in all of these items so that the Division can continue to serve you in the best way possible.

Also in this issue, you will find a report on TAPS 2006 and a list of the vendors and exhibitors (on page 39) that supported us this year. Please refer to this list and the list of sustaining members (on page 9) when choosing your vendors. These are the businesses that support the Division and we should reward them with our business when possible.

Finally, please notice the return of the Opinions to the Editor Column. If you have any questions that you would like to see covered in this column, please feel free to send your questions to me at TJP@txpd.org. and we will gladly open them up for discussion to the Division membership.

I hope that all had a very Merry Christmas and enjoy a safe and prosperous new year.

HOW TO REACH US

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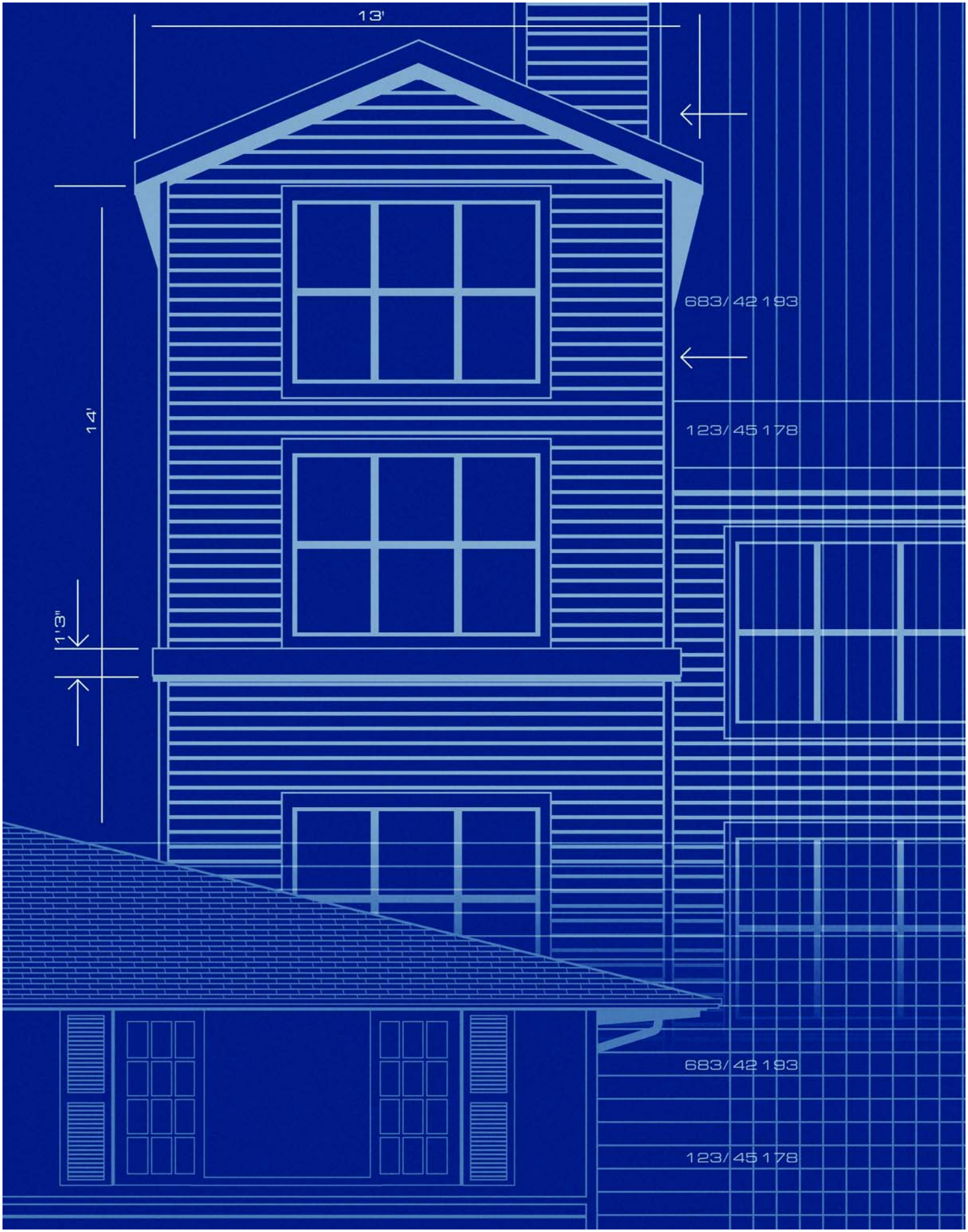
DEADLINE FOR SUBMISSION OF ARTICLES FOR THE SPRING ISSUE IS JANUARY 15, 2007.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Focus on...

Personal Property Issues after Foreclosure, Chapter 47

FREDERICK J. BIEL, Atlas & Hall Partner

I. OVERVIEW

On the first Tuesday of each month, at courthouses or other designated locations all across Texas, title to hundreds of improved and unimproved real properties (hereinafter, "property") are sold via non-judicial deed of trust foreclosure sales. Even though no one may be physically present on, or constructively controlling, the property, a foreclosure sale purchaser (hereinafter, "purchaser") often encounters tangible personal property (hereinafter, "personal property") left at the property. The purchaser may or may not know who owns the personal property, and the purchaser, for whatever reason, did not acquire title to the personal property at the foreclosure sale, or claim a security interest in the personal property. This article provides the practitioner guidance for reducing a purchaser's risk of liability to the owner of the personal property in removing it from the property.

Although certain principles of landlord—tenant law, and the identification of several causes of action available to the owner of personal property, are reviewed in this article, this article is not an exhaustive analysis of the principles discussed. Rather, the author believes that an introduction of those principles is necessary for the practitioner to be aware of the risks of removing personal property left on the property following foreclosure when the purchaser elects not to obtain an order and writ of possession available under the forcible detainer statutes and rules that are discussed in this article.

References in this article to "PROP. CODE" refer to TEX. PROP. CODE ANN. (Vernon 2000 & Supp. 2005).

II. STATEMENT OF THE PROBLEM

What does a purchaser do with the personal property left at the property after foreclosure when the purchaser does not claim to own the personal property, or does not claim a security interest in the personal property? The purchaser gets rid of it! How the purchaser gets rid of the personal property, "*that is the question!*"

III. FACTUAL BACKGROUND

Ready Realtor ("Ready") defaults on a note to Good Bank secured by a deed of trust lien on property that Ready used as a residence and a real estate office. Good Bank accelerates the debt and instructs the trustee named in the deed of trust to foreclose the deed of trust lien on the property.

Ready, aware of the impending foreclosure: (i) removes most of Ready's personal property from the property during the last week of the month preceding the foreclosure sale; (ii) intends to remove the balance of the personal property from the property before the foreclosure sale is conducted; and (iii) notifies the electric company to terminate service to the property effective on the Monday before the scheduled foreclosure sale. On the Friday before the foreclosure sale Ready gets notice that Ready's father has died. With a death in the family, Ready's priorities change. Ready secures the personal property remaining at the property by locking the doors to the structure. Ready notifies no one of his father's death, including the electric company and Good Bank. Ready leaves town to attend the funeral. Ready's plan is to return to the property after the funeral to remove Ready's personal property from the property.

At the foreclosure sale, Good Bank purchases the property. The deed of trust includes the following wording that is typical in most deeds of trust in Texas:

> If any of the property is sold under the deed of trust, grantor shall *immediately surrender possession* (emphasis added) to the purchaser. If grantor fails to do so, grantor shall become a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

On Wednesday morning following the foreclosure sale, Good Bank sends Hawkeye Smith (hereinafter, "Hawkeye") to the property to inspect it. Good Bank tells Hawkeye that it is anxious to get possession and control of the property because a couple of Good Bank's other realtor customers are interested in buying the property. The two realtors plan to demolish the existing structure and construct a new office building on the site.

Hawkeye contacts the electric company before driving to the property, and Hawkeye learns that electric service, at Ready's request, was disconnected on Monday. Hawkeye finds the doors to the structure locked. Hawkeye does not observe anyone outside the structure located on the property, there are no cars in the parking lot, and no one appears to be moving about in the structure located on the property. The mailbox affixed to the front of the structure contains several pieces of mail, including a couple of yellowed newspapers. By walking around the structure and looking in several windows, Hawkeye observes that: (i) the interior of the structure is littered with debris; (ii) there is one room in the structure that contains several open storage boxes that appear to hold clothes, personal care items, pictures, trophies, office supplies, and other associated household and office items; and (iii) stacked in a corner of another room in the structure are several pieces of old household furniture, a well used office chair, a damaged filing cabinet, and six black plastic bags, tied with string, containing what Hawkeye believes is trash.

Satisfied that no one is present at the property, Hawkeye telephones a locksmith to get inside the structure. The locksmith re-key the locks. On entering the structure, Hawkeye takes pictures of the interior, and inventories the personal property. Several file folders, a couple of recent bank statements, two or three pads of blank checks, and a few pictures and advertising brochures are discovered in the filing cabinet.

Hawkeye and Good Bank conclude that Ready has "surrendered possession" of the property as required under the deed of trust. On Wednesday afternoon Hawkeye rents a truck and hires a couple of day laborers to assist him in removing the personal property from the property. The personal property, including the mail, is

SUSTAINING MEMBER PROFILE

Amarillo College Paralegal Studies

The curriculum for Paralegal Studies was created and first offered in Fall 1999 in response to local survey and focus group reports supporting the program. One of the most effective ways to improve success to legal services is through expanded utilization of well-qualified legal assistants who, with proper training and supervision, can be delegated work that would otherwise have to be done by a lawyer (American Bar Association Standing Committee of Legal Assistants).

The Business Division of Amarillo College offers an Associate in Applied Science Degree in Paralegal Studies. The curriculum consists of 18 hours of general education courses, 15 hours of technical courses, and 38-39 hours of legal specialty courses. Specific training is provided in civil litigation; contracts; bankruptcy; wills/trusts/probate; family law; torts and personal injury; criminal law; cognitive skills; interviewing and investigating; law office management; and a real estate specialty which is optional.

In February 2006, the Paralegal Studies program received ABA program approval. That makes Amarillo College 1 of 12 ABA-approved programs in Texas, and 1 of 282 nationally approved programs.

The program prepares students to 1) work in a law office under the direct supervision of an attorney; 2) take national certification examinations; and 3) continue his/her education at a four-year university.

The Paralegal Studies program is supported by an outstanding Advisory Committee composed of attorneys, law librarians, paralegals, paralegal supervisors, a program graduate, a current student, a legal aid coordinator, and two general members. The committee meets twice a year to provide valuable input to the program.

The Paralegal Studies faculty includes a full-time coordinator and 7-8 part-time instructors who work full-time as attorneys or paralegals.

- Other advantages to Amarillo College's Paralegal Program are:
- Small class size
- Financial aid available for those who qualify
- Strong program support by local professional organizations
- Networking opportunities

For additional information, contact Sharla Miller Fowler, CP, Certified Paralegal, Legal Studies Coordinator, P.O. Box 447, Amarillo, Texas 79178-0001; (806) 371-5213; facsimile (806) 371-5210. E-mail address fowler-sj@my.actx.edu.

Sustaining Members, Paralegal Division, 2006-2007

The following companies are Sustaining Members of the Paralegal Division. Advertisement for these Sustaining Members can be found on the Division's website under VENDORS at www.txpd.org. Please support these companies as they are supporting the Paralegal Division.

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Visionary Legal Technologies, Dallas, www.freevisionary.com

loaded into the truck, and taken to Hawkeye's garage for temporary storage until Good Bank decides what to do with the personal property. The unopened black plastic bags, and the debris the day laborers collected from the floor of the structure, are placed at the curb to be picked up by the city's sanitation truck that is just down the street and making its weekly garbage pickup. Before driving off from the property Hawkeye posts a notice on the door of the structure stating that all inquiries related to the property should be directed to Good Bank.

On Thursday morning Ready returns to the property to claim Ready's remaining personal property. Unable to gain access to the structure, Ready contacts Good Bank. That same afternoon Hawkeye returns to Ready what Hawkeye claims is all the personal property removed from the property. On inspection, Ready claims that some of Ready's personal property is missing or damaged. Ready also claims that someone has rummaged through the storage boxes that contained items of a very private nature. Ready specifically asks about the six black plastic bags. Visibly angry, Ready nevertheless signs a receipt for the personal property that Ready takes from Hawkeye's garage. Ready also informs Hawkeye that he and Good Bank will be hearing from Ready's attorney.

Ready subsequently demands, without success, that Good Bank return or replace the damaged and missing personal property, or that Good Bank pay Ready the reasonable value of the missing and damaged items. Ready estimates the loss at $50,000.00. Unable to resolve the dispute, Ready files suit against Hawkeye and Good Bank, pleading trespass to realty and personalty, conversion, breach of bailment obligations and negligence.

Good Bank and Hawkeye, in all likelihood, are not entitled to summary judgment on any of Ready's causes of action because fact issues appear to exist. In other words, unless the parties settle, there will most likely be a bench or jury trial that resolves Ready's claims against Good Bank and Hawkeye, and if any party disagrees with the decision, an appeal will likely follow. Learning of Ready's lawsuit, the two realtors interested in the property decide to look elsewhere, and they so inform Good Bank. Let's examine what Hakweye and Good Bank might have done differently had they understood what Good Bank's and Ready's relative rights were under Texas law under their fact situation.

IV. MORTGAGEE'S RIGHT PRIOR TO AND FOLLOWING FORECLOSURE

A. "Self Help Repossession" of Real Property Prior to Foreclosure

Texas law does not recognize "self help repossession" of real property, and it does not condone seizure of real property prior to foreclosure unless voluntarily relinquished by the debtor. *Lighthouse Church of Cloverleaf v. Texas Bank,* 889 S.W.2d 595, (Tex. App.—Houston [14th Dist.] 1994, writ denied). There is no remedy in the Texas Property Code that corresponds to TEX. BUS. & COM. CODE ANN. (Vernon 2002 & Supp. 2005) 69.609 allowing a secured party after default to take possession of the collateral. The nearest equivalent is a deed of trust that allows for a non-judicial foreclosure. The manner in which a non-judicial foreclosure is conducted is strictly governed by PROP. CODE 651.002.

B. Possession Prior to Foreclosure

Texas follows the lien theory of mortgages. Under this theory the mortgagee is not the owner of the property and prior to default is not entitled to possession, rentals or profits. *Taylor v. Brennan,* 621 S.W.2d 592 (Tex. 1981). On default, but prior to foreclosure, a mortgagee holding a collateral assignment of rents may elect to enter upon the property and collect both accrued, unpaid rents, and rents thereafter accruing and becoming payable. *Id.*

C. Effect of Foreclosure

A foreclosure sale extinguishes inferior liens and encumbrances, *Motel Enterprises, Inc. v. Nobani,* 784 S.W.2d 545 (Tex. App.—Houston [1st Dist.] 1990, no writ), and a trustee's deed transfers a mortgagor's actual interest in the real property. *Diversified, Inc. v. Walker,* 702 S.W.2d 717 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) Title passes following acceptance of the bid price, *Peterson v. Black,* 980 S.W.2d 818 (Tex. App.—San Antonio 1998, no pet.), and equitable title is acquired if a trustee's deed is not executed and delivered. *Pioneer Building & Loan Ass'n v. Cowan,* 123 S.W.2d 726 (Tex. Civ. App.—Waco 1938, writ dism'd judgm't cor.). But a purchaser at a foreclosure sale acquires title subject to any rights of the mortgagor or other third parties under the deed of trust, *Smith v. Morris & Co.,* 694 S.W.2d 37 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), and at purchaser's peril, *Henke v. First Southern Properties, Inc.,* 586 S.W.2d 617 (Tex. App.—Waco 1979, writ ref'd n.r.e.). A purchaser acquires the property "as is" without any expressed or implied warranties, except as to warranties of title, and at the purchaser's own risk. PROP. CODE 651.009.

D. Rights Following Foreclosure

After foreclosure, a purchaser is entitled to full ownership of the rights conveyed at foreclosure, including possession. *Scott v. Hewitt,* 127 Tex. 31, 90 S.W.2d 816 (1936). **Although foreclosure transfers title from the mortgagor to the purchaser, it does not put the purchaser in possession; it gives the purchaser a right to possession. *Lighthouse Church,* 889 S.W.2d at 603.** (Emphasis added). If a mortgagor or another party who is not entitled to possession remains in possession of property following foreclosure, the purchaser's remedy is a lawsuit, i.e., a forcible detainer action. *Home Savings Ass'n. v. Ramirez,* 600 S.W.2d 911 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). Damages for wrongfully holding

over following a foreclosure is the reasonable rental value of the property for the period the purchaser is deprived of possession. *Donaldson v. Mansel,* 615 S.W.2d 799 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

E. Tenant at Sufferance/Tenant at Will

In the absence of an enforceable agreement, such as a lease or a contract to sell, a party in possession of property following foreclosure is generally at best a tenant at will or a tenant at sufferance, and at worst a trespasser. *Fandey v. Lee,* 880 S. W. 2d 164 (Tex. App.—El Paso 1994, no writ). In addition, unless there is a separate contractual agreement to the contrary, such as a non-disturbance and attornment agreement, a non-judicial foreclosure terminates a lease or other contractual right that was executed after the recorded deed of trust lien, or one that is contractually subordinated to a deed of trust lien. *United General Insurance Agency of Midland, Inc. v. American National Insurance Co.*, 740 S.W.2d 885 (Tex. Civ. App.—El Paso 1987, no writ). A purchaser at a foreclosure sale will therefore generally be entitled to possession, after notice and demand, by showing sufficient evidence of ownership to demonstrate a superior right to immediate possession. *Goggins v. Leo,* 849 S.W.2d 373 (Tex. App.—Houston [14th Dist.] 1993, no pet.). Conversely, a foreclosure sale, in the absence of a contractual subordination, generally will not terminate a lease or other contractual right executed prior to the recordation of a deed of trust lien, and the party is entitled to remain in possession of the property. *F. Groos & Co. v. Chittam et al.,* 100 S.W.1006 (Tex. Civ. App. 1907, no writ). But see, *M.D. Fleetwood v. Med Center Bank,* 786 S.W.2d 550 (Tex. Civ. App.—Austin 1990, writ denied).

Most deeds of trust provide that a party remaining in possession of property following a foreclosure of a lien superior to the rights of the party becomes a "tenant at sufferance." It is settled that such a provision is valid as between a mortgagor and mortgagee. *Criswell v. Southwestern Fidelity Life Insurance Company,* 373 S.W.2d 893 (Tex. Civ. App.—Houston 1963, no writ). A "tenant at sufferance" is distinguishable from a "tenant at will." A tenant at will occupies the property with the permission of the owner for no fixed term, *Robb v. San Antonio St. Ry.,* 82 Tex. 392, 18 S.W. 707 (Tex. 1891). A tenant at will has no certain nor sure estate; the lessor may put a tenant at will out at any time. A tenant at will, in contrast to a tenant at sufferance, possesses the property with the owner's consent. *Emerson v. Emerson,* 35 S.W. 425 (Tex. Civ. App.—San Antonio 1896, no writ.)

A tenant at sufferance is a lesser possessory estate. A tenant at sufferance is merely an occupant in naked possession of property. *Goggins,* 849 S.W.2d at 377). A tenancy at sufferance is one who wrongfully continues in possession of property after the tenant's right to possession has ceased and does not assert a claim to superior title. A tenant at sufferance is not in privity with the owner and possesses no interest capable of assignment. Id. (no privity); *Griffin v. Reynolds,* 107 S.W.2d 634 (Tex. Civ. App.—Texarkana 1937, writ dism'd) (not assignable).

F. What is "Immediately Surrender Possession?"

"Immediately" means without interval of time, without delay, straightway, or without any delay or lapse in time. *C. & R. Transport, Inc. v. Campbell,* 406 S.W.2d 191 (Tex. 1966); *American Central Ins. Co. v. Crespi and Co.,* 218 S.W.2d 269 (Tex. Civ. App.—Austin 1949, no writ); Black's Law Dictionary, 674 (5th ed. 1979). The word "immediately" is stronger than the expression "within a reasonable time" and implies prompt, vigorous action without

any delay. *Id.* Regardless of its definition, "immediate" is a relativistic term that does not necessarily or even suggestively establish a certain date for anything. *Texas Farmers Insurance Co. v. Hernandez,* 649 S.W.121 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

To "surrender" means to give back, to yield, to render up, to restore. Black's Law Dictionary, 1295 (5th ed. 1979). Surrender differs from "abandonment" as applied to leased premises, inasmuch as the latter is simply an act on the part of the lessee alone; but to show a surrender, a mutual agreement between the lessor and lessee that the lease is terminated must be clearly proved. *Id.* To constitute a surrender of a lease there must be a mutual agreement between the lessor and the lessee. *Early v. Isaacson,* 31 S.W.2d 515 (Tex. Civ. App.—Amarillo 1930, writ ref'd); *Crawford v. Haywood,* 392 S.W.2d 387 (Tex. Civ. App.—Corpus Christi 1965, no writ). A surrender by operation of law may be effected through the abandonment of the premises by the tenant and re-entry by the landlord. *Dearborn Stove Company v. Caples,* 149 Tex. 563, 236 S.W.2d 486 (1951).

"Possession" means custody and control, the having, holding or detaining of property in one's power or control; it is that condition of facts under which one can exercise his power . . . to the exclusion of all other persons. *The Citizens First Natl Bank of Tyler v. Rushing,* 433 S.W.2d 741 (Tex. Civ. App.—Tyler 1968, no writ). From a criminal context, "possession" means the exercise of control, management or care over the thing allegedly possessed. *Poindexter v. State,* 153 S.W.3d 402 (Tex. Crim. App. 2005).

G. What is "Occupying, Vacating and/or Abandoning the Property?"

For someone to occupy property does not necessarily mean that the person must actually live in it. *Kelly-Coppedge, Inc. v. Highlands Ins. Co.,* 980 S.W.2d 462 (Tex. 1998) ("occupy" means "to hold or keep for use"); *Am. Guarantee and Liab. Ins. Co. v. 1906 Co.,* 273 F.3d 605 (5th Cir. 2001). A tenant has vacated the premises when the tenant is no longer occupying the premises, and the tenant has removed all or substantially all of the tenant's property from the premises. *Knoff v. U.S. Fidelity,* 447 S.W.2d 497 (Tex. Civ. App.—Houston, 1969, no writ). Intent is not required to establish that a tenant has vacated the premises. *Scott Properties v. Wal-Mart,* 138 F.3d 571 (5th Cir. 1998). If there is a substantial amount of tenant's personal property in the premises, the tenant has not vacated the premises. In *Phoenix Assurance Co., Ltd. of London v. Shephard,* 137 S.W.2d 996 (Tex. Com. App. 1940), the Court, in considering whether the property was "vacant" at the time of a fire, held that the term "vacant" means "an entire abandonment, deprived of contents, empty." The Court went on to hold that although the property was not occupied by persons, the property was not vacant because the occupant had left behind some furniture and articles of clothing.

An abandonment is the intentional relinquishment of the premises without vesting ownership in any particular person. *Shahan v. N. Tex. Traction Co.,* 266 S.W. 850 (Tex. Civ. App.—Austin 1924, writ dism'd w.o.j.). Property is abandoned when the owner leaves it without any intent or expectation to regain it. *Worsham v. State,* 120 S.W. 439 (1909). Mere cessation of use is not sufficient to show an abandonment. The relinquishment must be voluntary, absolute and amount to a total desertion. *City of Anson v. Arnett,* 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.). A person does not abandon property merely by leaving it. *Lucky v. Fidelity Union Life Ins. Co.,* 339 S.W.2d 956 (Tex. Civ. App.—Dallas, 1960, no writ). Abandonment is generally a fact question. *Lopez v. State,* 797 S.W.2d 272 (Tex. App.—Corpus Christi 1990, writ denied).

There is no statutory definition of "abandonment" in a residential lease. A residence is a place where one actually lives or has a home. *Owens Corning v. Carter,* 997 S.W.2d 560 (Tex. 1999). Texas Courts generally hold that a landlord, in order to prove abandonment in a residential lease, must show an intent on the tenant's part to leave and not return, rather than mere non-use alone, unless the non-use is long, continued and unexplained. *PRC Kentron Inc. v. First City Center Associates, II,* 762 S.W.2d 279 (Tex. Civ. App.—Dallas 1988, writ denied). The term "abandon" means "[t]o give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connections with or concern in; to desert." *Railroad Comm'n of Tex. v. Waste Mgmt. of Tex., Inc.,* 880 S.W.2d 835 (Tex. App.—Austin 1994, no writ). PROP. CODE 693.002(d) provides that a commercial tenant is presumed to have abandoned the premises if goods, equipment or other property, in amounts substantial enough to indicate a probable intent to abandon the premises, is being or has been removed from the premises and the removal is not within the normal course of the tenant's business. A "commercial rental property" is rental property that is not residential rental property. PROP CODE 693.001(b). A landlord may remove and store any personal property of a tenant that remains on the premises that are abandoned. PROP. CODE 693.002 (e). A landlord may dispose of the stored personal property if the tenant does not claim the personal property within 60 days after the date the personal property is stored. *Id.* A landlord must deliver by certified mail to the tenant at the tenant's last known address a notice stating that the landlord may dispose of the tenant's property if the tenant does not claim the personal property within 60 days after the date the property is stored. *Id.*

V. FORCIBLE DETAINER ACTION

A. Proceeding to Determine Right to Immediate Possession

A forcible detainer action, commonly referred to as an eviction proceeding, is the principal remedy available to a purchaser following a non-judicial foreclosure sale to remove unwanted occupants, and

any personal property remaining on the property, if the deed of trust provides that the mortgagor, following foreclosure, becomes a tenant at sufferance, *Rice v. Pinney,* 51 S.W.3d 705 (Tex. App.—Dallas 2001, no pet.), or a tenant at will, *Home Savings,* 600 S.W.2d at 913. The procedure to determine the right to immediate possession of property, if there was no unlawful entry, is an action of forcible detainer. *Haginas v. Malbis Memorial Foundation,* 163 Tex. 274 (1962); *Kennedy v. Highland Hills Apartments,* 905 S.W.2d 325, (Tex. App.—Dallas 1995, no writ); *Anarkali Enterprises, Inc. v. Riverside Drive Enterprises, Inc.,* 802 S.W.2d 25 (Tex. App.—Fort Worth 1990, no writ). A forcible detainer action was created by the legislature to provide a summary, speedy and inexpensive remedy (or at least it is supposed to be) for determination of who is entitled to possession of property. *Fandey,* 880 S.W.2d at 168; *Johnson v. Fellowship Baptist Church,* 627 S.W.2d 203 (Tex. App.—Corpus Christi 1981, no writ). A forcible detainer action must be based on a landlord-tenant relationship. *Aguilar v. Weber,* 72 S.W.3d 729 (Tex. App.—Waco 2002, no pet.); *Mitchell v. Armstrong Capital Corp.,* 911 S.W.2d 169 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Haith v. Drake,* 596 S.W.2d 194 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Dent v. Pines*, 394 S.W.2d 266 (Tex. Civ. App.—Houston 1965, no writ). The statutes and rules for a forcible detainer action are chapter 24 of the Texas Property Code, and rules 738 through 755 of the Texas Rules of Civil Procedure.

Under PROP. CODE 624.002(a)(2), "[a] person who refuses to "**surrender possession**" (emphasis added) of real property on written demand commits a forcible detainer if the person . . . is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease[.]" The courts have held that a forcible detainer action is dependent on proof of a landlord-tenant relationship. *Haith,* 596 S.W.2d at 196. A notice to vacate is considered a demand for possession. PROP. CODE 624.005(h).

If the occupant is a tenant at will or by sufferance, the purchaser must provide the occupant at least three days' written notice to vacate before filing a forcible detainer action unless the parties have contracted for a shorter or longer notice period in a written agreement. PROP. CODE 624.005(b). If a building is purchased at a trustee's foreclosure sale under a lien superior to the occupant's lease, and the occupant timely pays rent and is not otherwise in default under the occupant's lease after foreclosure, the purchaser must give a residential occupant of the building at least 30 days' written notice to vacate if the purchaser chooses not to continue the lease. *Id.* An occupant is considered to timely pay rent if, during the month of the foreclosure sale, the occupant pays the rent for that month to the landlord before receiving any notice that a foreclosure sale is scheduled during the month or pays the rent for that month to the foreclosing lienholder or the purchaser not later than the fifth day after the date of receipt of a written notice of the name and address of the purchaser that requests payment. *Id.* The notice to vacate may be given in person or by mail at the property. Notice in person may be by personal delivery to the tenant or any person residing at the property who is sixteen years of age or older or personal delivery to the property and affixing the notice to the inside of the main entry door. *Id.* 624.005(f). Notice by mail may be by regular mail, by registered mail, or by certified mail, return receipt requested, to the property. If the property has no mailbox and has a keyless bolting device, alarm system or dangerous animal that prevents the purchaser from entering the property to leave the notice to vacate on the inside of the main entry door, the purchaser may securely affix the notice on the outside of the main entry door. *Id.* The notice period is calculated from the day on which notice is delivered. *Id.* 624.005(g).

Jurisdiction of forcible detainer actions is expressly given to the justice court of the precinct where the property is located, and on appeal, to county courts for a trial de novo. *Id.* 624.004; *Goggins v. Leo*, 849 S.W.2d at 375; *Home Savings,* 600 S.W.2d at 913. In a forcible detainer action the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. PROP. CODE 624.011. A final judgment in the county court may not be appealed on the issue of possession unless the property is used for residential purposes only. *Id.* 624.007. The sole issue in a forcible detainer suit is who has the right to immediate possession of the property. *Rice*, 51 S.W.3d at 709); TEX. R. CIV. P. 746 (Vernon 1967 & Supp. 2006). To prevail in a forcible detainer action, a plaintiff is not required to prove title, but is only required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession. *Id.* (citing *Goggins*, 849 S.W.2d at 377).

At the time a plaintiff files a forcible detainer action, or at any time before final judgment in the justice court, a plaintiff may execute and file a possession bond. TEX. R. CIV. P. 740 (Vernon 1967 & Supp. 2006). The purpose of the bond is to gain possession of the property, with the aid of a constable or sheriff, after six days from the date the occupant receives notice of the bond. *Id.* If a possession bond is filed, the justice court must notify the occupant, among other things, that the occupant may file a counterbond within six days and remain in possession. *Id.*

B. Writ of Possession

A purchaser who prevails in a forcible detainer action is entitled to a judgment for possession of the property, authorizing the justice court to issue a writ of possession. PROP. CODE 624.0061(a). An order of possession, without the issuance and execution of a writ of possession, however, does not entitle the purchaser to take possession. *Brown v. City of Dallas,* 549 S.W.2d 787 (Tex. Civ. App.—Waco 1977, no writ). A writ of possession may not be issued before the sixth day after the

date the judgment is rendered, unless a possession bond has been filed and approved under the Texas Rules of Civil Procedure, and judgment for possession is thereafter granted by default. PROP. CODE 624.0061(b); TEX. R. CIV. P. 748 (Vernon 1967 & Supp. 2006). The court must notify an occupant in writing of a default judgment for possession by sending a copy of the judgment to the property by first class mail not later than 48 hours after the entry of the judgment. PROP. CODE 624.0061(c). If a forcible detainer judgment in the justice court is appealed to county court, a writ of possession, following judgment, may be issued by the clerk of the county court according to the judgment rendered at any time after the expiration of two days from the rendition of the judgment, and the writ of possession may not be suspended or superceded in any case by appeal from the final judgment in the county court unless the property is the principal residence of a party. TEX. R. CIV. P. 748, 755 (Vernon 1967 & Supp. 2006). A judgment of a county court may not under any circumstances be stayed pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supercedeas bond in an amount set by the county court. PROP. CODE 624.007. In setting the supercedeas bond the county court shall provide for the protection of the appellee as in any other appeal, taking into consideration the value of the rents likely to accrue during appeal, damages which may occur as a result of the stay during appeal, and other damages or amounts as the court may deem appropriate. *Id.*

A writ of possession orders the officer executing the writ to post a written warning of at least 8 ? by 11 inches on the exterior of the front door of the property notifying the occupant that the writ has been issued, and that the writ will be executed on or after a specific date and time stated in the warning not sooner than 24 hours after the warning is posted. *Id.* 624.0061(d)(1). A writ of possession also directs the executing officer when the writ is executed: (i) to deliver possession of the property to the purchaser; (ii) to instruct the occupant and all persons claiming under the occupant to leave the property immediately, and if the occupants fail to comply, to physically remove the occupant and all persons claiming under the occupant from the property; (iii) to instruct the occupant to remove or allow the purchaser, the purchaser's representative or other persons acting in the officer's supervision to remove all personal property from the property other than personal property claimed by the purchaser; (iv) except in inclement weather (raining, sleeting, or snowing), to place or have an authorized person place, the removed personal property outside the property at a nearby location, but not blocking a public sidewalk, passageway, or street; and (v) at the officer's discretion, authorize the officer to engage the services of a bonded or insured warehouseman to remove and store, subject to applicable law, part or all of the personal property at no cost to the purchaser or the officer executing the writ. *Id.* 624.0061(d)—(e). The officer may not require the owner to store the personal property. *Id.* 624.0061(f). Neither the purchaser, nor the officer executing the writ, is required to stand guard over the removed personal property until it is retrieved by its owner, nor do either of them, under the forcible detainer statutes, have any duty to ensure that the removed personal property is not damaged. *Campos v. Investment Management Properties, Inc.,* 917 S.W.2d 351 (Tex. App.—1996 San Antonio, writ denied). An officer executing the writ of possession is not liable for damages resulting from a proper execution of the writ if the officer executes the writ in good faith and with reasonable diligence, and the officer may use reasonable force in executing the writ. PROP. CODE 624.0061(g)—(h).

C. Warehouseman's Lien

If the personal property is removed from the property and stored in a bonded or insured public warehouse, the warehouseman has a lien on the removed personal property to the extent of any reasonable storage and moving charges incurred by the warehouseman, but the lien does not attach until the personal property has been stored by the warehouseman. *Id.* 624.0062(a). An occupant may redeem any personal property left at the property, without payment of moving or storage charges to a warehouseman, on demand, during the time the warehouseman is removing the personal property from the property and before the warehouseman permanently leaves the property. *Id.* 624.0062(d). If the removed personal property is to be stored in a public warehouse, the officer executing the writ of possession shall deliver in person to the occupant, or send by first class mail to the occupant's last known address not later than 72 hours after execution of the writ if the occupant is not present, a written notice, underlined or in boldfaced print, *Id.* 624.0062(c), stating the complete address and telephone number of the location at which the removed personal property may be redeemed, *Id.* 624.0062(b), and advising the occupant of the conditions under which the occupant may redeem some or all of the personal property. *Id.* Within 30 days from the date of storage, the occupant may redeem certain personal property on demand following payment of the moving and storage charges reasonably attributable to the redeemed items. *Id.* 624.0062(e)—(f). After the 30-day period and before sale, an occupant may redeem the removed personal property on demand and on payment of all moving and storage charges. *Id.* 624.0062(g).

A warehouseman may sell the removed personal property that is subject to the lien following the warehouseman's compliance with the procedures set forth in TEX. BUS. & COM. CODE ANN. (Vernon 2002 & Supp. 2005) 67.210, 669.401—9.409, and 669.601—9.628, PROP. CODE 624.0062(j); however, an occupant, before the sale of the removed personal property, may file suit to recover any removed per-

sonal property required to be returned to the occupant on the ground that the purchaser or the warehouseman failed to return the removed personal property following the occupant's compliance with any conditions precedent to the return of the removed personal property, or on the ground that the amount of the warehouseman's moving or storage charges are not reasonable. *Id.* 624.0062(i).

D. Attacks on Removal of Person Property

Writs of possession involving the removal and storage of an occupant's personal property have been attacked on constitutional grounds. In *Merritt v. Harris County,* 775 S.W.2d 17 (Tex. App.—Houston [14th Dist.] 1989, writ denied), the court concluded, however, that the constitution does not require separate notice that the result of losing a forcible detainer action, coupled with a failure to remove personal property from the property, could be the storage of goods. The storage of goods for a fee, according to the court, is a better solution than leaving the occupant's personal property on the street.

E. Effect of Forcible Detainer Action Judgment

A judgment awarding possession in a forcible detainer action is not a bar to an action for trespass, damages, waste, rent or mesne profits. PROP. CODE 624.008. In addition, a subsequent suit by an occupant for wrongful eviction is not precluded by a forcible detainer judgment. *Johnson v. Highland Hills Drive Apartments,* 552 S.W.2d 493 (Civ. App.—Dallas 1977), ref'd n.r.e.), 568 S.W.2d 661 (Tex. 1978); *Anarkali Enterprises,* 802 S.W.2d at 27.

VI. SUMMARY OF READY REALTOR'S CAUSES OF ACTION

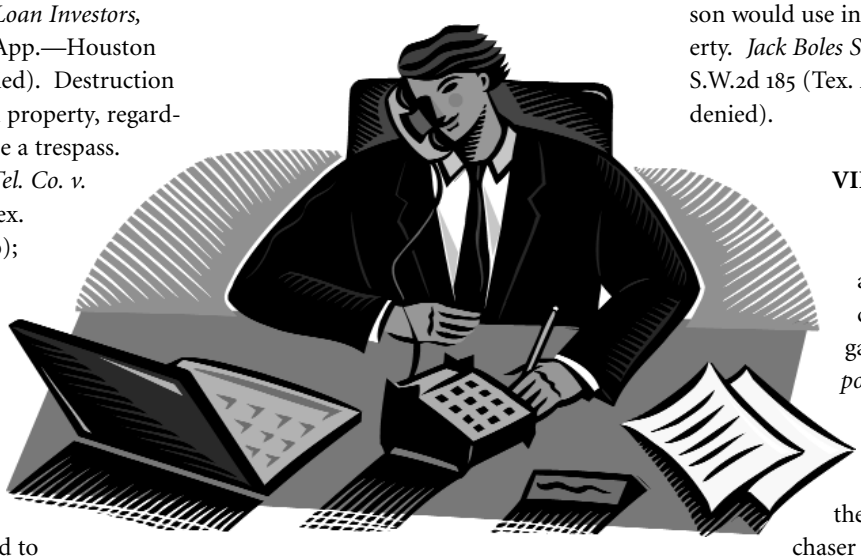
A. Trepass to Real Property

Trespass to real property occurs when a person enters another's land without consent. *Gen. Mills Rests., Inc. v. Tex. Wings, Inc.,* 12 S.W.3d 827 (Tex. App.—Dallas 2000, no pet.); *Rowland v. City of Corpus Christi,* 620 S. W. 2d 930 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.). Every unauthorized entry is a trespass even if no damage is done. *Trinity Universal Ins. Co. v. Cowan,* 945 S.W.2d 819 (Tex. 1997). Trespass requires only proof of interference with the right of possession. *Cargal v. Cargal,* 750 S.W.2d 382 (Tex. App.—Fort Worth 1988, no writ).

B. Trespass to Personal Property

Trespass to personalty is an injury to, or interference with, possession of the personal property, unlawfully, with or without the exercise of physical force. *Mountain States Tel. & Tel. Co. v. Vowell Constr. Co.,* 161 Tex. 432, 341 S.W.2d 148

(1960); *Jamison v. Nat'l Loan Investors, L.P.,* 4 S.W.3d 465 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Destruction of, or injury to, personal property, regardless of negligence, may be a trespass. *Mountain States Tel. & Tel. Co. v. Vowell Constr. Co.,* 161 Tex. 432, 341 S.W.2d 148 (1960); *Jamison,* 4 S.W.3d at 469.



C. Conversion

Conversion is established by proving that: (i) plaintiff owned, had legal possession of, or was entitled to possession of, the personal property; (ii) defendant assumed and exercised dominion and control over the personal property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with plaintiff's rights; and (iii) defendant refused plaintiff's demand for return of the personal property. *Huffmeyer v. Mann,* 49 S.W.3d 554 (Tex. App.—Corpus Christi 2001, no pet.).

D. Bailment Obligation

Bailment relationships may be governed by principles of contract or negligence. *Nelson v. Schanzer,* 788 S.W.2d 81 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *Anchor Cas. Co. v. Robertson Transport Co.,* 389 S. W. 2d 135 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.). For a bailor-bailee relationship to exist, there must generally be (i) a contract, either express or implied, (ii) delivery of personal property to the bailee, and (iii) acceptance of the personal property by the bailee. *Nelson v. Schanzer,* 788 S.W.2d 81 (Tex. App.—Houston [14th Dist.] 1990, writ denied). A bailment may arise by implication of law, if proof of sufficient circumstances shows the implied relationship of bailor and bailee rests upon a substantive foundation. *Nelson v. Schanzer,* 788 S.W.2d 81 (Tex. App.—Houston [14th Dist.] 1990, writ denied).*Nelson v. Schanzer,* 788 S.W.2d 81 (Tex. App.—Houston [14th Dist.] 1990, writ denied). In an implied bailment, it is not necessary that delivery and acceptance be formal. *Shamrock Hilton Hotel v. Caranas,* 488 S. W. 2d 151 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e. The element of acceptance of the personal property and of the responsibilities accompanying the relationship may be proved directly or circumstantially. *Sanroc Co. Int'l v. Roadrunner Transp. Inc.,* 596 S.W.2d 320 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). Knowingly taking personal property into possession or control is a sufficient acceptance and may suffice to establish an implied bailment. *Rust v. Shamrock Oil & Gas Corp.,* 228 S.W.2d 934 (Tex. Civ. App.—Amarillo 1950, no writ).

E. Negligence

The common law doctrine of negligence consists of the following elements: (i) a legal duty owed by one person to another; (ii) a breach of that duty; and (iii) damages proximately resulting from the breach. *Van Horn v. Chambers,* 970 S.W.2d 542 (Tex. 1998). Assuming the care, custody and control of personal property is tantamount to a bailment, where a duty of ordinary care normally arises. *Allright, Inc. v. Elledge,* 515 S.W.2d 266 (Tex. 1974). A bailee's standard of care is the care a reasonable and prudent person would use in protecting bailor's property. *Jack Boles Servs., Inc. v. Stavely,* 906 S.W.2d 185 (Tex. App.—Austin 1995, writ denied).

VII. CONCLUSION

If there is any doubt that a mortgagor, or a party claiming under mortgagor, actually *surrendered possession* of the property after the foreclosure sale, and there is personal property left on the property, a prudent purchaser is well advised to institute a forcible detainer action and obtain a judgment and writ for possession pursuant to the Texas forcible detainer statutes and rules before removing any personal property from the property.

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Focus on...

Federal AJ and DPJ Lien Issues, Chapter 34

Judith A. Gray

I. INTRODUCTION

Schedule C of the Commitment for Title Insurance promulgated by the Texas State Board of Insurance, contains information regarding conditions that must be satisfied before the forthcoming policy is issued, and the consequences of an inability to satisfy those conditions.

A Commitment for title Insurance is a legal contract between the insured and the title company. The Commitment is not an opinion or report of title. It is a contract to issue the insured a policy subject to the Commitment's terms and requirements.

Before issuing a Commitment for Title Insurance or a Title Insurance Policy, the title insurance company determines whether the title is insurable. Part of that determination involves the title company's decision to insure the title except for certain risks that will not be covered by the Policy. Some of these risks are listed in Schedule B of the Commitment as "Exceptions." Other risks are stated in the Policy as Exclusions. These risks will not be covered by the Policy.

Another part of the determination involves whether the promise to insure is conditioned upon certain requirements being met. Among those items is the requirement to remove any liens and encumbrances from Schedule C of the Commitment prior to closing. Schedule C of the Commitment lists the requirements that must be satisfied or the title company will refuse to cover them. The Policy will not cover loss, costs, attorney's fees, and expenses resulting from the requirements shown on Schedule C that will appear as Exceptions in Schedule B of the Policy unless these conditions are disposed of to the title company's satisfaction before the date the Policy is issued.

When the Policy is issued, the coverage will be limited by the Policy's Exceptions, Exclusions and Conditions defined as:

> EXCEPTIONS are title risks that a Policy generally covers but does not cover in a particular instance. Exceptions are shown on Schedule B or discussed on Schedule C of the Commitment. They an also be added if the insured does not comply with the Conditions section of the Commitment. When the Policy is issued, all Exceptions will be on Schedule B of the Policy.
>
> EXCLUSIONS are title risks that a Policy generally does not cover. Exclusions are contained in the Policy but not shown or discussed in the Commitment.
>
> CONDITIONS are additional provisions that qualify or limit your coverage. Conditions include your responsibilities and those of the Company. They are con-

tained in the Policy but not shown or discussed in the Commitment. The Policy Conditions are not the same as the Commitment Conditions.

In most circumstances, an attorney representing the purchaser of a property will focus his or her attentions on those items revealed in Schedule B of the Commitment because these items represent the exceptions to coverage that the title company will provide. The Policy, when issued, will not insure against those items listed as the exceptions to coverage shown in Schedule B of the Commitment. The attorney for the purchaser generally is not as concerned with those issues revealed on Schedule C of the Commitment as with the exceptions. Consequently, the purchaser's attorney will commonly provide a closing instruction letter to the title company to remove all requirements shown in Schedule C prior to closing of the transaction and proceed to close, confident that the title company will take care of any issues revealed in Schedule C. This, however, is often not possible no matter how anxious the title company is to close the transaction. This paper discusses three problematic liens that often appear in Schedule C of the Commitment—Federal Tax Liens, Federal Abstracts of Judgment, and Federal Criminal Liens.

II. FEDERAL TAX LIENS

A. General Overview

Under 26 USC 66321, in the United States Tax Code, a Federal Tax Lien is created in favor of the Internal Revenue Service of the United States against all property owned by a taxpayer for federal taxes that the IRS has determined are due and owing, but not paid by the property owner. The statute reads as follows:

If any person liable to pay any tax neglects or refuses 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 a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

The tax lien additionally attaches to the equitable interest of a potential purchaser of the taxpayer's real property pursuant to a contract for deed or installment land contract. The Federal Tax Lien arises from the time the taxes are assessed, not when the Federal Tax Lien is recorded in the Official Public Records of Real Property in the county or counties where the debtor owns real property.

B. Duration

The U.S. Tax Code reference to the tax lien, 26 USC Section 6322, states that unless another date is specifically fixed by law, the lien imposed by Section 6321 arises at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

The date that the tax is "assessed" and the tax lien attaches can be vital when attempting to determine whether the lien has priority over other liens, such as mechanic's liens, attached to the property.

Prior to the current revision of the Tax Code, the period of duration for a Federal Tax Lien was six years and 30 days. As of November 5, 1990, the lien was made effective for 10 years and 30 days after the date of assessment of the taxes owed. Consequently, the 10 year and 30 day-period applies to taxes assessed after November 5, 1990, as well as to those tax liens assessed prior to that date if the then applicable limitations period did not expire as of November 5, 1990. If the Federal Tax Lien is properly refiled before the expiration of 10 years and 30 days, the Federal Tax Lien is effective against the debtor's property for an additional 10 year and 30 day-period.

C. Priority

The details and priority issues discussed in the U.S. Tax Code, 26 USC Section 6323, are extensive and apply differently to specific situations, time limitations, the classifications of other liens attached to the property, etc. Generally, however, as to real property issues and the State of Texas, the priority of the Federal Tax Lien in relation to other liens is based upon the recording date of the Federal Tax Lien notice that is required to be filed of record in the Official Public Records of Real Property of the county in Texas where the real property owned by the taxpayer is located.

If a Federal Tax Lien is properly recorded against a taxpayer and that taxpayer subsequently acquires real or personal property, the purchase money mortgage against the taxpayer's ownership interest in the real property is superior to the previously-recorded Federal Tax Lien to the extent State law, such as Texas law, recognizes the superiority of the purchase money mortgage. *See* Slodov v. United States, 436 U.S. 238 (1978). Fortunately, in Texas Real Property and Tax law, a lien to collateralize real property for funds used to purchase that real property does have superiority over the previously-recorded Federal Tax Lien. This fact is vital if a deed of trust lien or a vendor's lien is filed on property collateralizing a loan to purchase the property. In reality, however, in the current day of title policies and title searches, the recorded Federal Tax Lien in the name of the individual obtaining the loan would be evident to the lender, and the lender would refuse to complete the loan until the tax lien was removed.

D. Judicial Foreclosure Extinguishment

A legally-conducted judicial foreclosure of a lien on Texas real property pursuant to State law extinguishes a Federal Tax Lien in favor of the United States if that tax lien was filed subsequent to the foreclosed lien or if the tax lien was in an inferior position due to the fact that it was a

purchase money lien or any other reason permitted by the U.S. Internal Revenue Code 26 USC Section 6323. The requirement necessary to extinguish the tax lien, however, is that the United States must procedurally be made a party to the lawsuit seeking the foreclosure if the Federal Tax Lien is filed of record prior to the commencement of the judicial foreclosure proceeding. In accordance with the statute 26 USC 67425(a)(1), failure to properly include the United States as a party to the judicial foreclosure proceeding will result in the foreclosure transfer of the property being made subject to the Federal Tax Lien.

E. Nonjudicial Foreclosure Extinguishment

A properly conducted nonjudicial foreclosure of a purchase money lien or a lien in a senior priority position, pursuant to local State law, extinguishes an inferior Federal Tax Lien in favor of the United States. The United States, in 26 USC 67425, through notice to the Internal Revenue Service, must be provided at least 25 days written notice of the pending nonjudicial foreclosure sale if the Federal Tax Lien is filed of record in the county of the property's location at least 30 days prior to the nonjudicial sale. The preceding Internal Revenue Code section also provides that the notice must be in accordance with the regulations prescribed by the Secretary of the Internal Revenue Service, such as the requirement that the notice be given in writing to the United States by registered or certified mail, or by personal service. Failure to provide the United States with proper written notice of the nonjudicial foreclosure proceeding will result in the foreclosure transfer of the property being made subject to the Federal Tax Lien. A subsequent effort by a lender to correct the lender's failure to properly provide timely notice to the United States by conducting a second nonjudicial foreclosure sale generally is ineffective. *See* Southern Bank of Lauderdale County v. IRS, 770 F. 2d 1001 (11th Cir. 1985), reh. den., en banc, 779 F. 2d 60, and cert. den., 476 U.S. 1169.

F. Right Of Redemption

Following a judicial or nonjudicial foreclosure of a lien having priority status, the United States has the statutory right to redeem the foreclosed real property within 120 days of the date of the foreclosure sale under 26 USC 67425(d)(1). If the United States elects to exercise its right to redeem the foreclosed real property, the owner of the real property cannot pay the amount of tax due and compel the U.S. to relinquish its right of redemption. *See* Olympic Federal Savings & Loan Association v. Regan, 648 F.2d 1218 (9th Cir. 1981). Thus, unless the U.S. specifically waives its right to redeem the property prior to the expiration of the 120-day period, the threat of such a redemption remains with the property. Title Companies, although faced with a growing desire to waive the 120 day right of redemption, honor the redemption period and do not commonly insure coverage until the redemption period expires.

III. FEDERAL ABSTRACT OF JUDGMENT

A. General Overview

The "Federal Debt Collection Procedures Act of 1990" creates a procedure whereas the United States can collect debts adjudicated against parties in the civil court system. In the Judicial and Judiciary Procedures Title of the United States Code, 28 USC 63201(a), a judgment in a federal civil action in favor of the United States creates a lien on all real property owned by the particular judgment debtor upon filing a certified copy of an abstract of that judgment in the Official Public Records of Real Property of the county in which the real property is located. The establishment and creation of this lien is similar to that of a Federal Tax Lien

notice, however, the lien is affixed to the real property when the abstract is recorded, rather than when the debt or tax is "assessed."

B. Duration

A Federal Abstract of Judgment is effective for a period of 20 years. The AJ may be renewed for an additional period of 20 years upon the recordation of a new notice as a renewal before the expiration of the original 20-year period. The Federal Court, additionally, must approve the renewal of such lien, but 28 USC Section 3201(c) is silent as to the method by which the United States must seek to obtain approval of the renewal.

C. Priority

The priority of the Federal Abstract of Judgment in relation to other liens is based solely upon the recording date of the certified copy of the judgment abstract in the county real property records. However, according to subsection (b) of 28 USC Section 3201, the Federal Abstract of Judgment "shall have priority over any other lien or encumbrance which is perfected later in time." Any lien recorded before the Federal Abstract of Judgment is recorded would have a superior priority over the subsequently-filed AJ, but, the aforementioned wording of subsection (b) of the statute may indicate that the Federal AJ could be handled as superior to a subsequently created purchase money mortgage. This would be contrary to the rule in Texas, and some other states, that recognizes a later-recorded purchase money lien as superior to any lien recorded previous to the purchase money mortgage. Consequently, regardless of the recognized law in Texas, the United States appears to take the stance that upon its recordation, a Federal Abstract of Judgment is superior to a subsequent purchase money mortgage. Following suit, most title companies are assuming that the Federal AJ of record is superior in priority over a purchase money lien that is created after the Abstract of Judgment. With this stance in mind, few mortgage companies or lenders will loan money using real property collateral upon which is recorded a valid, effective Federal Abstract of Judgment.

D. Judicial Foreclosure Extinguishment

In the process of a judicial foreclosure of a lien senior in priority to a Federal Abstract of Judgment, if the U.S. was properly made a party to the judicial foreclosure lawsuit pursuant to local State procedural law, the inferior Federal Abstract of Judgment and its encumbrances are extinguished.

E. Nonjudicial Foreclosure Extinguishment

A reading of 28 USC Section 2410 indicates that a proper nonjudicial foreclosure of a senior lien pursuant to local State procedural law extinguishes an inferior Federal Abstract of Judgment for the benefit and in favor of the United States, as long as the United States was provided proper written notice in accordance with local State law. However, in the United States v. Brosnan, 363 U.S. 237 (1960), it was decided that Section 2410 of the Federal Judicial and Judiciary Procedures Title of the United States Code did not apply to any local State nonjudicial foreclosure procedures which permit the extinguishment of inferior federal liens without notice to the United States.

F. Redemption

Following a judicial foreclosure of a senior lien that extinguishes an inferior Federal Abstract of Judgment, the United States may redeem the real property at any time within one year of the date of the foreclosure sale of the property in accordance with 28 USC 6 2410. To the contrary, following a nonjudicial foreclosure of a senior lien that would appear to extinguish an inferior Federal Abstract of Judgment, in view of the decision in Brosnan, the United States does not have a right of redemption under Section 2410 except if the redemption period is granted to the United States by local state procedural laws. It would appear, however, that at least in some jurisdictions such as Texas, the United States will take the same position being asserted as to the Federal Criminal Lien discussed below that: an inferior Federal Abstract of Judgment may only be extinguished pursuant to a judicial foreclosure sale in which the United States has been made a party, in accordance with 28 USC 62410; and, the United States has a one year right of redemption following the judicial foreclosure sale, in accordance with 28 USC 62410.

G. Current Underwriting Issues

The present underwriting position of the majority of the title companies in Texas is: an inferior Federal Abstract of Judgment may be extinguished by either a proper judicial or nonjudicial foreclosure sale in accordance with local State law; and, the Company will assume the United States has a one year right of redemption under 28 USC 62410.

Many in the real estate field have questioned whether there is any compelling need to change the title companies' current position that a Federal Abstract of Judgment will be superior to a subsequently created purchase money mortgage. The question is whether the Federal Abstract of Judgment is, in fact, superior to a subsequently created purchase money mortgage in States such as Texas that recognize the priority of a purchase money mortgage.

Arguably, the Federal Abstract of Judgment cannot attach to real property until such time as title passes to the judgment debtor. A purchase money lien, therefore, is not "perfected later in time," as title passes to the judgment debtor subject to the purchase money lien simultaneously. *See* for example Diversified Mortgage Investors v. Blaylock General Contractors, Inc., 576 S.W. 2d 794 at 804 (Tex. 1978), where the court held a purchase money mortgage was superior to a mechanic's lien, even though the inception date of the mechanic's lien was prior to the

recording date of the purchase money mortgage. In so ruling, the court in Diversified cited with approval the following holding in Irving Lumber Company v. Alltex Mortgage, 468 S.W. 2d 341 (Tex. 1971):

> (W)here a purchase money deed of trust was executed contemporaneously with the vesting of title in the mortgagor, then the purchase money deed of trust lien would have priority over a mechanic's lien since the title of the mortgagor was burdened instantly with the purchase money deed of trust lien before the mechanic's lien attached to the mortgagor's title.

In view of the Brosnan case, some question the non-applicability of 28 USC 62410 to a nonjudicial foreclosure of a senior lien that would extinguish an inferior Federal Abstract of Judgment. And, as with the Federal Tax Lien and the Federal Criminal Lien discussed below, there may be a growing trend to waive the right of redemption in regard to the Federal AJ. Some title companies are considering this waiver theory, but not many.

IV. FEDERAL LIEN SECURING THE PAYMENT OF A CRIMINAL FINE AND/OR RESTITUTION

A. General Overview

A fine and/or restitution imposed under Title 18, Crimes and Criminal Procedure, of the United States Code, Section 3571, against a criminal defendant found guilty or liable in a federal case is secured by a Federal Criminal Lien in favor of the United States against all property owned by the defendant as if the liability of the person fined was a liability for a tax assessed under the Internal Revenue Code. Under Section 3571, the Code provides that the United States may enforce a Federal Criminal Lien in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Therefore, it would appear that, procedurally, the United States has the option of enforcing a Federal Criminal Lien by utilizing the administrative levy procedures applicable to the Federal Tax Lien, or by utilizing the judicial levy procedures found in the U.S. court system.

B. Duration

The Federal Criminal Lien is effective for a period of 20 years, regardless of the crime or the criminal penalty, or until the liability is satisfied, remitted, set aside, or is terminated. The liability to pay the criminal fine terminates on the later of 20 years from the entry of the judgment or 20 years after the release from imprisonment of the person fined. The lien also terminates by law upon the death of the party penalized, which may be of little satisfaction to the debtor owning the real property, benefiting only subsequent owners.

Although the statute provides that the Federal Criminal Lien is to be treated in a similar procedural manner as the previously-discussed Federal Tax Lien, the statute provide for a 20-year limitations period rather than the 10 year and 30-day limitations period for a Federal Tax Lien.

C. Priority

Rather than being created when the action is committed (or the fine "assessed") a Federal Criminal Lien arises only upon the entry of the judgment, but the priority of the lien in relation to other liens on a single property is based upon the recording date of the notice of lien in the Official Public Records of Real Property in the county in which the property is located. Generally, a purchase money mortgage is superior to a previously recorded Federal Criminal Lien against the purchaser to the extent Texas law provides the superiority of a purchase money mortgage over other liens.

D. Judicial Foreclosure Extinguishment

The statute creating the Federal Criminal Lien indicates that it is to be treated as if it is a Federal Tax Lien. Under the Internal Revenue Code scenario, it would appear the same rules noted above that are applicable to a Federal Tax Lien should apply to the Federal Criminal Lien. Proper judicial foreclosure procedures of a senior lien pursuant to State law extinguishes an inferior Federal Criminal Lien in favor of the United States, as long as the United States was properly made a party to the foreclosure lawsuit.

E. Nonjudicial Foreclosure Extinguishment

For clarity, 18 USC 3613 further states that a proper nonjudicial foreclosure of a lien considered to be senior in priority pursuant to local State law extinguishes an inferior Federal Criminal Lien in favor of the United States, as long as the United States was properly provided with at least 25 days written note of the nonjudicial foreclosure sale, in compliance with similar requirements for Federal Tax Liens. However, in a recent opinion provided by the Department of Justice regarding a Federal Criminal Lien, and despite the reading of Section 3613 of Title 18 of the U.S. Code, the United States in certain jurisdictions, one of those jurisdictions being Texas, has asserted that an inferior Federal Criminal Lien may *only* be extinguished pursuant to a judicial foreclosure sale in which the United States has been made a party, in accordance with 28 USC 62410.

F. Redemption

Following a properly-conducted judicial or nonjudicial foreclosure of a lien in senior position to a Federal Criminal Lien, 18 USC 3613 states that the United States may redeem the real property within 120 days of the date of the sale. However, contrary to this interpretation, in a similar Department of Justice letter, it was stated that the United States has a one year right of redemption following the judicial foreclosure sale under 28 USC 62410 of the Federal Judiciary rules.

G. Current Underwriting Issues

At present, most underwriters of title companies take the position that an inferior Federal Criminal Lien may be extinguished by either a proper judicial or nonjudicial foreclosure sale in the same manner as the Federal Tax Lien; but, the title companies assume that the United States has a one year right of redemption under Section 2410 of the Judiciary and Judicial Proceeding Title 28. It would appear the United State's argument as to the applicability of 28 USC 62410 to the Federal Criminal Lien is suspect but the question to title companies remains whether a judicial foreclosure of a senior lien is required to extinguish an inferior Federal Criminal Lien and what is the correct right of redemption as to the Federal Criminal Lien- one year or 120 days.

Title companies believe that the lien provisions related to the Federal Tax Lien apply to the Federal Criminal Lien, not the provisions of 28 USC 62410. A reasonable reading of the statute indicates that except as otherwise provided in the statute, the Federal Criminal Lien is to be treated as if it was a Federal Tax Lien. In the earlier version of 28 USC Section 2410, the statute incorporates specific Internal Revenue Code provisions related to the lien. However, in the current version of the statute, the entire Internal Revenue Service Code is incorporated by reference into that section.

Case law would appear to confirm that the plain reading of the statute and the legislative history of the statute establish the Federal Criminal Lien is to be treated as if it was a Federal Tax Lien. *See* United States v. Rice, 196 F. Supp. 2d 1196 (U.S. Dist. Ct, N. D.Okla. 2002); United States v. Tyson, 242 F. Supp. 2d 469 (U.S. Dist. Ct., E. D. Michigan, S. Div. 2003).

Statute 28 USC 62410(c) specifically provides that the one year right of redemption does not apply to a Federal Tax Lien. The 120-day right of redemption applies. Since the Federal Criminal Lien is to be treated as a Federal Tax Lien, it would appear there is a 120-day right of redemption in favor of the United States as to the Federal Criminal Lien.

Statute 28 USC 62410 also provides an alternative course of action. It provides a mechanism for which the United States will agree to waive sovereign immunity in the event of a judicial proceeding. It does not require a judicial foreclosure of a senior lien, and most title companies believe that it was not intended to preclude other State foreclosure remedies, such as the remedies of Texas, to use a nonjudicial foreclosure sale to extinguish an inferior federal lien. *See* United States v. Brosnan, 363 U.S. 237 (1960) (where the Supreme Court held 28 USC 62410 did not prohibit the extinguishment of inferior federal tax liens pursuant to the nonjudicial foreclosure of a senior lien under California law with no notice to the United States).

The U.S. Department of Justice continues to cite Brosnan as authority for the proposition that State nonjudicial foreclosure procedures may extinguish inferior federal liens without the service of process on the United States required by 28 USC 62410. An explanation of this authority can be found in Section 4-4.541, Department of Justice, of the U.S. Attorney's Manual. Therefore, it would appear an inferior Federal Criminal Lien may be extinguished by the nonjudicial foreclosure of a senior lien in accordance with local State law.

Read literally, 18 USC 63613 provides that the Federal Criminal Lien is to be treated as if it was a Federal Tax Lien. Under the early version of the statute, subsection (c) incorporated specific provisions of the Internal Revenue Code, but stated all references in the Internal Revenue Code provisions to the "Secretary" shall be construed to mean "Attorney General." Accordingly, under the earlier version of the statute, notice or service of process would be provided to the United States Attorney General's Office prior to the foreclosure of a senior lien. When the statute was amended in 1996, this reference to "Attorney General" was deleted implying that notice and/or service of process could be provided to the Internal Revenue Service and the U.S. Department of Justice Office that filed the Federal Criminal Lien since the statute indicates the lien is to be treated as if it was a Federal Tax Lien.

As with the Federal Tax Lien, there may be a growing trend to waive the right of redemption regarding to the Federal Criminal Lien. Some Texas title companies are considering waiving this right of redemption but it depends upon the specific circumstances and whether or not the redemption period is considered to be 120 days or one year.

Many thanks to Mr. Stanley E. Keeton, Vice President and Regional Counsel for Alamo Title Insurance and Fidelity National Title Insurance Company for his contribution of information to this Article.

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Retirement Myths

Craig Hackler, Financial Advisor, Raymond James Financial Services

It is an unfortunate fact that many Americans spend less time planning for their retirement than planning for their vacations. All it takes is intelligent planning – and a clear understanding of the myths that hinder us from building a secure retirement.

Consider the following myths:

Myth #1: ***I'm too young to worry about retirement.*** You're never too young to make plans. The sooner you begin saving for retirement, the less you'll have to put aside. For example, if you want to have a $200,000 nest egg by age 65, you'll only have to save about $26 a week if you start at age 35. But if you wait until you're 55 to start, you'd have to put aside $233 every week.

(Both cases assume that your money is invested earning a hypothetical 9-percent return. This example is for illustrative purposes only and is not intended to reflect the actual performance of any security. Investing involves risk and you may incur a profit or a loss.)

Myth #2: ***I won't need much to live on.*** Many experts estimate that on average, to maintain your standard of living in retirement, you'll need 60 to 80 percent of your pre-retirement income. And that income has to continue to grow enough in an attempt to keep up with inflation.

Myth #3: ***My kids will take care of me.*** Most children want to lend their aging parents a hand, but many can't afford to. About the time you're ready to retire, they'll be paying their children's college tuition – and saving for their own retirement. You'd be wise, therefore, to leave the kids out of your plans.

Myth #4: ***Social Security will take care of me.*** Although it's unwise to expect Social Security to cover all your costs, you can take steps to increase your benefits. Work as long as possible. You can start collecting Social Security at age 62, but your benefits may be reduced by 20 percent. If, on the other hand, you work until age 70 you'll receive even more.

Myth #5***: I can't afford to put money away where I can't touch it for many years.*** The truth is, you can't afford not to participate in tax deferred retirement plans. Contributions to 401(k) and similar employer sponsored plans may reduce your current taxation. In addition, taxes are also deferred on earnings, so retirement savings have the potential to grow faster than others do. Best of all, many employers match all or part of your contributions to employer sponsored retirement plans, giving you money you would not otherwise have. The one drawback is that you may have to pay a 10-percent penalty, plus current income taxes, if you withdraw money out of a retirement plan before you're 59 ?.

What should you do? A comfortable retirement requires looking the facts squarely in the face – creating a realistic plan that works for you. Of course, this brief article is no substitute for a careful analysis of your personal circumstances. Before implementing any significant tax or financial planning strategy, contact your financial advisor, attorney or tax advisor as appropriate.

Craig Hackler holds the Series 7 and Series 63 Securities licenses, as well as the Group I Insurance license (life, health, annuities). Through Raymond James Financial Services, he offers complete financial planning and investment products tailored to the individual needs of his clients. He will gladly answer your questions. Call him at 512.894.0574 or 800.650.9517

How Bankruptcy Affects Landlords, Part 1

By Thomas Rice and Patrick Huffstickler

I. INTRODUCTION

Section 365 of the Bankruptcy Code, 11 U.S.C. 6 365, addresses issues involving executory contracts and unexpired leases. It is the longest section of the Bankruptcy Code and clearly demonstrates the importance of the debtor's executory contracts and unexpired leases as assets of the bankruptcy estate.

Issues involving unexpired leases can play a vital role in many different types of bankruptcies. A debtor's ability to maintain retail operations in various leased locations may be critical to the ultimate success of a plan of reorganization. Furthermore, the debtor's ability to reject leases that have become burdensome, while limiting the damages related to such rejection, can often lead to a more efficient and profitable use of the debtor's remaining assets. Additionally, if the debtor is capable of finding a willing purchaser, then the unexpired lease may provide additional value to the debtor through either eliminating all damages related to the rejection of the lease or by creating a surplus of funds to the debtor.

The playing field relating to unexpired leases, however, has been changed with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[1] The ratification of BAPCPA created a shorter time frame for the debtor to operate its leased locations without obtaining support from landlords. Additionally, the debtor's ability to assign leases to interested third parties has been modified.

Even with the changes in the Bankruptcy Code, a debtor's unexpired leases remain a very crucial and valuable asset that could affect a debtor's ability to reorganize. Due to the wide scope of Section 365 and the wealth of case law interpretating this section of the Bankruptcy Code, this paper will address some general concepts, including the new provisions set forth in BAPCPA, while citing representative case law, without attempting to be exhaustive.

II. CREATION OF THE BANKRUPTCY ESTATE, AUTOMATIC STAY, *IPSO FACTO* CLAUSES, AND RELIEF FROM STAY

A. Creation Of The Bankruptcy Estate

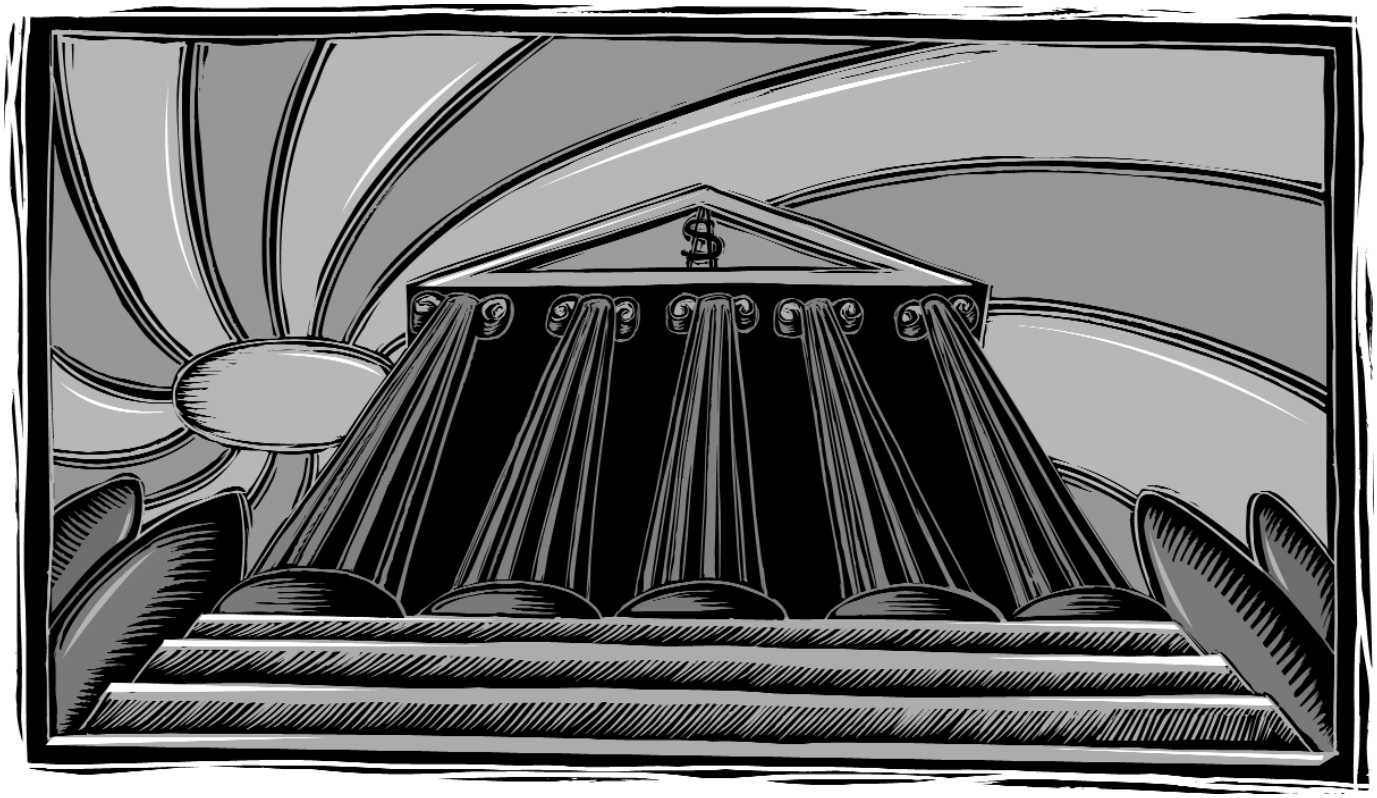
Leases as Property of the Estate

Upon commencement of the bankruptcy case, a bankruptcy estate is created and the estate is comprised of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 6 541(a)(1). This provision includes any rights that the debtor may hold in an unexpired lease as of the date of the bankruptcy filing. *See e.g., In re Rickel Home Centers, Inc.,* 209 F.3d 291 (3d Cir. 2000); *In re Palace Quality Servs. Indus.*, 283 B.R. 868 (Bankr. E.D. Mich. 2002). In this regard, it should be noted that property of the estate does not include any interest of the debtor as a lessee under a lease of non-residential real property that is terminated at the expiration of the stated term of the lease before the commencement of the case. 11 U.S.C. 6 541(b)(2). Additionally, property of the estate ceases to include any interest of the debtor as a lessee under a lease of non-residential real property that terminates at the expiration of the stated term of the lease and the expiration date occurs during the time the bankruptcy case is pending. *Id. See also, Erickson v. Polk*, 921 F.2d 200 (8th Cir. 1990); *In re Hickory Point Indus., Inc.* 83 B.R. 805 (M.D. Fla. 1988).

P*ractice Point:* It should be emphasized at this point that property of the estate does not include rights under leases that were appropriately terminated under applicable non-bankruptcy law (*i.e.*, state law) prior to the time that the bankruptcy case was filed. *See In re Gande Restaurants,* 162 B.R. 345 (Bankr. M.D. Fla. 1993). Thus, if the landlord anticipates a bankruptcy filing by the tenant and desires to have control of the leased premises free of the bankruptcy case, the landlord, if the opportunity is available, should terminate the lease prior to the bankruptcy filing, so that the subsequently bankrupt former tenant has no Bankruptcy Code protected interest in the leased premises. Of course, termination has to be effectuated properly and a great deal of litigation has arisen in bankruptcy courts over whether a lease was properly terminated pre-petition. *See, e.g., In re Trang*, 58 B.R. 183 (Bankr. S.D. Tex. 1985). A further point to note is that termination in this regard should be complete termination of the lease, and not simply termination of the right of possession (which is allowed under many state laws, including Texas). As the bankruptcy courts do not favor lease forfeitures (as leases are seen as valuable assets of the bankruptcy estate in many instances), less than complete termination may allow the bankruptcy court to protect the debtor (potentially by allowing debtor to retain control and possession of the leased premises) to the detriment of the landlord. *See, e.g., Hart Envtl. Mgmt. Corp. v. Sanshoe Worldwide Corp. (In re Sanshoe Worldwide Corp.)*, 993 F.2d 300 (2d Cir. 1993); *Vanderpark Props., Inc. v. Buchbinder(In re Windmill Farms, Inc.),* 841 F.2d 1467 (9th Cir. 1988); *In re Dash,* 267 B.R. 915 (Bankr. D.N.J. 2001); *In re 1345 Main Partners,* 215 B.R. 536 (Bankr. S.D. Ohio 1997); *In re Old Pike Pub, Inc.*, 115 B.R. 13 (Bankr. D.R.I. 1990).

B. Automatic Stay

Also, upon commencement of the bankruptcy case, one of the fundamental protections for the debtor arises, the automatic stay. In the context of the



landlord/tenant relationship, the automatic stay prevents the landlord or tenant from terminating the lease. *See In re Borbridge,* 66 B.R. 998 (Bankr. E.D. Pa. 1986) (reviewing existing case law on applicability of the automatic stay to leases). It also prevents the landlord, or in certain instances, the tenant, from attempting to collect lease obligations that arose prior to the date of the bankruptcy filing. The automatic stay, arising under section 362 of the Bankruptcy Code operates as a stay of the commencement or continuation of judicial, administrative, or other action or proceeding against the debtor that could have been commenced before the commencement of the case to recover a claim against the debtor that arose before the commencement of the bankruptcy case, and acts as a stay of any act to obtain possession of property of the estate, or of property from the estate, or to exercise control over property of the estate. 11 U.S.C. 6 362(a)(1), (2), (3), and (6). Thus, forcible entry and detainer or eviction actions are stayed by the filing of a bankruptcy case. *See, e.g., In re Smith Corset Shops, Inc.*, 696 F.2d 971 (1st Cir. 1982).

Similarly, personal property leases can not be cancelled and, in fact, the debtor can insist on performance from the other contracting party. Prior to the debtor's assumption or rejection of the contract, a personal property lease under Chapter 11 is not enforceable against the debtor party, but is enforceable against the non-debtor party. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). The only remedy a non-debtor party has to the continued enforcement of its obligations under the lease is to request an order from the court under Section 365(d)(2), requiring the debtor to assume or reject the contract. *See In re Grant Broadcasting of Philadelphia, Inc.,* 71 B.R. 891 (Bankr. E.D. Pa. 1987). Unfortunately for such party, it can only insist on compensation as an administrative claim in an amount equal to the benefit conferred on the estate. *In re Globe Metallurgical, Inc.,* 312 B.R. 34, 39, (Bankr. S.D.N.Y. 2004); *In re Patient Educ. Media,* 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998); *Broadcast Corp. of Georgia v. Broadfoot,* 54 B.R. 606 (N.D. Ga. 1985); *Beneke Co. v. Economy Lodging Sys. (In re Economy Lodging Sys.),* 234 B.R. 691 (B.A.P. 6th Cir. 1999); *In re Gamma Fishing Co.,* 70 B.R. 949 (Bankr. S.D. Cal. 1987). *See also, Bethlehem Steel Corp. v. BP Energy Co. (In re Bethlehem Steel Corp.),* 291 B.R. 260, 264 (Bankr. S.D.N.Y. 2003) (Contract rate is presumed to be reasonable value of goods or services unless party challenging rate introduces convincing evidence to the contrary).

On the other hand, as stated above, leases that have been terminated under appropriate non-bankruptcy law pre-petition are not assets of the estate. In recognition of this situation, section 362(b) of the Bankruptcy Code provides that the filing of bankruptcy does not operate as a stay of any act by a lessor to the debtor, under a lease of non-residential real property, that has terminated by expiration of the stated term of a lease before the commencement of or during a case under the Bankruptcy Code to obtain possession of such property. 11 U.S.C. 6 362(b)(10).

C. Exceptions to the Automatic Stay for Residential Real Property

Under BAPCPA, Congress enacted additional exceptions to the automatic stay relating to a landlord's ability to pursue remedies under a residential real property lease. Each of these new enactments places additional burdens on both the debtor and the landlord in the landlord's attempt to

recover possession of the premises.

1. Ability to Cure Monetary Defaults

In the event the landlord has obtained a judgment for possession of the premises prior to the debtor seeking bankruptcy protection, the landlord may continue to pursue recovery of the premises thirty (30) days after the petition date, if the debtor has not met the standards set out in section 362(l). Section 362(b)(22) provides:

The filing of a petition. . . does not operate as a stay-

> (22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor.

11 U.S.C. 6 362(b)(22). Under section 362(l), the debtor is given the opportunity to demonstrate through a certification filed with the Court, which is executed under penalty of perjury, that (1) applicable nonbankruptcy law in the jurisdiction where the debtor resides provides the debtor an opportunity to cure the monetary default that gave rise to the judgment for possession and (2) the debtor deposited with the clerk of the court, any rent that would come due during the 30-day period following the filing of the bankruptcy petition. 11 U.S.C. 6 362(l)(1). If the debtor is able to comply with section 362(l)(1) and files an additional certification that the debtor has cured within the 30-day period all monetary defaults for which the judgment of possession was obtained, then section 362(b)(22) is not applicable, unless the landlord objects to either of the certifications. If the landlord objects to either certification, then the bankruptcy court will hold a hearing in ten (10) days to consider the objection. 11 U.S.C. 6 362(l)(3)(A). If the court upholds the objection, then section 362(b)(22) shall apply immediately and relief from the automatic stay will not be required to continue any action for eviction or unlawful detainer. 11 U.S.C. 6 362(l)(3)(B).

Additionally, in filing the bankruptcy petition, the debtor is now required to indicate that a judgment for possession of residential real property was obtained pre-petition. 11 U.S.C. 6 362(l)(5). If the debtor does make the indication required under section 362(l)(5) and fails to make the certifications under sections 362(l)(1) or (2), then section 362(b)(22) shall apply immediately and no further relief from the automatic stay will be required. 11 U.S.C. 6 362(l)(4).

2. Endangerment of the Residential Real Property

In addition to the protection of the landlord's ability to continue pursuit of eviction remedies based on a pre-petition judgment of possession, BAPCPA provides an exception to the automatic stay where the debtor is either endangering the residential real property or illegally using controlled substances on the residential real property. Section 362(b)(23) provides:

The filing of a petition . . . does not operate as a stay-

> (23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property.

11 U.S.C. 6 362(b)(23). Upon the filing of the certification by the landlord, the debtor has fifteen (15) days to object to the landlord's certification or section 362(b)(23) will apply. 11 U.S.C. 6 362(m)(1). The debtor may file an objection to the truth or legal sufficiency of the landlord's certification and the court shall hold a hearing on the objection within ten (10) days after filing and service of the objection. 11 U.S.C. 6 362(m)(2)(A)—(B). Depending on the court's decision, either section 362(b)(23) will apply, if the court accepts the landlord's certification, or the automatic stay will remain in place, if the court approves the debtor's objection. 11 U.S.C. 6 362(m)(2)(C)-(D). If the debtor fails to object within the 15-day period, then section 362(b)(23) shall apply immediately and further relief from the automatic stay will not be required to pursue eviction of the debtor. 11 U.S.C. 6 362(m)(3).

D. Ipso Facto Clauses

Section 362 of Bankruptcy Code needs to be read in tandem with section 365 of the Bankruptcy Code. One issue that often arises when a party files bankruptcy is that the landlord, upon reviewing its contract or lease, discovers a standard provision that states the agreement can be terminated, or that the contract or lease is automatically terminated, if the other party files bankruptcy. Unfortunately for the non-bankrupt party, and fortunately for the bankrupt, Congress, when it rewrote the bankruptcy laws in 1978, felt that such provisions should not be enforceable (which was the opposite of the situation that existed prior to the enactment of the Bankruptcy Code as the prior Bankruptcy Act recognized and allowed the bankruptcy courts to enforce such provisions). Such provisions, known in bankruptcy parlance as *ipso facto* clauses, are unenforceable under section 365(e)(1) of the Bankruptcy Code. 11 U.S.C. 6 365(e)(1). Again, however, section 365(e)(1) does not serve as a basis for revival of a lease terminated prior to the bankruptcy filing. *See, e.g., Comp III, Inc. v. Computerland Corp.,* 136 B.R. 636 (Bankr. S.D.N.Y. 1992). As noted by another court, where the debtor breached a contract and the contract was terminated as a result of the breach, the termination is valid and does not arise out of an *ipso facto* clause. *Nemko, Inc. v. Motorola, Inc.,*

(In re Nemko, Inc.), 163 B.R. 927 (Bankr. E.D.N.Y. 1994). In addition to allowing the stay to be lifted for "cause," a court can also grant relief from the stay, if the landlord can demonstrate that the debtor has no equity in the property and the debtor cannot show that the property is necessary for an effective reorganization. 11 U.S.C. 6 362(d)(2).

E. Relief From The Stay

While the automatic stay prohibits termination of a lease once the bankruptcy case is filed and section 365(e)(1) invalidates automatic termination through *ipso facto* clauses, the other party to the lease can still attempt to terminate the agreement post-petition by filing a motion for relief from the automatic stay pursuant to section 362(d). Section 362(d)(1) of the Bankruptcy Code allows the bankruptcy court to grant relief from the stay by terminating, annulling, modifying, or conditioning the stay for cause. 11 U.S.C. 6 362(d)(1). With respect to leases, cause has been found to exist for lifting the automatic stay, where, for instance, the landlord allegedly terminated the lease pre-petition for non-payment of rent. *See In re Masterworks, Inc.*, 94 B.R. 262 (Bankr. D. Conn. 1988). Also, even if the termination issue is unclear, the bankruptcy court may lift the stay to allow the parties to address the issue in state court. *See In re Escondido West Travelodge*, 52 B.R. 376 (S.D. Cal. 1985).

Avoidance of Landlord's Lien

The Bankruptcy Code provides that a trustee or DIP may avoid the fixing of a statutory lien on property of the debtor for rent or distress for rent. 11 U.S.C. 6 545 (3) – (4). The Fifth Circuit has further elaborated on the term rent in avoiding the fixing of a lien on a royalty interest. *Duck Lake Acquisition Partners LP v. Gulfport Energy Corp. (In re WRT Energy Corp.)*, 169 F.3d 306 (5th Cir. 1999). See also *In re A&R Wholesale Distrib., Inc.*, 232 B.R. 616, 620 (Bankr. D.N.J. 1999)(citing numerous cases affirming avoidance of landlord's lien).

1 The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was signed into law on April 20, 2005.

Thomas Rice is a shareholder with the law firm of Cox Smith Matthews Incorporated specializing in bankruptcy matters. He has practiced law for 6 years and has extensive experience in representing debtors, creditors, and chapter 11 Trustees in numerous national, regional, and local bankruptcy cases. Mr. Rice graduated from the University of California, Los Angeles in 1995 and from the Pepperdine University School of Law in 1999 (cum laude).

Patrick L. Huffstickler is a shareholder with the law firm of Cox Smith Matthews Incorporated specializing in bankruptcy matters. He has practiced law for 20 years and has extensive experience in representing landlords and tenants in numerous national, regional, and local bankruptcy cases. Mr. Huffstickler also handles uniform commercial code and other commercial litigation matters. Mr. Huffstickler represents commercial landlords, including retail malls and shopping centers, with respect to numerous issues involving real property leases, including negotiating and drafting termination and modification agreements, in both bankruptcy and non-bankruptcy matters. Mr. Huffstickler graduated from Trinity University in 1983 (cum laude) and from the University of Texas School of Law in 1986 (with honors).

BYLAW WAS APPROVED BY THE MEMBERS OF THE PARALEGAL DIVISION IN NOVEMBER 2006

New Bylaw Language:

ARTICLE IX
ELECTIONS
Section 11. Effective Date.

An amendment to the Bylaws and/or referendum adopted in accordance with Article IX, Section 8 of these Bylaws shall be effective as of the date of approval by the Board of Directors of the State Bar of Texas for such amendment or referendum pursuant to Article IX, Section 2.c, 4.D of these Bylaws.

Linda Wolf Elected NALA First VP

Linda J. Wolf, ACP, a paralegal with the Dallas law firm of Sidley, Austin, Brown & Wood, has been elected First Vice President of NALA, The Association of Legal Assistants/Paralegals, the nation's largest professional association for paralegals.

Ms. Wolf was installed at the July 28 annual meeting during NALA's 30th annual convention in Tampa, FL. She will also serve as on the board of directors. She has been a member of NALA since 1984, and has served in a number of leadership positions for the Association.

A paralegal since 1980, she became a CLA in 1985, and in 1995 became a CLAS (now ACP) in the field of intellectual property. She is a founding member and former President-elect of LANTA.

She is a continuing legal education lecturer who has spoken frequently to Dallas area corporate paralegals, and is the only paralegal ever to address the Southwestern Legal Foundation.

She is Past President of the Friends of SMU Libraries, and a former member of the Library Executive Committee for SMU. She has served as a Republican Precinct Chair and Election Judge and is a long-time member of the Junior League. Her BA degree in Journalism and Political Science is from Baylor University, Waco, TX, and she is a member of the Society of Professional Journalists.

Also elected at the annual meeting were: Second Vice President—Karen Greer McGee, ACP, Waskom, TX; Secretary—Sharon A. Werner, CLA, Manchester, MI; and Treasurer—Ann L. Atkinson, CLA, Omaha, NE. These board members serve with Tita A. Brewster, ACP, Las Cruces, NM, who was elected President by the NALA Board of Directors last March and officially took office at the annual meeting.

Region directors taking office at the annual meeting were: Region I—Kathleen Bonelli, CLA, Kinnelon, NJ; Region V—Cheryl M. Snider, ACP, Toledo, OH; Region VI—Janie M. Boswell, ACP, Council Bluffs, IA; Region VII—Deborah Z. Elkins, ACP, Tucson, AZ; Region VIII—Annette R. Brown, ACP, Missoula, MT; Region IX—Carolyn Yellis, ACP, Anaheim, CA.

Nancy Mendenhall, ACP, Wichita, KS, will serve as NALA's Affiliated Associations Director.

ET *al.* . . .

TAPS 2006 Was a Huge Success!

Ellen Lockwood, ACP, RP – Chair, TAPS 2006 Planning Committee

The Texas Advanced Paralegal Seminar (TAPS) 2006 was the best ever! This event was held at the Crowne Plaza Hotel in Addison, TX on September 20-22, 2006. We had the highest number of registrants of any TAPS.

One major change that went very smoothly is the TAPS Planning Committee elected to do away with speaker material notebooks and provided each registrant with a CD Rom diskette that included all of the speaker papers from the seminar. The CD Rom was sponsored by a vendor who also provided a website where the papers were uploaded. On the Monday immediately prior to TAPS, each registrant was emailed the web address and password. The registrants then had the opportunity to print the papers and bring them to the seminar. This made for a much smoother registration process. Nan Gibson did a great job organizing everything and scheduling enough volunteers to cover registration. For those who have never taken on this job, it is more demanding than you would imagine. Thanks, Nan!

The Division awarded two TAPS educational scholarships to members of the Paralegal Division: Monty Mayes (District 3) and Leigh Steinberg (District 2). The scholarship covers the member's registration fee for the TAPS seminar.

TAPS 2006 had more than 50 speakers and two of the speakers each gave two-hour presentations. The speakers covered a wide range of topics and most were rated as very good speakers with good content by the attendees. Our keynote speaker for the luncheon was Joe Shannon, Assistant DA in Tarrant County. He presented an interesting and somewhat disturbing full hour of CLE regarding identity theft. The attendees appreciated the valuable information he provided.

The speaker committee and the co-chairs, Star Moore and Shirley Ross, did a wonderful job of getting all the speakers confirmed by the deadline for inclusion in the brochure and worked hard to get all the speaker papers in. Great job, ladies!

Our vendors are a huge part of helping make TAPS possible, by giving their support. It is a tribute to how valuable our vendors find the event that many return year after year. The vendors were impressed with the organization of the event. The vendors who attended the Thursday night social all appeared to enjoy themselves. The vendor committee, Jennifer Barnes and Rhonda Brashears, spent many hours calling and emailing vendors to tell them about TAPS and to answer their questions. Of course, we couldn't put on TAPS and keep the registration fee reasonable without our vendors. Kudos, ladies!

If you missed the Wednesday night social, the Division's last 25th Anniversary event, you missed the most wonderful, elegant event the Division has ever held. It was held at the Delaney Winery and Vineyards in Grapevine. The attendees traveled by bus to the winery and dressed for the occasion in black and silver attire! Some of our gents even donned their tuxes to mark this special occasion. The food was fabulous – delicious and beautifully presented. Everyone had a great time touring the winery and visiting with friends old and new, and being entertained by piano players.

However, in my opinion, the best part of the event was the decorations. Talk about setting a mood! The room was aglow with many candles, and their flames were reflected in the lovely mint julep cups with the 25th anniversary seal, each filled with an arrangement of white flowers. As the attendees entered, they were all surprised by how beautiful everything was. The evening ended with several door prizes and awards for Most Elegant, Most Creative, and Most Theme Appropriate attire. It was definitely a marvelous ending celebration of the Division's 25th anniversary.

Thursday night's social was much more relaxed. The comedy team from ComedySportz did a great job and even included a few audience members. The evening included a 25th anniversary cake with the past presidents and charter members in attendance blowing out the candles. We had a lot of our vendors stay and join us for this social, and as always, everyone

had a great time. Many vendors gave away their door prizes that evening, and there were tons of other door prizes. Thank you to Javan Johnson, President of the Paralegal Division, for all of her talent in organizing and decorating the social events; she truly outdid herself this year. Congratulations on two wonderful events!

We had many wonderful door prizes this year. Many were from vendors who participated in TAPS and others from other vendors and supporters of the Division. Debbie Guerra, door prize chair, spent a great deal of time contacting vendors and others for door prizes. Debbie's idea for the grand prize resulted in one of the most popular grand prizes ever. Debbie was able to get five companies to each donate $500. Those companies were listed in the TAPS brochure and on other signage during TAPS. This allowed us to offer a grand prize of *$2500.00 cash* without using any of the TAPS budget. The winner, drawn from the correctly completed vendor cards, was Charie Turner, CLA of Houston. Wonderful work, Debbie!

We would not have had so many registrants if not for the efforts of Tish Martin, marketing chair. Tish blanketed Texas with information about TAPS, including law firms, TAPA associations, and particularly the DFW area. I am happy to report that half of the registrants (275) were from the DFW area. It is important that a large percentage of our attendees come from the metropolitan areas where the current year's event is held to confirm the local paralegals are aware and taking advantage of this fantastic CLE opportunity.

Plans for TAPS 2007 are already underway, so stay tuned for where and when our next great event will be held.

ET *al.* . . .

TAPS 2006—Sponsors and Exhibitors

The Paralegal Division (PD) extends a special thank you to each of these companies for their sponsorship of the 2006 Texas Advanced Paralegal Seminar (TAPS 2006). The Division asks each PD member to please return the favor and look to these services as a "*Thanks for their Support*" of this organization.

WEDNESDAY SOCIAL—*PUTTING ON THE RITZ AT 25!*
CT—A Wolters Kluwer Business, Dallas
Hollerbach & Associates, San Antonio
The Marker Group, Houston
National Registered Agents, Inc./US Corpworks, Denver and Nationwide
Written Deposition Service, Inc., & Copy Solutions, Inc., Dallas

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PADFOLIO SPONSOR
One Legal, Inc., Houston

SIGNAGE SPONSOR
The Exhibit Company, Austin

ATTENDEES/VENDOR DIRECTORY
The Marker Group, Houston

Below, in its entirety is the complete list of all sponsors and exhibitors at the TAPS 2006 Event:

American Language Technologies, Inc., www.americanlt.com
Attorney Service Associates, www.asainfo.com
Blumberg Excelsior, www.blumb.com
C2 Legal www.c2legal.com
Capitol Services, Inc., www.capitolservices.com
Case File Xpress, LP, www.cfxpress.com
CT— a Wolters Kluwer business, www.wolterskluwer.com
Delaney Corporate Services, LTD, www.delaneycorporate.com
Digital Works DFW Litigation Support.Com, www.digital-works.net
eLaw Services, Inc., www.elawservices.com
Esquire Deposition Services/Esquire Litigation Solutions, www.esquirecom.com
Henjum Goucher Litigation Services, www.henjumgoucher.com
Hollerbach & Associates, Inc., www.hollerbach.com
LegaLink, A Merrill Communications Company, www.legalink.com
Legally Large, www.legallylarge.com
LegalPartners, LP, www.legalpartners.com
Litigation Solution, Inc., www.lsilegal.com
NALA—The National Association of Paralegals & Las, www.nala.org
National Registered Agents/US CorpWorks, www.uscorpworks.com
North Texas Legal Resource Network, www.bnidfw.com
One Legal, Inc., www.onelegal.com
Paralegals Plus, Inc., www.paralegalsplus.com
PDI @ UNT, www.pdi.org
ProveUp Legal Services, www.proveup.com
Reliable Document Retrieval, LLC, Austin, TX – no website address
RLS Legal Solutions, www.teamrls.com
Rodenbaugh & Associates/Tom Roney, www.comcast.net
SetDepo, www.setdepo.com
SPHERION, www.spherion.com
Sunbelt Reporting & Litigation Services, www.sunbeltreporting.com
Team Litigation Company, www.teamlit.com
The Common Source Incorporated, www.commonsource.com
The Exhibit Company, www.theexhibitcompany.com
The Marker Group, Inc., www.markergroup.com
Thomson West, www.thomson.com
The Vacek Group, www.vacekgroup.com
Visionary Legal Technologies, www.freevisionary.com
Written Deposition Service & Copy Solutions, www.writtendeposition.com

Paralegals Traveling to Italy Spring 2007

The third annual Division trip is planned for April 2007 to Florence, Italy departing on a Saturday and returning on a Saturday. The trip will include six nights hotel, daily breakfast, two dinners, trip to the wine country in Chianti (wine tasting/dinner); journey to San Gimignano, and roundtrip airfare. Details of trip on website at www.txpd.org under the news category and CLE/Events.

PARALEGAL DIVISION
STATE BAR OF TEXAS

EXCEPTIONAL PRO BONO SERVICE AWARD

The Paralegal Division of the State Bar of Texas is proud to sponsor an Exceptional Pro Bono Service Award. Its purpose is to promote the awareness of pro bono activities and to encourage Division members to volunteer their time and specialty skills to pro bono projects within their community by recognizing a PD member who demonstrates exceptional dedication to pro bono service. Paralegals are invited to foster the development of pro bono projects and to provide assistance to established pro bono programs, work closely with attorneys to provide unmet legal services to poor persons. This award will go to a Division member who has volunteered his or her time and special skills in providing uncompensated services in pro bono assistance to their community. The winner of the award will be announced at the Annual meeting, his/her expenses to attend the Annual Meeting will be incurred by the Division, and a profile of the individual will be published in the *Texas Paralegal Journal.*

Please complete the following nomination form, and return it **NO LATER THAN MARCH 31, 2007.**

Sharon D. Taylor, CP
Boyar & Miller, P.C.
4265 San Felipe, Suite 1200
Houston, TX 77027
832.615.4228 (o)
713.552.1758 (fax)
staylor@boyarmiller.com

Individual's Name: _____

Firm: _____

Job Title: _____

Address: _____

_____

Phone: _____

Fax: _____

Yrs. in Practice: _____

Work Experience: _____

Give a statement (on a separate sheet using "Nominee" rather than the individual's name) using the following guidelines as to how the above-named individual qualifies as rendering Exceptional Pro Bono Service by a Paralegal Division Member.

1. Renders service without expectation of compensation.
2. Renders service that simplifies the legal process for, or increases the availability and quality of, legal services to those in need of such services but who are without the means to afford such service.
3. Renders to charitable or public interest organizations with respect to matters or projects designed predominantly to address the needs of poor or elderly person(s).
4. Renders legislative, administrative, political or systems advocacy services on behalf of those in need of such services but who do not have the means to afford such service.
5. Assists an attorney in his/her representation of indigents in criminal and civil matters.

Opinions TO THE EDITOR

The TPJ wants to hear from you! The Publications Committee will poll members concerning their thoughts on some of the "hot topics" of the day. During each quarter, the Committee will draft a question, which will be distributed to membership, through the Directors. Each question will direct you as to where to send your response. We will print the responses in the following TPJ, reserving the right to edit for space considerations. While we prefer to print a name and city with each response, we understand that some of you may prefer that we not print your name. We will honor this request, so long as the response is not contrary to the objectives of the Paralegal Division or the Publications Committee. We hope that this column provides a way for PD members to express themselves, constructively, on issues that impact our profession, our communities, and our country.

Question of the Quarter:

On June 23, 2005, the U. S. Supreme Court issued its opinion in Kelo v. New London. This ruling held that the "public use" provision of the "takings clause" of the 5th Amendment of the U.S. Constitution permits the use of eminent domain for economic development purposes that provide a public benefit under a Connecticut statute. In response to that decision, the Texas legislature passed SB 7. Do you feel that the laws passed by the Texas legislature in response to Kelo are adequate to protect the individual's rights? Should individual rights be subordinate to the "public interest" in such situations? Do you feel the restrictions imposed by the Texas legislature will harm ultimately the economy or do you feel that the restrictions are fair and balanced? Did the Supreme Court go too far?

RESPONSE 1: The Texas legislature succeeded in limiting the taking of property through the use of eminent domain. The Bill clearly states that if the purpose of the use of eminent domain is for a private benefit to an individual, or by pretext to confer a private benefit later to an individual, eminient [sic] domain does not apply. It also makes it clear that private property can be taken for transportation projects, etc. Admittedly, I was surprised to see that private property can be taken for the purpose of a sports and community venue project. Whether or not the restrictions are fair and balanced would have to depend on the circumstances.

I believe the Supreme Court did go too far in the *Kelo v. City of New London* case. The mere fact that there were dissenting opinions from a well respected jurist should raise the red flag that the matter should be revisited. The 5th Amendment says that I as a citizen cannot be convicted of a crime without an indictment of a Grand Jury, cannot be tried twice for a crime, or be deprived of my life, freedom or property without due process of law. Well, the Supreme Court has ruled that property can be taken — what next my freedom?

—*Crystal Wilson, Fort Worth*

RESPONSE 2: *Do you feel that the laws passed by the Texas legislature in response to*

Kelo are adequate to protect the individual's rights?

Yes, and hooray for Texas in standing up against the *Kelo* ruling! The homes condemned in New London, Connecticut were taken for only one reason: to improve the general land value in the area and provide for economic development (i.e., Private land was reallocated to another private sector to improve the economy.). Prior to *Kelo*, "public use" was used to clear the way for railroads, highways, dams and stadiums — real property and facilities utilized by the public. *Kelo* has opened the way for legislatures to try and courts to allow the condemnation of private property for private uses. S.B. 7 prohibits the taking of private property by eminent domain through public use for economic development in the State of Texas.

Should individual rights be subordinate to the "public interest" in such situations?

Blight or public interest should be the predominant factors in an eminent domain taking (the Public Use Clause of the Fifth Amendment to the U.S. Constitution). Our "founding fathers" did not intend for the condition of economic value, which *Kelo* now places on the right to property.

Do you feel the restrictions imposed by the Texas legislature will harm ultimately the economy or do you feel that the restrictions are fair and balanced?

I believe the restrictions are fair and balanced, and protect the right to property. Yes, the government should promote growth, but it does not give them a right to step on property owners to realize that end. The absolute protection of rights is fundamental to American life — as written so eloquently in the U.S. Constitution — even if some tax revenue is lost in the process.

Did the Supreme Court go too far?

Yes, absolutely. In *Kelo*, the Supremes forgot that the U.S. Constitution is the "supreme law of the land" and should be immune to the opinions of legislatures to pervert the Public Use Clause for economic gain of the "haves" (i.e., wealthy property owners) over the "have-nots" (i.e., poor property owners). As Justice O'Conner said in her dissent in *Kelo*, "While the government may take their homes to build a road or a railroad or to eliminate a property... that harms the public... it cannot take their property for the private use of other owners simply because the new owners may take more productive use of the property."

—*Kim Messeri, McKinney*

RESPONSE 3: I do not see much in individual rights in relating to eminent domain in TX. Only the right of monetary restitution given to that petitioning individual versus the government that I see needs to have more looking into. The Kelo [SIC] affirmation of *Kelo v. New London* only gives more leeway to the government and big business to take advantage of the little guy.

—*Dalea Lugo*

Notice of District Director Elections, 2007—2008

Jennifer Fielder
Elections Committee Chair
512/236-9955
jfielder@riewelaw.com

The election of directors to the Board of Directors of the Paralegal Division of the State Bar of Texas from District 1, District 3, District 5, District 7, District 11, District 13, and District 15 will be held April 17, 2007, through May 2, 2007. All active and freelance members of the Paralegal Division of the State Bar of Texas in good standing and registered to vote as of February 1, 2007, will be eligible to vote online at the Paralegal Division's website (in the Members-Only section). **All voting must be completed on or before 11:59 p.m., May 2, 2007.**

Each potential candidate must satisfy the following requirements:

a. *Eligibility Requirements.* The candidate must satisfy the eligibility requirements of Article III, Section 3 and Article IX, Section 1 A and Section 4 of the Bylaws and Rule V B, Section 5c of the Standing Rules.
b. *Declaration of Intent.* The candidate must make a declaration of intent to run as a candidate for the office of director through an original nominating petition declaring such intent that is filed with the Elections Subcommittee Chair in the candidate's district pursuant to Rule V B, Section 5 of the Standing Rules.
c. *Nominating Petition.* The original nominating petition must be signed by and must be submitted to the Elections Subcommittee Chair in such district, on or before March 17, 2007. The number of signatures required on the original nominating petition shall be as follows:

Number of Registered Voters Within District	Number of Signatures Required
0 - 50	5 signatures
51 - 100	8 signatures
101 - 150	10 signatures
151 - 200	12 signatures
201 - 250	15 signatures
251 - 300	18 signatures
301 +	20 signatures

Beginning on February 16, 2007, each Elections Subcommittee Chair shall prepare and forward, upon request, the following materials to potential candidates for director in their respective district at any time during the nominating period:

a. A copy of the List of Registered Voters for their district;
b. A sample nominating petition; and
c. A copy of Rule VI of the Standing Rules entitled "Guidelines for Campaigns for Candidates as Director."

To request information from the Elections Subcommittee Chair for your district, please contact:

District 1: Sherry Contreras, 713/241-1028 (County of Harris) sherry.contreras@shell.com

District 3: Nichelle Boyland, 817/635-7055 (Counties of Callahan, Comanche, Eastland, Erath, Hood, Johnson, Jones, Palo Pinto, Parker, Shakelford, Somerville, Stephens, and Tarrant) nboyland@galyen.com

District 5: Melanie Langford, 210/224-2035 (Counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kinney, La Salle, Maverick, Medina, Real, Uvalde, Wilson, and Zavala) mlangford@akingump.com

District 7: Kathy Rieken, 806/468-3355 (Counties of Armstrong, Briscoe, Carson, Castro, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Parmer, Potter, Randall Roberts, Sherman, Swisher, and Wheeler) kathy.rieken@sprouselaw.com

District 11: Lee Bell Ulvestad, 432/684-5782 (Counties of Andrews, Coke, Concho, Crockett, Ector,

Glasscock, Howard, Iron, Loving, Martin, Midland, Mitchell, Nolan, Pecos, Reeves, Runnels, Schleicher, Sterling, Sutton, Taylor, Terrell, Tom Green, Val Verde, and Winkler) lbell@cbtd.com

District 13: Judi Kleinschrodt, 409/849-5741 (Counties of Austin, Brazoria, Colorado, Fayette, Fort Bend, Galveston, Jackson, Lavaca, Matagorda, Waller, Washington, and Wharton) judik@jrgpc.com

District 15: Patricia Gomez, 956/550-8373 (Counties of Brooks, Cameron, Hidalgo, Jim Hogg, Kenedy, Starr, Webb, Willacy, and Zapata) p.gomez@torteyalawfirm.com

The following timetable is provided to guide you through the election process.

February 1, 2007: In accordance with the Standing Rules V B, Section 5e, the voter registration deadline shall be February 1 of each year.

February 16, 2007: Contact the Elections Subcommittee Chair for your district and request a nominating petition and, at your option, prepare a short resume to attach to such nominating petition.

Brochure or Resume: A brochure or resume pertaining to each candidate for director may be posted on the Paralegal Division's website (in the Members-Only section) and shall be prepared and furnished to the Elections Subcommittee Chair at each candidate's own expense. Such brochure or resume shall be received by the Elections Subcommittee Chair or the Paralegal Division Coordinator on or before April 6, 2007 (7 days prior to the posting of the ballots) to be included in the mailing of the ballots. Such brochure or resume shall not exceed two 8 1/2" x 11" pages or one 8 1/2" x 14" page.

Campaigning: After the signatures on the Nominating Petition have been verified (March 18, 2007), the nominee may begin actively campaigning. Solicitation by mail is proper, provided that any mailing is on personal stationery or employer letterhead (provided that the employer's permission has been obtained), or any mailing or communication by electronic mail is conducted by a member of the Paralegal Division. No mailing or communication can be conducted by any individual/entity not a member of the Paralegal Division. Candidates themselves, in addition to the above, may campaign by personal solicitation. The full expense of such mail solicitation shall not exceed the sum of $500. However, to the fullest extent possible, all communications and solicitations, whether by letter or card or telephone, should concentrate on the candidate's merits and should avoid criticism of the other candidate or candidates. The excessive use of telephone solicitation by persons other than candidates through the use of WATS lines and similar organized solicitation is discouraged. Directors running for re-election cannot use Director communication as a form of campaigning. Any incumbent director must conduct his/her campaigning by personal, separate communication. Candidates shall avoid personal campaigning prior to 30 days before the date designated to mail or post ballots or the next following business day when the signatures on the nominating petitions for Director have been verified.

March 18, 2007: Return your Nominating Petition, properly completed, and at your option, with a resume or brochure (for posting to the Paralegal Division's website) to the District Subcommittee Chair. (**Any petition received after March 18, 2007, will not be accepted.** Faxed, Xeroxed, or telecopied nominating petitions **cannot** be accepted as proof of a candidate's eligibility for nomination.)

March 28, 2007: Elections Subcommittee Chair, after verifying signatures on the Nominating Petition, will forward the Verified Petitions to the Elections Chair.

April 3, 2007: Elections Committee Chair shall forward the Candidate Listing to the Paralegal Division Coordinator for posting.

April 17, 2007: Postcards mailed for Director Election. Voting begins online.

May 2, 2007: Deadline for voting for Director Election. **All voting must be completed on or before 11:59 p.m., May 2, 2007.**

May 3, 2007: The Paralegal Division Coordinator with the Elections Subcommittee Chair for District 4 will cause such ballots to be tabulated and notify the active candidates of such election results.

If you do not have access to the Internet at home or the office, you can access the Paralegal Division website at your local library. If you have any questions, feel free to contact the Elections Subcommittee Chair for your district.

IMPORTANT NEWS

Continuing Legal Education

ONLINE CLE
The Paralegal Division offers online CLE via the PD website. To participate in online CLE, please go to *www.txpd.org* and select CLE/Events.

CLE REQUIREMENT
ACTIVE AND ASSOCIATE members of the Paralegal Division are required to obtain six (6) hours of CLE (2 of which can be self-study). CLE hours must be obtained between June 1 – May 31 of each year.

CLE CALENDAR
A statewide CLE calendar can be found on the PD website at *ww.txpd.org* under Upcoming Events/CLE. You can find a variety of CLE programs offered around the State. Please check the PD website often because the calendar is updated weekly.

Membership Information

CHANGES TO MEMBER INFORMATION
Paralegal Division members can now change their credentials, addresses, email addresses, preferred mailing address and/or phone numbers via the State Bar of Texas website. Go to *www.texasbar.com*; click on MyBarPage (top of home page). If you have never visited this page, you will need to set up a pin/password. Your password to set up your **NEW Pin/password** is the last four digits of your social security number (**if the State Bar does NOT have your social security number on file, you will not be able to use this area nor will you have access to MyBarPage);** once you set up the new pin/password, you will be able to enter this section of the website to update your member records. If you have any problem accessing this page, please contact the Membership Department at 1/800-204-2222, ext. 1383.

MEMBERSHIP CERTIFICATE (Active Members Only)
Need to replace your Active membership certificate? Please complete the order form found on *www.txpd.org* under **Members-Only** area and follow instructions. The cost to replace an Active Membership Certificate is $15.00.

MEMBERSHIP CARD
Need to replace your membership card? Please send $5.00 made payable to the Paralegal Division along with a letter requesting a new membership card to the Membership Department, State Bar of Texas, P. O. Box 12487, Austin, TX 78711.

Were you ever issued a membership card? If no, please contact the Membership Department of the State Bar of Texas at 1/800/204.2222, ext. 1383 or email at rcarbajal@texasbar.com.

DELL COMPUTER DISCOUNT
The number assigned to the Paralegal Division by Dell Computer Corp is: SS2453215. This is the number you should use to receive the 10% discount for purchase of computers. However, Dell **does not** have the 10% discount special continuously. Dell sends a notice when the discount is offered to our members at which time it is forwarded to the PD members via the PD E-group. You may try to use this number anytime, but there are no guarantees that you may receive the discount at the time of access. Notices will continue to be forwarded to the PD E-Group when the discount is offered by Dell Computer Corporation.

PD Website Information

MEMBER DIRECTORY ONLINE
A membership directory is set up on the PD website under the Members Only area. By default, your membership information is listed in the online membership directory. If you would like to suppress showing your listing to other members, go to the Members Only "Edit My Profile" function to display your listing and then uncheck the "publication" box. If you haven't already done so, you might want to include info about adding member specialties through the same interface. If you need changes made to the online membership directory, you must make those changes using the procedures set out in the ***CHANGES TO MEMBER INFORMATION*** procedures located on this page.

MEMBERS ONLY AREA
The Members Only area of the PD website is for current members of PD only. If you are a member of the Paralegal Division and cannot access this area, please send an email to *pd@txpd.org* with your particular problem. Access is automatically given to members of the Paralegal Division. Access to the members-only area is available within two weeks from the date of the acceptance notice mailed to the individual by the Paralegal Division Coordinator.

PD E-GROUP
How do I sign up for the PD E-Group?
Going to trial in a "foreign" jurisdiction and want some tips from those who have gone before? Need a form but do not know where to turn? Then you need to sign up for the PD E-group! This is a members-only group and a benefit of being a member of the Paralegal Assistants Division (PD).
To sign up, go to *www.txpd.org*, click on Members-Only and choose E-Group. There will be directions on how to sign up. **You will be required to *respond to an email confirmation.*** Once you have completed the signed up, you will begin receiving emails from the members of PD.
For those who prefer not to be interrupted with email notifications, select "digest" for the PD email exchange. Emails are collected and distributed one time a day in one email.

How Do I change my PD E-group email address?

Instructions:
The PD E-Group created by the member is Password-protected, only the member has access to change a member's PD E-Group email. Go to *www.txpd.org*, click on Members-Only (access by USER ID and Password), click on PD E-Group, enter your *E-Group password*, unsubscribe the current email address, and create a new email address where you want to receive your PD E-Group messages. **You will be required to *respond to an email confirmation.***

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