STATUTE, PRACTICES ON

TAX SALE NOTICES

RAISE CONCERNS

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It is probably an unpleasant surprise for a lender in Oklahoma to receive a written notice from the County Treasurer telling it that the lender's debtor has not paid ad valorem real property taxes for the last four years on the real property on which the lender holds a mortgage. However, the shock increases when the lender discovers that the land will be sold -- for an amount probably substantially below market value -- at a County Tax Resale within the next 30 days, with the impending sale totally and permanently extinguishing the lender's mortgage lien.

As a lender, if you do not escrow for County ad valorem real property taxes and pay the taxes yourself, then you need to have a good "tickler" system to remind you to get a "paid receipt" each year from the borrower showing those taxes were paid. Otherwise, you are at the mercy of your debtor/mortgagor. Under current County Treasurer practice in many counties, you are denied a two-year advance warning of the pending extinguishment of your mortgage lien, and, if you seek to redeem the real property, just before the Tax Resale, you will be subject to paying not just the delinquent taxes, but the accrued interest, costs and penalties also. What might have been resolved in the beginning while it was a $3,000.00 inconvenience, could grow into a serious $15,000.00 problem. In turn, the lenders' equity cushion in the collateral can be gobbled up by an invisible accumulating tax bill, while the two-year redemption period (which starts with the initial tax sale to the county two years before the tax resale) evaporates. It is difficult to start a mortgage foreclosure lawsuit and finish the sheriff's sale on the collateral within the 30-day notice period provided to lenders by current state statutes on such Tax Resale. In fact, it is impossible -- even if the debtor defaults at every turn -- because of the minimum statutory notice periods provided to the

there you are, in an impossible situation. You can either pay the unpaid taxes and hope you can recover the sum from the obviously less-than-reliable borrower or lose the property and, therefore, your lien, at the Tax Resale.

What is especially interesting is that while it is the practice of some of the County Treasurers in Oklahoma to only give lenders publication notice of the initial Tax Sale, even though the recorded mortgages include a mailing address for the lender (per 36 O.S. § 3127), the reliance on such publication notice has apparently been ruled improper under the U.S. Constitution as a violation of minimum due process notice standards. Under the Constitution, any initial and subsequent related proceeding undertaken through a governmental process to deprive a person of an interest in property is void (not just voidable) if the governmental process, such as a tax sale, a probate proceeding or a general execution sale, fails to provide the interested person with both timely actual notice and a meaningful opportunity to address the challenge to its interest.

This condemnation of the use of publication notice to owners and lenders was established initially in a general way by the U.S. Supreme Court in 1950 in Mullane (Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652 (1950)) which was followed by another U.S. Supreme Court case on initial Tax Sales and subsequent Certificate Tax Sales, in 1983 in Mennonite (Mennonite Bd. of Missions v. Adams, 103 S.Ct. 2706 (1983)). Thereafter, in direct reliance on Mullane and Mennonite, the Oklahoma Appellate Courts dealt with initial Tax Sales and subsequent Tax Resales in 1984 in Malinka (U.S. v. Malinka, 685 P.2d 405 (Okl.App. 1984)), general execution sales in 1985 in Cate (Cate v. Archon Oil Co., Inc., 695 P.2d 1352 (Okl. 1985)), and probate proceedings in 1990 in Pope (Matter of Estate of Pope,

808 P.2d 640 (Okl. 1990)).

In the Mennonite and Malinka cases, publication notice to the lender was used at both the initial Tax Sale stage and at the later Certificate Sale or Tax Resale stage. The use of such constructive notice, rather than actual notice, to lenders is clearly condemned in these two cases, whether at the earlier or later stages of the tax sale process.

The courts in Oklahoma, even as recently as 1978 (Coates v. Hewgley, 581 P.2d 929 (Okl. App. 1978)), relied on a superseded 1944 case, and overlooked the 1950 Mullane case, to erroneously declare that: "Every person in Oklahoma...is charged with notice of the time and place where the property will be sold."

Once this presumption -- about automatically having notice of all tax sales -- was clearly destroyed by Mennonite (1983) and Malinka (1984), the state Legislature should have promptly amended both the initial Tax Sale and later Tax Resale notice provisions to direct the counties to start giving lenders actual notice (i.e., personal or mail service). Instead, the Legislature in 1984 amended only the later Tax Resale notice provisions (36 O.S. § 3127) to require that lenders be given 30-days notice via certified mail of such Tax Resale. However, nothing was done to remedy the absence of a requirement that actual notice be given to lenders at the initial Tax Sale stage, held 2 years earlier.

In order to overturn a Certificate Tax Resale Deed, the existing State statutes -- enacted in 1965, before Mennonite and Malinka -- provide that an interest holder, such as a lender, can defeat such deed if there is a defect in any one of several pre-conditions to a valid Tax Resale Deed. Included in this list of essentials is the requirement "that the said property was legally sold to the County at delinquent tax sale more than two (2) years prior to said resale."

Therefore, the Tax Resale Deed is void if the notice used to announce the earlier initial Tax Sale was unconstitutional and, as a result, the property was not "legally sold"

The right of a lender to receive actual notice of an initial Tax Sale is clearly expressed in the above cited landmark cases. These landmark cases held:

A mortgagee holds a constitutionally protected property interest,

2. The initial Tax Sale immediately and drastically diminishes the value of a mortgagee's mortgage lien,

3. The purchaser at the initial Tax Sale acquires title free of all liens and other encumbrances at the conclusion of the 2-year redemption period,

4. The mortgagee is entitled to notice reasonably calculated to apprise it of a pending Tax Sale,

5 Unless the mortgagee is not reasonably identifiable, constructive notice (i.e., publication notice) alone does not satisfy the due process notice requirements of the U.S. Constitution,

6. Notice by mail or other means (e.g., personal service) as certain to ensure an interested party receives actual notice is a minimum constitutional pre-condition to a proceeding which will adversely affect the property interests of any party,

7. A mortgagee must be given actual notice of the initial Tax Sale proceeds so that it might protect its interest in the subject property by foreclosure of its mortgage and by exercising its right of redemption as provided by law,

8. The act of mailing notice without proof of receipt of notice falls short of the exercise of reasonable diligence in assuring actual notice,

9. A mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that an initial Tax Sale is pending,

10. Notice to the property owner of an impending initial Tax Sale cannot be expected to lead to actual notice to the mortgagee.

11 The notion has been rejected that the mortgage company automatically has notice -- without receiving any written notice, but simply by

operation of law -- of all impending initial Tax Sales,

12. The State's failure to provide the mortgagee with actual notice of the initial Tax Sale violates due process, and

13. The Oklahoma initial Tax Sale procedures are silent with respect to actual notice of the initial Tax Sale to the mortgagee, and consequently are unconstitutional and therefore void.

These U.S. Supreme Court and the Oklahoma Appellate Court cases have clearly declared that, if the initial Tax Sale is conducted without "actual notice" being "received" by the lender, then the Tax Resale Deed is void, as to the lender. However, lenders are stuck with the continuing practice of at least some County Treasurers in Oklahoma whereby they follow the uncorrected initial Tax Sale notice statutes and only give publication notice to lenders.

Therefore, until legislative enactments directly correct this problem or the County Treasurers awaken to their Constitutional duties, all lenders need (1) to monitor their debtors' payment of ad valorem real property taxes very closely, to keep them from remaining unpaid and from accumulating, and (2) to promptly react to any kind of notice of an upcoming tax sale, since it will probably be a mistake to presume: "Oh, I have two years to deal with this."

[NOTE: This analysis also applies to initial Tax Sales followed 2 years later by Certificate Tax Deed notices.]

[NOTE: If you would like the author of this article to provide a free in-house presentation to your staff on Tax Deeds, Corporate Document Execution, L.L.C. Document Execution and similar issues, please contact him in Oklahoma City at (405) 842-7545]

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compliance is optional ... October 1, 1995, at which time it becomes mandatory.

Flood Insurance Fees

As noted previously, charges for flood insurance are excludable from the finance charge under Reg Z if they are imposed in connection with the initial decision to grant credit. If, however, the fee is for services to be performed during the loan term — such as monitoring a

the cardholder when the cardholder is claiming unauthorized use, the issuer must conduct a reasonable investigation. In connection with that investigation, it may request the cardholder's cooperation, but it cannot deny a claim based solely on the cardholder's failure or refusal to comply with a particular request. Note, however, that a card issuer may terminate the investigation if the cardholder's failure or refusal to comply with a particu-

... and issuers would be wise to develop and implement internal policies for investigating unauthorized use claims that incorporate some or all of the steps outlined above. Remember that the investigation must be conducted reasonably and should be promptly performed.

Right of Rescission

The revisions to the Commentary provide new guidance for determining when the right of rescission must be given to the

cipal dwelling and is building B to be occupied as his principal dwelling upon the completion of construction. A loan to finance B and secured by A is subject to the right of rescission. A loan secured by both A and B is also rescindable. They state that even if a loan is a purchase-money loan secured by a new home [and thus a residential mortgage transaction], if the loan is *also* secured by the consumer's *current* home, the loan is rescindable! Since this type of transaction is not infre-

ing creditor (as the successor in interest to the original creditor) would be considered the original creditor for purposes of the exemption to the right of rescission. As an example, if Bank X made a loan to John Doe secured by his principal residence and Bank Y then acquired Bank X, any subsequent refinancing of the loan by Bank Y would be deemed to be done by the original creditor and, to the extent no new money is advanced, there would be no right of rescission.

Statute, practices on tax sale notices raise concerns

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