

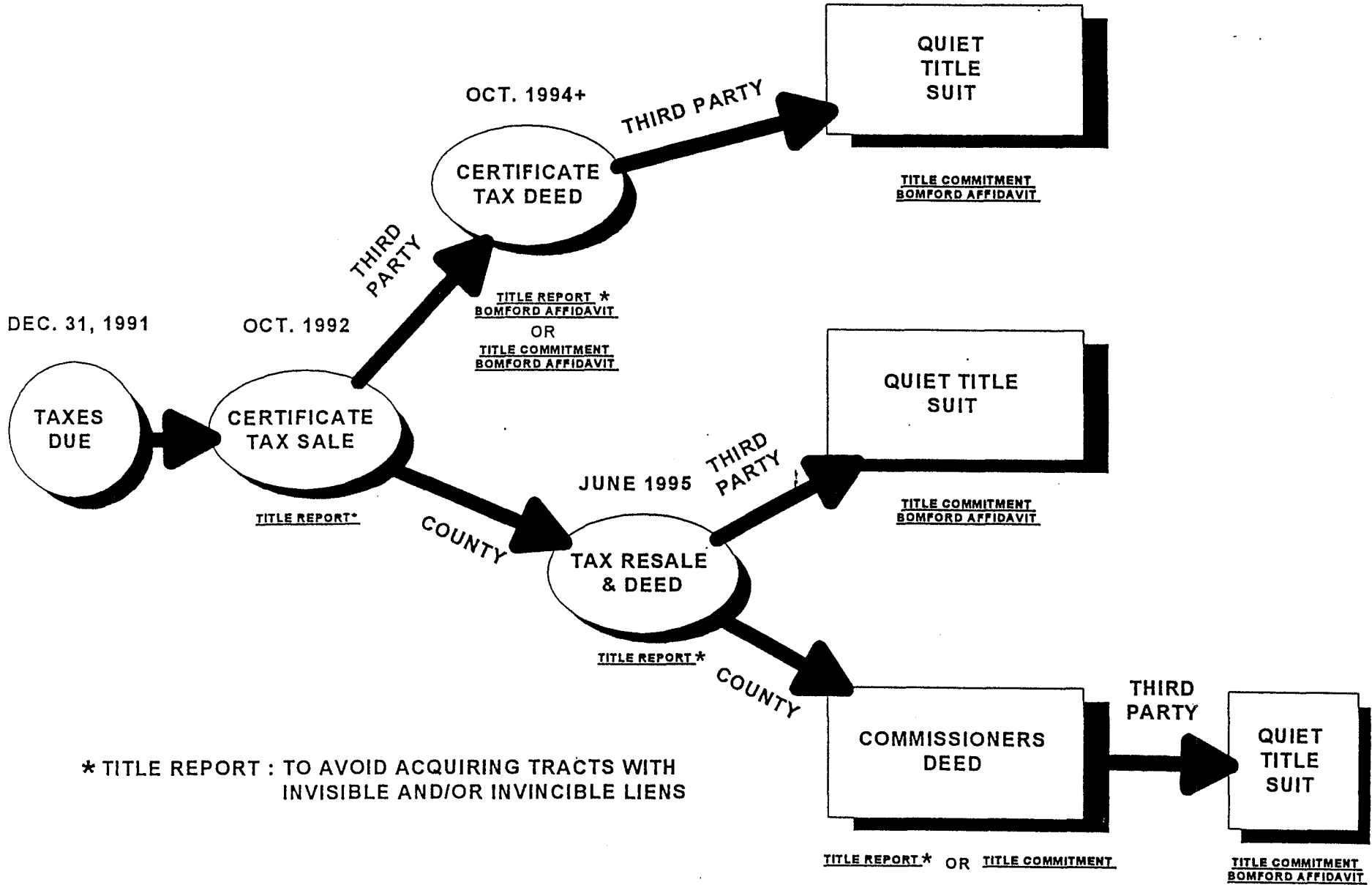
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# OKLAHOMA TAX SALE PROCEDURE



# Tax Resales: Invisible And Invincible Liens That May Be Surviving The Sale

By Kraettli Q. Epperson

(Editor's Note: OBA Sections have been invited to submit short notes of Section information for publication in the Bar Journal.)

## Introduction

Because of certain "invisible" and "invincible" liens, anyone considering acquiring title to real property located in Oklahoma through a County-held Tax Resale auction should "think twice" before bidding high enough to offer either the "assessed" value or the fair market value. (68 O.S. §§ 3125 *et seq*) Legislative reform in this area is long overdue.

Such Tax Resales are conducted by every County Treasurer in June of each year to sell lands with delinquent ad valorem taxes owed against them to satisfy the taxes. A Tax Resale is held only if the earlier initial Tax Certificate Sale (held over two years earlier in October) resulted in the County acquiring a Tax Certificate on the property and if the delinquent owner failed to redeem the property during the following two years. The County would acquire the initial Tax Certificate only if no third party offered to purchase the tract (68 O.S. §§ 3101 *et seq*; especially § 3108)

## Notice Risk

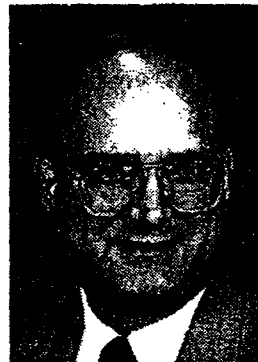
A prospective buyer should "think once" because of the uncertainty as to whether the County Treasurer satisfied the statutory and constitutional notice requirements during both the initial Tax Certificate Sale, and the subsequent Tax Resale. Even slight irregularities in the notice portion of these sale proceedings have frequently been used by the Courts to invalidate a Tax Resale Deed. (*Boone v. Claxton*, 269 P.2d 980 (Okla. 1954); *Jenkins v. Frederick*, 208 Okla. 583, 257 P.2d 1058 (1952); *Lawrence v. Ayres*, 206 Okla. 218, 242 P.2d 142 (1952); *Allgood v. Wetsel*, 275 P.2d 317 (Okla. 1954); *City of Tulsa v. Edwards*, 111 Okla. 251, 239 P. 572 (1925))

Therefore, in order to confirm the adequacy of the notices given during the tax sales, the tax deed holder

must successfully complete a separate court action to quiet title in the tax deed holder, sometime after the Tax Resale. Such a suit continues to be a necessity before a knowledgeable new buyer or lender will be willing to buy any interest which is based on a Tax Resale Deed.

## Invisible And Invincible Liens

A prospective buyer should "think twice" before bidding high enough to reach either the "assessed" or fair market value, because there are several types of



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seemingly "invisible" liens that might not be discovered during the title search leading up to the giving of

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actual notice, and there are also several other types of liens that arguably are "invincible" because their formidable holders (e.g., the FDIC) claim their interests survive such tax sale, even if the lienholders receive actual notice of the sales in advance. A quiet title suit cannot be used to defeat the holder of a truly unextinguished lien, assuming the lienholder has a senior lien and chooses to fight.

There are 4 sets of liens that might be "invisible" or "invincible", which include: (1) State Liens; (2) City Liens, (3) FDIC Liens, and (4) "Personal" Liens.

By State statute, the minimum bid at a Tax Resale must be for a sum equal to the lesser of either (a) the total of the taxes, penalties, interest and costs (i.e., the "Taxes Due") or (b) 2/3 of the County-computed "assessed value." (68 O.S. § 3129) However, when a third party computes their maximum bid, such bid will need to be reduced by the amount of any liens which will survive the Tax Resale. This reduction might reduce the "net" value to "zero." Therefore, a prospective buyer would be willing to buy the tract only if it is available for "nothing."

However, the common current practice is for the Counties to continue to offer all the tracts with no disclosure or representation as to whether they are free of liens or are so heavily encumbered as to be worthless to any buyer. It is likely that those tracts which are sold and are discovered to be heavily encumbered will be neither properly maintained nor fully developed to their highest potential by their new owners, and, therefore, such tracts will probably be abandoned and return to the pool of properties available at a later tax sale. Surely, the creation of strong incentives favoring the permanent abandonment of useable property was not the legislature's original intent, nor is that result in the public's best interest.

However, until the tax sale procedures are reformed (a) to allow tax deed holders to avoid the delay, expense and uncertainty arising from the need to conduct quiet title suits after every tax sale, and (b) to allow tax deed purchasers to buy the land free of all claims, it appears that the bidding at tax sales will continue to be "chilled" (i.e., dramatically reduced) because of the known and unknown risks involved, including the "invisible" and "invincible" liens.

### State Liens

The State's position is that, by statute, lands sold to pay for delinquent ad valorem taxes at a Tax Resale

are sold subject to all mortgages and other liens (e.g., tax or judgment liens) held by the State of Oklahoma. (68 §§ 3118 & 3142) Apparently, unlike other lienholders, the State claims it cannot be forced to buy the property to protect its own lien. An additional argument for the continuation of such State liens after a tax sale is found in the Oklahoma Constitutional provisions prohibiting the forgiveness of any debts owed to the State. (Ok. Const. Art 5 § 53)

Therefore, any prospective buyer should avoid bidding on a tract with a State lien on it where the amount of the Taxes Due, plus the State's lien, exceeds the property's fair market value.

### City Liens

According to existing State statutes, certain City taxes will become a lien on the specific real property causing the tax to arise. This lien arises from three forms of city nuisance abatement taxes, i.e., weed-removal taxes, dilapidated-building-removal taxes and boarding-and-securing taxes (respectively: 11 O.S. § 22-111(A)(6); -112(3) & (5), and -112.1(C)(4) & (C)(7)). Under the existing statutes, the County is obligated to act as the collection agent for its Cities and must include the amount of any such "certified" City taxes in the next available tax sale held by the County.

If the amount of the City taxes is included (i.e., endorsed) in the notice of the Tax Resale, the City liens will be extinguished. Otherwise, the City tax lien will arguably survive the tax sale. If the City lien is left unpaid, the land is subject to being sold again at the next tax sale by the County. This City lien can turn a marginally profitable venture into a loser.

### F.D.I.C. Liens

The federal government has, upon occasion, enacted statutes or rendered Court decisions exempting itself from the impact of Oklahoma's statutes which would otherwise affect real property interests held by the federal government (e.g., 28 U.S.C. §§ 3001-3008, Federal Debt Collection Procedures Act (effective May 29, 1991): creates a 20-year extinguishment rule for general money judgments issued by federal courts in favor of federal entities, in spite of a 5-year Oklahoma rule under 12 O.S. § 735; and *USA v. Ward*, 985 F.2d 500 (10th Cir. 1993): allowing in rem foreclosure of a mortgage made under a federal loan program (i.e., FmHA), even when the debt itself has become unenforceable due to the lapse of time, in spite of a contrary Oklahoma statute, 42 O.S. § 23).

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In this same vein, the FDIC has drafted and adopted a formal policy statement ("FDIC Statements of Policy," page 5359), arguably based upon a federal statute (*i.e.*, 12 U.S.C. § 1825(b)). This Policy declares that no forced sale of real property or an interest therein (*e.g.*, at a tax or execution sale) shall affect any title or interest of the FDIC in that tract, whether held in its corporate or its receivership capacity, unless (1) it is served with notice, and (2) it expressly consents to the sale.

Consequently, a prospective buyer of land at a Tax Resale should confirm, in advance of making a bid, that the FDIC received notice of the Tax Resale and that there is written evidence in the County Treasurer's file that the FDIC gave its affirmative consent to the sale.

### "Personal" Liens

The "title check" made by the County Treasurer needs to identify those "interest holders" entitled to receive actual notice of an upcoming County ad valorem Tax Resale, including any non-tract-specific liens. A lien holder's interest is not extinguished, if it is not notified of the proposed sale. (68 O.S. § 3127)

Both the Internal Revenue Service ("IRS"), and judgment lien holder of all types, file written "statements" in the land records which identify the debtor, but not the targeted real property. (IRS: 26 U.S.C. § 6323(f)(1)(A)(i); and Judgments: 12 O.S. § 706) Such a filing imposes a lien upon all of the debtor's recorded land holdings in that County, and the filing gives the world notice of such lien claim. If the County Treasurer fails to locate such "personal" liens which are filed against either the current title holder, or the previous title holders, the unsuspecting tax deed purchaser is subject to losing the lands in a subsequent foreclosure to satisfy an IRS or judgment lien. Unless the statute of limitations has run, these

overlooked non-tract-specific liens will survive the tax sale and will present paramount claims which can be eliminated only by making full payment or by reaching a settlement agreement.

### Conclusion

Tax Resales conducted by Counties in the State of Oklahoma are theoretically supposed to result in the purchaser acquiring "an absolute and perfect title in fee simple," free and clear of all prior claims of interest. (68 O.S. § 3131)

Instead, claimants from all three levels of government, as well as private general money judgment lien claimants, can not only block the Tax Resale Deed holder from completing a subsequent sale or securing a loan, but they will be able to enforce their own lien claims, asserting that the Tax Resale was conducted "subject to" their claims.

In order to have a workable ad valorem tax collection system, the sale process must be reformed by the State Legislature to create a system which will (a) give actual notice to all possible claimants, preserving written evidence of such notice, including the FDIC's assent, (b) ensure the land is sold for close to its fair market value to increase the funds raised to pay the multiple tax claimants and to treat the delinquent taxpayer fairly by producing some excess funds above the taxes due, and (c) ensure the land is sold free and clear of all claims, with the claimants shifting their search for payment to the fund generated by the sale.

In the absence of such reforms, it will continue to be accurate to declare:

*"No tax deed, be it certificate deed, resale deed or Commissioners deed, standing by itself, ever constitutes a basis for merchantable title." [Manual of Tax Titles", at 5 William J. Crowe]*

OKLAHOMA TAX SALE  
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**STATEMENT OF POLICY ON FORECLOSURE CONSENT AND  
REDEMPTION RIGHTS****Background**

12 U.S.C. 1825(b), the codification of section 15(b) of the Federal Deposit Insurance Act (FDIA), was added by section 219 of FIRREA. Section 1825(b) dealt with the immunity from state taxation enjoyed by the FDIC under section 15 of the FDIA applied when the FDIC acted in its receivership capacity. The section also protected receivership property from both involuntary alienation as well as involuntary liens.

Since the passage of FIRREA, the Corporation has received many requests for consent to foreclosure, waivers of the right to consent, interpretation of the scope of section 1825(b)(2) and its applicability, and specific explication of the Corporation's policy. After analysis, the Corporation has determined that in the interests of promoting efficiency in the Corporation's operations, providing certainty as to title upon foreclosure, and minimizing the impact the statute has on the secondary mortgage market in general, with respect to voluntary liens, the Corporation would, pursuant to its statement of policy, grant the consent required pursuant to section 1825(b) and, as to any property to which section 1825(b)(2) applies, state it will not assert any rights to which it may have been entitled pursuant to 28 U.S.C. 2410(c). The Corporation also has determined that it will continue to require holders of involuntary liens to obtain the Corporation's consent prior to foreclosing pursuant to an involuntary lien, provided the interest of the FDIC in the liened property is of record.

**Scope and Applicability**

The policy statement applies to the Corporation in its corporate and receivership capacities. It confirms that section 1825(b) applies to all property held by the Corporation acting as receiver or in its corporate capacity, including property of the financial institutions for which the Corporation has been appointed receiver or property which the Corporation holds for liquidation.

The policy statement further confirms that property of the Corporation encompasses any interest in real and personal property held by the Corporation, including security and equity interests. This is consistent with the Corporation's Policy Statement on the Payment of State and Local Property Taxes, which holds that section 1825(b)(2) covers both the Corporation's fee and lien interests in property. The statement of policy also makes clear that section 1825(b)(2) applies to both tax and non-tax liens.

The policy statement does not authorize, and shall not be construed as authorizing the waiver of the prohibitions in 12 U.S.C. 1825(b)(2) against levy, attachment, garnishment, or sale of property of the Corporation, nor does it authorize or shall it be construed as authorizing the attachment of any involuntary lien upon the property of the Corporation.

**Policy and Guidelines**

Section 4.a.(ii)(A) of the policy statement provides that where the Corporation holds a lien interest as a result of a mortgage, deed of trust or other similar security instrument, consent is granted to the holder of a consensual security interest which is senior to the Corporation's interest. Similarly, consent is also granted where the Corporation holds a title interest.

Section 4.a.(ii)(B) of the policy statement is a specific case of the general policy set forth in section 4.a.(ii)(A). Subsection (B) does not expand the consent granted under subsection (A), but, in light of the large number of mortgages insured or held by the Federal Housing Administration, the Department of Veterans Affairs, the Farmers Home Administration and the Secretary of Housing and Urban Development, the policy specifically refers to these organizations in order to make clear that it applies to interests they hold.

The statement of policy is explicitly limited to the application of 12 U.S.C. 1825(b)(2). The consents granted under the statement of policy do not act to waive or relinquish any rights granted to the Corporation, in any capacity, pursuant to any other applicable law or



