The Price of Redemption From an Alabama Tax Sale Just Went Up

By Jesse S. Vogtle Jr., Eric T. Ray and Paul H. Greenwood

The price of redeeming Alabama real estate from a tax sale has increased for both property owners and banks holding mortgages as collateral. When real estate is sold for delinquent ad valorem taxes, it must be redeemed from the tax sale or title may eventually be lost forever. A bank’s mortgage on real estate sold for delinquent taxes may likewise be extinguished (thereby eliminating the bank’s collateral) unless the property is redeemed from the tax sale.

Fortunately, if a mortgage is duly recorded at the time of a tax sale, the holder of the mortgage has additional time to redeem the property and protect its collateral. Under section 40-10-120(a) of the Alabama Code, the holder of such a mortgage has one year to redeem the property, beginning on the date of written notice of the tax sale. The Alabama Code states that this one year period is “in addition” to the time prescribed in section 40-10-120(a) (three years, if purchased by a party other than the state), although case law indicates that the additional one year period can run concurrently with the three year period, depending on when the written notice is given.

As many banks are aware, however, redeeming property from a tax sale can be an expensive and often litigious process. Although the extra time afforded to mortgage holders to redeem is helpful (provided that the mortgage was of record at the time of the tax sale), banks typically do not learn of a tax sale until years after it occurs. In fact, banks often learn of a tax sale when the tax purchaser files a lawsuit to quiet title to the property and extinguish the mortgage. Redeeming property years after a tax sale is even more expensive because interest on the amounts that must be paid has accrued at a high rate and the tax purchaser may claim improvements to the property, thereby necessitating negotiation or litigation as to the value (and validity) of the improvements.

Redemption now has an additional cost if a tax deed has been issued. In an opinion released on December 13, 2019, the Alabama Court of Civil Appeals held that “mesne profits” may also be required to be paid to the holder of a tax deed as part of the redemption price, in addition to the amounts required under section 40-10-122 of the Alabama Code. “Mesne profits” are the value of the use or occupation of land during the time that it was wrongfully possessed, and are commonly measured in terms of rents.

In Prescott v. Milne, Brenda K. Milne’s house was sold at a tax sale in May of 2014, for nonpayment of 2013 ad valorem taxes. A tax deed to the house was issued three years later. Without making a prior demand that Milne surrender possession of the house, the holder of the tax deed filed suit in 2018, seeking possession of the house (under section 6-6-280 of the Alabama Code) and the recovery of mesne profits, among other things. Milne filed a motion to dismiss, asserting that the tax purchaser had not demanded possession of the house before commencing the action and therefore, the ejectment
claim had not accrued. (Under section 40-10-74 of the Alabama Code, a tax purchaser is entitled to bring an ejectment action if the property is not surrendered within six months after demand for possession has been made.) Milne also filed a motion to redeem the property, asking the trial court to ascertain the amounts necessary to be paid to redeem, as provided under section 40-10-83 of the Alabama Code. It was undisputed that Milne had remained in possession of the house at all times relevant to the case.

The Circuit Court of Mobile County determined that Milne was entitled to redeem the house upon her payment into the court of all amounts required under section 40-10-83, including (i) all taxes and insurance premiums paid since 2013, with interest on those amounts at the statutory rate, plus (ii) the original filing fee and reasonable attorney’s fees incurred by the tax purchaser in bringing the lawsuit. Despite the tax purchaser’s arguments to the contrary, however, the trial court held that the tax purchaser was not entitled to recover mesne profits in connection with its ejectment claim under section 6-6-280 of the Alabama Code. The tax purchaser appealed and Milne cross-appealed.

In its December 13, 2019 opinion, the Alabama Court of Civil Appeals held that in order for the property to be redeemed, the holder of the tax deed must be paid, in addition to the other amounts required under Alabama law, the mesne profits for the period beginning on the date the tax deed was issued through the date of redemption. In reaching its decision, the court concluded that section 40-10-74 of the Alabama Code (which requires that demand for possession be made prior to bringing an ejectment action) applies only to the holder of a tax sale certificate (the document issued to the successful bidder at the tax sale), and not the holder of a tax deed. A tax deed to the property may be obtained three years after a tax sale. Once a tax deed has been issued, the holder is vested with “all the right, title, interest and estate of the person whose duty it was to pay the taxes.” The court, therefore, reasoned that the holder of a tax deed is not limited to bringing an ejectment action under section 40-10-73; rather, it may instead seek ejectment under section 6-6-280, as the tax purchaser in this case had done. Unlike section 40-10-73, section 6-6-280 does not require that the plaintiff demand possession before commencing an ejectment action.

Under this new holding, if a tax purchaser has obtained a tax deed to the property, then the amounts required to redeem from the tax sale may also include, among the other amounts required under Alabama law, the mesne profits for the period beginning on the date the tax deed was issued through the date of redemption, regardless of whether the tax purchaser has made demand for possession of the property. Banks that closely monitor the status of real estate collateral and ensure that taxes are timely paid can avoid the headache and increased expense of redeeming property from a tax sale.

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I’ll Hang Up and Listen: Eleventh Circuit Endorses Narrow Definition of TCPA Autodialer

By Grant Premo

Lawsuits alleging claims under the Telephone Consumer Protection Act (commonly referred to as the “TCPA”) have more than tripled since 2011. A recent decision by the Eleventh Circuit Court of Appeals, however, may stem the tide of TCPA claims. On Jan. 27, the Eleventh Circuit issued an opinion interpreting the TCPA in a way that limits the expansive potential liability companies face under the statute. In Glasser v. Hilton Grand Vacations Company, the court reached three significant conclusions:

• The court adopted a narrow definition of what constitutes an “autodialer” under the TCPA, rejecting the view that a telephone system that dials numbers from a predetermined list is an autodialer under the TCPA.

• The court also held that “clicker agent” systems — where an employee “clicks” a number on a computer application and the system then dials the number and connects the call to another employee — require human intervention to make calls and thus do not constitute an autodialer.

• However, the court noted that use of an artificial or prerecorded voice (without the consent of the called party) is an independent basis for liability under the TCPA, meaning the definition of an autodialer is not relevant to a TCPA analysis when the basis for liability is artificial or prerecorded voice calls.

Originally enacted in the early 1990s, the TCPA makes it unlawful to make a call to a cellular telephone, using an automatic telephone dialing system (ATDS) or using artificial or prerecorded voice, without the prior express consent of the called party. The TCPA notably allows for actual damages or statutory damages ranging between $500 per violation or treble damages up to $1,500 per willful or knowing violation. The TCPA is increasingly relevant because 53.9% of American households are “wireless only homes.”

The trend towards abandoning traditional landline phones is even more pronounced with younger generations: more than 70% of adults age 25 – 34 live in wireless only homes.

In Glasser, a consumer and a student loan borrower filed separate TCPA lawsuits against a timeshare marketer and a student loan servicer alleging that the defendants violated the TCPA by making calls to their cell phones with autodialers and without prior consent. Both trial courts granted summary judgment in opinions that examined the TCPA’s definition of an autodialer, and the Eleventh Circuit consolidated the cases on appeal.

In its opinion, the court first addressed the TCPA’s definition of an autodialer: “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). “Remember these words,” the court instructed before diving into an intricate grammatical analysis of the relevant language.

The question, as the court identified, is whether “using a random or sequential number generator” modifies both “to store” and “to produce,” or just one of those verbs. The defendants argued that it modifies both. In other words, to be an autodialer, the telephone equipment must (1) store numbers using a random or sequential number generator and dial them or (2) produce numbers using a random or sequential number generator and dial them.

The plaintiffs argued that the phrase “using a random or sequential number generator” only modified “[to] produce.” Thus, telephone equipment falls under the TCPA’s autodialer definition if it (1) stores numbers and dials them or (2) produces numbers using a random or sequential number generator and dials them. This interpretation is consistent with the Ninth Circuit’s view as expressed in Marks v. Crunch San Diego, LLC.

While lamenting that the TCPA’s text lacks clarity, the court endorsed the “better option” — that the phrase “using a random or sequential number generator” modifies both verbs, meaning that use of a random or sequential number generator is required for telephone...
equipment to qualify as an autodialer under the TCPA. Practically speaking, this decision means that telephone equipment that relies on a pre-set list of telephone numbers to generate calls is not an autodialer under the Eleventh Circuit’s holding — which encompasses the majority of modern systems. Instead, only telephone equipment that generates telephone numbers to be called randomly or by sequence would be considered autodialers for purposes of the TCPA, at least in the Eleventh Circuit.

In reaching this decision, the court noted that, while the FCC had adopted the more expansive definition, the D.C. Circuit’s decision in ACA International v. FCC “wiped the slate clean” and set aside the FCC’s interpretation. The Eleventh Circuit also noted that the Ninth Circuit’s expansive definition of an autodialer in Marks conflicts with the canons of statutory construction, so much so that the Ninth Circuit’s view amounts to “surgery” rather than interpretation.

The Eleventh Circuit’s opinion also briefly touched on the human intervention exception to the TCPA’s definition of autodialer. The opinion follows other courts that have found that “clicker agent” systems — where an employee “clicks” a number on a computer application and the system then dials the number and connects the call to another employee — require sufficient human intervention so as to take them out of the definition of an autodialer.

Lastly, the Eleventh Circuit noted that using an artificial voice or recordings to call someone without their consent is an independent basis for liability under the TCPA, notwithstanding the definition of an autodialer. In other words, TCPA liability can arise simply by making a call using an artificial or recorded voice message without consent of the called party, even if the telephone system used does not otherwise qualify under the now narrower definition of an autodialer.

The Glasser opinion is likely to have a significant impact in the Eleventh Circuit’s jurisdiction — federal courts in Alabama, Georgia, and Florida — and may reduce the volume of TCPA cases in these states. However, companies operating nationwide should continue to evaluate their TCPA compliance based on the more expansive definition of an autodialer used in other jurisdictions such as the Ninth Circuit, which includes Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington. Most of the other federal courts of appeal have yet to issue a determinative decision. It is notable, however, that the opinion was authored by Sixth Circuit Judge Jeff Sutton, who was sitting with the Eleventh Circuit panel by invitation. Judge Sutton’s opinion may hint at the direction that the Sixth Circuit could take on this issue. Given the circuit-split created by the opinion, both the FCC and the Supreme Court may now feel more urgency to act.

Grant Premo is an associate at Bradley. He represents financial services institutions and other businesses across the country in a variety of commercial litigation and compliance matters. He has experience advising clients on lending, servicing and operations in the areas of student lending and residential and commercial mortgage lending, including helping develop best practices for telephone and text-message communications with consumers to comply with the Telephone Collection Practices Act.

Rethinking Overdraft Protection Plan Consents
by Chris Couch

In Tims v. LGE Community Credit Union, the Eleventh Circuit upended how numerous banks think about their Overdraft Protection (“ODP”) obligations under Regulation E. In the wake of Tims, though, with some thought and clarification, banks can still use the Regulation’s model form to satisfy those obligations.

The Tims Decision
Carol Tims sued LGE Community Credit Union (“LGE”) for charging overdraft fees on two items drawn against her deposit account when the available balance in the account was insufficient to cover the items, but her ledger balance was sufficient. Among other things, Ms. Tims claimed the credit union breached the terms of
its agreement with her, which was reflected in part by the written consent she gave to participate in LGE’s ODP program. She also claimed the consent violated the ODP provisions of the Electronic Fund Transfer Act (“EFTA”) and its implementing regulation (“Regulation E”).

To obtain Ms. Tims’ consent to participate in ODP, in compliance with Regulation E, LGE used the form of consent promulgated by the Federal Reserve Board (the “Fed”) and adopted by the Consumer Financial Protection Bureau (the “CFPB”) (the "Model Form"), which read, "An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway." Ms. Tims argued that this form language indicated the "ledger balance" method of determining account balance, while LGE argued the language indicated the "available balance" method. Reading the Model Form together with the terms of the deposit account agreement, the trial court agreed with LGE.

The Eleventh Circuit reversed, finding the language of the agreement between Ms. Tims and LGE – consisting of the Model Form signed by Ms. Tims, the deposit account agreement, and LGE’s funds availability policy, read together – was ambiguous and did not clearly establish the parties’ intent with respect to balance calculation method. As a result, the Eleventh Circuit held that Ms. Tims stated a claim for breach of contract and violation of Regulation E.

Notably, the Eleventh Circuit reached this conclusion notwithstanding its observation that LGE used the Model Form, and that Regulation E expressly provides a safe harbor from EFTA liability where an institution uses "an appropriate model clause," and mandates notice of ODP terms be "substantially similar to" the Model Form.

After Tims, What To Do?

After Tims, are institutions like LGE – who use the Model Form to satisfy their EFTA/Regulation E requirements – simply out of luck? A close reading of Tims indicates otherwise. Importantly, the Eleventh Circuit found there was an agreement between depositor and depository, but that it was ambiguous. This is critically important, as Regulation E prohibits charging ODP fees without the affirmative consent of the consumer. In recognizing that LGE had an agreement with the consumer, the court implicitly recognized that LGE obtained an effective affirmative consent, and simply left open a question regarding the consent terms. That is, the court could not determine from the face of the agreement whether the parties agreed to follow the available balance method or the ledger balance method when determining sufficient funds.

As a result, the Eleventh Circuit’s holding and reasoning also suggests a solution for depositories utilizing the Model Form: Remove the ambiguity. By clarifying the terms of its ODP, institutions should be able to resolve Tims-like claims. Consumers who dislike the clarified terms can simply revoke their consent and discontinue participating in the ODP.

Conclusion

While the Tims decision is challenging – logically and operationally – its holding suggests a solution. Institutions who rely on the Model Form for ODP compliance should revisit their disclosures to clarify the terms of its program and satisfy the EFTA and Regulation E.

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Maximizing a Community Bank Capital Structure Under “Small Bank Holding Company Policy Statement” and “Capital Simplification for Community Banks” Regulation
by Michael S. Murphey, Porter White & Co.

Two recent regulatory changes go a long way to providing banks flexibility in accessing capital to fuel growth, acquisitions or liquidity for share buybacks or special dividends. This article provides updates and examples of how these rules effect community banks.

Regulatory Update
A summary of the Small Bank Holding Company Policy Statement (“SBHC”) and the Capital Simplification for Qualifying Community Banking Organizations (“CBL”) follows:

<table>
<thead>
<tr>
<th>SBHC</th>
<th>CBL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Effective date</strong></td>
<td>August 28, 2018</td>
</tr>
<tr>
<td><strong>Purpose</strong></td>
<td>Growth capital for community banks</td>
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<tr>
<td><strong>Measurement level</strong></td>
<td>Holding Company (“BHC”)</td>
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<tr>
<td><strong>Asset size</strong></td>
<td>&lt; $3 billion</td>
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<tr>
<td><strong>Basel III Framework</strong></td>
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<tr>
<td><strong>Leverage ratio</strong></td>
<td>No</td>
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<tr>
<td><strong>Debt / Equity (“D/E”)</strong></td>
<td>3:1</td>
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<td><strong>BHC debt level to finance acquisitions</strong></td>
<td>75%</td>
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<tr>
<td><strong>Dividends</strong></td>
<td>None if D/E &gt; 1.0 unless sub is well capitalized</td>
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<tr>
<td><strong>Well Capitalized Bank Subsidiary</strong></td>
<td>Yes</td>
</tr>
<tr>
<td><strong>BHC debt repayment</strong></td>
<td>25 yrs / 0.3 : 1 in 12 yrs</td>
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<td><strong>Bank Trading Assets</strong></td>
<td>NA</td>
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<tr>
<td><strong>Bank off balance sheet exposures</strong></td>
<td>NA</td>
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<tr>
<td><strong>Eligible BHC or Banks in Alabama</strong></td>
<td>93</td>
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</table>

**SBHC:** Created in 1980 to support local economic growth through community bank holding companies (“BHC”). The BHC will downstream the debt as an equity injection to its bank subsidiary (“bank”). This allows the bank to deploy growth capital while maintaining prudent capital ratios. SBHC is applicable to BHCs with assets up to $3B (vs $1B prior), effectively covering most community banks nationwide. Advantages of SBHC include (i) replacement of Basel III Capital Requirements with Debt/Equity < 3:1, (ii) 75% debt acquisition funding (iii) 25-year debt payback and (iv) BHC dividends if the bank is “well capitalized” or BHC Debt /Equity < 1:1. In sum, this regulation provides a conduit foe material capital raises to fund bank level growth, acquisition or stock tender/dividend strategies.

**CBL:** Effective January 2020, CBL replaces Basel III with a leverage ratio of 9.0%. Leverage is defined as Tier I capital divided by average assets. Eliminating Basel III frees up capital previously allocated to CRE...
assets, mortgage servicing rights and deferred tax assets. CBL is applicable to bank subsidiaries with < $10 billion in assets and does not apply to hold cos. Clearly CBL offers a much simpler alternative to Basel III while maintaining a prudent capital structure.

In sum, these regulations provide wide latitude to raise HC capital to downstream as bank equity to maintaining a prudent capital structure to grow or liquify your bank.

**Potential impacts**
The charts to the right reflect current community bank consolidation and capital raise trends, as follows:

**Consolidation:**
- Flat earnings growth, benign credit quality and low interest rates fuel ongoing 2020 consolidation.
- Small deal size resulted in falloff in 2019 deal dollar volume. Deal volume and size will increase in 2020.

**Financing:**
- SBHC and initiation of Kroll community bank ratings in 2012 supported BHC subordinated debt capital raises. Anticipate continued 2020 growth from the expansion of SBHC.
- $1 billion raised in 2019 sub debt through 32 offerings, 25 of which were BHCs with assets <$3B. Median yield was 5.56%.
- American Banker stated $672 million raised in Q4 2019, priced between 4.00%-5.88%. Uses included debt refi, acquisitions and capital support for CECL issues or branch expansion.

*Recent and projected acquisition activity indicates probable use of SBHC and CBL to raise capital.
Examples

The following demonstrate SBHC and CBL impact on three potential capital deployments: acquisitions, stock buybacks or dividends. Scenarios reflect HC sub debt down streamed to the bank subsidiary. The “pre-event” scenario reflects a well-capitalized HC and bank. Post event Scenario 1 assumes $2.0 in sub debt, Scenario 2 assumes $6.0. All scenarios reflect compliance with SBHC debt/equity requirements and maintenance of a well-capitalized bank rating.

### Scenario One: Acquisition
- Assume no goodwill with purchase price equal to down streamed cash
- Scenario 1: $2.0 in downstream equity acquires $25.0 in assets
- Scenario 2: $6.0 in capital acquires $80.0 in assets

**Takeaway:** SBHC and CBL are effective tools to finance acquisitions

### Scenario Two: Tender Offer
- Capital proceeds repurchase stock at book
- Scenario 1: $2.0 in downstream equity purchases $2.0 in stock
- Scenario 2: $6.0 in downstream equity purchases $2.5 in stock, builds cash $3.5, and overcapitalizes the bank as Treasury Stock growth reduces HC equity thereby increasing debt/equity

**Takeaway:** SBHC is ineffective use of capital above $2.5

### Scenario Three: Special Dividends
- Capital proceeds used as special one-time dividend
- Scenario 1: $2.0 in downstream equity supports a $2.0 dividend
- Scenario 2: $6.0 in downstream equity supports a $6.0 dividend

**Takeaway:** SBHC and CBL are effective tools to finance acquisitions, however bank is saddled with higher interest expense from sub debt raise

### Summary

Alabama banks are well capitalized, most Alabama HCs have no long-term debt, and the capital market are aggressively providing low cost sub debt. These industry fundamentals make the use of SBHC and CBL very viable options for Alabama’s community banks to fund acquisition, growth or stock tender/dividend strategies.

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