Money for Nothing: Who Is Entitled to the Excess Paid at a Tax Sale?

By William S. Hereford and James H. Haithcock, III

Section 40-10-28 of the *Alabama Code*, which is part of the statutory framework governing real property tax sales, addresses who is entitled to excess funds paid by a purchaser at an *ad valorem* tax sale. According to the Association of County Commissioners of Alabama, section 40-10-28 is "[o]ne of the most confusing statutes in Alabama law."[1] Indeed, the application of section 40-10-28 has been the focus of numerous lawsuits in recent years.

What Is an Excess?

When taxes are not paid on real property, the probate court in the county where the property is located can order the sale of the property to satisfy the tax obligation.[2] Pursuant to procedures identified in sections 40-10-1 through -31 of the *Alabama Code*, Alabama county officials offer for sale by public auction thousands of tax-delinquent real properties every year, with the properties being sold to the highest bidder. The "excess" discussed in this article is the amount paid for a tax-delinquent property that exceeds the minimum bid requirement. The minimum bid is the total of the unpaid taxes, accrued interest and sale-related costs. Following the tax sale, the minimum bid portion of the amount paid by the purchaser is distributed to the various taxing authorities entitled to the taxes. The "excess" portion of the bid is held by the county treasurer to be distributed pursuant to section 40-10-28.

Who Gets the Excess?

According to section 40-10-28, the excess "shall be paid over to the owner, or his agent or to the person legally representing such owner . . . ." Notwithstanding this seemingly simple directive concerning the payment of the excess, correctly determining who is entitled to the excess can be

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extremely complicated. The importance of this issue is better understood when the practical effects of a tax sale are considered.

A tax sale, in effect, splits the real property sold into two estates. One estate is the estate created in favor of the purchaser. This estate includes a right to possession, a right to obtain a deed to the property if it is not redeemed within three years of sale and the right to eventually obtain absolute ownership in the property if it is not redeemed.[3] The other estate consists of those real property rights that remain with the pre-tax sale owner of the property and any other parties having an interest in the property at the time of the sale, such as mortgagees and lienholders. It is this remaining estate, and the various interests in this estate, that are relevant to the topic of this article. The estate of the purchaser at the tax sale does not directly affect who is entitled to the excess. In general terms, the remaining estate consists of the right to redeem the property sold for taxes, the right to challenge the validity of the tax sale and the possessory interest of the occupant at the time of the tax sale (subject to the purchaser's right to seek possession of the property). All parties having an interest in the property before the tax sale have redemption rights and the right to challenge the tax sale.[4]

To redeem property sold for taxes requires the payment of an amount equal to the amount paid by the purchaser at the tax sale (which includes the excess), plus any subsequent taxes the purchaser has paid, and interest on those amounts of 12 percent per annum.[5] If, for example, the purchaser pays an amount creating an excess of $10,000, the "redemption amount" the owner (or anyone else having a right to redeem) must pay to redeem will include the $10,000 excess payment held by the treasurer. Thus, the excess funds are closely tied to the right to redeem, and it is clear that recovering the excess is a very important part of the redemption process. However, not everyone entitled to redeem is entitled to the excess funds.

Most properties sold at Alabama tax sales involving an excess payment (perhaps 90 percent or more) are redeemed by the owner of the property within the initial three-year redemption period established by section 40-10-120. With these redemptions, the excess held by the treasurer is typically applied as a credit to the total redemption amount. After a redemption, the county sends the redemption amount, which includes the excess the county has been holding, to the purchaser in exchange for the purchaser's release of its interest in the property. In these circumstances, because the excess is being applied to restore the title for the benefit of all parties who had an interest in the property when it was sold, there is not likely to be an issue of who is entitled to the excess funds.

The controversy concerning who is entitled to the excess arises when either the owner seeks to recover the excess from the county revenue commissioner[6] without redeeming the property or someone other than the owner seeks to recover the excess. Unless a claim to an excess is made by the owner for the purpose of redeeming the property, the revenue commissioner's decision to release the excess payment exposes it to future challenges from competing interests in the underlying real property. Even if a future challenge is unsuccessful, responding to the challenge is time-consuming and burdensome for revenue commissioners.

There are two primary reasons for this risk faced by revenue commissioners. First, it is not always clear who the "owner" is. If the revenue commissioner releases the excess to a claimant who is not the owner, it faces the risk of being sued by the owner. Second, releasing an excess to an owner who is not redeeming the property prejudices other parties with an interest in the property. When an owner does not redeem, other parties having an interest in the property must either redeem the property (but without the benefit of the excess funds to apply to the redemption amount) or risk the elimination of their interests in the property. A party whose interest in the property is prejudiced by the owner's failure to redeem is a likely candidate to object when they learn that the excess has been released. Accordingly, even if the revenue commissioner releases an excess to the correct owner, it remains subject to potential claims from other parties with an interest in the property.

Mortgagees, in particular, have a significant interest in property sold for taxes. If property is not redeemed, a mortgagee of the property risks losing all interest in the property securing its loan. Not surprisingly, most of the recent lawsuits in this area involve a mortgagee challenging a revenue commissioner's release of an excess payment to an owner who has not redeemed and does not intend to redeem.

Not all issues involve mortgagees, however. A simple factual situation that can lead to confusion exists where a claimant, who was the owner of the property at the time of the tax sale and has not redeemed, transfers his interest in the underlying property (in effect, his right to redeem) to someone after the tax sale, with neither the owner nor the transferee being aware of the tax sale when the transfer occurs. Section 40-10-28 does not address who gets the excess in these circumstances. If the excess is released to the original owner, then the excess will not be available to the transferee to use to redeem the property from the tax sale.

Another simple situation where applying section 40-10-28 is complicated is where the assessed owner at the time of the tax sale is not the actual owner. This is a situation that often arises when the parties to a real estate transfer do not confirm that the property has been correctly reassessed in the tax assessor's office. When the tax sale occurs, the tax assessor's records still reflect that the assessed owner is the previous owner, and not the actual, current owner. Section 40-10-28 does not identify which of these parties is the "owner" entitled to the excess. This very issue is at the center of a case recently filed against the Lee County Commissioner in *Auburn Bank v. Lee County Commission*, CV-2012-900385.00 (June 14, 2012).

The uncertainty concerning section 40-10-28 prompted the Association of County Commissioners of Alabama ("ACCA") to propose legislation in this past year's legislative session that it hoped would more clearly establish who is entitled to the excess funds and the circumstances under which a county treasurer may release the excess.[7] The ACCA's bill passed both legislative bodies, but was vetoed by the governor's failure to sign it.[8] The ACCA forecasts that this lack of clarity in the law will lead to additional litigation throughout the state and result in conflicting holdings among the various counties.[9]

This article (i) reviews the existing authority concerning the right to an excess payment and (ii) proposes an analysis for a court to apply to decide between competing claims to an excess. Although we believe this article should help county officials in identifying and addressing potential issues, we do not have a simple solution for addressing the risks they face when presented a claim to an excess.[10]

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Existing Authority

Section 40-10-28 is generally understood to establish that the excess is held by the treasurer for the benefit of the "owner." That section does not, however, define who qualifies as the "owner." The Alabama Supreme Court, in *First Union Nat. Bank of Florida v. Lee County Commission, et al.*,[11] ("*First Union*"), clarified the definition to some degree when it held that the term "owner" under section 40-10-28 means the "person against whom taxes on the property are assessed."[12] This ruling came in response to a mortgagee's challenge in which it asserted that its status as the legal title-holder to the underlying property (based on Alabama being a "title theory" state) meant it should be considered the "owner" under § 40-10-28, and, thus, entitled to the excess.

The supreme court recognized that there was no explicit definition of "owner" in section 40-10-28, but concluded it was clear from considering other sections of the tax sale statute that the legislature intended "owner" under section 40-10-28 to mean the equitable, and not legal, owner of the property.[13] According to the court, section 40-10-1 uses the term "owner" to refer to "the person or entity against whom the taxes are assessed."[14] The court also noted that section 40-10-120 references both an "owner" and a "mortgagee" in identifying the parties who are entitled to redeem from a tax sale.[15] The supreme court concluded that the legislature's listing of both "owner" and "mortgagee" in section 40-10-120 precluded an interpretation of the term "owner" under section 40-10-28 that would include a mortgagee.[16]

In addressing the nature of a mortgagee's legal title, the court stated that legal title does not equal absolute ownership.[17] According to the court, a mortgagee is a "*mere trustee for the equitable*" owner, "*who is the real owner*."[18] The court expounded upon the distinction between legal and equitable title, arguably in dicta, through a discussion of foreclosure sales.[19] It stated that when the failure to pay taxes is a breach of the mortgage agreement, the mortgagee could foreclose and purchase the property at the foreclosure sale, thereby merging the equitable and legal titles.[20] At this point, according to the court, the purchaser at the foreclosure sale would become entitled to the excess funds.[21] The court's statement that a mortgagee would obtain the right to the excess by foreclosing and acquiring the real property at the foreclosure sale implicitly recognizes that the right to the excess transfers with the equitable owner's rights in the underlying real property.

The issue of who is entitled to the excess bid was also a central issue in the class action lawsuit styled *Raymond C. Winston et al. v. Jefferson County Alabama et al.*, CV-2007-002297.00 (the "Winston Class Action") filed in June 2007, with the Circuit Court of Jefferson County. The Hon. Michael G. Graffeo was tasked with, among other things, determining if the Jefferson County Tax Collector was properly paying excess bids and who was entitled to the thousands of unclaimed excess bids resulting from Jefferson County tax sales during the years of 1999 through 2007.[22] In his order granting summary judgment for the plaintiff class, Judge Graffeo defined "owner" as "the owner of the property immediately before the tax sale."[23] This definition of owner appears to comport with the conclusion in First Union that the "owner" is defined as the person or entity against whom the taxes were assessed.[24]

The issue of ownership of an excess payment was also addressed in an August 16, 2011 Alabama Attorney General opinion ("August 2011 Attorney General opinion") responding to the following question submitted by the Walker County Revenue Commissioner: "[w]here the original owner of property following a tax sale has conveyed his right, title, and interest in and to the property, could that particular person demand from the county treasurer excess funds received from the tax sale?"[25] The attorney general concluded that the excess should not be paid to the original owner: "[t]he excess funds arising from a tax sale should not be paid to the original owner of the property sold for taxes when the original owner has conveyed all rights to the property to another."[26] The attorney general's answer and reasoning are instructive even if the opinion does not establish legal precedent.[27]

The attorney general recognized that its conclusion may seem inconsistent with its opinion letter dated July 26, 1983, in which it stated that "[i]t is apparent from reading § 40-10-28 that the excess arising from the sale of real estate is properly payable to the former owner, *i.e.*, the person who initially failed to pay his taxes on the property."[28] It distinguished the earlier opinion letter on the basis that the earlier circumstances did not involve the former owner conveying his rights in the subject property to another before making a claim to the excess payment.[29]

The August 2011 Attorney General opinion focused on the language of the warranty deed in determining whether the original owner transferred the right to the excess payment. The deed provided that the transferor "grants, bargains, sells, and conveys" to the transferee the subject property "together with all and singular the tenements, hereditaments, rights, privileges and appurtenances thereto belonging or in anywise appertaining."[30] Based on this conveyance language, the attorney general concluded that the owner transferred all rights in the real property, including the right to the excess: "It appears from the language of the warranty deed that the original owner has given up all rights to the property, including the right to receive the excess arising from the prior tax sale."[31]

Both *First Union* and the August 2011 Attorney General opinion support the conclusion that the right to the excess transfers with the equitable owner's real property interest. Implicit in this conclusion is that the right to the excess is in the nature of a real property interest. If the right to the excess instead were a personal property right, the right would not automatically transfer with the real property interest, and the Alabama Supreme Court's discussion in *First Union* concerning the effect of a foreclosure on the right to the excess would not have made sense. Likewise, if the right to the excess was a personal property right, the attorney general would not have been able to conclude, solely on the basis of the warranty deed, that the original owner gave up his right to the excess. Neither the *First Union* Court nor the attorney general, however, explains why the right to an excess transfers with the conveyance of the original owner's interest in the real property. Without understanding the reason the right transfers, it will be difficult to apply this principle when confronted with the variety of factual scenarios that do not fit neatly within the circumstances previously contemplated.

The Right to an Excess as an Incident of Real Property Ownership

The concept of property ownership recognizes that there are certain "incidents of ownership" relating to the property. "Incidents of ownership" are generally considered to be separate from the actual property itself, but, nonetheless, deemed by law to accompany the ownership of that property. Well-known "incidents of ownership," for both real and personal property, include the "right to its possession, the right to its use, and the right to its enjoyment."[32] Incidental ownership rights of real property are commonly said to be "running with the land."[33] Two other rights that are well recognized as "running with the land" are the right to receive rent arising from the real property and the right to crops growing on the real property.

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Under Alabama law, "[o]wnership in fee simple includes the right to the income, rents, and profits from the land."[34] This right "runs with the land" absent an unambiguous reservation of the right in the conveying instrument.[35] The bankruptcy court in *In re: Davis* recognized this principle in rejecting a debtor's claim that the rents were personal property exempted from the bankruptcy estate under section 6-10-6 of the *Alabama Code*.[36] The bankruptcy court held that under Alabama law, rents are not personal property separate from the real estate but are "incidental to the ownership of real estate and pass with the title to the real estate."[37]

Real property ownership includes the right to the crops growing on the land.[38] Absent the reservation of the right to the crops, the sale of the lands by deed "carries the right to the crops then growing on the lands."[39] Thus, even though growing crops are on land prior to a conveyance, because the crops are an incident of the real property ownership, the seller of the land does not retain any ownership in the crops unless, by written agreement, the crops are excepted from the conveyance to the purchaser.

Drawing from *First Union*, the August 2011 Attorney General opinion and the body of law relating to incidents of ownership, we submit that the right to an excess payment is an incident to real property ownership.[40] When the right to an excess is understood as an incident of real property ownership, an original owner's conveyance of its interest in the underlying real property would, as a general rule when the property remains encumbered by the tax sale, transfer the owner's right to the excess. Under these circumstances where the transferee is receiving property subject to a tax purchaser's interest, there is an implicit expectation that the excess funds would be available to the transferee to use toward a redemption.

Exceptions to this general rule would include circumstances where the conveying instrument reserves the right to the excess or where it is clear that neither party to the conveyance would have any expectation that the conveyance intended to convey the right to the excess. An example of the latter circumstance is where the original owner, having already redeemed the property from the tax sale, but without recovering the excess payment, then conveys the property. The transferee would not expect to receive the former owner's right to the excess since the excess is not needed to redeem the property from the sale. Another example is where a former owner chooses not to redeem, and instead issues a quitclaim deed to the tax sale purchaser to avoid being named in the tax sale purchaser's title-clearing lawsuit. Unless the tax purchaser provided some consideration to the original owner for releasing the claim to the excess, the tax purchaser, in receiving the quitclaim, would not expect to receive the right to recover the excess that it paid to purchase the property.

In proposing that the right to the excess is an incident of real property ownership, we realize that there are differences between the right to an excess and the rights to rents and crops. With respect to rents in particular, the Alabama Supreme Court has held that a purchaser is only entitled to rents that accrue after the purchaser becomes the owner.[41] In contrast, the application of the incident of ownership principle to the right to an excess that is supported by *First Union* and the attorney general opinion provides that a transferee is entitled to the excess regardless of whether the excess existed before or after the transfer. Notwithstanding any differences, however, the similarities are sufficient to conclude that the right to an excess is an incident of real property ownership. The rights to rent, crops and excess funds are all rights associated with real property but are not the real property itself. Further, Alabama legal authority has recognized that each of these rights transfers with the real property.

When this principle is applied to competing claims to an excess, the analysis of who is entitled to the excess is initially reduced to determining if and when there has been a redemption and tracing the original owner's equitable interest in the underlying real property to the holder of that interest at the time the excess is claimed. Thus, even if there are multiple transfers of the equitable title, this approach provides a workable legal framework to determine the proper recipient of the excess funds.

Consideration of Equitable Principles

We do not maintain that the party identified as the current "owner" should be the party who receives the excess in every scenario. Where there are competing claims to an excess, a court should first determine who has the real property title constituting "ownership" under section 40-10-28. Then, if applying a strict legal analysis would lead to an unjust result, it may be appropriate for a court to consider whether a competing claimant, who is not an "owner" under section 40-10-28, should, based on equitable principles, be entitled to the right to the excess.[42] Circuit courts, having equitable jurisdiction pursuant to *Alabama Code* § 12-11-31, are authorized to mold their decree "so as to adjust the equities of all the parties and to meet the obvious necessitates of each situation."[43] Instructive examples of the application of equity to prevent an unjust result are found in the cases of *Ex parte Chrysler First Financial Services Corp.*[44] and *Beasley v. Mellon Financial Services Corp.*[45]

In *Chrysler First*, the Alabama Supreme Court set aside a valid foreclosure sale to allow the home mortgagee to recover insurance proceeds paid into court by the insurer of the underlying home.[46] Five days before the foreclosure sale, a fire had destroyed the home, a fact unknown to the mortgagee when it bid the entire indebtedness secured by its mortgage to purchase the home at the foreclosure sale.[47] The trial court ruled that the mortgagee, by foreclosing after the fire, elected the foreclosure as its debt recovery remedy over its right to recover the insurance proceeds.[48] The Alabama Supreme Court reversed on the basis that, though the mortgagee had been diligent with respect to knowing the circumstances relating to the property, it was unaware of the loss at the time of the foreclosure sale, and to award the owners the insurance proceeds would be "neither equitable or just."[49] The supreme court concluded that "equity require[d] that the foreclosure sale be set aside and the parties returned to their status quo" prior to the fire to allow the mortgagee "to make an informed election between the two remedies available to it."[50]

A constructive trust is an equitable remedy that may be imposed "on a property in favor of one beneficially entitled thereto against the person who in any way, against the rules of equity and good conscious, has either obtained or holds and enjoys legal title to property that in justice that person ought not to hold and enjoy."[51] In *Beasley,* a borrower obtained a construction loan to build a home, but the home was somehow mistakenly built on a nearby parcel instead of the one mortgaged to the construction lender.[52] The borrower defaulted, which lead to the construction lender foreclosing on the mortgaged property, and then learning that the home had been constructed on another parcel.[53] The construction lender filed suit against the borrower and the mortgage holder on the parcel where the home was built, alleging that there was a mutual mistake in the description of the parcels and seeking relief on the theories of reformation and constructive trust.[54] The trial court ruled in favor of the construction lender on both theories, in large part based on the finding that the mortgagee on the parcel where the home was built, which had paid nothing for the home, would be unjustly enriched by retaining title to that parcel since the construction lender had paid for the home.[55] The Alabama Supreme Court agreed that the imposition of the constructive trust was necessary to prevent the mortgagee on the parcel where the home was built from being unjustly enriched at the construction lender's expense.[56]

We have identified two equitable factors from our experience as being relevant to determining who, among competing claimants, is entitled to an excess. The first factor concerns whether the property has been redeemed, and, if it has been redeemed, who paid the redemption price. Alabama law clearly favors the right to redeem so that the title to real property involuntarily sold can be restored to the original owner.[57] If the real property that was sold for taxes has not been redeemed, then it remains likely someone having the right to redeem will want to do so. The party who desires to redeem the property, and thus remove the encumbrance caused by the tax sale, has a compelling position that the right to the excess funds is a right tied to the redemption of the property.

There may be circumstances where the one bearing the burden of redeeming the property or restoring the title is not the same as the one who holds the title of the original owner. For instance, a property may be sold for taxes, and, thereafter, the original owner conveys his interest to a new owner. The new owner insured his title, but the

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title company failed to realize the property had previously been sold for taxes. The title company accepts its responsibility to its insured to redeem the property from the tax sale purchaser, and pays such purchaser an amount that includes the excess. In this situation, the party who incurred the expense of restoring title is not the current owner. Applying equitable principles allows a court to consider the merits of the title company's claim to the excess even though the title company is not the owner.

The other equitable factor is the consideration of whether releasing the excess will result in a windfall to a claimant and a loss to someone who may have a competing legal or equitable claim. Clearly, the title company in the previous example would argue that the owner's recovery of the excess would be a windfall to the owner since the owner's title was restored and the owner made whole.

This factor can also be understood by considering a strict application of *First Union's* definition of "owner" as "the person against whom taxes on the property was assessed." A strict application of that definition would result in a windfall to a claimant who was the assessed owner at the time of the tax sale, but not the actual owner. Often the tax assessor's records are not corrected after a real estate transfer by the parties involved in the transfer. If the tax assessor's records do not reflect the new owner as the assessed owner, the tax notices are sent to the old owner, who may ignore the notices. The new owner, without having received a tax notice, or any of the subsequent tax sale notices, fails to pay the taxes. As a result, the property is sold for taxes. In this situation, if equity is not considered, a literal application of the *First Union* definition would result in a windfall to the previous owner. The excess would be released to a person or entity who retained no interest in the property, and the actual, equitable owner would be left with the property encumbered by the tax sale without use of the excess funds to redeem the property. Thus, the assessed owner's recovery would constitute a windfall to that party. By applying equity, a court would consider whether the excess should be subject to a constructive trust in favor of the actual owner. [58]

Conclusion

The continuous litigation surrounding the right to the excess emphasizes the need for a defined, understandable analysis to resolve these disputes. Treating the right to an excess as incident to real property ownership is consistent with the established law relevant to the issue and provides a framework that can be consistently applied to the various factual scenarios that concern the ownership status of real property. The analysis we recommend involves (i) reviewing title work to trace the ownership of the property from the time of the tax sale until the claim is made, and (ii) determining whether the property has been redeemed, and if it has, when and who redeemed the property. Reviewing this information will identify the party currently holding the original owner's equitable interest and other parties who are likely to claim that they will be prejudiced by the release of an excess payment.

To avoid challenges from parties who fit the category of "likely to challenge the release of an excess," such parties should be given notice and an opportunity to assert a claim before a decision is made. Notwithstanding the theory suggested by this article that the right to the excess travels with the original owner's rights in the property, it would be prudent to notify an original owner who has transferred his interest.

In many instances, when all interested parties are notified and the equities of the situation are considered, the parties will be able to agree to the disposition of the excess funds. When the parties are unable to agree, a court should consider the equitable factors set forth above, as well as other equitable factors that may be raised, to reach its decision. By giving notice to interested parties and applying equity before a decision is made, the court will minimize, if not eliminate, the possibility of the revenue commissioner receiving a demand for the excess in the future. [59] | AL

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Endnotes

1 *http://www.alabamacounties.org/legislation/acca-legislation/*
2. *Ala. Code* § 40-10-1.
3. *Ala. Code* §§ 40-10-29, and 40-10-74.
4. *Ala. Code* §§ 40-10-82, -83, -120, and -122.
5. *Ala. Code* §§ 40-10-83 and -122 limit the recovery of interest on the excess payment to the portion of the excess that is less than or equal to 15 percent of the market value of the property.
6. Depending on how a particular county's revenue collection duties are organized, a claim for an excess will be reviewed by the county revenue commissioner, the tax collector or the treasurer. For simplicity, we will refer to these local government offices collectively as the "revenue commissioner."
7. *Excess Payments from Tax Sale, SB 177 by Sen. Ward, HB 177 by Rep. Clouse*, Alabama County Commissions of Alabama (2012), http://www.alabamacounties.org/wp-content/uploads/downloads/2012/03/Excess-Payments-Handout-for-web.pdf.
8. *See Legislative Detail: AL House Bill 177–Regular Session 2012*, LegiScan, *available at* http://legiscan.com/gaits/view/390943.
9. *Excess Payments from Tax Sale, SB 177 by Sen. Ward, HB 177 by Rep. Clouse*, Alabama County Commissions of Alabama (2012), http://www.alabamacounties.org/wp-content/uploads/downloads/2012/03/Excess-Payments-Handout-for-web.pdf.
10. We are not suggesting that revenue commissioners should resolve disputes or attempt to consider the equitable factors discussed in this article. We presume that county officials want, and understandably so, to have simple, clear guidelines for

responding to claims for excess payments so that they can make decisions without subjecting themselves to the risk of future challenges. Achieving those circumstances will likely require legislative changes that are not addressed in this article. Until such guidance is provided, the safest option for revenue commissioners in those less-than-clear situations would be to interplead the funds so a court can determine who should receive the excess.

11. 75 So. 3d 105 (Ala. 2011).
12. Although the Alabama Supreme Court defined the "owner" as the "person against whom taxes on the property are assessed," in the rest of its lengthy opinion, it almost exclusively speaks of the owner as the holder of the equitable title, rather than the assessed owner. Thus, we believe the supreme court assumed that the person against whom the taxes was assessed would also be the holder of the equitable title in the property, which is not always the case. Given that the court was not faced with a situation where the assessed owner and actual owner were different, we would caution revenue commissioners from relying on a strict application of the assessed owner definition.
13. *First Union,* 75 So. 3d at 112.
14. *Id.* This quote concerning § 40-10-1 is not a direct quote from § 40-10-1, but rather the supreme court's conclusion. The relevant portion of § 40-10-1 provides as follows:

    The probate court of each county may order the sale of lands therein for the payment of taxes assessed on the lands, or against the owners of the lands, when the tax collector shall report to the court that he or she or the holder or the holder of a tax lien . . . was unable to collect the taxes assessed against the land . . .

15. *Id.*
16. *Id.*
17. *Id.* at 113.
18. *Id.* (quoting, with emphasis added, *Loventhal v. Home Ins. Co.*, 20 So. 419, 420 (Ala. 1896)).
19. *Id.* at 116.
20. *Id.*
21. *Id.*
22. As of October 31, 2008, the Winston Class Action consisted of 1,765 parcels.
23. *See ORDER: CONFIRMING RULINGS MADE IN OPEN COURT; ON PENDING MOTIONS; and, ON MOTIONS FOR SUMMARY JUDGMENT* entered in the Winston Class Action on August 28,2008 and reaffirmed in the amended order entered October 27, 2008.
24. In March 2011, Judge Graffeo appointed William S. Hereford as a special master in the Winston Class Action in order to, among other things, resolve claims to over 850 unclaimed excess bids that remain a part of that case.
25. Op. Att'y Gen. of AL No. 2011-087 (2011).
26. *Id.* at p. 3.
27. *Farmer v. Hypo Holdings*, 675 So.2d 387, 390-91 (Ala. 1996) (Alabama Attorney General opinions are advisory and do not have the effect of law).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. 73 C.J.S. Property § 44 (2012).
33. *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154, 159 (Ala. 2000) ("Nonpossessory property rights such as covenants and easements are said to run with the land, becoming an incident of ownership, and they are generally not personal.")
34. *McGallagher v. Estate of DeGeer*, 934 So. 2d 391, 401 (Ala. Civ. App. 2005).
35. *Id.*
36. No. 07-11795-MAM-1, 2007 WL 3231782 *1 (Bankr. S.D. Ala. 2007).
37. *Id.*
38. *Cryar v. Ogle*, 99 So. 157 (Ala. Civ. App. 1923).
39. *Id.*
40. The idea that the right to an excess is an incident of the real property ownership was suggested to the authors by attorney William Hairston, III.
41. *Zeidman v. Homestead Sav. & Mortgage Co.*, 129 So. 281, 282 (Ala. 1930).
42. Penny A. Davis, TILLEY'S ALABAMA EQUITY § 1.1 (2002) (equitable remedies "were developed to further the ends of justice").
43. *Beasley v. Mellon Financial Services Corp.*, 569 So. 2d 389, 393 (Ala. 1990).
44. 608 So. 2d 734 (Ala. 1992).
45. 569 So. 2d 389, 394 (Ala. 1990).
46. 608 So. 2d 734 (Ala. 1992).
47. *Id.* at 735.
48. *Id.*
49. *Id.* at 738.
50. *Id.*
51. *Beasley v. Mellon Financial Services Corp.*, 569 So. 2d 389, 394-95 (Ala. 1990).
52. *Id.* at 391.
53. *Id.*
54. *Id.*
55. *Id.* at 392.
56. *Id.* at 395.
57. By jealously protecting redemption statutes in general, Alabama legal opinions demonstrate a public policy favoring the restoration of title to owners whose properties are involuntarily sold. *See Johnson v. Maness*, 1 So. 2d 655, 657 (Ala. 1941) (stating the "law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption . . . is characterized by a jealous and salutary policy"); *Williams v. Pruitt*, 2 So. 3d 862, 865 (Ala. Civ. App. 2008) (restating the court's policy that "redemption statutes will be liberally construed in favor of redemption . . . [and] the construction in any case of doubt or ambiguity should be in favor of the right to redeem"); *State Dept. of Revenue v. Price-Williams*, 594 So. 2d 48, 52–53 (Ala. 1992) (recognizing that the judicially created redemption method arising from *Ala. Code* § 40-10-83 has been expanded over the years to strengthen the right to redeem from a tax sale).
58. Our suggestion to consider equitable principles is not intended as a comment concerning whether a revenue commissioner has any responsibility to an actual owner after releasing an excess to the "assessed" owner. The revenue commissioner's responsibility to the actual owner will involve a number of factors not considered by this article, such as the commissioner's knowledge, or lack thereof, concerning the actual owner or any dispute involving ownership, and whether the revenue commissioner could rely on a strict application of the *First Union* definition of "owner."
59. An initial reaction to the approach suggested in this article is that it takes into account too many factors, thus doing little to simplify the determination of who is entitled to an excess payment. However, our experience in the Winston Class Action has been that this approach significantly simplifies and expedites the process of identifying the proper claimant. By knowing what information is relevant, the information can be gathered rather quickly. When we have that information–the title work and knowledge relating to any redemption–we are able to quickly identify and limit the scope of parties who may have a legitimate claim to the excess funds.