

**Alabama Real Property Tax Sales, Redemption
and Clearing Title**

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ALABAMA REAL PROPERTY TAX SALES, REDEMPTIONS AND CLEARING TITLE¹

I. AD VALOREM TAX COLLECTION – LAND AND LIEN SALES.

Tax sales are the mechanism by which counties collect delinquent *ad valorem* taxes. There are two types of tax sales in Alabama. The first involves the county selling the taxpayer's land to pay for the taxes, whereas the second involves the county selling the county's lien against the land for the taxes owed. Under the first system, the purchaser obtains an interest in the property sold, evidenced by a certificate, which certificate may later be exchanged for a deed to the property. Under the second, recently updated, system, the purchaser at the sale obtains a lien on the property that can be foreclosed after three years. This latter sale of lien system was used for the first time in 2019 after legislative changes to the system in 2018. Ten counties have elected to use the sale of lien system in 2020.²

II. SALE OF LAND (§§ 40-10-1 through 40-10-143).

The sale of land system, which is established in Alabama Code §§ 40-10-1 through 40-10-143, is the system historically used by all Alabama counties until 2019 when several counties adopted the revised sale of lien system. While the majority of Alabama counties continue to use the sale of land system, the counties using the sale of lien system increased

¹ This publication does not constitute legal advice. The legal authority relating to many of the issues discussed is very nuanced, and determining the most appropriate response and strategy to a particular situation requires a careful review of the particular circumstances. Obtaining the assistance of experienced legal counsel is recommended.

² The counties opting to use the sale of lien system in 2020 are: Baldwin, Calhoun, Cherokee, Cullman, DeKalb, Elmore, Jackson, Mobile, Shelby, and Talladega.

from 2019 to 2020. It will be interesting to see if this trend to the sale of lien system will continue.

A. Presale Noticing.

Ad valorem taxes are billed on October of each year and are delinquent if not paid by December 31. The steps leading up to the sale of land for taxes begins after January 1. Upon receipt of a book of delinquent taxpayers, the judge of probate of the county where the real estate is located issues a notice addressed to each known delinquent taxpayer listed in the book.³ The notice informs the taxpayer of a hearing before the probate court and requests that the taxpayer show cause at the hearing as to why a decree for the sale of the taxpayer's property should not be made.⁴ The notice is to be served on the taxpayer residing in the county where the property is located by the tax collector by handing it to the taxpayer or his agent, leaving a copy of the notice at the residence/place of business of the party, or by certified or registered mail.⁵ Notification procedures vary if the taxpayer has died (service shall be made on the decedent's personal representative) or is a nonresident of the county where the property is located (service shall be made by publication).⁶ When property is assessed to an "owner unknown," notice of a hearing on the sale of property must be given by publication once a week for three successive weeks in a newspaper published in the county,

³ Ala. Code § 40-10-4.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

or if no newspaper is published therein, by posting the same at the county courthouse for three weeks.⁷

A decree of sale of the real property in question is issued if the taxpayer raises no valid defenses to the tax deficiency.⁸ Pursuant to section 40-10-12, notice of the sale shall be given via publication. Strict compliance with these procedures is required, and failure to comply with the requirements can render the tax sale invalid.⁹ Sales of real property must be confirmed by the probate court following the sale.¹⁰ An adequate description of the real property must be given in the advertisements of the sale, and the failure to do so can invalidate a resulting tax deed.¹¹

B. Auction Sale.

On the appointed day, the tax sale is conducted with properties being sold by public auction to the highest bidders for cash.¹² If no one bids an amount sufficient to pay the sum specified in the decree of sale for a particular property, the judge of probate shall bid in such real estate for the State of Alabama for the amount specified in the decree.¹³ The properties which are bid in for the state are commonly referred to as "sold to state" properties.

⁷ § 40-10-5.

⁸ § 40-10-11.

⁹ *Morris v. Card*, 135 So. 340, 343 (Ala. 1931); *O'Barr v. Oberlander*, 679 So.2d 261 (Ala. Civ. App. 1996).

¹⁰ § 40-10-13.

¹¹ *See* § 40-10-14; *Craig v. Swader*, 143 So. 553 (Ala. 1932).

¹² § 40-10-15.

¹³ § 40-10-18.

C. Documents Evidencing the Acquired Interest from the Tax Sale.

1. Tax Certificate

After a tax sale, the tax collector issues to the purchaser a certificate of purchase (a "tax certificate") containing certain details about the sale, including a description of the real estate sold, the amount of taxes due, and the date of the sale.¹⁴ A complete description of what must be included in the tax certificate is set forth in section 40-10-19 as follows:

As soon after the confirmation of sale is made as may be practicable, the tax collector must make out and deliver to each purchaser, other than the state, a certificate of purchase, which shall contain a description of the real estate sold and show that the sum was assessed by the assessor, to whom assessed, the date of assessment, for what year or years the taxes were due, the amount of taxes thereon, the amount of and the name of the holder of each tax lien certificate related thereto, distinguishing the amount due the state and county and for school purposes and to each holder of a tax lien certificate and the fees and costs, that it was advertised and how long, that it was offered for sale and at what time, who became the purchaser, at what price and the fact and date of the confirmation of such sale.¹⁵

2. Tax Deeds

If a property sold for taxes is not redeemed within three years from the date of the sale, then the purchaser is entitled to a deed (herein, a "tax deed") to the property issued by the probate judge.¹⁶ To receive the tax deed, the purchaser must return the original tax certificate and pay a fee of \$5.00 to the judge of probate.¹⁷ Pursuant to section 40-10-29, such deed:

¹⁴ § 40-10-19.

¹⁵ § 40-10-19.

¹⁶ § 40-10-29 ("After the expiration of three years from the date of a sale of any real estate for taxes, the judge of probate . . . must execute and deliver to the purchaser, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, . . .").

¹⁷ *Id.*

shall convey to and vest in the grantee all the right, title, interest and estate of person whose duty it was to pay the taxes on such real estate in the lien and claim of the state and county thereto, but it shall not convey the right, title or interest of any reversion or remaindermen therein.¹⁸

Typically, a tax sale purchaser who obtains a tax deed will record the deed to provide notice of the tax purchaser's interest in the property.

D. Excess Bids.

Alabama law provides that the property will be sold to the highest bidder, provided the bid at least covers the past due taxes and other amounts identified in the decree ordering the sale. What is known as an "excess bid," "overbid," or "surplus" arises when a tax sale purchaser bids an amount higher than the outstanding tax indebtedness and sales costs. These surplus funds are received and held by the county until they are released as provided by Alabama Code § 40-10-28, the statute governing the handling and disposition of the surplus funds.

Section 40-10-28 was amended in 2013, 2014, and 2017. The current version of the statute provides for the following: (1) during the initial three year redemption period, anyone with a right to redeem is entitled to have the surplus funds applied as a credit toward the redemption of the property; and (2) following the initial three year redemption period, the county's release of the surplus funds is conditioned on the property being first redeemed. Upon presentation of proof of redemption to the county, the county is to release the funds to the redeeming party.¹⁹ Without proof of redemption, the county can refuse to release the surplus funds, which funds eventually become the county's property.

¹⁸ § 40-10-29.

¹⁹ § 40-10-28 (2017).

E. Purchaser's Right of Possession.

The purchaser of property at a tax sale is entitled to immediate possession of the property upon the purchaser's receipt of a tax certificate. Other than that right of possession, the statutes do not elaborate on the nature of the interest of a purchaser holding a tax certificate. The right to possession is set forth in § 40-10-74, which provides in part as follows:

Any purchaser of lands at a tax sale other than the state or anyone claiming under him shall be entitled to possession of said lands immediately upon receipt of certificate of sale from the tax collector; and, if possession is not surrendered within six months after demand therefor is made by said purchaser or his assignee, the said purchaser or his assignee may maintain an action in ejectment or a statutory real action in the nature of ejectment, or other proper remedy for the recovery of the possession of the lands purchased at such sales and shall be entitled to hold the possession thereof on recovery, subject, however, to all rights of redemption provided for in this title.

§ 40-10-74.

As indicated by § 40-10-74, the right to bring an action for possession is dependent on first giving a six month demand for possession.

F. Redemption.

Alabama law grants redemption rights to all persons or entities having an ownership interest in the property or who hold a mortgage or lien on the property at the time of the tax sale.²⁰ Alabama's time frame for redemption is likely the longest of any state in the country.²¹ Whereas most states have a one to two year redemption period, the right to redeem in Alabama lasts at least three years, but can continue indefinitely.²² As additional context,

²⁰ §§ 40-10-82, 83, 120, 122.

²¹ See *A View of How the States Do It*, REAL ESTATE TAX INVESTING: MAKING MONEY WITH DEEDS AND LIENS, <http://taxliens.homestead.com/SalesByState.html> (last visited Nov. 5, 2017).

²² *Id.*

the time period to redeem from a mortgage foreclosure sale in Alabama is six months for residential property, and one year for non-residential property.²³

Alabama law recognizes two distinct tax sale redemption periods. The first period, sometimes referred to as the “administrative” or “statutory” period, begins when the property is sold for taxes and continues for at least three years.²⁴ The second period, which has been referred to as the “judicial redemption” period, begins at the conclusion of the statutory period and continues as long as the former owner retains the level of “possession” identified by statutory and case law.²⁵

1. Statutory Redemption.

a. Statutory redemption period.

When land is sold to an individual at the tax sale (as opposed to being sold to the state), any party with an interest in the property (including lienholders and mortgagees) may redeem the property from the tax sale at any time within three years of the tax sale.²⁶ When land is deemed to be sold to the state due to there being an insufficient bid, the period of redemption under § 40-10-120 is the greater of three years or until the state sells or assigns its interest in the land to an individual. Section 40-10-120 also provides that a lienholder’s right to redeem continues for up to one year following written notice of the sale given by the purchaser. Thus, a lienholder’s statutory redemption period is the greater of three years from the tax sale, or one year from when the purchaser gives written notice of the sale. This time frame for redemption set forth in § 40-10-120 is commonly referred to as the “statutory redemption” period.

²³ § 6-5-248(b) (1975).

²⁴ § 40-10-120 (1975).

²⁵ See §§ 40-10-82, 83 (1975). See also *O’Connor v. Rabren*, 373 So.2d 302, 306 (Ala. 1979).

²⁶ § 40-10-120.

b. Redemption amount.

The procedure for redeeming land sold to a party other than the state is governed by § 40-10-122 of the Alabama Code. Pursuant to that section, one seeking to redeem must pay to the tax collector's office the amount for which the land was sold at the tax sale, together with the amount of all subsequent taxes paid by the purchaser, plus interest on those amounts.²⁷ Additionally, with respect to properties located in an urban renewal or urban redevelopment project area, the purchaser is entitled to recover from the redeeming party the value of all casualty insurance premiums paid and the value of "permanent improvements" made on to the property, together with interest. For properties containing a residential structure, the purchaser is entitled to recover the value of all casualty insurance premiums paid and the value of all "preservation improvements" made on the property, regardless of location, with interest.²⁸ There is no provision for the recovery of preservation or permanent improvements for commercial property not located in an urban renewal or urban redevelopment project area.

Many purchasers, though few, if any, institutional purchasers, are quick to assert possession of properties purchased, and to perform various types maintenance or preservation work on the properties. This proactive approach to possession appears to be undertaken on

²⁷ Paragraph (a) of the current section 40-10-122 provides as follows:

(a) In order to obtain the redemption of land from tax sales where the same has been sold to one other than the state, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated the amount of money for which the lands were sold, with interest payable at the rate of 8 percent per annum from date of sale, and, on the portion of any excess bid that is less than or equal to 15 percent of the market value as established by the county board of equalization, together with the amount of all taxes which have been paid by the purchaser, which fact shall be ascertained by consulting the records in the office of the tax collector, or other tax collecting official, with interest on said payment at 8 percent per annum.

²⁸ § 40-10-122(b) and (c) (emphasis added).

the assumption that the purchaser is assured of being reimbursed for the value of its preservation expenditures if the owner redeems. Not surprisingly, the owner and purchaser are often at odds with respect to whether the work qualifies for reimbursement, whether the work was necessary, and the value of the work. These frequent disputes lead to time consuming negotiations, litigation, and often disappointing results for all involved.

c. Interest on Redemption Amounts.

The interest rate on all amounts included in the redemption calculation is 12% per annum for properties sold before 2020, and 8% for properties sold after January 1, 2020. Interest accrues on the taxes paid, and on insurance and improvement expenses to the extent those expenses are recoverable. Because the "excess bid" is part of the amount paid at the tax sale, the excess bid and interest on the excess bid are part of the redemption amount under § 40-10-122. However, section 40-10-122 limits the portion of the excess bid on which interest must be paid to the portion of the excess bid that does not exceed 15% of the market value of the subject property as established by the county board of equalization.²⁹

d. Procedure for Redemption During the Statutory Period.

The process to redeem property during the statutory redemption period typically begins with a call to the county tax collector's office in order to obtain the redemption balance. Currently, many, if not all, counties in Alabama require the redeeming party to obtain a written verification from the tax purchaser that the tax purchaser has not incurred any of the reimbursable expenses (such as preservation expenses) identified in § 40-10-122(b) and (c). This requirement for verification can delay a redemption if the tax purchaser does not cooperate in returning the verification or if there is disagreement concerning the qualification and value of expenses incurred by the purchaser.

²⁹ § 40-10-122(a).

In establishing the amount the redeeming party must pay, counties apply any excess bid paid at the sale as a credit to the redemption amount. Thus, the redeeming party does not pay the excess bid, but does pay interest on the excess bid, plus the taxes and costs paid by the purchaser, the subsequent taxes paid by the purchaser, reimbursable preservation and insurance expenses, and interests on those amounts. If the property is redeemed, the county sends to the tax sale purchaser the amount the redeeming party paid the county to redeem, plus the excess bid held by the county.

The procedure for redemption when the land is sold to the state is governed by § 40-10-121, and is basically the same as when property is sold to an individual. The party seeking redemption applies to the county tax collector or revenue commissioner, and then pays the amount of money for which the lands were sold, with interest, together with the amount of all taxes found to be due on the lands since the date of the sale, with interest.³⁰

2. Post Statutory Redemption: “Judicial Redemption”.

Following the statutory redemption period, there is an additional right to redeem referred to as “judicial redemption.” This right of redemption cannot be accomplished through a county's tax collector's office. Instead, the right is recognized in the context of a lawsuit. Following the statutory redemption period, one having the right to redeem can file a lawsuit against the tax sale purchaser to redeem the property. Alternatively, if the purchaser files suit first against the former owner and/or lienholders to pursue possession of the property, the former owner and lienholders can assert the right to redeem in response to being sued.

Although the right to redeem exist in the context of a lawsuit, it is probably more common for the original owner and tax sale purchaser to effectuate a "redemption" by

³⁰ § 40-10-121.

agreement than through a legal action. Under this approach, the purchaser and the original owner (or those claiming through the original owner) negotiate and agree to an amount for which the purchaser will transfer its interest in the property (usually by quitclaim deed) to the original owner. The benefit of this approach is that it avoids the time and expense involved with a lawsuit.

a. Judicial redemption period.

The judicial right of redemption developed and evolved over decades through a series of Alabama judicial opinions applying what seemed to be a somewhat strained interpretation of previous versions of §§ 40-10-82 and -83. Referring to those statutes, courts concluded that, following the statutory redemption period, the right to redeem continues indefinitely if the owner has retained the minimally required possession. The Alabama Supreme Court, in *O'Connor v. Rabren*, 373 So.2d 302 (Ala. 1979), compared and summarized the statutory and judicial redemption periods provided by §§ 40-10-120 and 40-10-83, respectively, as follows:

Land sold for taxes to a purchaser other than the state may be redeemed within three years of the date of sale. Ala. Code 1975, § 40-10-120. The O'Connors' suits for redemption came four years after the sales. Thus, their only right to redeem is under Ala. Code 1975, § 40-10-83. *Heard v. Gunn*, 262 Ala. 283, 78 So.2d 313 (1955).

The purpose of § 40-10-83 is to preserve the right of redemption without limit of time, if the owner of the land seeking to redeem has retained possession. *Moorer v. Chastang*, 247 Ala. 676, 26 So.2d 75 (1946). The character of possession need not be actual and peaceable, but may be constructive or scrambling. *Tensaw Land & Timber Co. v. Rivers*, 244 Ala. 657, 15 So.2d 411 (1943).

Where there is no real occupancy of the land, constructive possession follows the title of the original owner and will not be cutoff by any possession by the tax purchaser short of

adverse possession. *Tensaw Land & Timber Co. v Rivers*,
supra.³¹

The judicial redemption right was further codified in 2009 when Alabama Code § 40-10-82 was amended to include the following language:

There shall be no time limit for recovery of real estate by an owner of land *who has retained possession*. If the owner of land seeking to redeem has retained possession, character of possession need not be actual and peaceful, but may be constructive and scrambling and, where there is no real occupancy of land, constructive possession follows title of the original owner and may only be cut off by adverse possession of the tax purchaser for three years after the purchaser is entitled to possession.³²

While the "judicial" right of redemption depends on the previous owner having "retained possession" of the property, the owner's actual possession is not required. Courts construe the possession requirement very liberally in favor of the owner. In fact, where there is a dispute as to whether the right to redeem exists or not, the tax sale purchaser must establish adverse possession for three years to cut off the right of redemption.³³

To exercise the right to redeem during the judicial redemption period, a redeeming party must file a lawsuit to assert its right to redeem the property. Alternatively, if the purchaser files an ejectment suit, the party wishing to redeem may respond by filing a motion in that lawsuit to exercise its right to redeem.³⁴

³¹ *O'Connor v. Rabren*, 373 So.2d 302, 306 (Ala. 1979).

³² § 40-10-82 (emphasis added).

³³ § 40-10-82; *Tanner v. Case*, 142 So. 2d 688, 693 (Ala. 1962); *McGuire v. Rogers*, 794 So. 2d 1131 (Ala. Civ. App. 2000).

³⁴ § 40-10-83.

b. Judicial redemption amount.

The amount that must be paid in a judicial redemption includes the same elements included in a statutory redemption. This includes the amount paid by the purchaser at the tax sale (including the excess bid), the subsequent taxes paid by the purchaser, and interest on those amounts.³⁵ Additionally, as with a statutory redemption, the purchaser is entitled to recover from the redeeming party (i) the value of all casualty insurance premiums paid and the value of "permanent improvements" made on property located within an urban renewal or urban redevelopment project area, together with interest, and (ii) the value of all casualty insurance premiums paid and the value of all "preservation improvements" made on any property which contains a residential structure thereon, regardless of location, together with interest.³⁶ Again, as it is with a statutory redemption, interest on the excess bid is limited to the portion of the excess bid that is equal to or less than fifteen percent (15%) of the market value of the property.³⁷ Like statutory redemption, the interest rate on all these items is 12% for properties sold before 2020, and 8% for properties sold in 2020 and thereafter.

At the time a judicial redemption occurs, the tax collector or revenue commissioner will still be holding the excess bid. Under the recent amendments to § 40-10-28, those funds are not to be released until the county is provided proof that the land sold has been redeemed.

Importantly, when the right to redeem is asserted in response to the purchaser's lawsuit for possession, the purchaser can seek as part of the redemption amount its reasonable attorney's fees for bringing the action.³⁸

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

3. Reduced Interest Rates on Redemptions.

I have noted that the interest rate on redemption is either 12% or 8%, depending on whether the tax sale was before or after January 1, 2020. This rate reduction is the result of the Alabama legislature's enactment of SB257 in 2018 which became Act 2018 - 494. SB257 reduced from 12% to 8% the per annum interest rate that applies to all of the reimbursable amounts payable to purchasers upon redemption or the invalidation of a tax sale.

Exactly when the rate reduction would take place was not clear under SB257. Section 2 of SB257, the "Effective Date" section, states: "This act shall become effective on January 1, 2020, for actions related to taxes delinquent on or after January 1, 2020." The logical interpretation of Section 2 is that the interest rate reduction would apply for the first time to taxes that come due on October 1, 2019, since that is the first year of taxes that could become delinquent "on or after January 1, 2020." Accordingly, properties sold for taxes in previous years would remain subject to the existing 12% interest after January 1, 2020. However, the actual changes to §§ 40-10-75, -76, -77, -83, and -122 made by SB257 seemed to impose the 8% interest rate to taxes that are delinquent before January 1, 2020. Fortunately, the Alabama Department of Revenue resolved this apparent inconsistency in issuing Administrative Rule 810-4-6-.02. According to that administrative rule, the interest rate reduction to 8% applies only to tax sales occurring after January 1, 2020. (<https://revenue.alabama.gov/tax-policy/proposed-rule-changes/>).

H. Enforcement of Purchaser's Rights (Ejectment and Quieting Title).³⁹

1. Taking Possession.

As stated in Section E above, the purchaser of property sold for taxes is entitled to possession immediately following the tax sale.⁴⁰ Obtaining possession cannot be accomplished by "self help," however, if doing so results in a "breach of the peace." Accordingly, in most instances, it is prudent to file a lawsuit for possession to exercise the right of possession. A lawsuit for possession also referred to as a suit for ejectment, can be brought after a six month demand for possession is first given.⁴¹ According to a recent opinion from Alabama's second highest court, this six month notice requirement applies only during the statutory redemption period. *Prescott v. Milne*, ____ So. 3rd ____ (Ala. Civ. App. 2019), 2019 WL 6798981. In other words, such notice is not required when the purchaser has a tax deed.

As a practical matter, institutional purchasers typically do not seek possession prior to the expiration of the three year statutory redemption period. Seeking possession involves time and expense, and there are risks associated with self-help possession. Nevertheless, where the value of a property is declining due to a lack of upkeep, greater consideration should be given to taking possession for purposes of preserving the value of the property. The determination of whether to seek possession should be done on a case by case basis to

³⁹ For a more extensive discussion of the ejectment and quiet title remedies, see William S. Hereford, Reducing Alabama State Owned, Tax Delinquent Properties by Clarifying the Laws of Redemption, 48 *Cumb. L. Rev.* 213 (2018). The article can also be accessed online at Cumberland Law School's law review website and at <https://www.burr.com/attorney/william-s-hereford/>.

⁴⁰ § 40-10-74 ("purchaser of lands at a tax sale other than the state or anyone claiming under him shall be entitled to possession of said lands immediately upon receipt of certificate of sale from the tax collector").

⁴¹ § 40-10-74.

weigh the potential loss in value of the property against the risks associated with taking possession.

2. Ejectment.

The legal claim for seeking possession is ejectment. The proper place to bring an ejectment action is in the county where the land is located.⁴² A plaintiff bringing an ejectment action must "prove that he had legal title to the land and was entitled to possession at the time of the commencement of the action and that he continued to hold title until the time of trial."⁴³ Service of process must be made according to Rule 4 of the Alabama Rules of Civil Procedure, just as required in other civil actions.⁴⁴ In most cases, personal service on the defendants will be required.⁴⁵

An order of ejectment in favor of a plaintiff grants to the plaintiff the right to possession against the defendants named in the order, and may be enforced by a "writ of possession." In executing a writ of possession in an ejectment action, the sheriff has a duty to place the plaintiff in actual and peaceable possession of the property.⁴⁶ Arguably, an ejectment order should eliminate the redemption rights of those defendants named in the order, and thus result in a "clear," insurable title against said defendants. Unfortunately, the case law supporting this argument does not satisfy most title underwriters in Alabama.

⁴² Jesse P. Evans, 111, *Alabama Property Rights and Remedies*, § 20.2[a](5th ed. 2012). ("The circuit court of the county in which the land that is the subject of an ejectment action lies has jurisdiction over an action of ejectment.")

⁴³ *Id.* at § 20.5.

⁴⁴ *Id.* at § 20.2[b].

⁴⁵ *Id.*

⁴⁶ *Lankford v. Green*, 62 Ala. 314, 319 (Ala. 1878) ("In the execution of a writ of possession, it is the duty of the sheriff to place the plaintiff in the actual and peaceable possession of the premises recovered.")

Under the Alabama statutory ejectment statute, Alabama Code § 6-6-280, the plaintiff may recover for “mesne profits” from a defendant who is wrongfully possessing the property. Mesne profits is generally understood to mean “fair rental value.”⁴⁷ The period for which mesne profits can be recovered begins when the wrongful possession begins and continues until redemption occurs or the plaintiff obtains a judgment for possession. The recent Alabama Court of Civil Appeals’ decision of *Prescott v. Milne*, 2019 WL 6798981, seemingly gives a big boost to a tax deed holder’s claim for rent against an owner. Though it remains unclear when an owner’s possession would become unlawful during the statutory redemption period, the *Prescott* decision supports the conclusion that the possession is unlawful as soon as the purchaser has a tax deed.

Notwithstanding the *Prescott* decision, seeking rent from the owner is not necessarily the best strategy. Seeking rent from the owner increases the risk to the owner of not just losing their property, but also having a money judgment entered against him or her. This increased risk to the owner may, and often does, cause the owner to more vigorously oppose the purchaser and challenge the validity of the tax sale. This will increase the purchaser’s legal costs, and possibly result in the tax sale being voided, thereby reducing the purchaser’s recovery from their investment.

3. Quieting Title.

In most instances, someone who owns a property by virtue of a tax sale will want to know that they have a complete and clear title to the property. The typical way to confirm that there is a complete and clear title is to obtain a title insurance policy. Exactly what must be done to achieve an “insurable” title is a discretionary determination by the title companies. Title companies want to be sure that all rights to redeem the property from the tax sale or to

⁴⁷ *Scott v. Colson*, 156 Ala. 450 (1908).

challenge the tax sale are forever eliminated. If there is any uncertainty as to whether these rights are eliminated, a title company will generally not agree to insure the title. Title companies are very cautious when it comes to Alabama tax titles because properties that have been sold for taxes generally have numerous title problems and because the law concerning who has redemption rights and when those rights expire is not sufficiently clear.

The primary factors a title company considers when assessing a tax deed title are possession and the record of title. Possession of the property by the tax title holder is necessary to eliminate redemption rights, but possession by itself is not sufficient for title insurance companies to insure a tax deed. To avoid any question about the possession of the property or any question concerning the validity of the tax sale, title companies in Alabama generally refuse to insure tax titles unless there is proof in the real property records that all title issues have been resolved. This can be accomplished either by a recorded transfer from a party with a right to redeem to the tax title holder, *i.e.*, by quitclaim deed, or by a quiet title order eliminating all redemption rights and affirming the validity of the tax sale, which order is then properly recorded.

Certain Alabama appellate opinions suggest that quiet title relief is not appropriate until the purchaser has been in possession of the property for at least three years. Through the years, case law established the principle that the right to redeem can be eliminated by the tax deed holder being in adverse possession for three years. The converse and equally established principle is that if the adverse possession is less than three years, then the owner may still assert a right to redeem. The Alabama legislature codified those principles by amending Alabama Code § 40-10-82 in 2009 to specifically provide that a tax purchaser

seeking to cut off the former owner's redemption rights by adverse possession must be in adverse possession of the purchased property for three years.⁴⁸

A number of cases have interpreted the three year adverse possession principle to mean that three years of adverse possession is a condition to a tax deed holder obtaining quiet title relief. According to Alabama Supreme Court decisions, a tax purchaser is entitled to "quiet title" relief only after being in exclusive, adverse possession for at least three years.⁴⁹ As a result of these opinions, many title companies will not insure title to a tax deed property even where a quiet title order has been entered, unless there is also proof that the tax deed holder has been in possession of the property for at least three years.

The principle that three years of adverse possession eliminates the right to redeem does not, however, compel the conclusion that three years of adverse possession is an absolute condition for quiet title relief. Further, the three year adverse possession principle is not the same as saying that adverse possession is the only way to eliminate the right to redeem. There is no reason why the right to redeem could not be eliminated voluntarily through releases from the holders of the redemption rights. Additionally, there is no logical reason why a form of possession that is of a greater quality than adverse possession could not be used to eliminate the right to redeem.

⁴⁸ The amendment to Alabama Code § 40-10-82 in 2009 provides, in relevant part, that:

There shall be no time limit for recovery of real estate by an owner of land who has retained possession. If the owner of land seeking to redeem has retained possession, character of possession need not be actual and peaceful, but may be constructive and scrambling and, where there is no real occupancy of land, constructive possession follows title of the original owner and may only be cut off by adverse possession of the tax purchaser for three years after the purchaser is entitled to possession.

⁴⁹ See *Southside Cmty. Dev. Corp. v. White*, 10 So.3d 990, 992 (Ala. 2008).

Under Alabama's specific quiet title statute, when there is "peaceable possession," a quiet title action does not require that the plaintiff be in peaceable possession for any length of time. "Peaceable possession" is defined as either actual or constructive possession that is so clear that no one denies it.⁵⁰ Outside the context of tax deeds, the law expressly provides for quiet title relief without any required length of possession. I see no reason why someone with a tax deed should be denied the rights of the specific quiet title statute just because their title is based on a tax deed. Accordingly, an argument can be made that where a tax title holder is in peaceable possession, the tax title holder can assert a claim under the specific quiet title statute, and not have to wait three years before bringing a lawsuit to quiet title.

When a tax deed holder cannot succeed in a quiet title action because it cannot prove peaceable possession, it would seem that it should be able to succeed in an ejectment action. Technically, an order of ejectment is the equivalent of a quiet title order with respect to establishing title to the property. Accordingly, an ejectment order establishes a purchaser's clear title against those parties identified in the order.

Unfortunately, there is insufficient authority for most title underwriters to accept these arguments relating to the availability of quiet title relief to a tax deed holder, or the effect of an ejectment order. Because title companies are risk averse, they must consider any possible interpretation of law that would expose them to liability. To avoid any risk with respect to the possession issue, title companies may require tax deed holders to demonstrate that they have been in possession for three years.⁵¹

⁵⁰ *Grogan v. Hillman*, 930 So. 2d 520, 523 (Ala. Civ. App. 2005).

⁵¹ This discussion concerning the conditions for title insurance does not encompass tax titles owned by land banks in Alabama. The legislation establishing land banks in Alabama expressly states that the land banks may seek quiet title relief without being in possession of the property.

When deciding whether to pursue quiet title relief, the tax title holder should consider the potential expenses for seeking quiet title relief in light of the value of the property. Frequently, title reports identify persons having an interest in the property who are deceased. When that occurs, the title company will require an *in rem* quiet title action. *In rem* quiet title actions require the appointment of a *guardian ad litem* to represent the interest of persons who may have an interest in the property, but who cannot be identified. Additionally, judges will sometimes appoint a *guardian ad litem* in cases where *in rem* relief is not requested when they are uncertain as to the parties with an interest in the property. For these and many other reasons, obtaining a quiet title order that will satisfy a title insurer can be very expensive.

4. Procedural Requirements for an *In Personam* Quiet Title Action.

A complaint to quiet title *in personam* must (1) describe the real property with certainty, (2) allege possession and ownership by the plaintiff, (3) allege that the defendants claim some "right, title, or interest in, or encumbrance upon" the real property, and (4) must demand that the defendant's "right, title, or interest in, or encumbrance upon" the real property was obtained by such defendant.⁵² In order to bring this action, no other action to test title can be pending.⁵³ This complaint must be personally served upon each defendant in accordance with the Alabama Rules of Civil Procedure.

5. Procedural Requirements for an *In Rem* Quiet Title Action.

The complaint to quiet title in an *in rem* action must be verified (in other words, the facts therein must be sworn to by the plaintiff or a representative of the plaintiff).⁵⁴

⁵² § 6-6-541.

⁵³ § 6-6-540.

⁵⁴ § 6-6-560.

Additionally, like an *in personam* action, in order to bring an *in rem* action, no other action to test title can be pending.⁵⁵ The complaint must be brought against the land and must describe the interest to be established as well as the plaintiff's origin of title.⁵⁶ The following persons or entities must be named as defendants in an *in rem* complaint: (1) all who have had possession of the real property within the last ten (10) years; (2) all who are known to the plaintiff to claim an interest in the real property; and (3) all who have assessed or paid taxes within the last ten (10) years.⁵⁷

The ages and addresses of all named defendants must be stated in the body of the complaint.⁵⁸ If the plaintiff is unable to locate any known persons or entities who should be defendants, the complaint must allege facts showing due diligence in attempting to locate such persons or entities.⁵⁹ Additionally, the complaint must request and the plaintiff must file a motion for the appointment of a *guardian ad litem* ("GAL") for any unknown defendants.⁶⁰ If any defendant is deceased, his or her heirs or devisees must be named as defendants.⁶¹

As to service of *in rem* complaints to quiet title, the named defendants must be served personally.⁶² Additionally, the pendency of the complaint must be "published once a week

⁵⁵ *Id.*

⁵⁶ § 6-6-561.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ § 6-6-562.

⁶¹ § 6-6-561.

⁶² *See* § 6-6-563.

for four consecutive weeks in some newspaper having general circulation and published in the county where the lands lie”⁶³ Finally, a notice of *lis pendens* must be recorded in the Office of the Judge of Probate for the county in which the real property is located.⁶⁴

III. SALE OF LIENS (ALA. CODE 40-10-180 THROUGH 40-10-200).

The second mechanism for Alabama counties to collect delinquent taxes was more firmly established by the Alabama legislature’s enactment of HB354 in 2018. HB354 greatly enhanced an already existing group of statutes, beginning with Alabama Code § 40-10-180, that had been identified under the title “Sale of Tax Liens.” Under the Sale of Tax Lien statutes, counties are authorized to sell their liens for unpaid taxes. The Sale of Tax Liens statutes are separate and distinct from the statutes governing the auction of real estate (or “sale of land”) discussed above (Ala. Code §§ 40-10-1 – 40-10-143). Though the Sale of Tax Liens system had been in existence in a less defined form before 2018, to my knowledge, no county had ever used the system until passage of HB354 in 2018. Counties have the option to use either tax recovery system, the older sale of land system or the newer sale of lien system. If a county wants to switch which system they use, they must give notice of the change by publication before October 1.

A. Overview of Lien Auction Sale.

Under the Sale of Tax Liens system, as modified by HB354, liens are sold individually to the bidder who bids the lowest interest rate on redemption. The bidding starts at 12% per annum, and the bidders bid to lower that interest rate. The bidder who offers the lowest interest rate is the winning bidder, and is issued a “tax lien certificate” upon payment

⁶³ § 6-6-564.

⁶⁴ *See* § 35-4-131(b).

to the county of the taxes, interests and costs due at the time of the sale. If there is more than one bidder willing to bid 0.00 percent, the tax collector is to draw lots to determine the winning bidder. The holder of the tax lien certificate (winning bidder) has the right to purchase subsequent tax liens at the same rate bid at the initial sale.

B. Redemption from Lien Auction.

Redemptions are handled through the county tax official's office. The amount that must be paid to redeem consist of the amount owed at the time of the tax sale plus interest at the lowest bid rate. Upon a property being redeemed, the tax collecting official is required to mail a copy of the certificate of redemption within ten (10) days to the holder of the tax lien certificate. The holder of the tax lien certificate must then make demand for release of the redemption amount. No deadline is provided for the tax collecting official to release the funds following the holder's demand.

C. Enforcement by Lien Holder.

After three years, and no more than ten years from the lien sale, the holder of the tax lien certificate can file a lawsuit to eliminate the right to redeem and to quiet title. Before filing suit, the holder must give thirty (30) days written notice to all parties identified by the property records as having an interest in the property. The right to redeem continues during the lawsuit up until the point of final judgment. Redeeming the property does not require payment of the tax lien holder's attorney's fees. However, the holder is entitled to a judgment against a party who redeems for the costs incurred by the holder in filing suit, including reasonable attorney's determined by the court, provided the redeeming party was properly served with the complaint. Thus, although the redemption amount does not include attorney's fees, there is an opportunity for the lien holder to recover attorney's fees by obtaining a judgment for the fees against the redeeming party.