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Introduction Symposium - Real Estate Finance - An Emphasis on Texas Law - Introduction.

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SYMPOSIUM: REAL ESTATE FINANCE—AN EMPHASIS ON TEXAS LAW

INTRODUCTION

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Attorneys with a preponderant real estate emphasis to their practice have for many years appreciated the coverage which *St. Mary's Law Journal* gives to that area of law. Recent issues of the Journal, for example, have provided valuable articles on real estate subjects such as land titles,¹ mortgages,² mechanics' liens,³ condominiums,⁴ landlord-tenant relations,⁵ and land use controls,⁶ as

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1. Student Symposium, *Texas Land Titles*, 6 ST. MARY'S L.J. 802 (1975); Student Symposium, *Texas Land Titles: Part II*, 7 ST. MARY'S L.J. 58 (1975); Comment, *USLTA: Marketable Record Title Act—A New Title Theory And Its Effect On Texas Law*, 12 ST. MARY'S L.J. 462 (1980).

2. Comment, *The Due-on-Sale Clause As A Reasonable Restraint On Alienation—A Proposal For Texas*, 8 ST. MARY'S L.J. 514 (1976).

3. Woodward, *The Hardeman Act—Some Unanswered Questions*, 6 ST. MARY'S L.J. 1 (1974); Comment, *USLTA: Article 5 "Construction Liens" Analyzed In Light Of Current Texas Law On Mechanics' And Materialmen's Liens*, 12 ST. MARY'S L.J. 113 (1980).

4. Comment, *An Analysis Of The Texas Condominium Act: Maintenance And Operation Of A Condominium Project*, 11 ST. MARY'S L.J. 861 (1980).

5. Sheehan, *Article 5236e—The Vanishing Panacea*, 10 ST. MARY'S L.J. 233 (1978); Comment, *Retaliatory Eviction In Texas—And Analysis And A Proposal*, 10 ST. MARY'S L.J. 303 (1978); Comment, *Texas Landlord Tenant Law And The Deceptive Trade Practices Act—Affirmative Remedies For The Tenant*, 8 ST. MARY'S L.J. 807 (1977); Comment, *The Implied Warranty Of Habitability In Landlord-Tenant Relationships: The Necessity Of Application In Texas*, 5 ST. MARY'S L.J. 64 (1973); Comment, *The Residential Tenant's Security Deposit—A Protected Interest Worth Litigating*, 8 ST. MARY'S L.J. 829 (1977).

6. Symposium, *Legal Aspects Of Environmental Problems: One Region's Response*, 8

well as other areas of law which are vital to the real estate practitioner, such as usury,⁷ partnerships,⁸ and securities regulation.⁹ The articles which follow in this issue continue the tradition by presenting analyses of various aspects of real estate finance.

The timing of this symposium is quite opportune. Although the subject of real estate finance has been discussed abundantly in newspapers and non-legal periodicals for the past few years—often receiving front-page billing—many important legal concepts affecting real estate finance are still at an infant stage of development. The articles in this symposium will, therefore, assist in accelerating the development of these concepts.

In the first article Jesse B. Heath, Jr. quite impressively reviews essentially *all* significant new developments in real estate financing. Although his article contains numerous important concepts, readers should be especially interested in Mr. Heath's commentary on the following two cases: *Durrett v. Washington National Insurance Co.*¹⁰ (inadequate bid price as a basis in bankruptcy for setting aside a foreclosure sale which occurred prior to the bankruptcy), and *Sonny Arnold, Inc. v. Sentry Savings Association*¹¹ (viability of the "due-on-sale" clauses in mortgages). As of the date

ST. MARY'S L.J. 18 (1976); Troilo, *The Texas Urban Renewal Law—An Important But Primitive Tool For Community Development*, 6 ST. MARY'S L.J. 76 (1974); Comment, *Land Use And Due Process—An Examination Of Current Federal And State Procedures*, 9 ST. MARY'S L.J. 846 (1978). See Comment, *Land Use Planning—A Prerequisite To Effective Zoning*, 11 ST. MARY'S L.J. 161 (1979); Comment, *Texas Historic Landmarks—Criteria For Designation*, 11 ST. MARY'S L.J. 176 (1979). See also Symposium, *Practical Aspects Of Environmental Litigation*, 9 ST. MARY'S L.J. 661 (1978).

7. Symposium, *Texas Usury Law*, 10 ST. MARY'S L.J. 678 (1979); Comment, *Computing Interest Rebates Under The Rule of 78ths: A Formula For Usury Upon Default In Maximum-Interest Precomputed Credit Transactions*, 10 ST. MARY'S L.J. 94 (1978); Comment, *Real Estate Sale-Leaseback Agreements Under Texas Usury Law: Circumvention Or Sale?*, 7 ST. MARY'S L.J. 821 (1976).

8. Symposium, *Limited Partnership Act*, 9 ST. MARY'S L.J. 441 (1978); Wolverson & Gwin, *Recent Amendments Of Partnership Tax Law—Complexities Prevent Meaningful Reform*, 9 ST. MARY'S L.J. 405 (1978).

9. Fisch, *Who Has "Access" To The Private Offering Exemption*, 5 ST. MARY'S L.J. 282 (1973); Student Symposium, *Interpreting The Statutory Definition Of A Security: Some Pragmatic Considerations*, 6 ST. MARY'S L.J. 95 (1974) (including Comment, *Real Estate Investments As Securities: The Sufficiency Of The Howey Test*, 6 ST. MARY'S L.J. 166 (1974)).

10. 621 F.2d 201 (5th Cir. 1980), discussed in the text accompanying notes 129 through 133 of Mr. Heath's article.

11. Docket No. 9247 (Tex. Civ. App.—Amarillo, filed June 2, 1980); discussed in the text accompanying note 198 of Mr. Heath's article.

this Introduction is being prepared, neither of the issues involved in these two cases has been finally resolved,¹² and Mr. Heath's analysis is therefore important as a chronological guidepost as well as a discussion of the relevant principles of law.

The second article by Eldon L. Youngblood is essential reading for those attempting to understand the labyrinth of priority rules affecting the competing interests of mechanics' lien claimants and mortgagees. Mr. Youngblood presents significant commentaries on all aspects of the landmark *Blaylock* decision rendered by the supreme court in 1978.¹³ He also argues quite convincingly for the continuation of the "common lien doctrine" (the doctrine that the liens of all contractors claiming pursuant to a particular construction project relate back to the earliest date of inception of any contractor), despite the failure of three courts of civil appeals to adhere to the doctrine.¹⁴ Also analyzed is the apparent conflict of judicial interpretation in two recent opinions concerning removable improvements.¹⁵ Finally, Mr. Youngblood addresses the roles of both the legislature and judiciary in fostering the necessary bal-

12. Although the *Durrett* case itself is final, another case with comparable facts and legal issues is pending in the U.S. Court of Appeals for the Fifth Circuit. *Harold C. Abramson v. Lakewood Bank & Trust Co.*, Docket No. 79-1592 (5th Cir., filed Mar. 12, 1979). In the *Sonny Arnold* case the court heard oral argument January 7, 1981; however, no decision has been rendered as of the date of this writing. Other pending Texas cases with "due-on-sale" clauses in dispute include the following: *Loeckle v. Gibraltar Sav. Ass'n*, Cause No. 80-10500-C, 68th Judicial District Court, Dallas County, Texas, transferred to Harris County, Texas (facts similar to those in the *Sonny Arnold* case) and *Crestview Ltd. v. Foremost Ins. Co.*, Cause No. 315,661, 126th Judicial District Court, Travis County, Texas (facts comparable to those in *Sonny Arnold* with the exception that the "due-on-sale" clause in the deed of trust provided that mortgagee's approval for any transfer "shall not be unreasonably withheld").

13. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794 (Tex. 1978), discussed in the text accompanying notes 23 through 48 and notes 119 through 129 of Mr. Youngblood's article.

14. *First Continental Real Estate Inv. Trust v. Continental Steel Co.*, 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ); *Ferris v. Security Sav. & Loan Ass'n*, 545 S.W. 208 (Tex. Civ. App.—Eastland 1976, no writ); *Perkins Constr. Co. v. Ten-Fifteen Corp.*, 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ). Mr. Youngblood's thorough and persuasive analysis is contained at the text accompanying footnotes 49 through 118 of his article.

15. *Richard H. Sikes, Inc. v. L & N Consultants, Inc.*, 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); *Surburban Homes Lumber Co. v. Lomas & Nettleton Financial Corp.* (*In re Jamail*), 609 F.2d 1387 (5th Cir. 1980). Mr. Youngblood's analysis of these apparently conflicting cases is contained at the text accompanying notes 140 through 152 of his article.

ance of competing interests evident within the construction industry.

The article by J. Cary Barton and Robert E. Morrison analyzes in great depth the re-emerging, and perhaps enduring, phenomenon of equity participation arrangements between institutional lenders and real estate developers. The article is quite exhaustive, and selecting a single aspect for emphasis in this Introduction is not easy. Readers, however, will be particularly impressed with two general aspects of the article. First, sections II, III, and IV do not merely repeat elementary concepts of partnership and corporate law but, instead, tailor each concept to the concerns of institutional lenders and developers in equity participation arrangements. Second, section V discusses significant development alternatives—and pitfalls—which this reader has not seen addressed with such thoroughness and insight in any other law review commentaries.

Another manner in which a real estate developer obtains financing is by means of a syndication (obtaining money from several private investors in lieu of, or in addition to, institutional financing). The article by John C. Andrews analyzes real estate syndications, discussing not only the securities aspects of these syndications but also the choice of syndication entity and tax considerations. Although readers will certainly want to update their files with Mr. Andrews' excellent treatment of the private offering exemption and the intrastate offering exemption, the section on broker-dealer registration also deserves careful study for his comments on this often ignored problem area.¹⁶

Foreign investment offers an additional alternative to institutional financing. The article by Stephen P. Jarchow discusses not only the legal aspects of foreign investment but also its historical antecedents. Mr. Jarchow's article includes an extensive tax analysis, a substantial portion of which addresses the Foreign Investment in Real Property Tax Act of 1980.¹⁷ Readers will enjoy the political and economic overview in this article and will find quite

16. See especially Mr. Andrews' analysis of the Commission's proposed rule 3a4-1, and related positions adopted by the Commission, discussed in the text accompanying notes 242 through 250 of his article.

17. Omnibus Reconciliation Act of 1980, Subtitle C—Taxation of Foreign Investment in United States Real Property, Pub. L. No. 96-499, 94 Stat. 2682.

valuable the practical suggestions which Mr. Jarchow inserts throughout the article, especially in the sections entitled "Legal Consultants" and "The Contract of Purchase" and the concluding remarks of the tax analysis.

This symposium issue includes three worthwhile student commentaries. The comment by Patricia E. Rant reviews non-judicial foreclosure procedures in Texas and compares them with the procedures set out in the proposed Uniform Land Transactions Act. The comment by Susan C. Shank reviews the Truth in Lending Simplification and Reform Act and disclosure requirements in home mortgage transactions. Finally, the comment by Scott R. Worthen analyzes the current status of variable rate mortgage in Texas. The three student comments not only contain valuable research and analysis but also indicate how real estate law is moving away from common law precedents and towards a more modern emphasis on statutory law.