IN THE SUPREME COURT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION,

Appellee,

vs.

CHARLES PHILLIP ELLIOTT, ET AL.,

Defendants,

CHARLES O. FARRAR,

Receiver-Appellee,

HOWARD DORE, RUTH DORE, GERALD J. BRAUN, CHRISTIE BRAUN AND MONICA BROOKE BRAUN

Claimants-Appellants.

CASE NO. 79,494

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ON CERTIFICATION FROM THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS

ANSWER BRIEF OF RECEIVER-APPELLEE, CHARLES O. FARRAR

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TABLE OF AUTHORITY

CASES	PAGE NO.
	13
	23
	15, 23

LAWS AND STATUTES

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QUESTION ON CERTIFICATION

Whether Florida tax certificates represent an interest in land for purposes of Article 9 of Florida's Uniform Commercial Code so that Article 9 does not govern their use as collateral in secured transactions by virtue of Florida Statute §679.104(10).

INTRODUCTION

This is an answer brief filed in connection with a question certified by the 11th Circuit Court of Appeals to this Court pursuant to Article 5, Section 3(b)(6) of the Florida Constitution, involving a question of Florida law determinative of the cause but unanswered by controlling precedent.

The case before the 11th Circuit involved an appeal by various claimants in an equity receivership from a Final Order entered by Judge William Hoeveler of the United States District Court for Southern District of Florida, approving a Final Plan for the Distribution of the Assets of the Receivership Estate.

Charles O. Farrar, the Court appointed equity Receiver in the District Court and Appellee both in the 11th Circuit and in this appeal will be referred to as "Appellee" or as "Receiver". The Appellants, Howard Dore, Ruth Dore, Gerald J. Braun, Christie Braun, and Monica Brooke Braun, who were also Appellants before the 11th Circuit had investments with the Receivership entities and filed claims in the proceedings pursuant to Court approved procedures. They will be referred to as "Appellants" or by their last name.

Reference to the Appellants' Brief in the 11th Circuit will be by "Dore's Br.", and the page number. Reference to the Receiver's Brief in the 11th Circuit will by "Rec. Br." and the page number. References to the Appellants' Brief before this Court will be by "Appellants Br." and the page number. Reference to the Receiver's appendix herein will be by "Rec. App.", the tab number and page number.

STATEMENT OF CASE

The Appellee does not disagree with the statement of the case as presented by Appellants but does feel the following additional information should be added for purposes of this appeal.

The Final Plan approved by the Federal District Court adopted the principal elements of a Proposed Plan recommended by the Receiver. The Proposed Plan was the result of lengthy investigation by the Receiver concerning the operation of the Receivership entities and approximately 1,890 claims filed by investors and creditors. (Rec. App. 1-1)

Although the District Court did not hold evidentiary hearings concerning the issue involved in this appeal, a procedure was adopted by the Court which allowed each claimant to file objections and legal and factual arguments in opposition to any portion of the Proposed Plan, prior to ruling by the Court.

In those proceedings counsel for the Appellants filed a lengthy objection to the Receiver's proposed classification of the tax certificates as general intangibles. However in the District Court they did not dispute the applicability of Article 9 to the transactions but instead argued that tax certificates are negotiable instruments under Article 3 and that their security interest was perfected by possession alone under §679.304 Fla. Stat. (Rec. App. 3-2). [1]

On Appeal to the 11th Circuit, the Dores and Brauns abandoned that position and contended that secured transactions involving tax

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[1] The Receiver filed a memorandum of law in the District Court pointing out that tax certificates do not fall within the definition of <u>any</u> of the types of writings as to which a pledge is permissible under Article 9. (Rec. App. 4_)

certificates are not governed by Article 9 of the Uniform Commercial Code but by Chapter 197 of the Florida Statutes providing for the creation and sale of such certificates. (Dore Br. 24). The Appellants claimed that under Chapter 197, a security interest in the tax certificates is perfected solely by their assignment in blank before a notary public and delivery. (Dore Br. 23) They also contended that their transactions are exempted from Article 9 by §679.104(10) Fla. Stat. which excludes transactions involving the creation or transfer of an interest in, or lien on real estate (Dore Br. 25).

Appellants argued alternatively before the 11th Circuit that if tax certificates are to be deemed within the purview of Florida's Uniform Commercial Code, the most apt classification would be as investment securities under Article 8 dealing with stocks and bonds, §678.01 Fla. Stat., et seq. Investment securities, like negotiable instruments, are perfected through a pledge under Article 9. §679.304 Fla. Stat.

The 11th Circuit in its Order certifying this issue to Florida's Supreme Court pointed out that "merely" because a security agreement bears a relation to land does not mean the agreement falls within the land exception", and that Florida Statues and Court decisions referring to tax certificates as creating a first lien on property "may not be dispositive of whether a tax certificate is an interest in land for purpose of Article 9". (Rec. App. 5)

STATEMENT OF FACTS

The Receiver does not dispute the Appellant's factual statement insofar as it recites the circumstances surrounding the Collateral Loan Investment agreements entered into by the Dores and Brauns with Elliott et al., which were purportedly secured by the delivery of Collier County tax certificates.

However it must be pointed out that prior to the appointment of the Receiver the Appellants: (1) never took any steps to publish constructive notice of their claimed security interest under any available filing system; (2)never filed a financing statement under §679.302 Fla. Stat; (3) never had the assignment of the tax certificates to them endorsed by the tax collector and reflected on the official records of tax certificates as provided in §197.462 Fla. Stat.; and (4) never recorded any notice of the assignment among the land records of any county in this State.

SUMMARY OF THE ARGUMENT

The 11th Circuit Court of Appeals has asked this Court to determine whether a Florida tax certificate represents an interest in land for purposes of Article 9 of Florida's Uniform Commercial Code, so that Article 9 does not govern the creation of a security interest therein by virtue of §679.104(10) Fla.Stat.(1985). This issue arose as a result of competing claims among creditors to the same collateral consisting of tax sale certificates issued in accordance with §197.01, et. seq Fla. Stat. (1985) ("Chapter 197"). The Dores and Brauns claim a prior perfected security interest in the tax certificates by virtue of their possession of them (with assignments in blank) as collateral for their loan to Elliott. The Receiver claims a superior interest in the tax certificates as a lien creditor having priority over unperfected security interests in all property of Elliott as of the date of appointment of the Receiver. §679.301(3) Fla.Stat. The federal District Court held that the Appellants' security interest in the tax certificates was unperfected because tax certificates are properly classified as general intangibles under Article 9 of the Uniform Commercial Code and the Dores and Brauns had failed to file the required financing statement with the Secretary of State. §679.106 & §679.302, Fla. Stat. (Rec. App. 2 10)

The Dores and Brauns claim that tax certificates represent an assignment of a lien on real property and, as such, are excluded entirely from Article 9 of the Uniform Commercial Code. They further argue that Chapter 197 not only governs the transfer of ownership of the tax certificate but also is applicable to a determination of their status and priority as secured lenders

claiming a lien on tax certificates as collateral. This argument is without merit. If the transaction between Elliott and the Dores and Brauns had been a simple purchase and transfer of a tax certificate, Chapter 197 arguably would be the controlling law applicable to a determination of whether an assignment which is valid and effective as against the tax collector had occurred. However, the issue is whether a perfected security interest in a tax certificate, effective against the Receiver as a competing lien creditor, was achieved in the transaction between Elliott and the Appellants. Chapter 197 does not address a secured lender's status and priority regarding tax certificates. The provisions in that chapter concerning the assignment and surrender of a tax certificate are intended merely to insulate the tax collector from conflicting demands for payment. There is no indication that the legislature intended Chapter 197 to exempt secured transactions involving tax certificates from the Uniform Commercial Code or to provide a separate filing system for recordation of security interests in tax certificates.

Neither is a secured transaction involving tax certificates as collateral for a loan excluded from Article 9 based upon §679.104(10) Fla. Stat. A tax certificate by its terms embodies only contractual rights between the tax collector and the purchaser of the certificate. Control of the lien for taxes is never relinquished by the tax collector who retains the exclusive right to enforce the lien and to collect and disburse tax redemption proceeds from the taxpayer. A purchaser of a tax certificate has no right to enforce the lien for taxes against either the land

owner or the land. He is not a simple assignee of a lien for taxes.

Furthermore, under §679.102 Fla.Stat. the application of Article 9 to a security interest in a tax certificate is not precluded by the fact that the lien securing the tax obligation involves real property. Additionally, transactions involving tax certificates are not recorded among the local land records in Florida. Instead, all records concerning them are kept by the local tax collector. The policy underlying the exemption found in §679.104(10) Fla. Stat. of avoiding conflicts between real and personal property laws and the burdens of dual recording on secured lenders has no application to a collateral assignment of a tax certificate.

Neither are transactions creating a security interest in a tax certificate by individual debtors exempt from the Florida Uniform Commercial Code under §679.104(5) Fla. Stat., which is inapplicable on its face. That section excludes only security interests created by governmental debtors.

Even if this Court were to accept the argument that a security interest in a tax certificate should be governed by real property law and not the Uniform Commercial Code, the Dores and Brauns nonetheless failed to record a notice of their security interest under either body of law. To avoid the consequences of their failure to record anything they also argue that neither the Uniform Commercial Code nor real property law apply to a secured transaction involving tax certificates.

Instead, they claim that provisions of Chapter 197 concerning the assignment and surrender of a tax certificate can be construed

as authorizing a pledge of tax certificates in the same manner as negotiable instruments or investment securities. However, the provisions of Chapter 197 dealing with the assignment and surrender of tax certificates are intended to insulate the tax collector from conflicting demands for payment, and cannot be construed as providing support for a valid common law pledge of tax certificates.

If such a construction were accepted, then lottery tickets, motor vehicle certificates, airplane tickets and many other writings whose surrender is required as a condition to realization of the rights represented thereby would likewise be capable of perfection through a pledge. Such a holding would undermine the narrow definition of the types of instruments listed in §679.105(1) (i) Fla. Stat. as to which perfection may be achieved through a pledge under Article 9.

Appellants' contention that tax certificates are intended to be transferred and pledged in the same fashion as negotiable instruments is belied by the clear pattern in Florida's revenue financing statutes which establishes that when instruments issued by the state of Florida or local taxing authorities are intended to function in the marketplace as commercial paper or investment securities, the enabling legislation explicitly provides that such governmental obligations shall have all the qualities and incidents of negotiable securities. Chapter 197 contains no such provision. The Dores' and Brauns' argument that lenders and others in the marketplace have nonetheless developed a "universal" business practice of negotiating and pledging tax certificates in the same

manner as bearer securities (i.e. with assignments in blank) is totally unsupported by the record or any other evidence.

A tax certificate sold under Chapter 197 is properly characterized as evidencing intangible contractual rights accorded the certificate purchaser by the issuing governmental taxing authority. Article 9 applies to and governs the creation and perfection of a security interest in such intangible personal property interests. Tax certificates are properly classified as general intangibles under Article 9.

ARGUMENT

I. FLORIDA TAX CERTIFICATES DO NOT REPRESENT AN INTEREST IN LAND FOR PURPOSES OF FLORIDA'S UNIFORM COMMERCIAL CODE, BUT ARE PROPERLY CHARACTERIZED AS "GENERAL INTANGIBLES" TO WHICH ARTICLE 9 (CHAPTER 679) MUST BE APPLIED TO DETERMINE THE METHOD FOR PERFECTING A SECURITY INTEREST IN SUCH A CERTIFICATE AS COLLATERAL FOR A LOAN.

A. FLORIDA TAX CERTIFICATES DO NOT REPRESENT AN INTEREST IN LAND FOR PURPOSES OF EXCLUSION UNDER FLORIDA'S UNIFORM COMMERCIAL CODE.

Appellants argued before the 11th Circuit that because tax certificates evidence an assignment of a lien on real property, a transaction involving their use as collateral for a loan is exempted under §679.105(10) Fla. Stat. (1985) [2] which excludes from Article 9:

> "The creation or transfer of an interest in or lien on real estate, including a lease or rent thereunder."

However, Florida tax certificates do not evidence an interest in land excluded under this section.

A tax certificate embodies two distinct contractual undertakings on the part of the governmental taxing authority. The first is an agreement that delinquent tax proceeds received by the tax collector on particular property will be paid to the purchaser of the tax certificate (if and when redemption occurs), and second, an agreement by the tax collector to conduct a statutory sale of the specific property upon application for a tax deed by the purchaser after the expiration of two years if the delinquent taxes have not been paid. These contractual rights do not create an

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[2] Citations to sections of Chapter 197 of the Florida Statutes and to the Uniform Commercial Code as enacted in Florida (Section 671.01, et. seq.) will be to the 1985 version, the year of issuance of the subject tax certificates and execution of the subject loan documents.

interest in real property. See, Martyn v. First Federal Sav. & Loan Ass'n of West Palm Beach, 257 So.2d 576 (Fla. 3d DCA 1971) where a lien on real property is held to be a chose in action which creates a lien on land but not an interest in the land.

Nor can a tax certificate, upon analysis, be said to represent an assignment of a lien on real property. In an assignment, the assignee succeeds to all of the assignor's rights to collect and enforce the assigned obligation. An assignee is said to "stand in the shoes of the assignor" in enforcing the assigned obligation against the obligor. A tax sale certificate bears no resemblance to such an assignment transaction. A purchaser of a tax certificate, the so-called "assignee" of the lien for taxes, has no right to proceed directly against the landowner or the lands to recover the amount paid for the tax certificate. §197.432(2) Fla. Stat. When the delinquent taxpayer redeems the certificate, he pays the money to the tax collector and does not deal directly with the holder. §197.472(1) Fla. Stat. The holder has no right to compromise or waive any of the interest, costs, penalties or other sums accruing under the terms of the certificate. If the tax collector fails to perform either by failing to pay the holder when the certificate is redeemed or by refusing to conduct a tax deed sale, the holder's only remedy would be to obtain a writ of mandamus against the tax collector. Rorick v. United States Sugar Corp. 120 F.2d 418 (5th Cir. 1941). A tax certificate, though it may arguably bear some relationship to land, is essentially an executory contract between the certificate purchaser and the tax collector. See, State ex rel Seville Holding Co. v. Draughon, 173 So. 353, 354 (Fla. 1937): "A 'tax certificate' is a contract

between the state and the purchaser thereof who is granted by such certificate the benefit of the laws of the state in force at the time securing and defining his rights under it".

B. ARTICLE 9 GOVERNS A SECURED TRANSACTION INVOLVING TAX CERTIFICATES AS COLLATERAL FOR A LOAN.

If the transaction between the Dores and Brauns and Elliott had merely involved a controversy over whether the assignment was valid and effective as against the assignor, (Elliott) and the obligor, (the tax collector), the issue would arguably be governed by the provisions of Chapter 197 of the Florida Statutes. However, the Appellants concede that is not the controversy. The issue is whether a valid, perfected security interest, good against competing third party creditors, was achieved by mere possession of the tax certificates given to them as collateral. Article 9 applies to any transaction regardless of its form which is intended to create a security interest in personal property. §679.102 Fla. Stat. The Dores and Brauns miss the mark when they argue that the assignment in blank by Elliott on the reverse of the tax sale certificates created a perfected security interest in favor of them as of the date of such assignment and delivery.

Nowhere in Chapter 197 or the administrative rules and regulations promulgated thereunder is there a procedure for filing a notice of a claimed security interest in a tax certificate listed on the tax collector's official rolls. There is not a single provision found in Chapter 197 which is intended to provide a mechanism for recording a security interest in tax certificates, a system of priorities among competing creditors of a purchaser of a tax certificate or a procedure for enforcing a lien or security

interest in a tax certificate. Florida does, in fact, have certain specialized central filing statutes with respect to secured transactions in particular types of personal property and the UCC recognizes that where such mini-recording acts exist, a filing under Article 9 procedures is not required. §679.302(3) Fla. Stat. This section expressly recognizes two such Florida Statutes, Chapter 319 (which deals with motor vehicle title certificates) and Chapter 328 (which deals with vessel title certificates).

This Court recently held that dual filing is not required under both the Uniform Commercial Code and §561.65(4) Fla. Stat. (1987) in order to perfect a security interest in a liquor license. United States of America v. McGurn, 17 Fla. L. Weekly S208 (April 2, 1992). The comprehensive nature of §561.65(4), Fla. Stat. persuaded this Court in McGurn that the legislature intended that statute to provide the exclusive means of perfecting a lien on a liquor license. No such comprehensive statutory counterpart is found in Chapter 197 of the Florida Statutes. [3]

Requiring creditors to file a financing statement to perfect a security interest in a tax certificate is not "another procedural hoop" which would result in confusion regarding the status of a secured lien and competing creditors' claims against a liquor license. McGurn, a p. S210. None of the policy matters which troubled this Court in McGurn are present in the instant case.

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[3] See also, the analysis made by the courts in In re TR-3 Indus., 41 B.R. 128 (Bankr. C.D. Cal. 1984); and In re Roman Cleaner Co., 43 B.R. 940 (Bankr. E.D. Mich. 1984), aff'd. mem. (E.D. Mich. 1985), 802 F.2d. 207 (6th Cir. 1986) where the Lanham Act governing trademarks (15 U.S.C. §1060) was held not to preempt the U.C.C. with respect to perfection of a security interest in a trademark despite that act's provisions on assignment and registration.

Instead, if Article 9 is inapplicable to a lien on a tax certificate, there would be no statutory guidance for lenders wishing to be certain of their secured status and priority.

Moreover, the fact that the contractual obligations embodied in the tax certificate may ultimately be secured by a lien on real property is not sufficient to render Article 9 inapplicable to the creation and perfection of a security interest in the tax certificate itself. §679.102(3) Fla. Stat. provides:

> The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

The effect of this section is to bring back into Article 9 transactions which would appear, at first blush, to be excluded under §679.104(10) Fla. Stat.

Thus, on the first tier, Chapter 197 governs the creation and sale of a tax certificate. However, when a purchaser grants a security interest in a tax certificate to collateralize his own obligations to a lender, Article 9 applies to the security interest thus created on the "second tier" and the question becomes the proper classification of the collateral (i.e., the tax certificate) in order to determine the method of perfection.

Courts applying Florida law in construing the interrelationship of §679.102(3) to §679.104(10) Fla. Stat. in such "two-tier" transactions involving an underlying interest in real estate have held that Article 9 governs the perfection of a security interest in a vendor's interest in contracts for the sale of real estate and to a security interest in real estate leases assigned as collateral. See, Gould, Inc. v. Hydro-Ski

International Corporation, 287 So.2d 115 (4th DCA 1973); In re Equitable Development Corp., 20 UCCR 1349 (Bk. Ct. S.D. Fla. 1976); In re Boogaart of Florida, Inc., 33 UCCR 69 (Bk. Ct. S.D. Fla. 1981) and In the Matter of Associated Air Services, Inc., 39 UCCR 1001 (Bk. Ct. S.D. Fla. 1984). See also, In re Shams,54 B.R. 61 (Bankr. S.D. Fla. 1985) where a collateral assignment of a beneficial interest in a land trust was held subject to the perfection rules of Article 9 as enacted in Florida.

The Appellants' reliance upon Rucker v. State Exchange Bank, 355 So.2d 171 (Fla. 1st DCA 1978) as overruling the analysis made by the courts in the above decisions is misplaced. In Rucker, the court considered the question of whether it is necessary under Article 9 both to take possession of a note pledged as collateral and to file a financing statement with respect to the assignment of the mortgage securing the pledged note.

The issue arose because the collateral assigned to the lender as security consisted of two distinct documents (a note and a mortgage) representing two distinct categories of personal property interests under Article 9. A security interest in a note, as an instrument under Article 9, could only be perfected by possession. §679.304 Fla. Stat. The mortgage, as a general intangible under Article 9, could only be perfected by a filing. §679.302 Fla. Stat.

The court in Rucker observed that the drafters of the UCC in their Official Comment to §679.102(3) Fla. Stat. stated that whether the transfer of a mortgage which is the collateral for a pledged note requires further action (such as recording an assignment of the mortgagee's interest) is left to local law. The

Rucker court then went on to observe that Florida does in fact have an express requirement in §701.02, Fla. Stat. that an assignment of a real estate mortgage must be recorded among local land records in order to give constructive notice of the claimed interest in the mortgage. The secured party in Rucker had, in fact, recorded a collateral assignment of the mortgage among the local land records as required under §701.02 Fla. Stat. and had thereby given constructive notice of its claimed interest.

The rationale of the court in Rucker is not applicable here. There is no specific Florida statute requiring tax certificates themselves or collateral assignments of tax certificates to be recorded among the local land records. To the contrary, owners of property in Florida are held to know that all official records concerning delinquent taxes as well as a list of tax certificates sold (including, inter alia, the names of the purchasers of the certificates) are kept by the local tax collector under the provisions of §197.332, §197.432(8) and §197.462(2), Fla. Stat.

Moreover, the Dores did not attempt to avail themselves of the "protection" afforded by Florida's real property recording act by recording a notice of the collateral assignment of the certificates to them. Indeed, although they contend that tax certificates should be excluded from Article 9 because they represent on assignment of a lien on real property, Appellants nonetheless do not urge that local real estate law should apply to their transaction with Elliott.

The only other subsection which the Dores and Brauns cite under §679.104, Fla. Stat. as a basis for excluding the secured transaction between Elliott and them from Article 9 is on its face

inapplicable. They cite §679.104(5) Fla. Stat. which concerns governmental borrowings where assets of the sovereign are pledged or assigned as collateral. See, §679.104 Fla. Stat.; (U.C.C. Official Comment No. 5). According to the commentary, this provision merely clarifies that security interests granted in specific government-owned assets which collateralize a debt obligation of a governmental authority are exempt from Article 9. An example would be a pledge by a local governmental agency of all revenue from tolls received with respect to a state-owned turnpike or bridge facility as collateral for bonds issued to finance the construction of such a facility. The security interest or lien on the toll receipts granted by the governmental agency to the bond trustee would be exempt from Article 9. Put simply, a financing statement naming the governmental entity as debtor and describing the toll receipts as collateral would not have to be filed.

The Appellants cannot seriously argue that the intent of this subsection is to exclude from Article 9 private transactions in which, for example, an individual borrower collaterizes his loan from a bank or other lender with his U.S. treasury or municipal bonds. The Dores' and Brauns' reliance upon the exclusion for governmental borrowings in §679.104(5) Fla. Stat. is patently erroneous. See, e.g., In re H.J. Otten Co., Inc., 8 B.R. 781 (W.D. NY 1981)

The federal district court classified the rights evidenced by a tax certificate as a general intangible under Article 9:

> "'General Intangible' means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments and money".
> §679.106 Fla. Stat.

This category is expressly designed to be a catch-all definition intended by the drafters of the UCC to bring under Article 9 "miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security." §679.106 Fla. Stat.; (U.C.C. Official Comment) For example, a collateral assignment of a beneficial interest in a land trust is a general intangible. See, In re Shams 54 B.R. 61 (Bankr. 5.0. Fla. 1985); as is the right to payment of principal and interest under mortgage pass-through certificates. In re ESM Government Securities, Inc., 812 F.2d 1374 (11th Cir. 1987).

C. CHAPTER 197 DOES NOT SANCTION A COMMON LAW PLEDGE AS A METHOD OF PERFECTION.

The Dores and Brauns also argue that Chapter 197 authorizes tax certificates to be pledged and negotiated in the same manner as commercial paper or negotiable securities. According to their argument, a security interest or lien may be perfected through a pledge of the tax certificate with no further publication or Article 9 filing needed in order to impart notice of their claimed lien.

A review of relevant Florida statutes reveals that in specific instances where this state authorizes the issuance of certificates of indebtedness, revenue bonds, assessment bonds, etc. by special ad valorem and non-ad valorem taxing districts, Florida's legislature, by express statute, indicates its intention that such instruments circulate in the marketplace as negotiable instruments and investment securities. Florida Statutes Chapter 153 entitled, "Water and Sewer District Boards" authorizes the issuance of

revenue bonds, general obligation bonds or assessment bonds and §153.72 Fla. Stat. provides:

> "All revenue bonds, general obligation bonds or assessment bonds issued hereunder shall be and constitute, and have all the qualities and incidents of negotiable instruments under the law merchant and the Negotiable Instruments Law of Florida, and shall not be invalid for any irregularity or defect in the proceedings through the issuance and sale thereof and shall be incontestable in the hands of bona fide purchasers for value." §153.72, Fla. Stat.

Chapter 197 contains no similar provision relating to tax certificates and, to the contrary, provides an express procedure whereby an improperly issued tax certificate can be canceled after sale to a bona fide purchaser. §197.442 and §197.443 Fla. Stat.

Another provision of Chapter 153 authorizes the issuance of certificates of indebtedness against specific parcels of land assessed for improvements but states in subsection (5) thereof that:

> All assessment bonds or other obligations issued under the provisions of this law, except certificates of indebtedness issued against separate parcels of land as provided in this section, shall be and constitute and have all the qualities and incidents of negotiable instruments under the law merchant and the negotiable instruments law of this state. Section 153.74(5) (emphasis added)

Chapter 170, Florida Statutes deals with the issuance of municipal improvement bonds. Again, there is a specific statute providing that all such bonds shall constitute negotiable instruments. §170.20, Fla. Stat.

Chapter 190, entitled "Community Development Districts" also authorizes the issuance of certificates of indebtedness as to

specific parcels of land assessed for improvements. Once again, a specific statute provides that all assessment bonds or other obligations issued under that act will have all of the qualities and incidents of negotiable instruments except for certificates of indebtedness issued against separate lots or parcels of land. §190.023, Fla. Stat. To hold that Chapter 197 tax certificates issued against separate lots or parcels of land are intended to circulate in the marketplace in the same manner as negotiable instruments would be to ignore the clear pattern and intent of Florida's legislature with respect to certificates of this type.

Moreover the pattern evidenced by the above revenue financing laws makes highly suspect the Dores' and Brauns' unsupported assertion that "current business practices" confirm that "unquestionably, possession of the document itself is the evidence of the ownership of the lien interest". (App. Br.12) How can such business practices be simply presumed to exist when dealers in governmental revenue-financing issues should arguably be familiar with the statutory declarations of legislative intent concerning such debt issues? No lender could confuse a tax certificate issued in accordance with Chapter 197 with, for example, a revenue bond or a state warrant issued in accordance with the laws of this state. [4]

[4] The most obvious distinction is the uncertainty of payment of any money under a tax certificate. There is no obligor or maker obligated unconditionally to pay anything. There is no rational basis upon which to determine the timing of payment (if ever) or whether the land owner is insolvent, with bankruptcy and an automatic stay imminent. In short, there is no readily ascertainable means to establish a market value for tax certificates. These characteristics, peculiar to tax certificates, impair their suitability for use as commercial collateral with institutional lenders. They would likewise make any demand for their free transferability in the marketplace questionable at best.

The Dore's place great reliance upon the fact that the tax certificate must be surrendered to the tax collector when the redemption proceeds are disbursed. Such required surrender, according to their argument, is persuasive evidence that tax certificates are writings capable of a valid common law pledge. The role of possession is critical when dealing with negotiable instruments; however, when dealing with winning lottery tickets, motor vehicle certificates, airplane tickets and similar documents whose surrender is a prerequisite to realization of the rights evidenced thereby, possession alone is irrelevant in determining priorities among competing third party creditors. [5]

The Dore's policy argument that both possession and a filed financing statement would be unduly burdensome to lenders seeking a perfected security interest in a tax certificate is unpersuasive. This is not a situation where a lender would be required to search and file under two parallel recording systems as in the case of Rucker and McGurn. Both Rucker and McGurn involved a specific statutory filing requirement under a chapter other than Article 9 in order to perfect a claimed lien or security interest in the type of collateral under consideration in those cases. Here, there is no specific statute requiring liens on tax certificates to be filed in a manner other than that provided in Article 9 of the Uniform

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[5] See, e.g. Freightliner Mkt. Dev. Corp. v. Silver Wheel Freightlines, Inc. 833 F.2d 362 (9th Cir. 1987) possession of motor vehicle certificates ineffective to perfect security interest; See also, Lee v. Cox, 18 UCCR 807 (Bk. Ct. M.O. Tenn. 1976), possession of thoroughbred registration papers until payment of the purchase price is ineffective against a bankruptcy trustee having the status of a lien creditor. See also, In re Air Flo System, Inc., 49 B.R. 321 (Bankr. S.D. Fla. 1985), sub nom. United States v. Air Florida, Inc., No.85-313-, slip op. (S.D. Fla. 1983) airline tickets are not instruments for purposes of Article 9 of the U.C.C.

Commercial Code. The instant case is more akin to lenders holding a security interest in a motor vehicle who follow the universal business practice of having their lien noted by the Department of Motor Vehicles and who then retain possession of the original certificate of title until their lien is satisfied. Their reason for holding the certificate of title is the same as that with respect to tax certificates: to prevent unauthorized transfer and sale. It is not to ensure priority over competing creditors.

Similarly, in In re ESM Government Securities, Inc., 812 F.2d 1374 (11th Cir. 1987) the Court ruled that a secured creditor must not only retain possession of a mortgage pass-thru certificate but must also file a financing statement covering the principal and interest payable thereunder as a general intangible. Indeed, a ruling by this Court that a secured transaction involving tax certificates as collateral for a loan is excluded from Article 9 would lead to uncertainty among lenders who would then have no statutory guidance at all concerning the proper method of creation and enforcement of a security interest in tax certificates. Certainly it is clear that Chapter 197 provides no such guidance.

The Dores also argue that the tax collector would be unduly burdened because he would have to search for financing statements filed with the Secretary of State prior to paying redemption proceeds to the party surrendering the tax certificate. This is not correct. The tax collector would have no "additional" duty to search for filings with the Secretary of State in order to ensure he pays the proper party. The tax collector has no duty to search for recorded federal tax liens or judgments or any other liens against the record owner of the tax certificate prior to payment.

The Appellants' argument on this point demonstrates once again their misunderstanding of the underlying purpose of the provisions of Chapter 197 concerning assignment and surrender of tax certificates. These provisions insulate the tax collector from any administrative burden in discharging his duties under the tax certificates. Similar legislation has long existed with respect to federal government obligors. [6]

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[6] The most familiar example is the federal Assignment of Claims of Act of 1940 (41 U.S.C. §15) which the courts have construed as designed soley to protect the United States government by its statutory requirement that, all assignees must file written notice of an assignment with certain government agencies and as having no affect on the rights of an assignor/assignees inter se or as preempting state laws under the Uniform Commercial Code. See, e.g., Matter of Palmetto Pump & Irr., 81 B.R. 109 (Bankr. M.D. Fla. 1987) which held that failure to comply with the Assignment of Claims Act did not invalidate a creditor's secured status in bankruptcy where the creditor had complied with the Uniform Commercial Code. That case involved a creditor who, based upon his filed financing statement covering general intangibles, claimed a perfected security interest in a tax refund due the bankrupt although he had not complied with the Assignment of Claims Act.

CONCLUSION

A Florida tax certificate does not represent an interest in land for purposes of exclusion under Florida's Uniform Commercial Code, nor does it represent an assignment of a lien on real property. It does represent two (2) distinct contractual undertakings by the local government taxing authority. The fact that those obligations may be secured by a lien on real property is not sufficient to render Article 9 inapplicable by reason of §679.104(10) Fla. Stat.

While Chapter 197 may govern the creation, sale and assignment of tax certificates, it does not contain any provision for a central filing system for recordation of security interests. Neither can provisions of Chapter 197 concerning the assignment and surrender of a tax certificate be construed as authorizing a pledge in the same manner as negotiable instruments or as preempting the application of Article 9 to secured transactions involving tax certificates.

A tax certificate is properly characterized as evidence of contractual rights accorded the certificate purchasers. As such it is a general intangible to which Article 9 applies as to the creation and perfection of security interests.

Therefore Appellee, Charles O. Farrar as Receiver requests that this Court answer the question certified to it by the United States Court of Appeals for the 11th Circuit by indicating that Florida tax certificates do not represent an interest in land for purposes of exclusion under Florida's Uniform Commercial Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to Mark A. Ebelini, Esq., 1625 Hendry Street, Suite 301 Fort Myers, Florida 33901 on this 15th day May, 1992.

BY: _____
Marsha L. Lyons, Esq.