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IN THE SUPREME COURT OF FLORIDA

SECURITIES AND EXCHANGE
COMMISSION,

Appellee,

vs.

CHARLES PHILLIP ELLIOTT,
ET AL,

Defendants,

CHARLES O. FARRAR,

Receiver-Appellee,

KENNETH J. DAVIS, et al.,

Claimants-Appellants.

CASE NO. 79,494

FILED

SID J. WHITE

APR 14 1992

CLERK, SUPREME COURT

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Chief Deputy Clerk

ON CERTIFICATION FROM THE UNITED STATES ELEVENTH CIRCUIT
COURT OF APPEALS

INITIAL BRIEF OF CLAIMANTS-APPELLANTS, HOWARD DORE, RUTH DORE,
GERALD J. BRAUN AND CHRISTIE BRAUN

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PRELIMINARY STATEMENT

In this brief, Claimants-Appellants, Howard Dore, Ruth Dore, Gerald J. Braun and Christie Braun, will be referred to by their proper names or, collectively, as "Dores". Appellee, Charles O. Farrar, Receiver-Appellee will be referred to as "Receiver". All other parties will be referred to by their proper names, except as indicated herein. Citations to the multi-volume record before the Eleventh Circuit Court have been omitted but appear in the initial brief.

There is an appendix attached to this brief. References to the appendix will be by the letter "A" followed by the appropriate page number or numbers.

STATEMENT OF THE CASE

This question has come before this court on certification from the United States Court of Appeals in and for the Eleventh Circuit. This court has jurisdiction pursuant to Article V, Section 3(b)(6), Florida Constitution.

The case before the United States Court of Appeals was an appeal by twenty-seven (27) claimants in an equity receivership from a final order entered by Judge William Hooveler of the United States District Court for the Southern District of Florida rendered on April 29, 1989. The order appealed established a final plan for distribution of assets of the receivership estate. The Receiver was appointed following a Securities and Exchange Commission (SEC) complaint against a promoter, Charles Phillip Elliott, and his related companies for various violations of the Securities and Exchange Act.

The appeals challenged the disposition of various claims in the final plan as well as the summary procedure employed by the District Court in disposing of the receivership assets¹. Many of the substantive issues pertained to whether certain of the appellants had perfected security interests in various collateral.

Claimants-Appellants, Howard Dore, Ruth Dore, Gerald J. Braun,

¹ Due to the summary procedure employed by the Receiver, no evidentiary hearing was ever held on this issue, therefore, there is no transcript and no depositions of any party to the collateral loan agreements.

Christie Braun² challenged, *inter alia*, the district court's disposition in its final order on their claimed secured status in certain tax certificates in their possession. In its final plan, the district court determined that the tax certificates held by Claimants-Appellants as collateral were "general intangibles" and not "instruments" or "chattel paper" and, therefore, the only way Appellants could have perfected a security interest in the tax certificates was to file financing statements with the Secretary of State pursuant to Florida's Uniform Commercial Code. The Appellants did not file financing statements.

Claimants-Appellants timely filed an appeal of the final order to the United States Circuit Court of Appeals for the Eleventh Circuit on May 30, 1989.

On February 27, 1992 the Eleventh Circuit Court rendered its decision on the appeals. In its decision the court reserved its ruling on the question of the proper characterization of tax certificates, certifying to this court the question of whether a Florida tax certificate represents an interest in land for the purposes of the Florida's Uniform Commercial Code.

² Monica Brooke Braun was also a named Claimant-Appellant, but her interest was limited to other issues not before this court.

STATEMENT OF FACTS

On June 20, 1985, Phillip Elliott d/b/a Elliott Enterprises ("Elliott") entered into a collateralized loan agreement with Howard Dore and Ruth Dore (as co-trustees under an agreement dated April 4, 1984).³ (A1) Mr. & Mrs. Dore's agreement with Elliott was in the face amount of Twenty Thousand (\$20,000.00) Dollars paid by the Dores to Elliott. The agreement provided for monthly "interest only" payments at a rate of fifteen (15%) percent of the principal per annum, or Two Hundred Fifty (\$250.00) Dollars per month, for two (2) years until its maturity on June 20, 1987. Id. At maturity, the principal amount of Twenty Thousand (\$20,000.00) Dollars was to be repaid to Mr. & Mrs. Dore and any collateral held by the Dores was to be returned to Elliott. Id.

As security for this agreement, Elliott tendered Collier County Tax Certificate No. 210 to Mr. & Mrs. Dore. (A2) The certificate had a face amount of \$23,211.87 and was secured by a first lien on a parcel of real property in Collier County with a taxable value of \$1,796,250.00. Id. The interest rate of the tax certificate was indicated at eighteen (18%) percent per annum. Id.

The tax certificate had been originally issued to Gary K. Wilson but was transferred by endorsement to Phillip Elliott on May 31, 1985, in accordance with the form contained on the reverse side of the certificate document. Id. at 3.

Phillip Elliott then transferred the certificate by

³ The loan agreement was one of many "collateral loan agreements" and repurchase agreement entered into between the Appellants, as investors and Elliott.

endorsement in blank on June 20, 1985 and delivered the certificate to the Dores. Id. Mr. Wilson's signature and Mr. Elliott's signature were each acknowledged by a notary public as provided on the certificate form. Id.

On August 2, 1985 Elliott entered into a second collateral loan agreement with Mr. & Mrs. Dore in the names of their daughter and son-in-law, Gerald J. Braun and Christie Braun, as joint tenants with rights of survivorship, in the face amount of Five Thousand (\$5,000.00) Dollars. (A4) This agreement also provided for monthly "interest only" payments on the loan for two years at sixteen (16%) percent interest per annum or Sixty Six (\$66.67) Dollars 67/100 per month. Id. The maturity date of the agreement was August 2, 1987, at which time the principal amount would be repaid to Mr. & Mrs. Dore and any collateral held by the Dores would be returned to Elliott. Id.

As security for the loan, Elliott tendered Collier County Tax Certificate No. 4877 to Howard and Ruth Dore. (A5) The certificate was in the face amount of \$3,091.38 representing a first lien for taxes on forty (40) acres of land in Collier County with a taxable value of \$230,900.00. Id. The interest rate of this certificate was also eighteen (18%) percent. Id. The certificate had been originally issued to Phillip Elliott and was transferred by him by endorsement in blank on August 15, 1985 and delivered to the Dores. Id. Phillip Elliott's signature was acknowledged by a notary public, as provided for on the certificate form. Id.

In both cases, Phillip Elliott tendered tax certificates to

Mr. & Mrs. Dore which included executed endorsements in accordance with the form provided on the certificate by the Florida Department of Revenue. (Form DR 509) (A3,6) The endorsement form provides that the transferor transfers "all right, title and interest in the foregoing tax certificate" (emphasis added) and contains a form for an acknowledgment by a notary public. Id. The certificate provides that "Endorsement must be acknowledged before the tax collector or a notary public." Id. The form also provides that where acknowledgment is by a notary public as in the instant case, the tax collector's office should be notified of the change in ownership. Id.

The Dores received timely interest payments under all their agreements with Phillip Elliott until the District Court's issuance of the final judgment of permanent injunction on March 31, 1987. The Dores retained possession of the two tax certificates throughout the subsequent receivership proceedings, refusing to turn the certificates over to the Receiver. However, they could not receive the tax payments made by the property owners on the parcels because of the lower court's injunction.⁴ The Dores subsequently filed timely proofs of claim for their certificates as required by the District Court. The Dores never considered filing

⁴ Upon learning of the SEC action by media coverage, Mr. & Mrs. Dore travelled to Collier County with the certificates and attempted to collect any redemption proceeds for the properties liened by their certificates. However, Mr. & Mrs. Dore but were informed by the Collier County Tax Collector that payment could not be made by his office because the tax certificates were "frozen" by court order. They also learned of the "stops" placed on all their securities by the receiver, which rendered them non-transferable.

financing statements with the Florida Secretary of State, believing they were secured holders of the certificates under the tax laws.

The Receiver's proposed plan characterized tax certificates, conditionally pledged or delivered to investors as collateral for their agreements, as "a general intangible" evidencing a contractual right. (A7) The receiver opined that investors holding tax certificates were not secured investors because they had not perfected their security interests as required by Section 679.302(1), Fla.Stat., by filing financing statements with the Secretary of State. Id.

Despite the objection and legal arguments of the Dores, the district court agreed with the Receiver and, in its final plan, held that the tax certificates were properly classified by the receiver as general intangibles under Chapter 679. In its final order the district court held as follows:

The rights represented by a tax certificate are properly classified under Fla.Stat. §679.106 as a 'general intangible', and not as 'instruments' or 'chattel paper' as defined successively in Fla.Stat. §§679.105(1)(i) and 679.104(1)(b) (sic.) [679.105(1)(b)]. As a result, possession of such certificates by claimants did not give rise to a perfected security interest under Fla.Stat. §679.304. The only method by which a security interest in a general intangible can be perfected under the code is by filing a financing statement with the Secretary of State. Fla.Stat. §679.302(1). None of the investors in question had filed financing statements with the Secretary of State and had no perfected interest in such collateral. (A8)

The district court held that investors holding tax certificates, had a valid unsecured claim to the extent of the amount of their approved claim. (A9)

On appeal, the Eleventh Circuit Court of Appeals found that this case involved a question of Florida law which was "unanswered by controlling precedent [of this court]". (A10)

The question, as presented by the United States Circuit Court of Appeal to this court was as follows:

DOES A FLORIDA TAX CERTIFICATE REPRESENT AN INTEREST IN LAND FOR PURPOSES OF THE FLORIDA UNIFORM COMMERCIAL CODE, SO THAT ARTICLE 9 DOES NOT GOVERN THE CREATION OF A SECURITY INTEREST THEREIN BY VIRTUE OF §679.104(10). (A14)

The court recognized that if tax certificates represent an interest in land, then their assignment as collateral would not be governed by Article 9. (A12)

SUMMARY OF ARGUMENT

By definition, a tax certificate represents a local government's assignment of its first lien on real property for ad valorem taxes. A tax certificate is a first lien on the real estate specifically described in the tax certificate document. Chapter 197 of the Florida Statutes prescribes the exclusive method for the creation, sale, transfer and redemption of a tax certificate, and for enforcement of the statutory first lien by an applicant for a tax deed. Under Chapter 197, an interest in a tax certificate can only be perfected by taking possession of the certificate itself, as possession of the certificate is necessary to exercise the statutory rights of a holder.

Tax certificates are expressly exempt from the purview of Florida's Uniform Commercial Code and, therefore, the financing statement requirements of Article 9 do not apply. Tax certificates are exempt under at least two provisions of Section 679.104, including Section 679.104(10,) which provides a specific exclusion for the creation or transfer of an interest in or lien on real estate.

To require the filing of a financing statement with the Secretary of State pursuant to Article 9 in order to perfect an interest in a tax certificate would be absurd, cause confusion and not comport with present universal business practices. There is absolutely no reason to require this "procedural hoop" to the Dores' status as secured creditors.

ARGUMENT

I. FLORIDA TAX CERTIFICATES REPRESENT AN INTEREST IN LAND FOR THE PURPOSES OF THE FLORIDA UNIFORM COMMERCIAL CODE SO THAT ARTICLE 9 DOES NOT GOVERN THE CREATION OF A SECURITY INTEREST THEREIN BY VIRTUE OF SECTION 679.104(10).

A. CHAPTER 197 GOVERNS THE CREATION, SALE, TRANSFER AND REDEMPTION OF TAX CERTIFICATES.

All local government ad valorem taxes imposed pursuant to the Florida constitution and the laws of this State constitute first liens superior to all other liens on any property against which the taxes are assessed. See, e.g., Section 197.122, Fla.Stat. (1985)⁵; Hillsborough Co. v. City of Tampa, 149 Fla. 7 5 So. 2d 256 (1941); Horn v. City of Miami Beach, 142 Fla. 178, 194 (So. 620 (1940)).

Likewise, a tax certificate represents the assignment of this first lien for ad valorem taxes by the local government as to the specific parcel of real property which is described in the tax certificate itself. In fact, Section 197.102, Fla.Stat. (1991) defines a tax certificate as:

A legal document representing unpaid delinquent real property taxes, non-ad valorem assessments, including special assessments, interest, and related costs and charges issued in accordance with this Chapter against a specific parcel of real property

⁵ The rights of a holder of a tax certificate are those defined by the law in force the time the certificate is issued. See, Baldwin Drainage Dist. v. Mac Clenny Turpentine Co., 18 So. 2d 792 (Fla. 1944), cert. denied 65 S. Ct. 554, 323 U.S. 798, 89 L. Ed. 637; Leland v. Andrews, 176 So. 418 (Fla. 1937). See also, Section 197.432(7) (1991). Therefore the citations to sections of Chapter 197 of the Florida Statutes relevant to this issue will be to the 1985 version, the year of issuance of the subject tax certificates, unless otherwise indicated.

and becoming a first lien thereon superior to all other liens. . .⁶ (emphasis added)

County tax collectors have the authority and obligation to collect delinquent ad valorem taxes by the sale of tax certificates. Section 197.332. After notice and advertisement required by the taxing statutes, the tax collector commences an auction sale of tax certificates on those lands on which taxes have not been paid. Section 197.432.

Each certificate is struck off to a buyer who will pay the taxes, interest, costs and charges on a specific parcel and will demand the lowest rate of interest on the obligation, not exceeding the maximum rate.⁷ Section 197.432(5). If there is no buyer, the certificate is issued to the court at the maximum allowed interest rate. Id. The tax collector requires immediate payment of a reasonable deposit from any person to whom a certificate is struck off. Section 197.432(6).

Section 197.432(8) requires the tax collector to maintain a record of all the certificates sold for taxes. This record contains the date of the sale, the number of each certificate, the name of the owner of the land, the description of the land within the certificate, the name of the purchaser of the certificate, the

⁶ The exceptions provided in the statute relate to survival of restrictions and covenants contained in the deed in the chain of title.

⁷ Naturally, the interest rate demanded by the successful bidders varies in relationship to the property to which the tax certificate applies. More desirable properties and properties on which there are no other outstanding certificates for previous years would, presumably, support a lower interest rate.

interest rate bid and the amount for which the sale was made. The list is known as the "list of tax certificates sold". Id.

The tax certificates are issued in a form (DR 509) prescribed by the Florida Department of Revenue. Section 197.432(7). See also, Rule 12D-16.002, Fla. Admin. Code (prescribing Form DR 509).

In the event of loss of the certificate, the holder must deliver an affidavit to the tax collector stating that the affiant is the owner of the tax certificate and that the certificate was lost or destroyed and must pay a fee of Five (\$5.00) Dollars. Section 197.433(1). If the tax collector issues a duplicate certificate, he must clearly stamp the certificate as a duplicate and note that a duplicate certificate was issued in the list of tax certificates sold. Id. Unquestionably, possession of the tax certificate document itself is the evidence of ownership of the lien interest.

Any person may redeem a tax certificate. Section 197.472(1). The person redeeming a tax certificate must pay to the tax collector the face amount of the certificate, including interest, costs and charges and omitted taxes, if any, upon the part or parts of the certificate redeemed or purchased. Id. If a tax certificate is redeemed in full, the holder must surrender the tax certificate at the time of payment of the redemption proceeds, less service charges. Section 197.472(5).

If no redemption is made, the holder of the tax certificate, at any time after two years have elapsed since April 1st of the

year of issuance of the tax certificate, and before the expiration of seven years from the date of issuance, may exercise this lien by filing an application for a tax deed with the tax collector on all or a portion of the property encumbered by the tax lien. Section 197.502(1). The application may be made on the entire parcel of property represented by the certificate or on any portion of the property. Id. A certificate holder applying for a tax deed must pay the tax collector all amounts required for redemption or purchase of other outstanding tax certificates on the property, or portion thereof, plus interest and any delinquent taxes not yet converted to tax certificates. Section 197.507(2).

After notice to the persons entitled to notification under Chapter 197, the Clerk of Court advertises and administers the sale of the properties, with the net proceeds being paid to the certificate holder. If no bids exceed the certificate holder's claim, the tax deed is issued to the certificate holder for his claim. Section 197.542(3). The grantee of the tax deed is entitled to immediate possession of the lands described in the deed. Section 197.562.

Therefore, the rights of a holder are to either receive the redemption proceeds within the specified period or to apply for a tax deed no redemption is made. This right to have the property sold to enforce the lien is not a mere contractual right, but is a statutorily protected right of a tax certificate holder. If the holder complies with the tax deed application requirements, the sale of the property by the Clerk of Court is a ministerial act.

All tax certificates issued to an individual may be transferred by endorsement at any time before they are redeemed or a tax deed is issued. Section 197.462(1) The official endorsement of the issuer's signature on a tax certificate by the tax collector or endorsement by a notary public is sufficient evidence of an assignment of the certificate. See Section 197.462; See also, Memorandum of Rick McClure, Assistant General Counsel, Department of Revenue (February 2, 1988) (the assignment of a tax certificate acknowledged by a notary public would assign the certificate holder's interest.)

As summarized above, Chapter 197 of the Florida Statutes prescribes the exclusive method for creation, sale, transfer and redemption of a tax certificate, and for enforcement of the statutory first lien by the application for a tax deed. Tax certificates are entirely "creatures of statute" under Chapter 197. Chapter 197 and the Department of Revenue's regulations and forms govern the administration of these creatures of statute.

B. TAX CERTIFICATES ARE NOT SUBJECT TO THE PROVISIONS OF ARTICLE 9 OF FLORIDA'S UNIFORM COMMERCIAL CODE AND ITS FILING REQUIREMENTS.

Despite the apparently exclusivity of the administration of tax sale certificates as a first lien in real property under Chapter 197, the lower court held that tax certificates are within the purview of Chapter 679, Florida's version of Article 9 of the Uniform Commercial Code. The district court classified tax certificates as a "general intangible". A general intangible is defined in Section 679.106 as:

Any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments and money.

Chapter 679 sets out a comprehensive scheme to regulate consensual security interests in personal property and fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts, and any sale of accounts or chattel paper, with the exception of certain transactions excluded under Section 679.104. Section 679.104 excludes the following transactions, among others, from its provisions:

1. A transfer by government or governmental subdivision or agency. Section 679.104(5).
2. [T]he creation or transfer of an interest in or lien on real estate, including a lease for rents thereunder. Section 679.104(10).

Tax certificates are exempt from Chapter 679 under each of these exclusions and, therefore, no filing is required under the Chapter 679⁸ to perfect a security interest in the certificates.

Tax certificates are exempt under Section 679.104(5) as they are an assignment of the first lien of a governmental taxing authority for governmental services, afforded by Chapter 197 of the Florida Statutes. Section 679.104(5) excludes certain governmental borrowings, including the assignment of user charges from governmental and quasi-governmental services. See, UCC §9-104, Official Comment (1972). The rationale behind the Uniform Commercial Code's exclusion of these governmental transfers is that these assignments are usually governed by special provisions of

⁸ See Sections 679.302 and 679.401.

state law. Id. The transfers of these first liens on real property by Elliott, accomplished by endorsement as provided on the Florida Department of Revenue form, are clearly exempt under Section 679.104(10) as transfers of first liens on real estate. See, e.g., Rucker v. State Exchange Bank, 355 So. 2d 171 (Fla. 1st DCA 1978). In Rucker the First District Court of Appeal held that a real estate mortgage, which is an inferior lien in real estate as against the lien of a tax certificate, does not become a "secured transaction" under the Uniform Commercial Code when it is assigned along with the note as collateral for a bank loan because it is specifically excluded by Section 679.104(10). Id. at 174. The Rucker court cited 79 Harv. L. Rev. 270-271 as follows:

The clear intent of section 9-104(j) [§679.104(10)] to exclude transfers of liens on real estate would be completely nullified if the argument were accepted that the lien, as a form of wealth, is personal property, a security interest in which is subject to Article 9. Id. at 173.

Therefore, the court explained:

If the court were to hold that a real estate mortgage assigned as collateral comes under Article 9, the status of all such mortgages would be called into question. This would generate considerable litigation. Undertaking to file all outstanding security interests in such mortgages would be time consuming and expensive. Chaos would result. We must not burden the business world with further chaos. We must not burden either the consumer or the business world with additional financial burdens. Id. at 174.

See also, the following cases construing identical provisions to Section 679.104(10): In Re Hoepfner, 49 B.R. 124, 127-129 (Bankr. E.D. Wis. 1985) (Bankruptcy court construed an identical provision to Section 679.104(10) in Wisconsin's Uniform Commercial

Code. The court held that even though a land contract vendor's interest is, itself, personal property, it is still an "interest in or lien on real estate". Therefore, the court held, the assignment of a vendor's interest in a land contract, being a transfer of that interest, falls within the scope of the exemption); In re Shuster, 784 F. 2d 883, 884-1885, (8th Cir. 1986) (transactions involving assignment of vendor's interest in contract for deed involve a "transfer of interest in real estate" excluded from Minnesota's version of the Uniform Commercial Code; and In re Bristol Associates, Inc., 505 F. 2d 1056 (3d Cir. 1974) (the use of a real estate lease as collateral for a loan is excluded from the filing and perfection requirements of Pennsylvania's Uniform Commercial Code).

The court's rationale in Rucker applies equally to tax certificates, which are frequently assigned as collateral and transferred between parties in the business world. To hold tax certificates within Article 9 would create the same chaos the court sought prevent in Rucker. Under Chapter 197, possession of the certificate is essential to receiving payment of a redeemed certificate or exercising the right to apply for a tax deed. Any transfer of a tax certificate in the marketplace is accomplished by delivery of the certificate itself with the necessary endorsement, as was done in the instant case. No transferee would assume that compliance with Chapter 679 was required, as the transfer is made effective under Chapter 197 by delivery of the instrument with proper endorsement.

The Florida appellate court's decision in Rucker sets forth the current law in Florida regarding the exclusion of assignments or transfers of interests in real property from the provisions of Article 9 provisions. This rule is squarely applicable to the transfer of the lien of a tax certificate.

The Uniform Commercial Code should be considered in light of common business practices and, in the case of any doubt, the court should choose an interpretation which is consistent with current practices in the business world. See, In re Hoepfner, 49 B.R. 124.

This court's recent decision on certification from the Eleventh Circuit Court of Appeal, in United States of America v. McGurn, 17 Fla.L.W. 208 (April 2, 1992), is instructive on this issue. In McGurn, the appellees filed suit to foreclose their interest under a security agreement in a liquor license which license was issued by the Florida Division of Alcoholic Beverages and Tobacco ("Division").

The McGurns had recorded their security agreement in the license with the Division within ninety (90) days of its execution, but did not file a financing statement with the Secretary of State. Id. at 209. The United States was a named defendant because the Internal Revenue Service had seized the liquor license for non-payment of federal taxes. Id. The United States removed the case to federal court and claimed that because the McGurns had failed to file a financing statement with the Secretary of State, their interest in the license remained unperfected as against the United States. Id. The parties did not dispute that in order to perfect

the security interest in a liquor license, the interest must be recorded with the Division in accordance with the Florida Beverage Law.⁹ Id.

The issue before this court was whether a filing was also required under the Uniform Commercial Code, specifically Section 679.401, Fla.Stat. (1987). This court answered the certified question in the negative, holding that no financing statement is required. The court held:

In our view it was not the legislature's intent to require a duplicate filing under the Uniform Commercial Code. If we were to so hold it would require resolution of conflicts between the two statutes. We find that this subsequent enactment of the legislature providing express methods to protect its security interest in a government issued, regulated, and controlled liquor license was intended to provide the exclusive means of perfecting a lien on the license. Id. at 210.

This court continued:

To hold that a duplicate filing is required, as sought by the Internal Revenue Service in this case, would not provide increased protection to creditors; it would merely require secured creditors to jump through another procedural hoop. We find no reason for such a procedural hoop, and such a construction would result in unnecessary confusion regarding the status of a secured lien and creditors' claims against a liquor license. Id.

The lower court's rationale in McGurn is very similar to the rationale of the First District Court of Appeal in Rucker.

In the instant case, it is clear from the foregoing argument that possession of the tax certificate is the only method to properly perfect an interest. The form of the instrument itself

⁹ Section 561.65(4), Fla.Stat. (1987)

expressly provides for its easy transfer in the normal course of business. As the court stated in Rucker:

A court in the commercial field, should choose that interpretation which comports with concurrent universal practice in the business world. (cite omitted) Rucker, 355 So. 2d at 174.

In the normal course of business no one would ever assume that the filing of a financing statement with the Secretary of State would be necessary to perfect a security interest in a tax certificate, the possession of which is necessary to exercise any of the rights granted thereby. Therefore, no third person would ever consider examining the records of the Secretary of State to determine whether an assignment of tax certificate had been made. The transferee would merely examine the certificate itself, which contains the transfer information. If such a filing was required, chaos would indeed result as the reliability and ready transferability of tax certificates, which the Florida Legislature intended in enacting Chapter 197, would be impaired. The status of ownership of all certificates would be called into question and the very situation Chapter 197 is designed to avoid would occur.

Finally, Chapter 197 itself does not contemplate such filing, and neither Chapter 197 nor the Florida Administrative Code requires the tax collector to check with the Secretary of State prior to accepting an application for a tax deed or prior to tendering the redemption proceeds to the holder of a tax certificate. Under the receiver's analysis, entirely new responsibilities and additional costs in the administration of tax collection would be thrust upon this State's tax collectors.

CONCLUSION

The provisions of Chapter 197 are unmistakably clear. The Legislature has declared that local government ad valorem taxes are first liens, superior to all other liens on any property against which the taxes are assessed. Chapter 197 also provides that the tax certificate becomes a first lien superior to all liens on the property described in the certificate. The Dores are holders in possession of fully endorsed tax certificates which constitute first liens on the properties described in the certificates.

Section 679.104(10) expressly excludes from the purview of Article 9 of Florida's Uniform Commercial Code, creation or transfer of an interest in or lien on real estate. Somehow, however, the Receiver has sought to subvert the plain meaning and intent of Chapter 197 and the exclusive purview of Chapter 197 over tax certificates and bring the certificates within the purview of Chapter 679, despite this express exemption. Furthermore, the courts of this state, including this court in a recent decision, have clarified the purpose of Chapter 679 and these cases clearly show that no logical argument can be made to support the position that Chapter 679 and its filing requirements govern tax certificates.

Therefore, Claimants-Appellants, Howard Dore, Ruth Dore, Gerald J. Braun and Christie Braun request that this court answer the question that is certified to it by the United States Court of Appeals for the Eleventh Circuit in the positive, finding that a Florida tax certificate represents an interest in land for the

purpose of the Florida Uniform Commercial Code.

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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 Marsha L. Lyons, Esq., Longs & Farrar, 1401 Brickell Avenue, Suite 802, Miami, Florida 33131 on this 13th day of April, 1992.

By: 

Mark A. Ebelini

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APPENDIX