Title Management Today

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*EDITOR'S DESK *.

In 2002 the PLI Commercial Real Estate Financing Faculty strongly suggested there was trouble ahead and that the commercial loan market was headed for a period of restructuring. As the real estate financing business continues to face uncertain times, cost reduction pressures and a renewed vigilance over troubled loans, banks continue looking for people with experience in workout and pre-workout agreement preparation and debtor rehabilitation. Demand continues to rise because non-performing commercial loans are up and default rates are high. With Workouts and bankruptcies soaring demand for PLI and ABA-ALI bankruptcy law workshops and seminars continue. The middle-market buyout world is seeking new sources of capital. However, credit has severely shrunk because of the weakened economy. Business investment has yet to show any meaningful upturn and is not contributing much to economic growth. The commercial market is flat. Contributing factors include changes in post Enron accounting methods, a softening economy, corporate tenant defaults, and increased bankruptcy during this period of restructuring. In their attempts to rehabilitate the borrower lenders are exploring & negotiating "nonjudicial" reorganization plans. Lenders are continuously requesting title insurers to insure mortgage modification agreements. I would caution that there is no such thing as a routine mortgage modification agreement. They are fraught with risk. Underwriters should beware. Lenders should be cognizant that any actions which would jeopardize the insurer's right of subrogation may jeopardized coverage under the existing policy and, the policy will not automatically insure the effectiveness of contemplated changes in the relationship between the borrower and lender. I refer you to the Mortgage Modification link located on the TLA website which discusses these issues at length and the FDIC outlook located at www.fdic.gov/bank/analytical/regional/ro20032q/na/INFOCUS.html

INTRODUCTION

As we head toward the end of the Federal legislative session, the status of many of these issues may change. Accordingly, we are highlighting below the expected outlook on some of the major Federal issues:

- RESPA: As several of the major housing and financial services groups have approached HUD and asserted that "the rule should not be issued at this time," HUD action on a final rule is not expected before the end of the year. NB At the last moment the Mortgage Bankers Association [MBA] has withdrawn support for the HUD single package approach and rule. The ALTA's primary argument has always been there is not statutory authority for the proposed HUD rule. The ALTA two package approach was always its fall back position although that position does include small business concerns. Also, the OMB has prepared a pre-rule review raising its own issues to the HUD single package approach.

  For a more detailed discussion and analysis of the new HUD regulations, and the views of the ALTA and other industry and consumer groups see the articles prepared by (i) Sheldon E. Hochberg, entitled *HUD's RESPA Regulations: the Proposals, The Comments, The Future* appearing in the *ALTA Title News* (January/February 2003) and (ii) John C. Murray, *Reforming RESPA – Is there a GMC, GFE (or UFO) in Your Future?* appearing in *The ACREL Papers* (March 2003). Take note also that there is a good discussion of RESPA Closing Changes appearing on the ABA/RPPT discussion bulletin board at located DIRT@LISTSERV.UMKC.EDU , which post is dated November 19, 2003. A fourth source of good information regarding the one or two package approach may be found in the *RESPRO report* for July/August 2003. [See *Current Developments*, A. RESPA Development below]

  NB For recent news article and related articles regarding RESPA Enforcement of "Markups" see "Bush Administration Announces Controversial, Hardball Approach to Real Estate "Markups" by Kenneth R. Harney located at http://realtytimes.com/rtcpages/20031020_markups.htm .

- GSE Reform Legislation: Although there is continuing concern in Congress that Fannie Mae and Freddie Mac are not adequately regulated, a dispute over which agency should be the primary regulator of housing and new programs--HUD, which is perceived as a weaker regulator, or Treasury, which would be a stronger regulator--has led to a legislative impasse.

- Privacy/FCRA Extension: This week, the U.S. Senate is expected to consider amendments offered to the Fair Credit Reporting Act (FCRA) extension. Senators Barbara Boxer (D-CA) and Dianne Feinstein (D-CA) will be offering an amendment on the Senate floor to re-instate provisions of California privacy law that would be preempted by a Senate reported proposal on the FCRA extension dealing with affiliate information sharing. At this point, the amendment is not expected to pass.

- Appropriations Restrictions: It appears likely that Congress will place restrictions on Federal agencies preventing them from issuing rules (1) to allow banks to engage in real estate brokerage and management, and (2) to modify existing regulations on overtime which would reclassify certain categories of workers as exempt.

I would like to thank the contributions of James R. Maher, ALTA Executive Vice President, Ann Von Eigen, ALTA Legislative and Regulatory Counsel and other ALTA staff members in the preparation of the materials for this issue of Current Developments

Current Developments

A. RESPA Developments

Issue: In response to lender group proposals to "simplify" and reform RESPA (i.e., relief from liability of RESPA and TILA) HUD has proposed an exemption from Section 8 of RESPA. The exemption would allow lender "packagers" of settlement services, to obtain volume discounts from the settlement service providers in the package as long as the total price of the group of packaged settlement services was guaranteed to the consumer.

Background: [See RESPA Developments, ***Title Management Today,*** July 2003, page 13] RESPA and TILA are consumer protection statutes that were enacted over 25 years ago to provide home buyers information on, respectively, residential real estate closing costs and credit terms. Because the real estate industry delivery system and consumers' sophistication have changed, these statutes no longer work effectively. Many lenders and the consumer groups argue that RESPA and TILA should be simplified, that a combined disclosure for RESPA and TILA should be developed, and that a new exemption to Section 8 to allow internal discounts of "packaged" and guaranteed settlement services should be allowed.
Policy: In October 2001, ALTA modified its policy position on RESPA as follows:

> ALTA supports settlement services legislation or regulations that promote consumer choice and empowerment and require meaningful disclosure.

Status Update as of August 8, 2003

ALTA Responds to Consumer Group Concerns on RESPA see TitleWeb article located at http://66.23.193.18/titlelews/news617.html

Status Update October 7, 2003:

1. Regulatory Developments

As of this writing, the regulatory situation is very fluid. The rule has not yet been published. The Secretary has publicly announced that it will not be published in conjunction with the MBA Annual Convention in mid-October, a triggering event frequently cited as a likely unveiling for the rule. Discussions with internal HUD contacts suggest an even longer delay, perhaps as late as the new year. However, private discussions are taking place at this time which may delay or prevent the issuance of the rule altogether. As we reported on the GAC conference call on October 8 , the MBA has reversed its position–which had been among the staunchest in favor of HUD's onepackage concept–and is now in favor of no rule at all at this time. Apparently, this change was brought about by a minor "revolt" among the rank and file membership which may have been organized (although rumblings have been heard about it for a long time) by outside lobbying consultants, some of whom may be associated with the Realtors®. To date, this position has not been announced publicly and the MBA appears to be trying to treat the matter as quietly as possible for the time being, although it's hard to imagine the matter will not become public at some time during their convention which occurs shortly before ours.

The Realtors®, working with the MBA, arranged a meeting at HUD where a tenuous coalition of those two organizations, the National Association of Mortgage Brokers, the National Association of Home Builders (not in attendance), RESPRO, and ALTA, presented its collective view that now was not the right time for RESPA reform, particularly the rule proposed by HUD. Meeting with Secretary Martinez's chief of staff, the message received from HUD was very cool yet professional. The joint position announced appeared to come as no surprise to the HUD official who advised that RESPA reform was–and apparently would remain–the highest priority for the Secretary. A joint letter from the organizations was discussed but not formally presented.

A meeting with White House officials was scheduled but cancelled by them, perhaps because they preferred dealing with the various organizations separately in the hopes of

persuading one or more to change their position. Rescheduling of the joint meeting will be attempted. At this time, it is unclear whether HUD or senior Administration officials will choose to back off and, even if they did, whether any public announcement to that effect would ever be made.

2. Legislative Developments

ALTA has scheduled several meetings with members of Congress on RESPA which has helped to chill Congressional interest in pressuring HUD to issue the rule. Since March, we have met with the Chairs of the Banking Committees in the House and Senate, including such members as Senator Richard Shelby (R-AL), Senator Wayne Allard (R-CO), Rep. Bob Ney (R-OH), who chairs the House Housing Subcommittee, and Rep. Steve Israel (D-NY). Many of these members wrote letters or communicated to HUD for us on these matters.

It appears that the rule is now being reviewed by OMB. Given the developments with respect to MBAA membership support of the RESPA rule, there may be more support for a legislative solution to limit Secretary Martinez's ability to issue a rule. ALTA will continue to pursue educating members of Congress to the issues involved in allowing HUD to issue a rule at this time. This spring, Stanley Friedlander testified before a House Financial Services Subcommittee chaired by Rep. Bob Ney (R-OH). Greg Kosin testified before Chairman Don Manzullo (R-IL) of the House Committee on Small Business, and Chuck Kovaleski testified before Senate Banking Committee Chair Richard Shelby (R-AL).

3. Possible Litigation Regarding HUD Final Rule

As has been the case since our public announcement of our intent to litigate over HUD's authority to issue the rule, should it look similar to the proposed rule, not much has happened. We believe our public posture of willingness to litigate has somewhat chilled HUD aggressiveness regarding the rule. That chill may have been somewhat deepened in light of the recent decision in the Do-Not-Call/FTC litigation in the U.S. District Court in Oklahoma. That court's finding that the FTC had no authority (albeit on entirely different statutory grounds) contains favorable language for our position and quotes a Supreme Court decision which had long been a cornerstone of our legal reasoning. While the decision may have been rendered moot by the subsequent authorization of the FTC's Do-Not-Call registry granted by Congress, its reasoning remains sound and it is highly unlikely Congress would react similarly should ALTA be successful in litigating the matter–there are not 50 million American families signed up for HUD's proposal!

Again, it is hoped that this tactic may be unnecessary if other developments result in the desired HUD reaction.

4. Washington/Grassroots Activities

We have hosted several fly-ins since March, and met with both the Secretary, and, subsequently, with the FHA Commissioner Weicher and staff. We also met with the NAR, and several other groups. We generated several grassroots letters from members of Congress, and arranged opportunities to educate other segments of the industry.

B. Radian/Mortgage Impairment

Issue: Several insurance companies and Radian, a mortgage insurer, have developed and marketed mortgage impairment products. ALTA and the underwriters have challenged this effort primarily at the state level, including litigation in California.

Status Update June, 2003 see ***Title Management Today*** July, 2003 Vol. 13, No. 7 page 14

Status Update October 7, 2003:

1. Status of Lawsuit & CA Judicial Appeal

ALTA's lawsuit in California district court in Orange County remains stayed, pending the results of Radian's judicial appeal of CA DOI Commissioner Garamendi's final determination to uphold the Cease & Desist order his agency issued against Radian in June 2002. That appeal, to a more liberal, activist CA district court in San Francisco, remains in early pleading stages at this time. It is likely that ALTA (and the CLTA, among others) may either intervene or file an amicus brief in support of the CA DOI's position. While nothing is ever certain in litigation, the very deliberative process pursued by Garamendi and his staff, coupled with the strong deference usually shown an administrative agency's interpretation of the statutes it is charged with administering, suggests a probable sustaining of the DOI's actions. If that occurs and any subsequent appeals by Radian are similarly unsuccessful, ALTA may wish to pursue the damages component of its stayed litigation.

2. Status of CA Legislative Initiative

CLTA, with strong support from several national underwriters and ALTA, was able to beat back Radian's efforts to adopt amendments to the California monoline statute which would have enabled limited cross-selling of title insurance by mortgage guaranty companies and mortgage guaranty insurance by title insurers (both limited to seconds and refis). State Senator Jackie Spier, chair of the CA Insurance Committee of the Senate, had been enlisted to sponsor the legislation. However, in part because of the duality of the grant of regulatory authority, the Mortgage Insurance Companies of America (MICA, the trade association representing mortgage guaranty companies), weighed in to oppose the bill. CLTA lobbied most effectively as did private lobbyists engaged by the industry. ALTA commissioned a white paper written by Nelson Lipshutz which effectively challenged all of the economic benefit arguments (and their underlying economic assumptions) Radian's economist had contended for its RLP product. That paper and its attendant publicity was very helpful in the overall offensive against the bill. Senator Spier was unable to garner the votes sufficient to get the bill out of her own committee.

That victory, however, undoubtedly will not mark the last time Radian attempts a legislative end-run around their regulatory–or any judicial--defeats. It is expected that the bill, in one form or another, may well be re-introduced or otherwise brought up again. Efforts are underway to educate key legislators regarding what we believe are the true characteristics of the RLP product in the hopes of blunting many of the pro-consumer claims which so influenced legislators and the public this past session.

3. State/Grassroots Efforts

While Radian and California remain our primary focus, other companies and other states have not entirely gone unnoticed.

- Efforts to reverse the unfortunate Illinois DFI/DOI decisions on the Radian RLP product continue.
- We made efforts in Kansas to alter the KS DOI's approval of Zurich's (Fidelity & Deposit) errors & omissions type coverage. While we were successful in convincing the KS DOI of the correctness of our legal position, their view was that this product had been in the market place (with no untoward effect) for several years, the KS Banking Department had issued a positive bulletin on it, and, consequently, it was too late to reverse its earlier approval. It should be noted that KS law is not strong and we were unsuccessful in our efforts to persuade them to disapprove Radian's RLP product. Focus may begin to shift away from Radian to the Great American E&O-type policy which is also being offered in refinances. The ALTA met, along with the Land Title Association of Colorado, with the Colorado DOI. A full PowerPoint presentation was made to a number of DOI staff and it is hoped that they will be convinced to take action regarding this product. If not, a review of CO statutes suggests the possibility of litigating the matter which will be considered.
- Presentations have been made to a number of other states on MI generally with products like Zurich's and Great American's highlighted.

4. NAIC Involvement

The Title Insurance Issues Working Group met on September 14, 2003, during the fall NAIC Convention in Chicago. After an update on Radian, the Working Group members indicated that they would look into other mortgage impairment products.

The Working Group voted to recommend to the Executive Committee of the NAIC that their charge be expanded to include RESPA reform issues.

C. GSE Reform Legislation and Study/Fannie Mae/Freddie Mac Activity: Report on the Value of Title Insurance

Issue: Convincing legislators and regulators that title insurance has value in indemnifying lenders and Secondary Market Institutions.

Background: The title insurance industry has historically had problems convincing legislators and regulators of the value of our product in limiting lender and, therefore, systemic risk. This concern has arisen in the context of combating the Radian product in convincing Federal and state regulators and the GSEs of the value of our product.

As part of the Association's long-term objective of reversing the alleged negative impression of the title insurance product and process, it was the recommendation of the Government Affairs Committee that a paper be prepared on the "Value of Title Insurance." Such a paper was to have a firm, empirical foundation and appeal particularly to the risk managers of Fannie Mae, Freddie Mac, large institutional investors, and governmental decision makers.

Because of the concern about Freddie Mac's financial results restatement, Congress is now actively considering legislation to restructure regulation of Fannie Mae and Freddie Mac.

Status Update October 7, 2003: ALTA engaged Nelson Lipshutz of Regulatory Research Corporation to prepare a paper. ALTA will be using this product to convince legislators and regulators of the need for investors to consider title insurance in lowering risk. This can be undertaken in the context of an education effort for the Federal legislators and regulators who are currently reviewing risk in the context of GSE Reform.

ALTA has played a "behind the scenes" role in the GSE Reform debate to date. When we were approached by Fannie Mae in August to endorse their position, we counter-offered with a request for a quid pro quo to limit their ability to use a Radian-type product. As that offer was not accepted, we refrained from endorsing Fannie Mae positions. We also declined efforts to sign onto letters supporting retention of regulatory power at HUD (perceived as a weaker regulator) in order to preserve housing. We have already communicated our concerns about the GSE's past practices regarding Radian to several members of Congress and suggested that Fannie Mae and Freddie Mac should focus on their "core business." The ALTA will follow up with an appropriate education effort for members of Congress.

The ALTA Staff is seeking guidance on message development for communication with regulators and legislators in the context of educating them about the value of the product. The ALTA will discuss these concerns with members of Congress in our next fly-in and during lobby meetings.

There are several key messages in the debate that we can use as we go forward. ALTA staff would appreciate the Committee's views on the relative merits of the following arguments:

- Support Treasury or HUD as the key regulator of housing programs;

HUD is generally perceived as the pro-housing regulator, and historically has been the office regulating Fannie Mae and Freddie Mac's compliance with Housing Goals. Treasury historically has been perceived as a regulator of financial institutions.

- Support provisions for Treasury to have the authority to establish and enforce the criteria for acquisitions, new lines of business, or investments by the GSE for ensuring that corporate affiliations or structures do not expose the GSE to undue risks or hinder effective supervision;

There has been substantial debate on the level of supervision Treasury may have over the GSE's business lines. Treasury is now opposing Chairman Oxley's bill on the grounds that it is too weak. ALTA can argue that limitations which take title risks into account are favorable.

- Support maintaining or increasing core capital and supporting the argument that

there should be no moratorium on risk-based capital guidelines;

Core capital is not a direct issue for our companies. However a moratorium on the risk based capital guidelines could limit our ability to convince Treasury to address this issue in future revisions of the rule.

D. Privacy/FCRA Extension

Privacy and Identity Theft

Issue: State and Federal privacy statutes currently limit the ability of financial institutions, including title companies and agencies, to share customer information with affiliates and business partners.

Background: Protection of consumer information and information sharing have also become an issue in the context of the "Safeguards" rule, issued by the FTC earlier this year, which relates to the need to protect customer information from theft. It has also become an issue in the context of affiliate information sharing in the expiration of the Fair Credit Reporting Act (FCRA), which is due to be re-authorized this year, and in the FTC Do Not Fax and the FCC Do Not Call lists.

Issue: Non-public Information: State and Federal privacy statutes currently limit the ability of financial institutions, including title companies and agencies, to share customer information which is not public with affiliates and business partners. These information sharing concerns arise periodically in State and Federal legislative and regulatory vehicles.

Access to the public records has historically been open to the title industry and the public. However, there is now a tension between new technologies, such as Internet access, and the amount of consumer information available in the public records which includes names, signatures, and social security numbers on mortgage documents. Social security numbers present a distinct problem because they are used so frequently for credit card information and for access to financial accounts.

The issues are described below.

Sharing of Non-public Information Held by Companies and Agents:

Background: The Gramm-Leach-Bliley Act (GLB) restrictions on sharing customer information were enacted because large banks were selling customer lists to telemarketers. The GLB Act applied restrictions to title companies because the privacy provisions apply to financial institution functions. These financial institution functions can include settlement functions. Under Gramm-Leach Bliley, title companies and agents, like other institutions, are required to provide a privacy notice when insurance is initially issued. The current "standard" applicable to financial institutions under "Gramm-Leach Bliley," is an "opt-out standard" where consumers are given notices and are allowed to restrict the use of their information when they initially open accounts. ALTA obtained an exemption from the annual notice requirement in the Federal Trade Commission regulations adopted in 2001.

Congress is expected to devote considerable attention to this issue in the 108th Congress because of continuing public concern over telemarketing, the FCRA re-authorization legislation, the "Safeguards" Rule issued by the FTC, and in the FTC "Do Not Fax" and the FCC "Do Not Call" lists.

Status Update October 7, 2003: In September, the House approved landmark legislation to give consumers new tools to fight the rapidly growing crime of identity theft. The new bill, "The Fair and Accurate Credit Transaction Act," which was approved by the House, allows consumers free access to credit scores annually. Financial services firms gained a victory with a permanent extension of a key provision in the Act, blocking states from promulgating conflicting state rules on how businesses report, share, and use consumer credit histories.

In the Senate, Senator Richard Shelby (R-AL) added a provision dealing with information sharing among affiliates. These proposals were circulated to the Government Affairs Committee. No concerns were raised by the membership. Privacy may be on the Congressional agenda next year.

Federal Trade Commission's (FTC's) Do-Not-Call (DNC) Registry

Issue: The FTC established a national do-not-call registry of individuals who do not want to receive "telemarketing calls." Within the rule that established the registry, the definition of both "telemarketer" and "telemarketing calls" is broad. Many business calls to consumers, not transactionally related, would be considered unsolicited telemarketing calls and would, therefore, be subject to penalties. As a general rule, you should not use the phone to solicit business from anyone who has placed their number on the Do-Not-Call List. There are exceptions; if an individual has contacted your business within the past three months or you have conducted business with the individual within the last eighteen months. Beginning October 1, 2003, title companies and agents soliciting businesses by telephone and calling individuals who fall within the requirements mentioned above will be required to check the DNC list.

Background: The registry has been challenged by the telemarketing industry. The district court in eastern Oklahoma, in a case brought by the Direct Marketing Association, ruled that the FTC had no statutory authority to establish the DNC Registry or require its use by telemarketers. Congress quickly passed legislation, which was signed by the President, to grant authorization. A federal judge in Denver, in a case by the American Teleservices Association, ruled the registry unconstitutional. The FTC has appealed and a U.S. Court of Appeals panel has permitted the FTC to enforce their DNC Registry requirements during the pendency of its appeal of the lower court ruling on the constitutionality of the registry.

Status Update October 7, 2003: The FTC has appealed the Denver ruling and a U.S. Court of Appeals panel has permitted the FTC to enforce their DNC Registry requirements during the pendency of its appeal of the lower court ruling on the constitutionality of the registry.

ALTA has been monitoring this issue. A key question is whether title companies and agents are actively soliciting consumer business by phone or fax. ALTA Staff would appreciate comments on the extent of this business practice.

ALTA Staff Contact: Charlene Nieman

Use of Public Information: Use of Social Security Numbers, Access to the Public Records:

Background: Lenders and other financial institutions have been using SSNs for years as identifiers on Mortgage Documents. The Fannie Mae-Freddie Mac Uniform Instrument actually has a space for a SSN, although the GSEs now indicate that they do not require that the SSN be provided. Consequently, many companies have begun to use partial SSNs as mortgage loan tracking numbers and many businesses use them as identifiers. In addition, because the uniform instrument has the space, many of the mortgage loan documents in the public records actually have SSNs and addresses recorded in the public records along with signatures.

Status Update October 7, 2003: Several bills are under active consideration at the Federal level. Rep. John Shadegg (R-AZ) has offered an amendment on the Fair Credit Reporting Act extension limiting use of SSNs at the Federal level.

ALTA receives calls requesting our policy on these issues because many states and counties are beginning to consider Internet access. Further, a Uniform Act for Real Property Recordation is being developed at the National Conference of Commissioners on Uniform State Laws.

ALTA should therefore develop a policy concerning use of social security numbers with mortgage loan documents, and access to the public records.

E. Flood Insurance Extension

Issue: Re-authorization of the National Flood Insurance Program was among the first tasks undertaken by the 108 Congress. Representative Mike Oxley (R-OH) sponsored H.R. 11, entitled the “National Flood Insurance Program Re-authorization Act of 2003." The bill was introduced on January 7, 2003, and was signed the into law by President Bush (PL 108-3) on January 13, 2003.

Background: ALTA, with the clearance of the Steering Committee of the Government Affairs Committee, joined a coalition whose objective was to assure that real estate closings would proceed uninterrupted during any lapse and that flood insurance would be reinstated. ALTA joined the coalition in signing letters to lawmakers in support of the reinstatement of flood insurance.

Status Update October 7, 2003: Congress is currently discussing multi-year Re-authorization of the NFIP. In the House, H.R. 253, “Two Floods and You Are Out of the Taxpayers’ Pocket Act of 2003," sponsored by Representative Bereuter (R-NE) and H.R. 670, “Flood Loss Mitigation Act of 2003" sponsored by Representative Baker (R-LA) have been introduced. Both bills address properties that suffer repetitive flood insurance claims. H.R. 253 has passed through Committee and will be voted on before the full House.

F. USA Patriot Act Regulations and Legislation

Issue: In response to the September 11, 2001 terrorist actions, Congress enacted and the President signed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001” (Pub. L. No.107-56). This act is commonly known as the “USA Patriot Act” and requires financial institutions, including insurance companies and, through applicability of a section applying to bank holding companies, “persons performing real estate settlements,” to establish compliance programs to identify terrorists.

Background: The Treasury Department has issued rules applicable to banks and deferred applicability to insurance companies and real estate settlement persons.

ALTA established a working group of regulatory counsels who are advising on the issue, and coordinated with the American Bar Association and the American Escrow Association. Issues that the group is addressing include the need to: (1) know the identity of our customers; (2) check identity against the government list of suspected terrorists; (3) report cash transactions over $10,000; and (4) maintain records documenting the ID process. To some extent, the working group may be able to use existing cash reporting requirements and procedures already in place. In addition, members of the group are concerned about potential

liability. However, members also need to recognize potential underwriter-agent concerns and practical issues facing sole practitioners. The regulatory counsel group has recommended that ALTA seek a regulatory safe harbor of industry practices.

ALTA and several members of the ALTA regulatory group met with Charles Klingman of the Treasury Department on November 18, 2002, and subsequently sent over a suggested "sample program" as a basis for a proposed advance notice of proposed rule-making. The Treasury Department did commend the ALTA on the link on its home page to the suspicious persons list. The Department staff indicated that they often cite it as an example of an excellent industry effort to improve compliance.

Status Update October 7, 2003

ALTA filed a comment on June 5, 2003, on Treasury's advanced notice of proposed rule-making, but the Treasury Department has not yet issued a proposed rule for comment. While some industry counsel have been pushing for a rule, many lenders and the ABA have been pushing for exceptions.

In what is definitely a bonus for lenders, the U.S. Treasury Department announced in late September that lenders are not required to maintain photocopies of identification documents used to verify customers' identities as recommended under Section 326 of the USA Patriot Act. Title companies and agents will be subject to a separate rule on real estate settlements. Recent lender actions suggest that they may attempt to pass on their obligations in mortgage account creation to closers through lender closing instructions. The Treasury Department has published an advanced notice of proposed rule-making that would cover money laundering in real estate settlements.

G. Interest on Business Checking Legislation

Issue: Legislation to allow banks to offer interest to businesses holding checking accounts

proceeded through the 107 Congress, but failed to be enacted. H.R. 1009, the **Business Checking Freedom Act** that passed the House on April 9, 2002, provided that, two years from the date of enactment, banks would be allowed to pay interest on business checking accounts. The legislation would affect bank and title agency escrow relationships, since it would lift the current prohibition against banks paying interest on escrow funds.

Background: ALTA members voiced concerns that the interest on business checking bill, which would repeal the current Regulation Q (Federal Reserve) prohibition on banks paying interest, would effectively eliminate certain well-established financial benefits and checking services that large depositors now receive from banks in lieu of interest. These services are provided in

accordance with current guidance under Regulation Q.

ALTA hopes that the current provision of services by banks in accordance with Regulation Q, and identical legal treatment, would be continued even if the interest on business checking legislation passed. The services that members receive in return for the large deposits they make currently subsidize their settlement service operations. The ALTA believes that a clear Congressional statement to that effect would be invaluable.

The Federal Reserve Congressional staff has indicated “they don’t have a dog in this fight.”

Rep. Judy Biggert (R-IL) offered an amendment in the Financial Institutions Subcommittee consideration of the Interest on Business Checking legislation to address this issue. A version of this amendment was adopted in the full Financial Services Committee consideration of HR 974, Interest on Business Checking in 2002.

Status Update October 7, 2003: The House has passed the bill reported from the Financial Services Committee, HR 758, “The Business Checking Freedom Act of 2003.” Unfortunately, Rep. Mel Watt (D-NC) also added an amendment which tends to negate our amendment language. We have been working with Senator Chuck Hagel (R-NE) on the Senate version of the legislation and he seems amenable to our suggestions to date. Senator Bennett’s staff believes that they will really turn their attention to the issue next year.

H. Tax Reporting Issues - FSA Guidance/Miscellaneous New IRS Requirements

Field Service Advice on Form 1099 Reporting on Agents' Retention

Issue: The title industry must develop a response to Field Service Advice on 1099 reporting for Agents' Retention.

In August 2001, in response to an inquiry from an IRS agent conducting an audit of one of the national companies, the IRS national office issued a Field Service Advice-Section 6041-Form 1099 "Reporting on Agent's Retention." Historically, ALTA and its members have argued that we are not subject to 1099-MISC reporting on agents' retention because our agents are similar to managing general agents in property and casualty insurance. Consequently, they qualify for an exception to 1099 reporting for those other lines of insurance. In the August Field Service Advice, however, the IRS concluded that title insurance companies did not qualify as property insurance companies. Therefore, our companies could not benefit from this exception.

Background: Field Service Advice is not legal authority, so other title insurance companies and agents do not have to submit Form 1099 reports to the IRS at this point. However, as the IRS agents will communicate with each other, it is likely that other companies may face this issue.

Status Update October 7, 2003: Initially, ALTA's outside consultant, Price Waterhouse, met with some success. Two planning meetings were held with Mary Tapley, Field Director, IRS. She agreed to try and form a joint industry government group to seek a resolution to the dilemma prompted by the FSA advice. In the process of forming the study group, the Chief Counsel at IRS expressed an interest in "reconsidering" the Field Service Advice. The IRS has communicated to the affected company that it may withdraw the Field Service Advice or issue a clarifying FSA which would effectively moot the first advice.

Unfortunately, the ALTA's recent information from the Service is that they are currently considering reverting to their original position. We have retained Price Waterhouse to schedule a meeting with the IRS.

Miscellaneous New IRS Requirements:

1. IRS Notice 2003-60: Income Reporting for Foreign Transferors

The IRS has just issued final regulations, effective November 2, 2003, requiring Taxpayer Information Numbers of foreign transferors to be included on withholding tax returns, applications for withholding certificates, and others notices and elections for all transfers of real property. The final rule also has a section dealing specifically with like kind exchanges. That section states that while a foreign transferor can provide a notice of non-recognition in a simultaneous like-kind exchange where there is no boot, they cannot do so in deferred like kind exchanges.

2. Federal Liens – Enforcement -*U.S. v. Craft*

IRS Notice 2003-60 will provide guidance on tax collection from property held by spouses in a tenancy by the entirety, where only one spouse is liable for outstanding taxes. (Federal Register Sep. 29, 2003). The notice addresses collection issues arising as a result of the Supreme Court's decision in *U.S. vs. Craft* (issued on April 17, 2002) which held that the federal tax lien attached to the rights of the entireties property, even though local Michigan law insulated the property of the claims of creditors of only one spouse. The Court's decision in *U.S. v. Craft* affected twenty-six jurisdictions that recognize tenancies by the entireties and a variety of situations where the IRS lien is applicable, including claims in bankruptcy and transfers. The Notice provides guidance on such issues as when the Service will apply *Craft* prospectively, when it is likely to use administrative seizure and sale of the taxpayer's interest, and when it is likely to exercise its right to foreclose.

Of specific interest to the title insurance industry are the following provisions:

A. The Service will, under certain circumstances, refrain from applying *Craft* for interests created before the decision where third parties may have reasonably believed that state law prevented the attachment of the lien.

B. The administrative sale of entireties property subject to the federal tax lien presents practical problems that limit the usefulness of the Service's seizure and sale procedures. Consequently, the Service is likely to focus on cash and cash equivalents instead of real estate.

C. Because of the potential adverse consequences to the non-liable spouse of the taxpayer, the Service will review lien foreclosures on a case-by case basis.

D. In general, where there has been a sale or other transfer of the property subject to the federal tax lien that does not provide for discharge, the lien will still encumber a one-half interest in the property.

Questions and Answers included in the notice address such issues as:

- Divorce: As a general rule, if the transfer occurred before *Craft,* then the IRS will not assert its lien against the property in the hands of the ex-spouse of the taxpayer. The lien will be asserted on entireties property subject to a federal tax lien and transferred after *Craft* to the non-liable spouse pursuant to a divorce where the property is in the hands of the ex-spouse.

- Donation: Transfers to donees that occurred before *Craft* will be decided on a case by-case basis to determine whether the equities favor or disfavor the Service asserting the federal tax lien against property held by a donee. The Service will examine such issues as whether the donee thought the property was unencumbered, or whether the donee is a disinterested person.

- Administrative Seizure and Sale and Foreclosure: The Service has determined that an administrative sale is not a preferable method of collection with respect to entireties property because of the difficulties in gauging the marketability of the taxpayer's interest. However, the Service has indicated that it will exercise its right to foreclose in "appropriate" cases.

3. New IRS Process to Obtain EINs

Two new services for business taxpayers have allowed the IRS to close its district telephone number for obtaining an employer identification number. Anyone needing an EIN now should use either the new business and specialty line 800-829-4933, or the new on line EIN Internet application at www.irs.gov.

I. Amendments to E-Sign Legislation - Foreclosure

Issue: The Electronic Signatures in Global and National Commerce Act, commonly referred to as “E-Sign,” was enacted in 2000. The law allows parties to use electronic records, signatures, and contracts. The statute excepts residential property default, foreclosure and eviction notices from its coverage, but provides that the Department of Commerce should evaluate the effect of the exemptions and whether they are still necessary to protect consumers.

Background: Originally, the exemption was provided because the housing finance industry believed that it was premature to allow electronic notification of “bad news.” ALTA filed a comment letter supporting retention of the exemption.

Status Update October 7, 2003: The Department of Commerce issued their final report, and adopted the ALTA position.

J. Title Issues in Bankruptcy Reform Legislation - *McConville*

Issue: In *McConville,* the Ninth Circuit failed to apply Section 549(c) of the Bankruptcy Code to allow perfection of a lender’s lien after the borrower filed an undisclosed bankruptcy. The court limited the application of section 549(c) to transfers of fee interests only. The case was appealed to the Supreme Court and certification was denied.

Background: ALTA has sought amendments to the Bankruptcy Code to clarify that a post petition transfer is valid and exempt from the automatic stay of bankruptcy. The amendments would overturn the Ninth Circuit decision in McConville, and clarify that post petition transfers (1) are valid; (2) are exempt from automatic stay; and (3) may be transfers of security interests in real property. ALTA has been working on these amendments since 1996.

Status Update October 7, 2003: In the 107 Congress, S. 220, the Senate version of Bankruptcy Reform Act of 2001, contained three separate provisions to address the problem created by McConville. Unfortunately, one of the three provisions appeared to have been

dropped in the Committee action on the bill. The ALTA needed to get a new paragraph, Sec. 311, added to S. 420, the updated version, in Conference with the House. The House-passed bill, H. R. 333, had all three provisions. On April 23, 2002, the Bankruptcy conferees met and agreed to all provisions except for a provision dealing with abortion clinic protestors who declare bankruptcy. The Bankruptcy Conference report language considered at the end of the 107 Congress included all

ALTA sought provisions. Again in the 107 Congress, the bill failed to pass.

In the 108 Congress, ALTA has obtained the amendments to overturn *McConville* in the House bill. The amendments have now passed the House and are awaiting Senate action.

K. First-Time Homebuyers' Tax Credit Act:

Issue: ALTA was asked to endorse legislation introduced in the Senate that would provide a new tax credit for down payment and closing costs for first time homebuyers.

Background: Senators Debbie Stabenow (D-MI), Gordon Smith (R-OR), and Senator Mark Dayton (DFL-MN) have introduced legislation to allow first-time homebuyers a one-time tax credit of up to $3,000 for individuals and $6,000 for married couples. Taxpayers must be in the 27 percent tax bracket or lower in the year before they purchase their home. The tax credit would apply to down payment and closing costs, and could be taken by the taxpayer as a credit on an annual tax return, or could be transferable at closing. It could be used for up to 10 percent of the purchase price.

On the positive side, the tax credit would serve as an additional incentive lowering the price of home ownership that would stimulate home sales. Depending on (1) the magnitude of the down payment and closing costs, and (2) the priority in how the credit is applied, it could effectively make title insurance and other closing costs tax deductible. On the other hand, a refundable tax credit designed to be used at closing could present an administrative nightmare for our industry.

Under S. 1175, the *First-Time Homebuyers' Tax Credit Act of 2003,* the Treasury would have to certify that the buyer is a first-time homebuyer. The legislation envisions a transaction where the credit would be refundable and assignable. Under the bill, this assignment might be made to the lender or another person. It is possible that the credit could be received before closing. On the other hand, it could be received after closing. Assignment of the credit to the lender might be practical because of the borrower's ongoing relationship with the lender. Old Republic has pointed out that it could result in a situation where a title company might face a closing where the borrower could insist that they should make no or a limited cash payment

because the tax credit has not been paid. A workable credit transfer mechanism will be key.

Status Update October 7, 2003: The ALTA Government Affairs Committee decided to endorse the concept of the bill but indicate that we would like changes to minimize the impact of the bill on our industry. Action is not expected before the end of the fall session.

L. Office of the Comptroller of the Currency -- Comment Filed

Issue: ALTA should maintain state real property laws on which insurability is based

Background: The OCC has published for comment a proposed revision to its regulation concerning the preemption of state laws applicable to national banks and their operating subsidiaries that significantly expands the scope of such purported preemption. The proposal would preempt state laws "concerning . . . the origination of mortgage loans" and "security property, including leaseholds." State laws relating to the "acquisition and transfer of real estate" would not be preempted if they have only an incidental effect on a national bank's mortgage lending. (The proposal does not relate to preemption of state laws on sales or underwriting of insurance, which is governed by the provisions of the Gramm-Leach-Bliley Act.)

The OCC proposal, when read broadly, could potentially preempt state laws that title companies rely on to make insurability determinations regarding the validity, enforceability, and priority of national bank mortgage loans. It could also potentially apply to state laws that provide requirements or limitations on the handling of closings of such loans (e.g., good funds legislation).

Status Update October 7, 2003: ALTA staff and outside counsel reviewed the proposal and relevant preemption precedents, and ALTA filed comments with the OCC on October 6, 2003 explaining why the OCC should narrow its language and eliminate some of the ambiguities that could affect the insurability of national bank loans.

M. Federal Regulation of Insurance

Issue: Several insurance and banking groups have been seeking Federal regulation of insurance. ALTA has tentatively determined that it should seek exclusions from applicability to underwriters and agents.

Background: Several years ago the American Council of Life Insurers, (ACLI), the major trade association for the life insurance underwriters, surveyed their membership on the business

issues facing their companies. One of the most serious issues was the speed at which new products could be brought to market. Consequently, the ACLI sought two solutions: (1) more pressure on the NAIC, who set up a joint coordinating committee to try and approve new products, and (2) legislation seeking Federal regulation of insurance underwriters and agents.

In addition, the banking community historically has seen advantages to their dual chartering system, for instance, the national bank system regulated by the Office of the Comptroller of the Currency and the state chartered bank system regulated by the individual states banking regulators. The competition between those two regulators has resulted in an expansion of powers and a competition on exam fees. Further, as they enter the insurance arena, the national banks see the problems of trying to run insurance agencies through the state systems. Consequently, the American Bankers Insurance Association is also seeking Federal regulation of insurance.

Status Update October 7, 2003: Senator Chuck Schumer (D-NY), a key member of the Senate Banking Committee, was the Senate sponsor of the National Insurance Chartering Act, and retiring Rep. John LaFalce (D-NY) was the key House sponsor of the House legislation, H.R. 3766, the “National Insurance Chartering and Supervision Act,” to establish Federal regulation of insurance. Retired Rep. Richard Baker (R-LA) has held a series of roundtables in the last Congress, but no legislation was reported from Committee. H.R. 3766 covers both underwriting and agency activity. ALTA filed a statement at one of the roundtables, but had not devoted much effort to the bill last year, given the likelihood that the bill would not move. It appears that there will be a series of hearings this year.

The ALTA now expects the process of review to continue in the 108 Congress. The Independent Insurance Agents and Brokers is circulating a draft bill to deal with this issue.

N. Predatory Lending

A. Issue: State and Federal legislators and regulators have undertaken a variety of efforts to address "abusive" lending practices that have led low-income borrowers into unsuitable loans. Because the default and foreclosure rates of "predatory" loans are very high, politicians have attempted to develop a variety of solutions to address these issues.

One solution to "predatory lending," suggested by some interest groups and now recommended by HUD and the Treasury Department, is to include currently excluded points and fees (such as title insurance) in the "trigger" calculation for determining whether or not a loan becomes a high cost loan. Under HOEPA (Home Owners Equity Protection Act), additional disclosures are required to be provided to consumers.

Policy: Based on GAC Steering Committee guidance, ALTA staff has alerted Congress and the Federal regulators who have formally asked for guidance on these issues of industry concerns on "technical" issues that have arisen with respect to predatory lending issues.

Our emphasis has been on:

1) Maintenance of the current exclusion for "residential mortgage transactions;"

2) Maintenance of the current title charge **exclusion** from the calculation of points and fees that can lead to categorization as a high cost loan;

3) Preventing potential liability on closers who "allow" the collection of unnecessary credit insurance premiums; and

4) Narrowing the circumstances under which home mortgage documents may be invalid to allow room for correction of scriveners' errors and recording information

Background: Currently, 103(aa) of TILA defines a high cost loan as a loan where the total **points and fees** payable by the consumer at or before closing will exceed the greater of (I) 8 percent of the total loan amount; or (ii) $400 (indexed for inflation)." Also under current law, "fees or premiums for title examination, title insurance, or similar purposes" are **included** within the definition of "points and fees," and then **excluded** if:

- the charge is reasonable;
- the creditor receives no direct or indirect compensation; and
- the charge is paid to a third party unaffiliated with the creditor

Status Update October 7, 2003: Representative Bob Ney (R-OH) has introduced H.R. 833 entitled the "Responsible Lending Act." The bill seeks to establish a consumer mortgage protection board and establish licensing and minimum standards for mortgage brokers. ALTA was able to review the bill prior to introduction. The bill has been referred to both the Subcommittee on Financial Institutions and Consumer Credit and the Subcommittee on Housing and Community Opportunity, which is chaired by Representative Ney. Representative Stephanie Tubbs Jones (DOH) has introduced H.R. 1663. Neither bill is scheduled for a hearing.

B. New Jersey Predatory Lending Bill Runs into Opposition

Assembly Bill A-75 a/k/a/ the "New Jersey Home Ownership Act of 2002" was signed into law by New Jersey Governor James McGreevy on May 2, 2003. It went into effect November 27, 2003. The Act is forcing many of the nation's lending institutions to substantially curtail, and in some cases altogether eliminate their mortgage lending in New Jersey.

The Act, which addresses abusive predatory lending practices, is the strictest predatory lending law in the country. The legislation prohibits, inter alia, financing of credit insurance, penalty interest rates, interest on interest, balloon and unfair arbitration standards. As presently written the Act will likely have the unintended effect of preventing persons with less than perfect credit from refinancing their home loans for the purpose of taking cash out of their home equity to pay for home improvement, college tuition, or medical expenses. The Act will also affect the so-called "high end" market in that those lenders will have to review their policies and form documents to ensure that they comply with the terms of the Act with regard to late fees and acceleration provisions.

There is currently substantial opposition to the Act. The Governor and the Legislature are working to amend the new law in order to strike an appropriate balance between protecting consumers from abusive lending practices and assuring that borrowers have access to their home equity through a competitive mortgage market.

There are currently two web sites addressing the issue. The first is that of the New Jersey Mortgage Bankers Association located at info@mbanj.com . The second site is that of the Coalition to Save New

Jersey Loans located at www.savenjloans.org . The first site is password protected. The second site is not. We recommend you contact your title underwriter for guidance.

O. Federal Reserve Board Proposed Rule on Real Estate Brokerage

Issue: The Federal Reserve Board has proposed rules to allow financial holding companies to engage in real estate brokerage and management activities. They have proposed this rule under a general provision in the Gramm-Leach-Bliley Financial Services Modernization Act that allows financial holding companies (generally large, well-capitalized bank holding companies which elect to become financial holding companies) to engage in "activities that are financial in nature or incidental to a financial activity."

Background: The American Bankers Association and a Nebraska bank asked for this authority, a continuing effort by the banks to expand their powers. The National Association of Realtors opposes it. The Government Affairs Committee recommended that ALTA file comments on the Federal Reserve Board proposal to allow banks to expand into real estate brokerage and management, and explore the legal arguments. ALTA filed a comment letter with the Board May 4, 2001.

Status Update October 7, 2003: In February 2003, President Bush signed a spending bill that prevented the Treasury Department from finalizing a rule that would allow banks to sell real estate until at least fall of 2003. The Treasury spending bill for fiscal year 2004 will likely delay the finalizing of the rule until October 2004. Representative Ken Calvert (R-CA) and Senator Wayne Allard (R-CO) have reintroduced legislation in the House and Senate prohibiting banks from engaging in real estate brokerage. ALTA will monitor Congress and the Department of Treasury for further actions.

P. MERS

Status Update October 7, 2003:

A. Financial and Operations Report

MERS continues to grow and generate substantial profits. The latest President's Report covers the year through August 31, 2003, and the figures speak for themselves. MERS is averaging more than 30,000 flow (MOM) registrations per day by 1225 mortgage companies. Their cumulative registrations had reached 18,664,106 as of September 16 . Net income for the first 8 months was $14,356,000. In every regard, except seasoned registrations, MERS will exceed the company's business plan for the year, in some cases by a substantial amount.

B. "Pay-off Depot" Concept

As has been reported previously, ALTA Staff has been attending meetings with MERS officials and representatives of EDS, ccPace, and Pierson & Patterson, regarding the development of an automated pay-off process using the MERS system. The objective of such a system would be for closers to access the MERS database and, seamlessly, obtain legally reliable and accurate payoff information and terms as though it came directly from that database–although it would be from the servicer and constantly updated. With the tremendous growth in loans on the MERS system and the likely capture rate of MERS exceeding 50% of all new residential loans by year's end, having such a utility could prove very valuable to all ALTA members. [This is envisioned as the first stage of this project; The second stage would be to provide lien release services and, finally, electronic lien releases where applicable.]

Several national underwriters have agreed to finance the development of this concept. It is expected that the next step will be to obtain specific servicer buy-in for the concept beyond general statements of interest. A program on the proposal will be offered at this Annual Convention by Dan McLaughlin, CIO of MERS.

Q. MORTGAGE BANKING COMMENTARY - loans to suspected terrorist

The Treasury Department recently issued regulations regarding making loans to suspected terrorist subject to being determined null and void pursuant to Executive Order 13224. The alert may be accessed on the K&L website located at www.kl.com . Click on the publications link. The article is entitled *Land Mine for Lenders: Treasury Announces Right to Nullify Loans Made to suspected Terrorists on Government list.* OFAC oversees enforcement.

R. ANTI-TYING ARRANGEMENTS

The FDIC has amended the Bank Holding Company Act of 1956, inter alia, to adopt an anti-tying law that forbids banks to force their clients to use the bank's ancillary services in order to obtain a loan. [*Source: Section 106 (a)-(h) of title I of the Act of December 31, 1970; Codified 12 U.S.C. 1971-1978*] available at regs@fdic.gov

S. FLIPS

HUD Announces New Anti-Flipping Rule

Background:

For a detailed discussion of this issue please turn to the **Title Law Associates Newsletter** Vol. 1 NO. 5, Spring 2001 page one feature issue. The matter was briefly touched upon in this publication, Vol. 13, No. 7 for the Summer Issue, 2003.

RULE:

HUD has published a final rule that addresses property "flipping" on FHA – insured mortgages. The rule, titled "FR 4615: Prohibition of Property Flipping in HUD's Single-Family Mortgage Insurance Programs," makes recently flipped properties ineligible for FHA mortgage insurance. It also allows the FHA to better manage its insurance risk by requiring additional support for a property's value when a significant increase between sales occurs.

Under the rule only the owner of record may sell a home to an individual who will obtain FHA mortgage insurance for the loan; it may not involve any sale or assignment of the sales contract.

The rule provides for time restrictions on re-sales. Resales occurring on or less than 90 days of acquisition will not be eligible for a mortgage insured by the FHA. The FHA's analysis disclosed that among the most egregious examples of predatory lending were on "flips" that occurred within a very brief time span, often within days. Under the rule the "quick Flips" will be eliminated.

Resales occurring between 91 and 180 days will be eligible, provided the lender obtains additional appraisal from an independent appraiser based on a resale percentage threshold established by the FHA; this threshold would be relatively high so as to not adversely affect legitimate rehabilitation efforts but still deter unscrupulous sellers, lenders and appraisers from attempting to flip properties and defraud home buyers. Lenders must also prove that the increased value is the result of a rehabilitating of the property.

Resales occurring between 90 days and one year will be subject to a requirement that the lender obtain additional documentation to support value, and to address circumstances or locations where HUD identifies property flipping as a problem. This authority would supersede the higher expected threshold for the 90 to 180 day period, and will be invoked only after the FHA determines that substantial abuse may be occurring in a particular locality. For more information on FR 4615, visit www.hud.gov .

ALTA Forms Committee Report

A detailed analysis of this material may be found in the August 2003 ***Title Management Today Title Gram*** located on the TLA web site on the TMT link. These Commercial Endorsements as revised slightly at the September 23 and 24, 2003 Forms Committee Meeting were adopted by the ALTA Board of Governors at its meeting of October 22, 2003. A detailed discussion of these endorsement forms was presented to the American College of Mortgage Attorneys [ACMA] by Robert S. Bozarth, Vice President and Senior Underwriting Counsel of LandAmerica Financial Group. Inc. They may be found on the ALTA web site located at www.alta.org .

ALTA Title Counsel Counsel Conference

NB Circumstances dictate the extent to which lengthy commentary is provided. In this instance we have chosen to report only on those cases we find to be the most significant of those discussed at ALTA Title Counsel.

Recent Cases

5. ACCESS

A. *Preschool Development, Ltd v. City of Springboro*, 792 N.E. 2d 721 (Sup. Ct. Ohio 2003) (Currie) **Exhibit 4**

Comment: Case relates to issue of curb cut license and relocation

6. AGENCY

A. *Countrywide v. LaFonte*, Index No. 14265/01 (N.Y. Sup. Ct. Nassau County 2002) (Davis) **Exhibit 5**

7. ARBITRATION

A. *Wolschlager v. Fidelity National*, 4 Cal.Rptr.3d 179 (2003) (Cavallaro) **Exhibit 6**

Comment: A California court of appeals has determined that: the arbitration provision may be validly incorporated by reference into a preliminary report if the preliminary report makes reference to a title insurance policy containing same and that an insurer did not forfeit the right to require arbitration of a title claim by issuing a preliminary report absent such provision. The court held that even though a preliminary title report did not carry a notice of arbitration, the plaintiff was still bound by the arbitration agreement contained in the final policy by reason of the fact that the report incorporated the arbitration clause by reference. Thus the Arbitration Clause became binding upon the insured. Featured case in the September 2003 issue of *the* Title Insurance Law *Newsletter.*

8. BANKRUPTCY

A. *LaSalle National Trust v Trak Auto, Inc.*, 288 B.R. 114, 2003 U.S. Dist. LEXIS 6029, (E.D. Va. 1/10/ 2003) (Davis) **Exhibit 7**

Comment: A Federal District Court, in consideration of defacto anti-assignment clauses, has affirmed the ruling of the Bankruptcy Court below and held that a shopping center landlord may not enforce a use clause restricting use to the identified retail outlet and must demonstrate scheme of integration of tenant uses into a viable "tenant mix" through its leasing policies in order to argue that a change of use upon assignment by "tenant mix" consideration under 365(b)(3). The court rejected a restriction for a retail auto parts store and permitted the lease to be assigned to a discount clothing store operation. For further commentary on this case please visit www.blankrome.com/publications/Articles/ominsky_85.asp and the *ABA Real Estate Quarterly Report*, Spring 2003 at page 8

B. *Precision Industries, Inc. v Qualitech Steel*, 327 F.3d 527 (7th Cir. 2003) (Davis, Kletke) **Exhibit 8**

Comment: This was the featured case in the July issue of this publication beginning at page 17. In this case the 7th Circuit Court of Appeals was asked to determine the application of two

provisions of the Bankruptcy Code that were in apparent conflict. In a case of first impression the court determined that a bankrupt landlord can overcome a tenants protection against lease rejection under 365(h) by selling the landlord's property free and clear of the tenant's interest in the lease pursuant to a 363(f) sale. This case has generated a lot discussion throughout the real property bar and title industry. For further commentary see www.blankrome.com/publications/Articles/ominsky_075.asp , http://ul.firstam.com/landsakes/Bank040303.pdf ; the *ABA Real Estate Quarterly Report*, Spring 2003 at page 3; PLTA *Common Ground* Issue 3, 2003 page 10.

C. *In re: Gregory Dewitt Cantrell*, U. S. Ct. of App. 9th Cir. No. 01-17358 (2003) (Klarin) **Exhibit 9**

D. *Pleeter v. Pleeter*, 293 B.R. 812 (2003) (Rush) **Exhibit 10**

Comment: A Florida Court has determined that a judgment entered against an attorney-escrowee for breach of his fiduciary duty and manipulations of escrow funds, is not dischargeable in the lawyers subsequent bankruptcy pursuant to 11 U.S.C. 523(a)(2). Further discussion may be found in the September 2003 issue of *the* Title Insurance Law *Newsletter.*at page 5.

E. *Hechinger Investment Co. v. Hechinger Liquidation Trust*, U.S. Ct. of App. 3rd Cir. No. 02-1917, 2003 WL 21674961 (7/16/2003) (Rush) **Exhibit 11**

Comment: a sale of real estate assets from a bankruptcy estate is not exempt from state and local transfer taxes unless it is carried out pursuant to an approved plan. A 363(f) sale outside the plan requires payment of all doc. Stamps. See *ABA Real Estate Quarterly Report*, Summer 2003 at page 15 for additional commentary. NB This case overturns the court below reported in 254 B.R. 306 (Bankr. D. Del 2000) and the Spring 2001 issue of *the Title Law Associates Newsletter* at page 7, ALTA Title Counsel Agenda Exhibit 11

F. *In re: Jones*, 2003 U.S. Dist. LEXIS 15672 (Bkcy. E.D. Pa., 08/05/03)(Angelo) **Exhibit 12**

Comment: This case is illustrative of the extent to which a trustee will go in a Chapter 7 proceeding in an attempt to avoid a mortgage. Here the debtor trustee initiated an adversary proceeding by complaint against the secured creditor seeking to avoid the mortgage under the "strong arm" provisions of 544(a) that enables a trustee to invoke state law remedies.

In this case the debtor and his wife signed a mortgage and other closing documents then later denied, inter alia, they had signed the mortgage. The creditor initiated a foreclosure action and the debtor filed bankruptcy proceedings. The debtor and his wife claimed that there was no notary present at the signing of the mortgage, that the mortgage was not only improperly acknowledged, and was fraudulent and void under 21 Pa. C.S.A. 444. The Bankruptcy Court discharged the debtor but did not grant the motion to avoid the mortgage. The debtor and the trustee appealed. The Federal District Court found no clear error in the bankruptcy court's findings that the debtor's testimony was not credible and, because the mortgage on its face contained indicia of validity, held that the mortgage was not void or fraudulent.

NB There has been some additional case law in this area in other states with regard to Trustee Avoiding Powers; Notary Jurats; Defective Acknowledgments and Defective Documents. See Firstam Landsakes listserv. Posts of 10/21/03 and 10/22/03.

G. *In re: Moreno*, 293 B.R. 777 (Colo. 2003) (Angelo, Kletke) **Exhibit 13**

9. CLOSING AGENT LIABILITY

A. *Old West Annuity Life Insurance Co. v. Progressive Closing & Escrows, Inc.*, 2003 WL 21872555, (US Ct. of App. 10th Cir) (Rush) **Exhibit 14**

Commentary: Escrow company's failure to record lenders mortgage in first lien position constituted a breach of contract under the insuring provisions of the title insurance policy and the escrowee: (i) was liable for two mortgages recorded during the gap not disclosed by the title search; (ii) was liable for to the lender for the full amount of the mortgage loan it closed; and (iii) had no right to delegate the job of searching title. Further discussion may be found in the September 2003 issue of *the* Title Insurance Law *Newsletter* at page 3.

10. CONSTRUCTIVE NOTICE; INDICES; PERSONS USING ONLY INITIAL OF FIRST NAME; JUDGMENT LIENS; SEARCH AND EXAMINATION

A. *Franklin Bank v. Bowling*, _ P 3d _ (Colo. 2003) (Zachow, Rush, Kletke, Angelo) **Exhibit 15**

Commentary: The Colorado S. Ct. has determined that when a person uses only the first initial of his given first name, he signals the common use of his middle name and, therefore, there is a duty to search that name. The court did not go to far as to adopt the rule set forth in IV ALP 18.76. There was interesting discussion of this issue on the Landsakes listserv. of Oct. 16, 2003. Further discussion may be found in the September 2003 issue of *the* Title Insurance Law *Newsletter* at page 7.

B. *Coffelt Land Title, inc. v. Firstar Bank*, 2003 Mo. App. LEXIS 586 (Rush) **Exhibit 16**

11. COVENANTS

A. *Barner v. Chappell*, 585 S.E.2d 590 (Va. 2003) (Davis) **Exhibit 17**

B. *Reagan National Advertising of Austin v. Capital Outdoors, Inc.*, 96 S.W.2d 490 (Tex. 2002) (Davis) **Exhibit 18**

C. *Country Club District Homes Assoc., et al. v Country Club Christian Church*, No. WD61418 (MO Sup. Ct. 2003) (Zachow) **Exhibit 19**

12. DEEDS

A. *Utsch v. Utsch*, 266 Va. 124 (2003) (Davis) **Exhibit 20**

B. *Seymour v Evans*, 608 So.2d 1141 (Sup. Ct. Miss. 1992) (Matrick) **Exhibit 21**

13. DEEDS OF TRUST; NOTARY JURATS; ACKNOWLEDGMENT; DEFECTIVE DOCUMENTS; TRUSTEE AVOIDING POWER

A. *In re Akins*, No. M2002-00337-SC-R23-CQ, 87 S.W.3D 488 (Sup. Ct. Tenn. 2003) (Rush) **Exhibit 22**

Comment: More case law in support of the position that a particular non-conforming acknowledgment is nonetheless sufficient under Tennessee law to satisfy the "substantial compliance" test for jurats embodied in the in the Tennessee Code. Facts are similar to case cited in Exhibit 12 to the extent that a debtor chapter 7 trustee filed an adversary proceeding in an attempt to avoid a mortgage not properly acknowledged. The court determined that a notary's actions are presumed regular so long as the essential requirements of the statute appear to have been satisfied and the evidence satisfies the "intent test". The Landsakes Editor believes this to be a great decision which clarifies earlier Tennessee cases regarding defective jurats. Future discussion may be found on the LandSakes post of October 22, 2003. Inquiry may be made to LandSakes@firstam.com .

14. DORMANT COMMERCE CLAUSE

A. *South Dakota Farm Bureau v. Hazeltine*, 2003 U. S. App LEXIS 17018 (8th Cir. 2003) (Zachow) **Exhibit 23**

15. DUTY TO DEFEND; DILIGENT INQUIRY

A. *Morgan v. Chicago Title*, 2003 WL 21212656 (9th Cir.Hawaii) (Kletke) **Exhibit 24**

Comment: This case was previously reviewed in this publication in the June 2003 issue, Vol. 13, No. 6 at page 10. The case is significant to litigation counsel in that the court determined that the law requires title insurers to conduct a reasonable investigation into the underlying facts as a pre-condition to denying coverage. This is the featured case in the July 2003 issue of *the* Title Insurance Law *Newsletter.*

16. EASEMENTS; CREATION; GRANT; RULE AGAINST RESERVING INTERESTS IN STRANGERS

A. *Beachside Bungalow Preservation Association v. Oceanview Associates*, LLC, 753 N.Y.S.2d 133 (App. Div. 2d Dept. 2003) (Davis) **Exhibit 25**

Comment: Contrary to the opinion of most commentators a New York Appellate Court has reaffirmed the rule that a fee grantor cannot reserve an enforceable easement benefiting land not retained by the grantor. Further commentary may be found in the ABA Real Estate Quarterly Report for the Spring, 2003 page 25 and the DIRT posts of 05/21/03 available at DIRT@LISTSER.UMKC.EDU .

B. *Fike v. Shelton*, 2003 WL 22290101 (Miss.App.) (Matrick) **Exhibit 26**

Comment: easements of necessity arise by operation of law when part of a commonly owned tract.

17. EQUITABLE CONVERSION

A. *High Street Columbia, LLC. v Laboratory Corporation of America, et al.*, C.A. No. 03-1971 (Supr. Ct. Dist. of Col. 2003) (Davis) **Exhibit 27**

18. EQUITABLE SUBROGATION

A. *American National Bank v. Clark*, 660 NW 2d 530 (Neb App 2003) (Zachow) **Exhibit 28**

B. *Chase Manhattan Bank v. Westin*, 2003 WL 22227394 (Ohio) (Maher) **Exhibit 29**

NB further discussion of Equitable Subrogation cases see DD for 11/13/03. Contact DIRT@LISTSERV.UMKC.EDU. For good case which discusses fraud, equitable subrogation, forfeiture and homestead protection see *In re: Financial Federated Title and Trust, Inc*., 2003 WL 22271621 (11th Cir., Florida).

19. ERRORS & OMISSIONS

A. *Pacific Insurance Co. v Burnet Title Inc.*, No. 02-2767 (D. Minn. 9/24/2003) (Zachow) **Exhibit 30**

20. ESCROW AGENTS

A. *Johnson v Robinson*, a/k/a/ *In re Johnson* 292 B.R. 821 (Bankr. E.D. Pa. 2003) (Davis, Kletke) **Exhibit 31**

Comment: This case was previously discussed in the June 2003 issue, Vol 13, No. 6 at page 7 and relates to the issue of predatory lending. The borrower claimed, inter alia, that she was a victim of a predatory lending scheme in a refinance and home improvement loan. She sued the mortgage broker, lender, title agency and title insurer. The court, in granting motions to dismiss filed by Firstam and its Pioneer Agency, said that a title insurer may not be sued for a claimed duty to warn the borrower that she was borrowing too much money and with unconscionable loan fees [Contra., *Pulphus v. Sullivan,* (Ill. 04/28/03)]. Stated another way, the Bankruptcy Court for the Eastern District of Pennsylvania answered a key question of concern to title insurers nationwide

when it held a *Title Company is not required to warn a Borrower of Predatory Lending* (emphasis mine) and it has no fiduciary responsibility to do so. Additional commentary may be found in the June 2003 issue *the* Title Insurance Law *Newsletter* at page 7.

21. EXECUTION SALES

A. *Gonzalez v Toews et al.*, Calif. Ct. of App., 6th App. Dist. No. H024649 (Klarin) **Exhibit 32**

B. *U.S. v Serendensky*, 2003 WL 21543519 (S.D.N.Y.) (Kletke) **Exhibit 33**

22. FORECLOSURE

A. *Residential Capital, LLC v. Cal-Western Reconveyance*, 2003 Cal. App. LEXIS 715 (Rush) **Exhibit 34**

23. FORFEITURE; NOTICE; LETTER RETURNED

A. *US v. Donald Lawrence Ritchie*, U. S. Cir. Ct. of App. 9th Cir., No. 01-35989 (Klarin) **Exhibit 35**

Comment: Not surprisingly the court determined additional efforts must be undertaken to determine whereabouts of party.

24. FRAUDULENT CONVEYANCE

A. *Mejia v. Reed et al.*, Sup. Ct. of Calif., S106586 (2003) (Zachow, Cavallaro, Rush) **Exhibit 36**

Comment: This case as it appeared in the court below was previously discussed at the Spring 2002 Title Counsel meeting as Agenda Exhibit 49 and was compared to *In re Altmeyer*, 268 B.R. 349. Comments were previously set forth in the Spring 2002 issue of *the Title Law Associates Newsletter*, Vol 1, No. 19 at page 5 and the Fall 2002 issue of the *Title Law Associates Newsletter* Vol 1, No. 20 at pages 8. Here the S. Ct upholds in part and reverses in part the court below in determining that a marriage settlement agreement may be a fraudulent transfer. The S.Ct has held that provisions of the UFTA may be used to attack an agreed upon division of marital property incident to a divorce, even when the division has been approved by the divorce court and included in its final judgment.

B. *First National Bank of Seminole v Hooper*, 104 SW 2d 83 (TX 2003) (Zachow) **Exhibit 37**

25. IMPUTED KNOWLEDGE; CONSTRUCTIVE KNOWLEDGE

A. *Huntington v. Mila, Inc.*, 75 P.3d 354 (Nev. 2003) (Davis, Rush, Angelo) **Exhibit 38**

Comment: Nevada Supreme Court has held that a title insurance company is not an agent of its insured in conducting a title search. So, absent actual knowledge of a prior first lien, there is no constructive notice imputed to the insured lender obtained through a search and the insured lender has no notice of a recorded document contained in title company's file. The court drew a distinction between an abstract of title and a title insurance policy. The

court stated that, unlike an abstract of title, a title insurance policy is an indemnity agreement of an independent contractor and contains no elements of agency. The court further explained that an abstract of title typically discloses all matters affecting title while a title insurance policy is a contract of indemnity disclosing only those matters that the insurer is not willing to insure against. NB This puts Nevada and California on the same page. See *Rice v Taylor*, 220 Cal. 629, 32 P.2d 381 (1934). Contra: *Hall v. World S&L Ass'n*, 189 Ariz 495, 943 P.2d 855 (Ariz.App. 1997). Lead case for the October 2003 issue of *the* Title Insurance Law *Newsletter*, page 1. See LandSakes Editors commentary on LandSakes posting for 09/10/03.

26. MECHANIC'S LIENS

A. *In re: EL Dorado Improvement*, U. S. Ct. of App. 9th Cir. CV –00-01645 MLR (2003) (Klarin) **Exhibit 39**

27. MERGER OF TITLE

A. *Cowan v. Carnevale*, 752 N.Y.S.2d 737 (App. Div. 3d Dept. 2002) (Davis) **Exhibit 40**

Comment: Compare this *to Martin v. Moore*, 263 Va. 640 561 S.E.2d 672, noted in the Fall 2002 issue of the *Title Law Associates Newsletter*, Vol. 1 No. 20 at Exhibit 22 page 12.

B. *Sanderson v. Hudlett*, 832 So. 2d 845 (Fl. 2002) (Davis) **Exhibit 41**

28. MORTGAGES

A. *Fleet National Bank v. Nazareth*, 818 A.2d 69 (Conn. App. 2003) (Davis, Rush) **Exhibit 42**

Comment: A Connecticut Court of Appeals `has held that mortgage holder by assignment may not foreclose if it cannot produce evidence of formal ownership and assignment of note.

NB Title Rule: The note is the evidence if the debt. The mortgage is security for that debt. Upon assignment of the Mortgage, if the mortgagee does not also assign its interest in the underlying note and security agreement to the assignee, the assignee cannot thereafter foreclose it is not the owner of the debt. Further commentary may be found in the ABA Real Estate Quarterly Report for Summer of 2003 at page 53. *See Also* LandSakes post of 06/24/03 by contacting LandSakes@firstam.com

B. *Schwab v. GMAC Mortgage Corp.*, No. 02-3989, U.S. Ct. of App. 3rd Cir. (2003) (Kletke, Angelo) **Exhibit 43**

29. ORAL GIFT OF LAND

A. *Cox v. Clifton*, 2003 Okla. Civ. App. LEXIS 30 (Angelo) **Exhibit 44**

30. POLICY COVERAGE

A. *Home American Credit, Inc. v. Investors Title*, 199 F.R.D. 563 (E.D. N.C. 2001) (Zachow) **Exhibit 45**

B. *First American v. First Trust National Assoc.*, C.A. No. 1.02cv103GR U.S.D.C. (So. Dist. Miss. 2003) (Rush, Kletke) **Exhibit 46**

Comment: Title insurance policies were released with UCC financing statements attached to the legal description and the issue became whether the definitions of insured indebtedness was thereby intended to include the personal property located off site. The court determined coverage of the financing statement was included in the the definition of secured indebtedness and was intended to include personal property located off site but to be moved to the insured location. Further commentary in DD of 07/16/03 including reply by Bert Rush. Case is also briefed in ABA Real Estate Quarterly Report for Summer 2003 at page 73.

31. PREEMPTION

A. *Pinchot v. Charter One Bank*, F.S.B., 99 Ohio St.3d 390, 792 NE 2d 1105 (OH 2003) (Zachow, Currie) **Exhibit 47**

Comment: The Ohio Supreme Court has determined that, notwithstanding certain OTS pronouncements that the loan payoff process is exempt from state law, Ohio's law requiring lenders to satisfy mortgages of record within 90 days of payoff applies equally to lenders regulated by the federal Office of Thrift Supervision. Further commentary may be found in the October 2003 issue of *the* Title Insurance Law *Newsletter* at page 7.

32. PRIORITY

A. *Bank One v. Jude*, 2003 WL 21469145 (Ohio App. 10 Dist.) (Kletke) **Exhibit 48**

33. PROBATE

A. *Ozuna v. Wells Fargo Bank*, 2003 Tex App. LEXIS 7296 (Angelo) **Exhibit 49**

34. RECORDING

A. *Antonis v. Liberati*, 821 A 2d 666 (PA 2003) (Zachow, Hart, Kletke, Angelo) **Exhibit 50 & Exhibit 51**

Comment: Attorney is responsible for proper recording of Mortgage and may be held liable for legal malpractice for failing to verify that the mortgage was indexed properly. However, under 16 P.S. 9852 and 8541 of the Tort Claim Act, the Recorder of Deeds cannot be held liable for damages as a result of clerical error made by a staff member when mis-indexing and instrument. For further analysis see Page 10 of *the* Title Insurance Law *Newsletter* for July 2003; PLTA Title Policies issue 3 at page 7; and Harris Ominsky's commentary appearing at www.blcnkrome.com/publications/Articles/ominsky_082.asp

B. *First Citizens National Bank v. Sherwood*, 2003 Pa Super. 47: a discussion (2003) (Hart) **Exhibit 52**

Comment The case was discussed earlier in the July 2003 issue of this publication at page 25, ALTA Title Counsel Agenda Exhibit 24, where your editor ranted and raved over the courts decision. Further commentary may be found in the ABA Quarterly Real Estate

Report for the Summer 2003 issue appearing at page 63 [NB Comment 2 where DIRT Editor agrees with opinion expressed by your Editor in the July 2003 issue of TMT].

C. *Bankers Trust Co. v. Collins*, 2003 WL 21516214 (Tenn. Ct. App.) (Kletke) **Exhibit 53**

35. RESCISSION

A. *Matthews v. Bank One, et al.*, No. 02-80041/B, __ BR __ (2003) (Kletke) **Exhibit 54**

36. RESPA

A. *Weizeorick v. ABN AMRO Mortgage Group*, 337 F 3d 827 (U.S. Ct. of App. 7th Cir., 2003) (Kletke) **Exhibit 55**

Comment: This case is not particularly consistent with prior 4th, 7th and 8th Circuit Court decisions in that it survived a motion to dismiss a RESPA 8(b) fee split allegation. The "split" allegedly came about because the title company charged for the actual cost of recording the release and the lender also collected for the recording of its payoff statement. A detailed analysis may be found in the September 2003 issue of *the* Title Insurance Law *Newsletter at page 10.*

B. *Saso v. Chase Manhattan Mortgage Corp.*, No. 13930 U.S. Ct. of App. 11th Cir. (2003) (Maher) **Exhibit 56**

Comment: The 11th circuit dismissed a lawsuit claiming that a lender violated section 8 of RESPA by overcharging for a courier fee. However, in doing so it rejected of the 4th, 7th and 8th Circuit Courts findings that there was no fee "split" between two parties. It ruled instead that the cost was legitimate because the lender was charging for courier services rendered. This could become a slippery slope. Here, in reviewing 8(b) the court read the "and" as an "or" and in doing so determined that there could be a single settlement service provider who violated 8(b). Such an interpretation suggests a "value added" component be considered in the 8(b) analysis.

C. *Snow v. First American*, Nos. 02-60539, 02-60627 U.S. Ct. of App. 5th Cir. (2003) (Kletke) **Exhibit 57**

Comment: This case is the latest in a continuing series of class action lawsuits under RESPA based upon various incentives provided by service providers to their agents with, in this instance volume incentives for title insurance agents. Plaintiffs in this case attempt to address and attack the underwriter/agent premium split as a RESPA kickback violation alleging that 3 underwriter gave illegal fee splits and kickbacks to title agents. The 5th Cir. Affirmed two lower court findings and tossed out the lawsuit against the three underwriters for rewarding agents for delivering high remittances.

D. *Santiago v. GMAC Mortgage Group*, 2003 U.S. Dist. LEXIS 17728 (Angelo) **Exhibit 58**

37. SOVEREIGN IMMUNITY

A. *Balser v. Department of Justice*, No. 02-35114 U.S. Ct. of App. 9th Cir. (2003) (Kletke) **Exhibit 59**

Editor's Note: Another and perhaps more interesting case from a title underwriting perspective is that of *Blaxland v. Commonwealth Director of Public Presecutions, Australian Securities and Investment Commission, 2003 U.S. App.LEXIS 5849, (9th Cir. Ct. App.)*

38. TAX SALE

A. *40235 Washington Street Corporation v. Lusardi*, U.S. Ct App. 9th Circuit CV-90-01472-JSR (2003) (Klarin) **Exhibit 60**

Comment: 9th Cir. BAP addressed the validity of sales made to a BFP under the automatic stay and determined there is no BFP exception to the automatic stay at nonjudicial foreclosure sales. Purchasers at the trustee sale can move to retroactively annul the stay that originally prohibited the sale, and may succeed if the court finds that the eqyuties are balanced in their favor. To be read in conjunction with *40235 Washington Street Corporation v. Lusardi*, 177 F.Supp. 2d 1090, 2001 U.S. Dist. LEXIS 19973 (S.D.Cal. 2001). For further discussion see DD of 03.25.02 and 08/28/03.

B. *Cypress-Fairbanks Independent School District v. Loggins*, _ S.W. 3d _ (Tex App 2003) (Zachow) **Exhibit 61**

39. TRUSTS

A. *Austin v. City of Alexandria*, 265 Va. 89 (Sup. Ct. Va. 2003) (Rush, Angelo) **Exhibit 62**

Comment: A deed to a trustee effects a change in ownership of property, even if the grantor, the trustee and the beneficiary of the trust are the same person. Read in conjuction with *Gray v .First American Title Ins.Co.* 2003 WL 220606 (Cal.App., Feb 3, 2003) previously reviewed in the publication in the July 2003 issue title counsel agenda Exhibit 66. See Bush Nielsen's observation in the March 2003 issue of *the* Title Insurance Law *Newsletter* ***Commentary*** appearing at page 2.

40. UNAUTHORIZED PRACTICE OF LAW

A. *Dressel v. Ameribank*, No. 119959 (Sup. Ct. Mich. 2003) (Rush, Kletke) **Exhibit 63**

Comment: This case and the case below was the subject of much discussion on DIRT. The Michigan Supreme Court reversed the Court of Appeals in holding that preparation of standard form legal documents, including residential mortgages, does not constitute the practice of law and further, the lender may charge the borrower a preparation fee therefore. Further commentary may be found in the August 2003 Issue of *the* Title Insurance Law *Newsletter* at page 6 and the *ABA Quarterly Real Estate Report* for the Summer 2003 at page 12 and 50.

Editor's Note: There has been considerable discussion of the subject of the unauthorized practice of law in recent months on the ABA DIRT site and elsewhere. Our readers may wish to view posts to the DIRT website of June 27, 2003, November 13 & 15, 2003 and the LandSakes post of November 12, 2003. As an observation we should like to suggest that once there is a history of Lay closings established in a given state you can't overcome that practice. Interested parties may want to go back and read Joyce Palomar's article that appeared in 31 Conn. L. Rev. 423 (1999) entitled *The War Between Attorney sand Lay Conveyancers – Empirical Evidence Says "Cease Fire!"*

B. *Lenders Title Company v. Chandler*, 2003 WL 21196599 (Sup. Ct. Ark.) (Kletke) **Exhibit 64**

C. *Countrywide Home Loans, Inc. v. Kentucky Bar Association*, 2003 WL 21990261 (Ky.) (Kletke, Maher) **Exhibit 65**

41. ZONING

A. *Kelly, et al v. 1250 Oceanside Partners*, Civil No. 00-1-0192K (Hawaii 3rd Cir. 2003) (Klarin) **Exhibit 66**

B. *City of Ames v. Regency Builders*, 653 NW 2d 553 (Iowa 2002) (Zachow) **Exhibit 67**

LEGISLATION, REGULATION AND ENFORCEMENT

42. *In the Matter of Radian, et al.* California Department of Insurance Final Determination (Maher) **Exhibit 68**

Comment: See prior August 2003 issue of this publication Volume 13 No. 8 for this and related enforcement actions.

43. IRS Final Regulations requiring use of TINs on Submissions under Sections 897 and 1445 regulations (68 F.R. 46801; August 5, 2003) (Angelo) **Exhibit 69**

44. OCC Alert 2003-12: Debt Elimination Schemes Using Fictitious or Worthless Bonds, Due Bills and Bills of Exchange (Angelo) **Exhibit 70**

On October 1, 2003 the OCC issued an alert to all national banks warning them of internet based mortgage elimination schemes and providing guidance as to how the banks should respond. To view the OCC alert click on the URL located at http://ul.firstam.com/landsakes/occalert100103.pdf

45. IRS Notice 2003-60: Guidance on collection procedures with regard to property held in a tenancy by the entirety under *US v. Craft* (Angelo) **Exhibit 71**

Comment: Notwithstanding the case of *Hatchett v. U.S.,* 330 F.3d 875 (6th Cir. 2003) which held that Craft is retroactive, at least as to all cases still open at the time of the decision, the IRS has issued guidance (IRS Notice 2003-60) as to how it will enforce lien rights against property held in a tenancy by the entirety, following the decision of the U.S. Supreme Court in U.S. v. Craft (discussed in our postings for 4/22/02 and 1/29/03). To view IRS Notice 2003-60, click on the link below to an IRS webpage.

http://www.irs.gov/pub/irs-drop/n-03-60.pdf

Also, Ann vom Eigen, ALTA's Legislative & Regulatory Counsel, has written a summary of Notice 2003-60 which can be found on the ALTA website (go to www.alta.org /click on "Press Room"/click on "ALTA E-News"/click on "September 16, 2003"). Or, to view Ann's summary you may click on the URL below.

<http://ul.firstam.com/landsakes/irs092903.pdf>

46. Justice Dept Investigation of REALTORS® Focusing on MLS Online Listings (MortgageDaily.com, 10/13/03) (Angelo) **Exhibit 72**

Comment: See prior August 2003 issue of this publication Volume 13 No. 8 for this and related enforcement actions.

47. Company owners plead guilty in flipping case (Baltimore Sun; 10/2/03) (Angelo) **Exhibit 73**

    Comment: The owners of a Baltimore real estate title company who pleaded guilty last month to defrauding the federal government of nearly $600,000.00 property flipping schemes were sentenced November 25, 2003 in U.S. District Court. Edward Charles Rybczynski and his wife owned Liberty Title Co. in Baltimore. They were among 18 people charged with fraudulent property transactions linked to former Perry Hall real estat broker William Otto Schmidbauer. Schmidbauer pleaded guilty to conspiracy charges earlier this year. Rybczynski was sentenced to five months in prison and ordered to pay $594,433.00 in restitution. Following his prison term he will also serve 5 months of home detention and three years of supervised release. His wife was given 3 years' probation, six months of home detention and also ordered to help pay restitution.

48. Five are charged in mortgage scam (Philly.com; 10/31/03) (Angelo) **Exhibit 74**

49. OLD BUSINESS

50. NEW BUSINESS

NB E-mail copies of all materials are available upon request. There may be an additional charge depending upon request. Some systems may not be compatible.

Newsbriefs

HUD Secretary Martinez recently announced that he is resigning as Secretary of HUD in order to return to Florida and run for election to the United States for the Senate seat that has become open by reason of Senator Bob Graham deciding not to seek re-election. We shall see how this decision will affect future HUD Policy.

Noteworthy Articles and Library Publications

Brian Grant has provided a checklist for title companies for the purpose of the title industry of compliance with the Patriot Act. In may be found in the July/August 2003 issue of the ALTA *Title News* at page 10. The article is entitled *Complying with the USA Patriot Act – A Primer.*

WestGroup has issued the long awaited Patton and Palomar On Land Titles, Third Edition. Please contact your WestGroup representative for copies.

William R Clayton and Lisa R. Mahoney have prepared and article entitled *A Title Insurance Company's Blueprint for Pursuing Its Former Agent.* The article may be found in the Summer 2003 issue of the ABA/TIPS Title Insurance Litigations Committee's *Committee News.*

The State of Market Title [with sample clause] prepared by S.H. Spenser Compton, appears in the September 2003 issue of *The Prqctical Real Estate Lawyer* at page 33.

Jack Murray prepared an article entitled *Transfer Tax Consideration in Real Estate Bankruptcy Proceedings.* It appears in the Summer 2003 issue of the Real Property Probate and Trust Journal, Vol. 38, No.2

REMEMBERING OTHERS DURING THE HOLIDAY

My wife and I want to wish you and your families a healthy and happy holiday season. During these good times let us remember those less fortunate. Please help those who are unable to help themselves and share the holiday spirit. There are numerous charitable organizations to which we may all contribute. Once again we are supporting Aid For Friends in Philadelphia. This organization assists the frail and elderly home bound people in the five county metropolitan area. Please visit their web site located at www.aidforfriends.org . The mailing address 12271 Townsend Road, Philadelphia, PA 19154-1204. Each of us can make a difference in someone's life. We thank you for your support on their behalf.

Title Management Today is a quarterly news magazine that supplements materials presented on the Title Law Associates web site located at www.titlelawannotated.com . As successor by reason of merger with ***the Title Law Associates Newsletter***, it is the one publication that presents to both the land title industry and the Real Estate Bar those cases selected by ALTA title underwriting counsel as significant to the industry for inclusion in the Spring and Fall ALTA Title Counsel Meeting Agenda. This publication is designed to provide title company employees, officers, agents, approved attorneys and real estate lawyers general information prepared by professionals with regard to the subject matter covered. It does not include full legal analysis of the matters presented. It is distributed with the express understanding that the Publisher and the Editor are not engaged in rendering legal opinions or advice. We recommend a full review of the cases listed. This publication should not be utilized as a substitute for specific legal services. As circumstances warrant, if legal advice or other expert assistance is required, the services of a professional should be sought.

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