

**ALTA TITLE COUNSEL
FALL COMMITTEE MEETING**

**La Mansion del Rio Hotel
San Antonio, Texas**

November 10-14, 2001

1. CALL TO ORDER FROM CHAIRMAN JIM KLETKE, STEWART TITLE GUARANTY COMPANY, AND INTRODUCTIONS
2. COMMITTEE BUSINESS AND ANNOUNCEMENTS
 - a. Meeting logistics and information
 - b. Next meeting dates, location, format: Next meeting 4/26-4/30/2002 in Montreal
 - c. Designation of Recording Secretary for the meeting: Bruce Davis
 - d. Approval of Minutes from May, 2001 meeting (**Exhibit 1**)
3. ALTA GOVERNMENT AFFAIRS REPORT (Maher, on behalf of ALTA Legislative & Regulatory Counsel Ann vom Eigen) (**Exhibit 2**)
 - Radian/Mortgage Impairment Insurance
 - RESPA Developments – Initial Comments to HUD Policy Statement of 10/6/2001
 - NAIC Creditors' Rights Coverage
 - Tax Reporting Issues
 - Technology Task Force
 - Federal Reserve Board Proposed Rule on Real Estate Brokerage
 - Predatory Lending
 - Federal Financial Institution Insurance Regulation – Association of Banks in Insurance et al v. Duryee,
 - MERS
 - Title Issues in Bankruptcy Reform Legislation – McConville – Status update: President Clinton vetoed the Bankruptcy Reform legislation last year. The House and Senate Conferees did agree to include all the ALTA proposed amendment provisions to overturn the Ninth Circuit decision. Those changes included a change to the automatic stay, a change in definitions and a change to post-petition transfers. The Bankruptcy Reform Act of 2001 is Senate S 22 and House Bill H.R. 333. The Conference Committee is currently delayed due to the focus on the terrorist crisis.
 - Interest on Business Checking
 - Privacy Issues
 - The Financial Services Antifraud Network Act of 2001
 - TIPAC
4. FORMS COMMITTEE REPORT (Maher) (**Exhibit 3**) See page 4 of Newsletter. The Committee has also begun work on a short form expanded coverage policy.

RECENT CASES DISCUSSED AT MEETING OF NOV. 2001

ADVERSE POSSESSION

- a. *Tungsten Holdings, Inc. v. Parker*, 2001 WL 767063 (Mont.) (Sewell) **Exhibit 4**

Issues: Mining claims case – color of title – taxes – payment - tax payment timing question notwithstanding prior assessment and levy

Comment: Claimants failure to pay real estate taxes by date on which they were payable did not defeat her claim of adverse possession provided they were paid within redemption period.

6. AGENT LIABILITY

- a. *Fidelity of NY v. National Title Resources*, 261 F.3d 758 (Kletke) **Exhibit 5**

Same case as Exhibit 7 Comment: Escrow Shortage Agreement entered into between insurer and agent is not a waiver of right to cancel agent. Subsequent termination of agent affirmed by 8th Circuit Court of Appeals

- b. *United Fire & Casualty v. Fidelity Title*, No. 00-2595, 2596, Minn. 8th Cir Ct of App. (7/16/2001) (Zachow, Kletke) **Exhibit 6**

Issues: Torrens system – Installment Sales - failure to file Contract for Deed - Affect of Notice of adverse claim – Defect within meaning of the policy insuring clause 2 - Knowledge

Comment: This case illustrates both the bad points of the torrens system of recording and the risk associated with E & O Policy Coverage which contains an exclusion for matters known to the agent. As a prudent practice suggestion attorneys and agents should review their E & O policies to determine if they contain knowledge exclusions. If they do you may not be covered for your actions undertaken in attempting to clear title to real estate.

- c. *Fidelity National Title Insurance Co. v. National Title Resources Corp.*, 2001 WL 921382 (8th Cir.(Minn.)) (Zachow) **Exhibit 7**

- d. *Steadman v. Central Alabama Title Co., Inc.*, 2001 Ala. LEXIS 178 (5/25/2001) (Kletke) **Exhibit 8**

Issue: Does abstractors liability extend only to the person employing him or to one who is a party or privy to the contract of employment. Weight of modern authority sustain the rule of liability for negligence resulting in injury to the vendee, where the vendor is under a duty, or assumed the obligation, to furnish the abstract for the vendees use and reliance.

Title Rule: Title insurer, also engaged as an abstractor of title, has a duty to disclose anything, which may subject the insured [whether they be the

vendee or the mortgagee] to the threat of future litigation or serious financial loss.

- e. *Michak v. Transnation*, 31 P.3d 20; 2001 Wash. App. LEXIS 2081 (9/14/2001) (Kletke) **Exhibit 9**

Core Terms: knowledge – actual knowledge – ambiguity – amend – easement – overburdening – defect under policy insuring clause 2 – right to amend the commitment

Conflict of terms and provisions: Actual v. Imputed Knowledge debate with regard to 1966 ALTA Commitment; Policy Insuring Clause 1 v. 1966 ALTA Commitment Condition 2; Ex Cl. 3(b)

Issue: What is the obligation of the proposed insured and insurer who discover matters affecting title between issuance of the preliminary title insurance commitment and closing?

Annotations: 18 ALR4th 1311, *Defects Affecting Marketability of Title Within Meaning of Title Insurance Policy*; 87 ALR3d 764, *What Constitutes a Charge, Encumbrance or Lien within Contemplation of Title Insurance Policy*

Comment: We are of the opinion that the court rewrote the commitment. For a good commentary and review of this case see *the Title Insurance Law Newsletter*, November 2001 page 1

BANKRUPTCY

- a. *In re: Chapman*, 2001 DJDAR 7845 (Kletke) **Exhibit 10**

Key Words & Phrases: Bankruptcy – Forfeiture – Conflict of Laws;

Facts: Debtor filed for bankruptcy after premises were arrested and trustee claimed property became part of the bankrupt's estate of which he was a BFP with the right to sell free and clear of avoidable interests.

Issue: Whether the bankruptcy court erred in holding that the action was not excepted from the automatic stay under 362(b)(4).

Comment: Government forfeiture of property for drug use is not subject to automatic stay from bankruptcy proceedings. Government wins. Trustee losses.

- b. *In re: Rodriguez*, 261 B.R. 92; 2001 U.S. Dist. Lexis 4063 (Rush) **Exhibit 11**

Key terms: Bankruptcy - Unrecorded mortgage – failure to timely record instruments – priority – lost priority – knowledge of facts sufficient to put party on inquiry;

Facts: Appellees sold blackacre to debtor and took back PMMtg. Title company failed to record deed and mortgage until two weeks after debtor filed a Chapter 11 petition. Bankruptcy trustee commenced adversary proceeding against mortgagee and asserted his rights under 544(3)(a) and sought to avoid unrecorded lien on real property owned by debtor 10 months after closing and 2 weeks after debtor filed for bankruptcy.

Issue: Can the trustee be charged with inquiry notice of the unrecorded mortgage on the property at the time of the filing of chapter 11 petition?

Held: Trustee may not claim title free and clear of unrecorded mortgage back to seller when deed to debtor is also not recorded by title insurer. Unrecorded seller's mortgage may be enforced against trustee.

Comment: The circumstances of the case are unique because the deed was also unrecorded. It is upon this distinguishing fact that the case turns. And the court goes on to cite cases holding *there is a further duty to inquire where possession and record title are inconsistent*. Had this not been the case we believe the trustee would have prevailed. For additional commentary see *the Title Insurance Law Newsletter* July 2001 at page 9.

- c. *Ryan v. Homecomings Financial Network*, 2001 U.S. App. LEXIS 11378 (4th Cir. 2001) (Davis) **Exhibit 12**

Comment: good comparison of difference between "strip off" and "strip down" of liens in chapter 7.

- d. *In re: Regional Building Systems, Inc.*, 254 F.3d 528 (4th Cir. 2001) (Davis) **Exhibit 13**

Comment: good explanation and comparison of Chapter 11 and Chapter 13 Plans and issues, particularly treatment of secured v. unsecured creditors.

- e. *Tavener v. Smoot*, 2001 U.S. App. LEXIS 15901 (4th Cir. 2001) (Davis) **Exhibit 14**

Comment: Discussion of 522(g) of Code, which permits debtor to exempt property recovered from trustee in certain circumstances. In this case, voluntary transfer of property overcomes exemption.

- f. *In re: Reasonover*, No. 98-1288 (Bankr. E.D. Va. 2001) (Davis) **Exhibit 15**

Comment: Loss mitigation issue. Addresses trustee's avoidance powers under the strong arm provisions of sec 544 and good faith purchaser defense under sec 550 providing, however, purchasers are able to prove they are good faith purchaser without knowledge.

- g. *In re: Bean*, 253 F. 3d. 113 (2d Cir. 2001) (Davis) **Exhibit 16**

Comment: Unauthorized post-petition transfer not avoided where bankruptcy trustee gets sale proceeds. See Guest Column by Mr. Davis in *the Title Insurance Law Newsletter*, September 2001 page 9.

- h. *In re: Miller*, 260 Bankr. Rptr. 158 (Bankr. D. Idaho 2001) (Davis) **Exhibit 17**

Issue: Deeds of Trust – sufficiency of description – requirement of state law.

Comment: this case addresses issues surrounding facts where D/T has no legal description other than street address. Trustee attempted to avoid

transfer under 544 strong-arm provision based on insufficiency of property description. Held: legal description of the property may be ascertained from street address by use of extrinsic evidence.

- i. *In re: Thomas*, 2001 Bankr. LEXIS 462 (Bankr. E.D. Va. 2001) (Davis) **Exhibit 18**

Comment: Tenancy-by-the-Entirety exemption may not be used where both spouses file bankruptcy, even if separate cases are filed, either together or serially.

- j. *In re: Section 20 Land Group, Ltd.*, USBC (Fla., 99-14697-9P1) (Knox) **Exhibit 19**

Issue: Will indemnity accompanied by escrow deposit withstand bankruptcy trustees attempt to turnover funds in an adversary proceeding?

Comment: Creditor may perfect security interest in funds escrowed under UCC law. Therefore, trustee may not take money still needed for secured indemnity where conditions for the release of the funds have not been met. *Common Law of Pledge* explained by court. NB. This case is otherwise known as the "Twineagles" case.

CONSTRUCTION LIEN

- a. *Amerihost Development, Inc. v. Bromanco, Inc., et al.*, 786 So. 2d 362 (Miss. 2001) (Matrick) **Exhibit 20**

Issue: Whether one subcontractors Stop Payment Notice to the owner benefits all subcontractors and suppliers, including those who failed to give stop payment notice before the owner made the final payment to the general contractor. Held: one stop payment notice does not inure to the benefit of the other subcontractors.

COVENANTS

- a. *Buick v. Highland Meadows*, 2000 DJCAR 1792 (2001) (Winkelmann) **Exhibit 21**

Comment: Covenant that subdivision of lots only be used for single family dwellings is use restriction; that building an access road crossing property violated said covenant; covenant is not restricted only to the types of structures lot owners may build on property; it applies also to the broader use of the property.

- b. *Schneider v. Drake*, 2001 DJCAR 3775 (2001) (Winkelmann) **Exhibit 22**

Comment: Amendment to subdivision covenant prohibited further development of lots

- c. *Hudson v. Morrison Heights Baptist Church*, 782 So.2d 726 (Miss 2001)
Matrick **Exhibit 23**

DEED WARRANTIES

- a. *Benton v. Harkins*, Miss Ct. of App. (No. 2000-CA-00362) (Matrick)
Exhibit 24

Issue: Whether properly executed and delivered deeds were good even though they were not recorded. Held: Following delivery grantor may not thereafter unilaterally direct attorney not to record deed since she had “changed her mind”; grantor may not thereafter further direct attorney to prepare new deed conveying property otherwise.

- b. *Taylor, et al. v. Pearl River Valley Water Supply District*, 785 So.2d 314 (Miss.App.2001) (Matrick) **Exhibit 25**

DUTY TO SEARCH

- a. *Lawyers Title v. Baik, et al.*, 2001 WL 704374 (Wash.App.Div.2)(Kletke)
Exhibit 26

Key Words and Phrases: Duty to search title – Community Property – Independent examiner – due diligence

Facts: Following decedent’s death, decedent’s wife obtained independent opinion of counsel as to estate tax issues as to all property listed in the estate. LTIC was contracted with to perform a title search on blackacre. They in turn hired an independent examiner to review the probate file. The preliminary report for blackacre contained an exception for estate taxes. Thereafter, the widow ordered title insurance from LTIC on greenacre commercial property. That preliminary report on greenacre did not contain an exception for estate taxes because LTIC had, during the interim, obtained from the law firm an opinion letter relating to estate taxes. LTIC relied on said opinion of counsel in their preparation of the title report for greenacre. Title closed. Three years later the IRS recharacterized the property as separate property and not community property and determined that there remained estate taxes due in excess of \$600,000.00 on the decedent’s estate. LTIC paid the tax and then proceeded against the law firm for negligent misrepresentation and fraud. The law firm contended that LTIC violated its own underwriting guidelines and had no right to rely upon the firms estate tax letter, presumably because it was not addressed to them but to the decedents widow.

Comment: Title insurer had no right to rely on law firms estate tax closing letter in lieu of its own underwriting guidelines. See Bush Nielsen’s commentary in *the Title Insurance Law Newsletter*, August 2001 page 1.

b. *Hulse v. First American*, 2001 WY 95 (Kletke) **Exhibit 27**

Issue: Access [Policy Insuring Clause 4] – Private Roads - Vacation
Annotation: 40 ALR2d 1247; 8ALR4th 1246

Nielsen, [Access] Title & Escrow Claims Guide, 2001 Cum.Supp, page 120, sec.9.6.1 and page 127 sec. 9.7.3

Nielsen, [Duty to Search] supra., page 237-240 (cases cited);

Comment 1: Private parties cannot unilaterally vacate private roads *established pursuant to statute*. Official action must be undertaken to vacate it.

Comment 2: The Wyoming Supreme Court has ruled that an issuer of a title insurance policy may not be sued in tort for failing to search and examine title with reasonable care. There was no breach of contract by the title insurer in failing to except the easement inasmuch as the title company had no duty, express or implied, under either the commitment or policy to search the public records. Thus, there is no abstractor negligence liability in Wyoming under the statutes. See *the Title Insurance Newsletter*, November 2001 page 3 for additional commentary.

DUTY TO DEFEND

a. *R.W. Docks & Slips v. Chicago Title*, 2001 Minn.App. Lexis 864 (Kletke) **Exhibit 28**

Comment: A title insurance policy covering dockominium slip units “unambiguously excludes coverage” for the state claim of public trust ownership of the lake bed. Dockominium policy does not insure ownership of lake bed and, therefore, there was no duty to defend. See *the Title Insurance Law Newsletter* of September 2001 page 1

EASEMENTS

a. *Lewitz v. Porath Family Trust*, 2001 DJCAR 1630 (Winkelmann) **Exhibit 29**

Comment: Easement appurtenant to property runs with conveyance of property.

b. *Hudson v. Pillow*, 541 S.E. 2d 556 (Va. 2001) (Davis) **Exhibit 30**

Issue: whether there was sufficient evidence to support finding that the prescriptive easement was abandoned.

Comment: VA S.Ct. has held that easement created by prescription may be extinguished by prescription where the time frame during which the easement has not been used [in this case 39 years] is sufficient to create alternative prescriptive rights, providing action has been taken which reflect intent to adversely use easement for purposes other than ingress and egress.

c. *Ladner v. Harrison County Board of Supervisors*, Miss. Sup. Ct. (No. 2000-CA-00695SCT) (Miss 2001) (Matrick) **Exhibit 31**

Comment: this case sets forth the 6 pre-requisite elements necessary to establish a prescriptive easement. Burden of proof upon party claiming right. Query: What about issue of implied dedication?

- d. *Guthrie v. Hardy*, 2001 WL 826950 (Mont.) (Sewell) **Exhibit 32**

Comment: access limited to historic use and switchback could no longer be used because it had been abandoned.

- e. *Ryan v. Harrison*, 2001 WL 828068 (Mont.) (Sewell) **Exhibit 33**

Comment: party may not trespass and cross over private property to use water for recreational purposes.

- f. *Renner v. Nemitz*, 2001 WL 1169900 (Mont.) (Sewell) **Exhibit 34**

- g. *Mularoni v. Bing*, 2001 MT 215 (No. 00-766; 10/29/2001) (Sewell) **Exhibit 35**

Comment: case examines doctrine of merger and manner of extinguishment based on commonality of ownership

14. EMINENT DOMAIN

- a. *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 2001 U.S. Dist. LEXIS 9894 (Rush) **Exhibit 36**

- b. *Elon Piche, et al. v. Independent School District No. 621*, C7-01-267, C3-01-394, Minn. Ct. of App. (8/28/2001) (Zachow) **Exhibit 37**

Discussion: This case, inter alia, discusses the term "fee simple" and suggests, in the case of eminent domain proceedings, the terms "fee simple absolute" and "fee simple determinative" create an ambiguity. Affect of interest taken under eminent domain is determined by statute authorizing taking. If statute does not expressly or by implication grant the right to take in "fee simple" the interest taken is limited (*to a lesser estate in fee*) [emphasis mine] and the question of marketability arises. The term "fee simple Title" includes defeasible fees, which are fee simple estate subject to special limitation, condition subsequent, executory limitation, or a combination of restriction. During the 40+ year intervening period the property remained undeveloped. Schools district now proposes to use property for other than school purposes.

Issue: does the statute of limitation on defeasible estates bar recovery?

Held: The 40-year Marketable title act bars a claim for reversion by appellants

Comment: We wonder why the School district did not directly include an argument that the conveyance, ambiguity notwithstanding, imposed a "Constructive Trust" upon the property for any public purpose.

ENCROACHMENTS

- a. *Hirshfield et al. v. Schwartz et al.*, 2001 Ca. App. LEXIS 646 (Rush) **Exhibit 38**

Comment: the argument was advanced that you can't get an easement over another parties property absent elements of adverse possession. Argument rejected because case was brought in equity rather than at law.

ENDORSEMENTS

- a. *Aoute v. Hotels Europe, Inc.*, 2001 WL 913754 (Fla. App. 3 Dist) (Hart, Jones) **Exhibit 39**

Key Words and Phrases: Pro Forma Endorsement – outstanding liens of record – insuring over – insurable and marketable title;

Discussion: A Florida Appellate Court has ruled a title insurer's *pro forma* endorsement protecting against a lien and insuring over a *lis pendens*, a lawsuit and the claim of an equitable lien on hotel property, which endorsement was conditioned upon money being held in escrow, which condition was never complied with, is nonetheless in force and makes title insurable, good and marketable.

Comment: This is perhaps the second worse title insurance case decided this year. The real issue here is whether the endorsement (constituting a part of the policy) was unconditionally delivered to the purchaser. The appeals court completely blew-off the title insurance agent/lawyers attempt to explain why the endorsement was only pro forma and not binding until (i) the conditions were satisfied, (ii) the title closed and (iii) the premium paid, none of which occurred. Furthermore, the court completely disregarded the fact that Florida Department of Insurance Rate Rules and Regulations prohibit affirmative coverage. This is a terrible decision. It fails to distinguish between marketability and insurability of title and raises questions about the legal effect of such an endorsement.

EQUITABLE SUBROGATION

- a. *Kim v. Lee*, No. 70347-7, Slip Op., Sept. 20, 2001, 2001 WL 1095731 (Kletke) **Exhibit 40. Washington State Supreme Court refuses to apply doctrine of Equitable subrogation when title company is involved**

Issue: Does title company owe a duty to a record judgement lienholder to see that it is paid?

Comment 1: Apparently in the State of Washington it does!

Held: Equitable subrogation to refinanced senior lien not available to a title company defending an insured refinancing lender as against a judgment lien recorded after the original mortgage but before the refinancing mortgage.

Comment 2: This is a terrible case. No amount of rhetoric about the insurer's duty to the insured supports the court's conclusion. The court's

conclusion that title companies have some kind of duty to insure that judgment lienholders are paid when the property changes hands goes far beyond the scope of title insurance coverage. At the very least the court is guilty of strained construction. This case makes bad law and established a bad precedent. This case generated a lot of criticism on DIRT. The Initial post was the DD for 9/26/2001 and subsequent discussion. The entire Washington Land Title Association is in agreement supporting an amicus brief requesting a rehearing. It is significant that on the issue of negligence, the court didn't address the Revised Code of Washington 48.29.010 intended to limit "duty to search" issues. We are advised that a rehearing is pending before the Washington Supreme Court. It is our understanding that the brief cites the DIRT discussion of the case as an indication that the case has achieved national significance. For additional commentary see *the Title Insurance Law Newsletter* of September 2001 page 7.

- b. *Suntrust Bank v. Riverside Nat'l Bank of Fla.*, 2001 WL 980818 (Kletke) **Exhibit 41**

Comment: Florida Appeals Court applies doctrine of equitable subrogation where title insurer of refinancing bank failed to disclose prior mortgage, emphasizing that the money was used to pay off three prior mortgages.

- c. *Bankers Trust Co. v. United States*, 2001 Kan. App. LEXIS 476 (5/25/2001) (Kletke) **Exhibit 42**

Other significant cases not addressed at Title Counsel

- d. *Liberty Mortgage Corp., Inc. v. National City Bank*, 2001 WL 1047414

Comment: No Equitable Subrogation on payoff of equity loan

- e. *Homeside Lending Inc. v. Miller*, 2001 UT App. 247, 2001 WL 920846

Comment: Lender was not entitled to claim priority over a judgment by equitable subrogation when title insurer first excepted the judgment and then mistakenly removed the exception in reliance upon proof that debt was discharged in bankruptcy. See Bush Nielsens *Title Insurance Law Newsletter* of September and October for further comment on both these cases.

ESCROW

- a. *In re the Marriage of Cloney*, 110 Cal. Rpr. 2d 615 (Cal App. Div. 3 2001) (Cavallaro, Davis, Rush) **Exhibit 43**

Key Words and Phrases: Escrow – Identity - Duty to search full name – Notice – Impartiality - Good Faith Obligation to both parties - Knowledge Imputed in Escrows

Issue: Does valid judgment lien against debtor under different name impart constructive notice to purchaser of property where purchaser's escrow agent knows both names?

Opinion: A purchaser of real property acquires the property subject to prior interest of which he or she has *actual or constructive notice*. The escrow agent gained actual knowledge that Mike Cloney and James Michael Cloney were one and the same person. The issue was whether the escrow agent's actual knowledge could be imputed to the purchaser. The Escrow officer worked for a title insurance agency. The escrow agent asked for Cloney's identification, *not simply as a notary public, but as the escrow officer acting on behalf of both parties*. Because knowledge of Cloney's full name was acquired in the scope of the agent's job as an escrow agent, escrow agent was obliged to disclose the information to purchaser. As this was a legal duty, it was presumed the agent fulfilled that duty, so that the knowledge of Cloney's actual name is imputed to purchaser. Thus, purchaser had constructive notice of the recorded judgment against Cloney.

Comment: This case presents the title insurance industry with a troubling issue and potential liability for failure to disclose matters of which they become aware but don't act upon. The practical practice suggestion would be that, where the escrow officer becomes aware of such discrepancy, they contact the title department and have both names run for judgments on the "bringdown" or continuation search. The Policy Ex. Cl. 3(b) was apparently not available in this instance. For additional commentary see *The Title Insurance Law Newsletter* of September 2001 page 6

- b. *Denaxas v. Sanstone Court of Bellevue*, 2001 Wash. App. LEXIS 1982 (Rush) **Exhibit 44**

Issue: Does Escrow Agent have a fiduciary obligation to disclose difference in legal descriptions?

Comment: Apparently they do in the state of Washington. A Washington Appellate Court, applying the "duty of reasonable care" has determined that it was an escrow agent's fiduciary duty to inform the buyer that the legal description in the contract included more land than the seller owned according to the title company's preliminary report on the property. Failure to make such disclosure imposes liability upon agent

- c. *Flatiron Linen, Inc. v. First American State Bank, Co.* Sup. Ct., 99SC887 (Rush) **Exhibit 45**

FEES AND TAXES

- a. *Oakland County Treasurer v. The Title Office, Inc.*, 245 Mich. App. 196, 627 N.W. 2d 317 (4/3/2001) (Zachow) **Exhibit 46**
- b. *First American v. State of Washington*, 2001 Wash. LEXIS 537 (7/26/2001) (Kletke) **Exhibit 47**

Comment The Washington S.Ct. has affirmed last years Court of Appeals ruling that found that an underwriter business and occupation tax only on the remitted portion of the title insurance premium, not the entire premium. Further commentary may be found in *the Title Insurance Law Newsletter* of September 2001 page 2.

FORCLOSURE

- a. *Mortgage Investment v. Battle Mountain Corp*, 2001 DJCAR 3575 (2001) (Winkelmann) **Exhibit 48**

Key Words and Phrases: Foreclosure – Deed of Trust – Note – Suit – Judgment – Limitations (Statute of); Conflict between foreclosure on deed of trust v. suit and judgment on Note;

Comment: Claim to foreclosure on deed of trust barred by six-year statute of limitations.

NB: Judgment on note may be moved to another jurisdiction.

- b. *Shaw Acquisition Co. v. The Bank of Elk River*, C2-00-1803, Minn. 8th Cir. Ct. of App. (5/29/2001) (Zachow) **Exhibit 49**

Comment: Mechanics lien issue involving split priorities resulting from non-obligatory advances.

- c. *Beneficial Hawaii, Inc. v. Kida*, HI Sup. Ct. (No. 22420; 8/31/2001) (Beasley) **Exhibit 50**

Comment: if refinance is put together by unlicensed loan originator or broker obligation is render void and unenforceable. This is an act of the insured. However, that defense may not prevail if the loan was thereafter assigned on the secondary market. Policy Ex. Cl. 3(b) May also be applicable as a defense.

GOOD FUNDS

- a. *Guardian Title v. Matrix Capital Bank*, 141 F.Supp. 2d 1277 (Kletke, Rush) **Exhibit 51**

- b. *Greenwald v. Chase Manhattan Mortgage Corp.*, 241 F.3d 76 (Rush) **Exhibit 52**

Comment: In a case where the court allowed that restitution principles outweighed principles of equity it was held that where mortgage banker failed, and its loan funding checks were no good, the investor has no duty to pay back the law firm that acted as closer and funded the loan for the failed mortgage banker/broker.

INDIANS—SOVEREIGN IMMUNITY WAIVER

- a. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, US Sup. Ct. No. 00-292 (2001) (Kletke) **Exhibit 53**

INSURANCE

- a. *McDonald v. Continental Casualty*, 2001 DJCAR 4123 (Winkelmann) **Exhibit 54**

Comment: Insurance Company is liable for prejudgment interest as 'claim expense' beyond liability limit.

- b. *Progressive v. Herring*, 2001 DJCAR 2004 (Winkelmann) **Exhibit 55**

Comment: Court should not have postponed decision regarding insurance company's duty to defend policyholder until conclusion of lawsuit

- c. *Tait v. Hartford Underwriters*, 2001 DJCAR 4606 (Winkelmann) **Exhibit 56**

Comment: Trial court authorized to increase exemplary damage award based on delaying tactics of insurer

JUDGEMENTS

- a. *Bratcher v. Buckner*, 2001 DJDAR 7649 (Cavallaro) (Ca. Ct of App., 4th Dist) **Exhibit 57**

Keywords: Judgments- Execution Sale – Subordination's

Comment: Court may order sale to partially satisfy judgment lien if any amount will remain after prior obligations are satisfied. Remanded and Court to modify its order of sale. Payments to be made using the then current amounts of the various parties claim.

- b. *O'Neal Steel, Inc. v. Millette*, Miss. Sup. Ct. (No. 1999-CA-01213-SCT) (Miss 2001) (Matrick) **Exhibit 58**

LAND SALES CONTRACTS

- a. *Girard Savings Bank v. Worthey*, 761 So. 2d 230 (Rush) **Exhibit 59**

Discussion: Vendee entered into agreement for deed [installment sales contract (ISA)] upon completion of 240 monthly payments. The ISA was not recorded. The ISA provided that if the vendees went into default for 10 days they became tenants only. The Grantor, who filed for bankruptcy, failed to pay property taxes and the property was sold at tax sale to subsequent purchaser while automatic stay was still in effect. About the same time vendees sold their interest in ISA to Appellant bank who recorder its interest. Tax sale purchaser then sold his interest by Quit Claim Deed to another buyer who sold PQ to final purchaser. Quiet title proceedings brought by appellant bank.

Issue: was interest acquired under ISA property of the bankruptcy estate and therefore protected by the automatic stay, thus staying the tax sale and nullifying

subsequent sale to a resale by tax sale purchaser? was the owner of the interest acquired under the unrecorded ISA entitled to notice of the tax sale?

Comment: the property interest acquired under the ISA was not recorded and imparted no actual or constructive knowledge sufficient to set the tax sale aside. The court found that that a stay on an unrecorded interest in property did not serve to defeat an otherwise valid tax sale and tax deed to the property.

LIENS

- a. *Rosenbaum v. City of New York, et al.*, NY Ct. of App. (1 No. 997/5/01); and earlier opinion (Richards) **Exhibit 60**

LIS PENDENS

- a. *Gaugert v. Duve*, 244 Wis.2d 691, 628 N.W.2d 861 (7/2/2001) (Zachow) **Exhibit 61**

Comment: This case distinguished the difference between statutory Lis Pendens and Common Law Lis Pendens and defines the Doctrine of Common Law Lis Pendens in Wisconsin. Recommended reading.

MALPRACTICE

- a. *Commonwealth and Citicorp Mortgage Inc. v. Kurnos*, 2001 WL 611157 (N.J.Super,A.D.); 2001 N.J. Super. LEXIS 233 (Kletke) **Exhibit 62**

A title company that waited more than six years after it first became aware that a closing attorney failed to close out an equity line of account after paying it off survived a malpractice lawsuit. CLTIC is bared by the statute of limitations from collecting from the attorney. Even though the loss took place much later when the borrower defaulted, the title insurer that paid the claim had previous knowledge of the error and waited too long to sue him.

- b. *First Bancorp Mortgage Corp. v. Giddens*, A01A0870 (10/3/01), (Kletke) **Exhibit 63**

MARKETABILITY

- a. *Nelson v. Anderson*, 1977 Ill. App. LEXIS 68, (Jones) **Exhibit 64**

Key Terms: Marketability v. insurability; insuring around exception to title; agreement to insure around exception in future policies;

Discussion: It is not uncommon for title insurers to be asked to “insure over” or “insure around” a special exception appearing in Schedule B. In the instant case the title insurer examined title and issued a title report disclosing the violation of a restrictive covenant. Thereafter the title insurer agreed to insure over the exception and would insure over the exception in the future for subsequent purchasers. Buyers refused to close. Suit was filed and the trial court found title unmerchantable because of the building line violation. There is no discussion of what the

contract called for although the App.Ct. noted that the buyers bargained for a merchantable, unencumbered title. The appellate court sustained, citing numerous Illinois cases on point.

Comment: the terms "insurable title" and "marketable title" are not synonymous [a distinction which the Fla. App. Ct. in Aoute, supra., failed to recognize].

Practice aid: When such coverage is given the exception must remain in the policy and the extent of the coverage must be precisely defined in the endorsement. The policy format should be followed in describing the coverage that is being given, i.e., you should insure against loss or damage by reason of the existence of a fact or occurrence of an event, rather than insuring that the fact does not exist or the event will not occur. No agreement should be given agreeing to insure around the exception in future policies without consideration being given to a subsequent change in conditions or circumstances, and such a voluntary undertaking should include (i) a limitation as to continued liability and (ii) events which obviate or release the title insurers future obligation to so provide.

MORTGAGES

- a. *Graves v. American Acceptance Mortgage Corp.*, 246 Mich. App. 1, 630 N.W.2d 383 (5/15/2001) (Zachow) **Exhibit 65**

Key Words: Mortgages – Priority – Purchase Money Mortgage – Installment Sales Contract – intervening lienholders

Comment: Mortgage that refinances buyer's obligation under a preexisting installment land contract is a purchase money mortgage, even when given to third party lender, and has priority over prior liens against contract vendee. This case was posted on DIRT as DD June 20, 2001.

- b. *Weems v. Transamerica Mortgage Co.*, 770 So 2d 936 (Miss. 2000) (Matrick) **Exhibit 66**

- c. *In re: First T.D. & Investment, Inc.*, 2001 U.S. App. LEXIS 13582 (6/19/2001) (Rush) **Exhibit 67**

Bankruptcy issue: Debtor was allegedly engaged in a Ponzi scheme. Investors were given security interests assigned by the debtor. Trustee claimed that the security interests assigned were not perfected because the investors did not have possession of the security interests.

Comment: Some of our readers may recall that back in the 1980's mortgage brokers would sell a security interest in a mortgage and note to investors but frequently failed to assign the note. Thereafter, in the event of a future bankruptcy by the broker, the Trustee would claim the security was an asset of the bankrupt's estate, and usually prevail. Title insurers who had issued endorsements to the investors thereafter faced policy claims under insuring clause 1, *title vested otherwise than as stated*. California subsequently passed legislation holding that when investors purchase an interest in security from a mortgage broker it is perfected even if not delivered. See Cal. Bus. & Prof. Code sec. 10233.2. This case tests that legislation. See also new UCC 9 provisions.

OPTIONS

- a. *Schreck v. T&C Sanderson Farms*, 2001 Colo. App. LEXIS 1614 (9/27/2001) (Kletke) **Exhibit 68**

POLICY COVERAGE

- a. *Hofmann v. Chicago Title*, 107 Wash.App.1010 (Kletke) **Exhibit 69 [Survey Coverage]**

Discussion: This case involves a properties description, a state highway, its actual width by law v its paved width for use, and examines the pre-printed Schedule B Survey Exception. The Washington Appellate Court states that if the policy is clear and unambiguous, the policy will be enforced as written. An ambiguity exists only when language is fairly and reasonably susceptible to two different interpretations. Here the policy clearly states that it does not insure against defects, liens, encumbrances or other matter set forth in the Schedule B general and special exceptions and specifically excepts from coverage: "encroachments or questions of location, boundary and area, which an accurate survey may disclose". The court concluded that a survey exception excludes questions of boundary where no survey obtained.

- b. *Zeiger et al. v. Shons, et al.*, 2001 Ohio App. LEXIS 1991 (Kletke, Rush) **Exhibit 70**

Comment: This case examines the determination of the measure of damages and examines Policy insuring clause 2; Exclusion 3(c) and the determination and extent of contract liability pursuant C&S 7(a)(ii).

Annotation: Measure, Extent or Amount of Recovery on Policy of Title Insurance 60 ALR2d 972

33. **RESPA SEC 8(b)– HUD 1 – MARK-UPS – RECORDING FEES – FEE SPLITTING – CARVE-UPS AMONG SEPARATE PROVIDERS AS ADDITIONAL REVENUE**

- a. *Echevarria v. Chicago Title*, C.A. 7th Cir., 256 F.3d 623 (Rush, Kletke) **Exhibit 71**

- b.

Issue: single provider charges in excess of actual costs

Comment: This case dealt for the first time with a "single provider" being held liable for violation section 8(b) unilaterally by its own actions. Heretofore fee splitting was generally thought to require action on the part of two or more parties. HUD attempted to explain its "single provider" theory, inter alia, in its October 6, 2001 Policy Statement regarding the scope and coverage of RESPA sec 8(b) and its application to mark-ups and other charges made by settlement service providers. According to Jim Maher, ALTA EVP, the greatest effect on the title industry will be that settlement service providers that engage in *marking up the charges of*

other providers can expect to see much greater scrutiny of those practices by both HUD, Bank Examiners and Insurance Department Examiners. Expect examiners to look for this type of activity. Take note that there is no definition of "reasonable" fee mark-ups in either sec. 8(b) or the policy statement. While minor differences between charges and actual cost may be overlooked, assume that anything \$10 or more over the actual cost will likely be questioned.

Practice Aide: Until the industry has further clarification from HUD we suggest that underwriters and their agents follow the advice provided by Sheldon Hockberg in the article he prepared for the November/December 2000 issue of the ALTA Title News, Volume 79, number 6, appearing at page 26.

NB There is another recent single provider case with HUD implications. In that case the settlement statement contained a \$400 fee for document preparation. Following the closing the borrower filed suit alleging preparation of mortgage and closing documents constituted the unauthorized practice of law, was illegal under the laws relating to banking, violated the state consumer protection act and ignored Michigan common law. The case was certified as a class action. The borrower prevailed. *Dressel v. Ameribank*, ____ NW2d ____ (Mich.App. 2001).

STATUTE OF LIMITATIONS

- a. *Chapman v. King Ranch, Inc., et al.*, 2001 WL 30620 (1/11/2001) (Maher) **Exhibit 72**

SUBDIVISION

- a. *Yellowstone II Development Group, Inc. v. First American Title*, 2001 MT 41 (No. 99-688; 3/6/2001) (Sewell) **Exhibit 73**

Comment: Policy does not insure the right to subdivide in the future. See *the Title Insurance Law Newsletter* April 2001 issue page 3.

TAX SALE

- a. *F.C. Enterprises, Inc., v. Dibble*, 516 S.E.2d 459, 1999 S.C. App. Lexis 54 (Rush) **Exhibit 74**

Discussion: This case involves the rights of an optionee under a leasehold estate and his right to enforce the option following tax sale. Fee owner and lessee executed a 20 year lease to which was later added an option to purchase. Thereafter owners failed to pay taxes, levy and execution was had, and property was sold at tax sale. Optionees had exercised their option before tax sale. Purchaser at tax sale argued sale was not subject to the lease and the option agreement and he took free of such encumbrances. The court held that at the time of the sale appellant only purchased such title as the owner had at the time of the sale. Because the delinquent owner had conveyed an interest in the property before the tax sale *and because the lessee/appellee had properly*

exercised its option before the tax sale, appellant purchased property subject to same.

Comment: The court's decision is contrary to the usual "Relation Back Theory".

UNIFORM FRAUDULENT TRANSFER ACT

- a. *Sasco 1997 NI, LLC v. Zudkewich*, 767 A. 2d 469, 166 N.J. 579 (2001) (Angelo) **Exhibit 75**

ZONING

- a. *Pinecrest Lakes, Inc. v. Shidel*, Fla. Ct of App. (No. 4D99-2641; 2001) (Rush) **Exhibit 76**

Discussion: This case was the subject of a DIRT Post of Oct 3rd, 2001 and ensuing discussion. The case involved a conflict inherent in a county's comprehensive land use plan discoverable during subsequent residential development and challenge. The 4th District Court of Appeals agreed that the Jensen Beach housing complex breached the guidelines of the County's comprehensive plan; and further said that, notwithstanding the fact that the builder expended considerable monies in proceeding with residential construction during the litigation and appeal period, the county's land-use plan is more important than the money the developer put into the construction of The Villas at Pinecrest Lakes and the last stage of construction had to be torn down and 136 homes must be demolished.

Comment: This was a non-title insurance case but the events and outcome should be of importance to the title insurance underwriter. There was absolutely no balancing of the equities here.

Risk Lesson: Don't bet on the outcome of a suit and insure over pending litigation during construction. Notwithstanding the fact that a title insurer may be entitled to rely on Ex. Cl. 3 in the Owner's Policy and Ex. Cl. 1 in the Lenders Policy in the event of claim, there are no guarantees claim will not be tendered.

Title Rules: (i) don't make the company go to the court of appeal to prove your right; if you do (ii) always charge a premium commensurate with the risk and include exculpatory litigation language in the coverage.

LEGISLATION AND REGULATION

39. *California: AB 1090* (Lenders' Response to *Bartold v. Glendale Federal Bank*) (Cavallaro) **Exhibit 77**

Comment: Legislation abrogates Bartold decision which appeared as exhibit 47 of last November's Title Counsel Agenda

40. *Philadelphia City Council Passes Predatory Lending Ordinance, Financial Services Alert*, April, 2001, (Corrigan) **Exhibit 78**

41. OLD BUSINESS

42. NEW BUSINESS