

ALTA TITLE COUNSEL

FALL COMMITTEE MEETING

Royal Orleans Hotel
New Orleans, LA
November 3-5, 2002

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
 - c. Designation of Recording Secretary for the meeting
 - d. Approval of Minutes from April 2002 meeting (**Exhibit 1**)

3. ALTA GOVERNMENT AFFAIRS REPORT (Maher, on behalf of ALTA Legislative & Regulatory Counsel Ann vom Eigen) [**Exhibit 2**]**Major Discussions noted as A, C & F**
 - A. RESPA Developments** [see also: item 34, Exhibits 48 and 49; item 42, Exhibits 59A (Federal Register, Monday 7/29/02, 24 CFR Part 3500), Exhibit 59(B) HUD Proposed Rule changes and 59(C) Sheldon Hochberg's analysis of proposed changes]; The reader may also want to review *RESPA and Online Mortgage Lending* which appears in the May 2002 issue of The Practical Real Estate Lawyer. The article suggests that fees charged in online lending may be prohibited referral fees under Sec. 8 of RESPA.

 - B. Radian/Mortgage Impairment Insurance**

 - C. USA Patriot Act** [See TLD Feature Reports Nov. 11, 2002, page 4, Treasury Department details USA Patriot Act compliance at ALTA conference; ALTA'S *Suggested Best Practices for Anti-Money Laundering Compliance Programs* and DIRT Posting of 7/29/02 re: Interim Rule with regard to due diligence requirements under sec 312 of the USA Patriot Act, 21 U.S.C. 5318 (I)];

F. Terrorism Insurance

Comment: Following the 9/11/02 terrorist attacks and the major impact that they imposed on the bond and global insurance markets, insurance and reinsurance coverage began to disappear from the marketplace. Particularly those forms of commercial liability and casualty coverage required by lenders generally designed for brick and mortar liabilities. The threat of terrorism also greatly affected the leasehold market particularly with regard to the enforceability of lessee cancellation rights. This brought commercial real estate development literally to a halt in certain "target/tenant" sensitive specific urban centers. It has also created a demand for coverage for structure and location of high profile commercial buildings and tenant occupants, in some cases at exorbitant premiums that in turn led to some questionable lender loan enforcement practices and subsequent litigation. All this contributed to a continued downturn in the commercial real estate market, including debt restructuring. In some cases, it threatened previously otherwise profitable projects.

After a year long logjam House and Senate Conferees on the Terrorism Insurance Bill appear to have reached agreement on the principle concepts. Under a compromise Bill approved by the House Nov. 14th, 2002, the government would cover up to \$90 Billion annually in insurance claims from any future terrorist attacks. It is expected the Senate will clear the Bill quickly and send it to President Bush for signature. It is hoped the legislation will help invigorate a drooping economy, create new construction jobs and resolve lenders fears with regard to existing project construction and catastrophic loss. See DIRT Posts of Oct. 27th 2002, Nov. 15th 2002 and Nov. 25th 2002.

4. FORMS COMMITTEE REPORT (Maher, Klarin)

RECENT CASES DISCUSSED AT THE ALTA MEETING AND ADDITIONAL TITLE CASES OF SIGNIFICANCE SELECTED BY THE EDITOR

NB Cases without an Exhibit No. were not part of the original agenda. They are included because the editor believes them to be significant cases of interest to the title insurance community and real property bar.

NB ACCESS [see case cited under **Exhibit 39**]

5. ADVERSE POSSESSION

a. *Dotson v. Former Shareholders of Abraham Lincoln Land and Cattle Co., Inc.*, Ill. Ct. App., 4th Dist. (8/1/02) (Rush) **Exhibit 3** [see Landsakes discussion of

5(A) ADVERSE POSSESSION; TAX TITLE [Hart-Editors Addition to agenda]

b. *Killion v. Meeks*, No. 5-01-0924 (Ill.App. 9/13/02)

Held: A sale under tax foreclosure will terminate a title obtained by a completed adverse possession although the adverse possession title holder is not notified of the sale or of the tax delinquency.

Comment: This case bears careful and cautious reading as it was a case of first impression in Illinois and not covered by statutes regarding tax sales. The court noted that similar cases in Washington, Wisconsin and North Carolina had reached the same result but we question whether the constitutional requirement of due process enunciated in Mullane and Mennonite were sufficiently complied with. Ed.

Our thanks to Prof. Patrick Randolph for pointing this case out to us in the ABA Real Estate Quarterly Report, Summer 2002, page 3 and 66.

5(B) ADVERSE POSSESSION; INSURED'S EXPECTATIONS; POLICY EXCEPTIONS; DUTY TO DEFEND

c. *Panciocco v. LTIC*, 2002 WL 570661 (N.H.) [Also cited at **Exhibit 21**]

Comment: The New Hampshire Supreme Court has determined that title insurer has no duty to defend against third party adverse possession and boundary line lawsuit where title insurance policy specifically excepted from coverage claims as to parties in possession and survey matters. Coverage is not determined by insured's expectations.

Our thanks to Bush Nielsen for pointing out this case out to us in the June issue of the *Title Insurance Law Newsletter*.

6. AGENCY/BREACH OF FIDUCIARY DUTY/NEGLIGENT MISREPRESENTATION

a. *Lane v. Oustalet*, 2002 WL 1166481 (Miss. App.) (Matrick) **Exhibit 4**

Comment: House purchasers brought action against seller, real estate agent and closing attorney for breach of fiduciary duty and negligent misrepresentation with regard to failure to disclose termite damage to premises. Trial court granted directed verdict to defendants. Plaintiffs appealed. Court of appeal held seller and closing attorney were not obligated to furnish a closing certificate from a licensed termite company.

7. AGENT LIABILITY; APPROVED ATTORNEY CONTRACTS; ATTORNEY/CLIENT; MALPRACTICE; TITLE EXAMINATION; ABTRACTOR NEGLIGENCE

a. *Lawyers Title v. Groff, So. Ct. N.H.*, Case No. 2001-325 (Zachow, Kletke, Davis) **Exhibit 5**

Comment: Approved Attorney not responsible for abstractor's search error. Attorney retained to examine title is not liable for negligence if independent contract title examiner. Title examination duty is not nondelegable. Bush Nielsen, in the October issue of the *Title Insurance Law Newsletter* points out that this case is an open invitation to title underwriters to tighten the language of their

approved attorney contracts. See DIRT DD 9/24/02. See also commentary in ABA Real Estate Quarterly Report, Summer 2002.

NB BANKRUPTCY/PROSPECTIVE RELIEF FROM AUTOMATIC STAY/FUTURE BANKRUPTCY [Hart, Editors Choice; addition to the Agenda]

Issue: Can a bankruptcy Court prospectively grant relief from the automatic stay of future bankruptcy cases?

Comment: The issue arises with regard to debtors who own property in foreclosure, who then file multiple bankruptcies in succession to stave off foreclosure for as long as possible. The frustrated lender may apply to the present bankruptcy court for relief in rem, i.e., which relief is intended to apply to subsequent bankruptcies and the stays that automatically arise therefrom. In at least one case the relief has been granted. The question then becomes whether this is a good insurable underwriting risk? We do not believe so. There are presently three cases that have addressed this issue. The courts are not of a uniform opinion. See *In re Sicilano*, 167 B.R. 999 (U.S.B.C. E.D. Pa.); *In re Hamer*, 2000 WL 1230496 (U.S.D.C.E.D. Pa.) and *In re Abdul-Hasan*, 104 B.R. 263 (U.S.B.C.C.D. Ca.).

Our thanks to Bert Rush and Keith Pearson of First American Title Insurance Company for providing us with this issue on their LandSakes@firstam.com listserv.

NB. BANKRUPTCY; AUTOMATIC STAY; POST-PETITION TAX SALE;TAX DEEDS; SHERIFF'S SALES; PRESENT FAIR EQUIVALENT VALUE [50% RULE]; 549(c)

40235 Washington Street Corp. v. Lusardi, 177 F.Supp.2d 1090 (S.D.Cal. 2001)[Hart, Editors Choice; Agenda Addition]

Comment: *In re BFP* applies to preferences as well as fraudulent transfers. Tax deed set aside in Bankruptcy due to value. A California Court has set aside a deed derived from a bid at tax sale of less than half the fair market value of the property, when the sale was conducted in violation of the automatic stay. The court distinguished this situation from the safe harbor created by the U.S. Supreme Court, for pre-petition foreclosure sales, in *BFP v RTC*, 511 U.S. 531, 114 S.Ct. 1757 (1994). See DIRT LandSakes DD of 4/23/02.

8. BANKRUPTCY

a. *In re Gilbert*, 274 B.R. 541 (Bankr.D. Kan. 2002) (Davis) **Exhibit 6**

Comment: another interesting example of the "trustee avoiding power" under sec 544(a)(3) of the Bankruptcy Code to avoid a mortgage lien on property owned by Chapter 7 debtors. See DIRT DD of 6/11/02 and bush Nielsen's commentary in the *Title Insurance Law Newsletter*, June 2002 issue, page 5. Jack Murray wrote a brief commentary on this case. It may be viewed at <http://ul.firstam.com/landsakes/BankMtgRel.pdf> .

- b. *In re Clark*, 280 B.R. 620 (Bankr. D. Md 2002) (Davis) **Exhibit 7**

Comment: This case illustrates the danger in lending to one married spouse alone because of credit reasons without the joinder the other spouse in the loan documentation, particularly in those states where there exists strong equitable distribution provisions within the states divorce law. In this case the wife argued that despite the fact that she was not the record owner of the property, she had a legally enforceable interest in it because she contributed to the mortgage payments out of her earnings and because she and her husband agree that the property was the marital home. In the instant case GMAC ultimately prevailed. Had they been an insured under a policy of title insurance there is little doubt that the title insurer would have been called upon to defend under the policy. This is not a good risk scenario from a policy claims viewpoint.

- c. *In re Crim*, 81 S.W.3d 764 (Tenn. 2002) (Davis, Rush) **Exhibit 8**

Comment: This case deals with questions of constructive notice based upon erroneous notarization. Trustee filed an adversary proceeding to avoid deed of trust under 544(a)(1) & (3) as unperfected. Court held that a deed of trust recorded with erroneous information in the notary's jurat, due mainly to use of the wrong form, is null and void for the purpose of imparting constructive Notice. See DIRT DD 9/25/02.

- d. *In re Middlesex Power Equipment & Marine, Inc.*, 292 F.3d 61 (U.S. Ct. App., 1st Cir., 2002) (Kletke) **Exhibit 9**

Comment: This cases addresses the question of whether the Bankruptcy court has authority to discharge an individual debtor from real estate taxes. In the instant case the U.S. App. Ct. determined the Bankruptcy Court was within its broad powers of discretion to abstain from hearing state law claims in that it had concurrent but not exclusive jurisdiction over the proceedings. This is precisely why it is the general title rule of underwriters to require that all state taxes, including real estate taxes, be paid at closing. While some would suggest that so long as the tax authority were brought within the jurisdiction of the court by reason of being named in the schedule of creditors and, having been so named, failed to enter an appearance or response, and thereafter having been served notice, a subsequently entered 363 "free and clear" order which specifically states "the sale shall be free and clear of all liens, including, inter alia, state and local taxes on real estate" would be sufficient to bar the claim providing the appeal period has expired, we do not think that to be a sound underwriting practice from a risk perspective precisely because the bankruptcy court jurisdiction is not exclusive.

- e. *In re Bame*, 279 B.R. 833 (2002) (Zachow) **Exhibit 10**

Comment: This case addresses the Federal Doctrine of Marshalling of Assets against competing claims. [For illustrations see Kratovil, Modern Mortgage Law & Practice, sec 377]

- f. *In re Watts*, US. Ct. App. 9th Cir. No. 00-55207 (2002) (Cavallaro) **Exhibit 11**
- g. *In re: Thomas Kai-Ming Chiu*, 2002 U.S. App. LEXIS 19181 (Klarin).

Comment: This case addresses the issues of Homestead; Exemption; Lien avoidance under 522(f); Proper Release of Escrowed Funds and involves the sale of property by the debtor to a third after following discharge and case closure. The factual scenario is as follows: Debtors filed a voluntary petition under chapter 7 in July of 1995. The PQ was scheduled. Debtors also claimed a homestead exemption. Judgment creditor had a judicial lien on the premises. During the bankruptcy proceedings debtors did not take action to avoid the judicial lien pursuant to 522(f). Thereafter debtors were granted a discharge and the case was closed Dec. 15, 1995. In 1999 debtors contacted with and thereafter sold pq. To purchasers. Creditor continued to sit on its lien. At the time of closing escrow was held pending a judicial determination of the debtors' liability on the lien. In January of 2000 debtors filed a motion to reopen their bankruptcy proceedings and to avoid the judicial lien under 522 (f), claiming that the lien impaired their homestead exemption.

Issue: The issue for the bankruptcy court to resolve was whether, for the purpose of applying 522(f)(1), (i) the debtor must have an interest in the exempt property *at the time of moving to avoid the lien*, (ii) *at the time of filing for bankruptcy* or (iii) *at the time the lien fixed or attached*.

Held: The court determined that the lien avoidance *related back* to the date of the filing of the petition and granted the debtors motion to avoid the creditors judicial lien.

NB Application to Escrow and post closing actions. Judicial lien creditor failed to seek a stay of the bankruptcy courts order and debtors recorded the order. The escrow company relied upon the order and disbursed the funds held in escrow to the debtors before the appeal period expired. The creditor appeal to the BAP. The BAP affirmed the lower court and creditor timely appealed to the 9th Cir. Ct. App. The first thing the App.Ct did was determine the purchaser were bona fide purchaser at arms length for good and valuable consideration entitled to the protection of the recording acts. Thus, while the escrow company may have relied upon the bankruptcy court's order in disbursing the funds to the debtors, its reliance does not affect the creditors lien and *there is nothing in or on the record to suggest the 9th Cir.App.Ct. could not reinstate the lien*. Ultimately the App. Ct. sustained the BAP. However, look at the exposure the actions of the escrow agent created.

NB Compare the circumstances of this case to that of *In re Motley* 268 B.R. 237 (**Exhibit 14**) from the cases reviewed in the Spring 2002 TLA Newsletter.

- h. *In re Dial Business Forms*, No. 02-6009 (8th Cir. Bankruptcy Appellate Panel) [Hart, Editors Choice] [BANKRUPTCY; LAPSED SECURITY INTEREST; LIEN SUBORDINATION; PLAN OVERCOMES STATE LAW]

Comment: An 8th Cir. Bankruptcy Appellate Panel has held that a lapsed

security interest is still superior to and takes priority over a junior lien even though state law holds to the contrary. GE Capital held first lien on equipment. Before lien expired debtors filed for Bankruptcy. GE thereafter failed to file UCC continuation statement before its original lien expired. Supplier/Creditors named in proceedings agreed to second lien position under confirmed plan. Under Missouri UCC law, their subordinate lien agreed to under the reorganization plan would have supplanted the lien of GE Capital. However, when the Chapter 11 trustee attempted to enforce the suppliers' rights, lawyers for GE Capital asserted the confirmed plan overcame state law and subrogated the suppliers' lien permanently. The 8th Cir. affirmed stating that the confirmed plan created a new and binding contractual agreement among the parties to the bankruptcy.

Our thanks to Andrew Harris for calling this case to our attention in the October issue of the *National Law Journal*.

- i. *DMC v. Downey S&L Ass'n.*, 2002 DJDAR 6491 (Cal. Ct. App., 4th District, 2002) [Hart, Ed. Choice][MORTGAGES; FORECLOSURE; LIEN REVIVAL; REATTACHMENT; PRIORITY OF LIENS; TITLE]

Comment: California follows the "Rule of Reattachment" of wiped out junior liens upon the reacquisition of the property by the foreclosed owners. In applying the rule Appellate Court held that when a foreclosed owner reacquires the same property, the purchase money lender on the reacquisition has priority over any junior lien that is revived against the property upon reacquisition by the foreclosed out owner.

Our thanks to Keith Pearson at First American for calling this case to our attention in his 6/27/02 post to LandSakes@firstam.com .

9. COMMITMENT. TLTA COMMITMENT TO INSURE

- a. *Hispanic Housing & Education Corp. v. Chicago Title*, Ct. App. Tx 2002 WL 1303426 (Kletke) **Exhibit 12**

Comment: This case provides good commentary on the Texas Court definition of a Title Commitment and reliance issues. Plaintiff [HHEC] sought to purchase an apartment complex. Property purchase was supposed to be finance by HUD. Several loan extensions were negotiated for an additional deposit of \$30,000.00 in earnest money . Because the original commitments term expired a second revised commitment was issued which listed a large second lien not shown on the original. Notwithstanding the certification of the second lien on the revised commitment, the parties to the proceedings did not dispute that the judgment lien was previously settled, although no release of judgment was filed at the time. Proposed insured ultimately failed to close on the

property because its HUD funding had not been approved. Thereafter HHEC filed suit against CTIC alleging negligent misrepresentation of title, breach of contract and bad faith. Texas Court of Appeals held plaintiff (i) had no right to pursue title insurer for having missed a judgment lien in the original commitment because it, plaintiff, was not an insured under a policy; and (ii) never paid a policy premium which precluded a bad faith claim.

10. CORPORATE DISSOLUTION; MEDICAL FACILITIES; PROPER VESTING OF TITLE IN DISSOLUTION; PRIOR DIRECTORS; DIVERSION OF CORPORATE ASSETS; IMPOSITION OF CONSTRUCTIVE TRUST

- a. *Tauber v. Commonwealth of Virginia*, 263 Va. 520; 562 S.E.2d 118 (2002) (Davis) **Exhibit 13**
 - **Comment:** This case involves the improper application of assets of a defunct non-profit corporate charitable institution and imposition of a constructive trust on the assets of the non-profit corporation whose charter was revoked after initially being granted as a "for-profit" corporation for the purpose of operating a hospital. Following dissolution it was determined that the former directors held title as trustees in dissolution of the charitable non-profit corporation and could not thereafter authorize transfer of title to premises to a partnership of which they were members for their own benefit. Any actions thereafter by the parties "as corporate officers, and not done to wind up or liquidate the business, where without effect because there was no corporation for which to act". The fairness test for the purported sale was whether grantees met the requirement of bona fide purchasers of trust assets at arms length for good and valuable consideration. The record is replete with examples of self dealing by the directors of the charity, purported merges unsubstantiated or supported by proper title documentation, & sale-leaseback transactions. This case illustrates the need for careful review of any medical facility transaction involving any or all of the following red flags:
 - one or more non-profit corporate dissolution's, and
 - transfers or sales to related partnerships followed by sales to for-profit corporations, & sale-leaseback transactions, or
 - sublease of the hospital operating license agreements, liabilities, plant, equipment, and tangible and intangible assets to another in exchange for large annual payments which are allocated to prior lease and mortgage obligations;
 - and/or subsequent corporate name changes, or purported merges some or all of which can not be established by proper documentation.

11. COVENANTS

- a. *Chesterfield Meadows Shopping Center Associates, L.P. v. Smith*, Va. No. 012519 (Sept. 13, 2002) (Davis) **Exhibit 14**

12. CREDITORS' RIGHTS; BANKRUPTCY; DIVORCE; FRAUDULENT TRANSFER; MARITAL RIGHTS; CONSIDERATION; REASONABLY EQUIVALENT VALUE

- a. *In re Altmeyer*, 268 B.R. 349 (U.S. Banr. Ct., W.D.N.Y. 2001) (Rush) **Exhibit 15**

Comment: This case discusses the issues of bankruptcy, fraudulent transfer and reasonably equivalent value in light of an alleged marital settlement agreement. Husband and wife owned title as tenants by the entirety. They had marital problems. Couple separated and wife moved out. No action for divorce is filed and no formal property settlement agreement is executed and delivered. Thereafter H applied for a mortgage loan. Lender approved the loan providing that W would execute a Quitclaim Deed voluntarily conveying her interest in property to H. W agrees to do so despite the fact that she had many creditors and was insolvent. The deed shows consideration of \$1.00 and nothing more. Later, W files Chapter 7 Bankruptcy. Trustee in bankruptcy files an adversary proceeding to set aside the Quitclaim Deed as fraudulent conveyance and to avoid new mortgage as to wife's one-half property interest. Held: Quitclaim deed avoided as fraudulent conveyance under 548(a)(1); H bound by deed recital that consideration was \$1.00; H not a bona fide purchaser at arms length for good and valuable consideration; new lender was not a "good faith" transferee entitled to rely upon "safe harbor" protection of Bankruptcy Code sec. 550(b). See Spring, 2002, ABA Real Estate Quarterly Report. NB compare this case with *Mejia v. Reed*, cited as Agenda Exhibit 49 in the Spring 2002 Title Counsel Seminar Agenda.

13. DAMAGES; TITLE INSURANCE; DETERMINATION OF; LITIGATION COSTS; LEASEHOLD

- a. *Patel v. Anand, L.L.C.*, 264 Va. 81; 564 S.E.2d 140 (S.Ct 2002) (Davis) **Exhibit 16**

Comment: this is a somewhat convoluted case involving fraud; breach of fiduciary duty; legal malpractice; self-dealing; misrepresentation of facts concerning: appraisals, costs and fictitious buyers; false statements and breach of contract arising out of a real estate financing scheme involving title to a ground lease of 99 years (of which there were remaining 82 years)and improvements located thereon. Deep Enterprises [DE] (controlled by the Patel brothers together with some English minority shareholders) owned as its only asset the right to purchase a long-term ground lease from the FDIC. Through various fraudulent actions, DE acquired title to the ground lease. Later, Dilip Patel, acting on behalf of DE, but without the knowledge of the English minority shareholders,

conveyed the ground lease to himself and two other individuals. Thereafter, Patel and the other two individuals formed Anand, LLC and conveyed the ground lease to Anand, LLC. A separate lawsuit was filed challenging the ownership of the legal interests in the ground lease. The LLC filed suit for damages as a result of the corporate president's conduct. The court noted generally that a person who acquired property by virtue of a commercial transaction and who has been defrauded by false representations is entitled to recover as damages the difference between the actual value of the property at the time the contract was made and the value that the property would have possessed had the representations been true. The court then found that the LLC (i) failed to present evidence that it suffered damages because it failed to obtain clear title to the ground lease; and (ii) failed to present evidence of the actual value of the ground lease that it bargained for - a ground lease that would have had a clear title - and the value of the ground lease that it actually received, i.e., a ground lease with a cloud on title. Interestingly enough the court itself notes the record in this case is voluminous but does not undertake to suggest what evidence counsel for the LLC should have presented with regard to (i) & (ii) above. They may have started with the appraisals.

14. DEEDS

- o. *Hiltebrand v. Carter*, 27 P.3d 1086 (Ore. Ct. App. 2001) (Rush) **Exhibit 17**

Comment: A correction deed changing the type of tenancy by which the grantees held title, recorded five years after original deed, and recorded by grantor, was not binding on the grantees and grantees were not barred by laches from quieting title in themselves. Mother, by recording correction deed, could not unilaterally revoke the contingent remainders created by the original deed. See DIRT DD of 7/18/02.

DEEDS; EXECUTION; STATUTES OF FRAUDS; AMANUENSIS

- p. *Vohs v. Williams*, Sup. Ct. CA No. S095401 (2002); a/k/a Estate of Stevens, Cal. 4th (July 25, 2002) (Cavallaro, Rush) **Exhibit 18**

Comment: The California Supreme Court has held that a deed signed by a grantee, upon instructions of the grantor but outside of his presence, may nevertheless be valid as the act of the grantor under the "Rule of Amanuensis", even in the absence of written authorization signed by the father, noting that amanuensis has been invoked as an exception to the statute of frauds. Blacks Law Dictionary defines amanuensis as one who writes on behalf of another that which he dictates while Ballentine's Law Dictionary additionally defines the term as one who signs the name of another person *who is present in the same room* (emphasis mine), at the direction of the latter, citing *White Eagle Laundry Co. v. Slowek*, 296 Ill 240, 129 NE 753. The Cal. S.Ct. went beyond the definition offered in Ballentine when it ruled the amanuensis grantor may function as the execution

instrument of another, even if execution is done outside of the presence of the party for whom the execution is performed. In so ruling the court states it is mindful of the unusual circumstances of the case noting that “the validity of the transfer must be examined under the heightened level of judicial scrutiny”. The court further noted that because “unscrupulous parties” could use the rule to sidestep protections against frauds, forgeries, perjury, undue influence and duress, “the signing of a grantor’s name by an interested amanuensis must be presumed invalid, which presumption may be successfully rebutted. See Prof. Pat Randolph’s commentary in the Summer 2002 issue of the ABA Real Estate Quarterly Report.

NB We do not recommend the rule be relied upon until determined by the court of last resort beyond repeal.

15. DUTY TO DEFEND;

- a. DUTY TO DEFEND; TITLE INSURANCE; POLICY COVERAGE;
Stevens v. United General, 801 A2d 61, D.C. Ct. App. (2002) (Kletke, Davis)

Exhibit 19

Comment: Insured brought action against title insurer for declaratory judgment alleging that insurer had a duty to defend and indemnify insured against an adverse claim by an alleged prior purchaser of real estate. The appellate court held that the title insurer was not required to defend its proposed insured in a suit brought by another prospective buyer because the claim was created by and known to the insured and thus excluded from coverage under the policy by reason of both Exc. Cl. 3(a) and 3 (b). Thus there is no duty to defend a tortious interference suit.

NB This is to be distinguished from *Schwartz v. Stewart Title Guaranty Co.*, 711 NE2d 1159 (Ohio, 1999) reviewed in the Spring 1999 TLA Newsletter but not posted to DIRT until the DD of 11/7/02. That case stands for the proposition that (i) there is no duty of the insurer under the policy to pay for a suit voluntarily brought by the insured to clear title of a claimed defect and (ii) a title insurer has no duty to pay defense costs unless there is a third party challenge or collateral attack upon title [Ed. Note (for which no exclusion or exception applies)].

- b. DUTY TO DEFEND; POLICY COVERAGE CLAUSES; POLICY DEFENSES;
INSUREDS OBLIGATIONS; ADVERSE OR COMPETING CLAIMS

Fidelity National v. Matrix Financial, 567 S.E.2d 96, Ct. App. Ga. (2002) (Zachow, Kletke) **Exhibit 20**

Comment: This case may be illustrative of how not to handle a claim. Lender sued title insurer for breach of title insurance contract and bad faith refusal to pay insurance claim. Lender moved for summary judgment in the trial court. Motion was granted and judgment entered in favor of lender. Insurer appealed. Insurer contended that the insured lender had

created or suffered the loss of title by failing to defend is priority position in the foreclosure action. Insurer further argued that lenders failure to defend its priority in a mortgage foreclosure obviated policy coverage. The court replied that insurer should have asserted the priority/validity argument on the insured's behalf in the foreclosure action, rather than as a defense to its liability under the policy. The court further noted that nothing in the policy's terms required or imposed a duty upon the lender to quiet title or otherwise commence litigation challenging the adverse or competing claim. However, the policy did give the insurer the right to establish the insured lenders superior position or cure the title defect through litigation or other action, something which the insured failed to do. Thus, the Court of Appeals held that:

1. Lender suffered a loss under the policy terms;
2. lender was not required to litigate title dispute;
3. lender's repurchase of the loan was not a voluntary assumption of loss;
4. lender's failure to discover borrower's misrepresentations was irrelevant to coverage under the policy;
5. lender was not required to first seek remedy for borrower's misrepresentations from loan originator; and
6. insured's refusal to pay claim warranted bad faith penalties.

c. DUTY TO DEFEND; ADVERSE CLAIM; GENERAL EXCEPTIONS FROM COVERAGE

Panciocco v. Lawyers Title, 794 A.2d 810 (N.H. 2002) (Davis) **Exhibit 21**

Comment: Insured brought action against title insurer for declaratory judgment alleging that insurer had a duty to defend and indemnify insured against an adverse claim by adjoining neighbor asserting that the insured was trespassing on their property and that they had obtained title to a portion of the insured's property by adverse possession. The insurer denied coverage by reason of the fact that that the claims were expressly excepted from coverage under Schedule B of the policy.

DUTY TO SEARCH [See item 28 **Exhibit 37** below (Mass. App.)]

16. EASEMENTS

a. EASEMENT BY PRESCRIPTION; JOINT DRIVEWAYS

Martin v. Moore, 263 Va. 640; 561 S.E.2d 672 (2002) (Davis) **Exhibit 22**

Comment: This case involves a question of permissive versus adverse use and clearly sets forth at page 4 of 9, the requirements for establishing prescriptive easements in Virginia. Defendant neighbors blocked access to plaintiffs property after thirty years of joint driveway use. Title went right

down the center of the entrance road. Plaintiffs filed suit claiming an easement. Defendants contended the use was permissive, not adverse and cross claimed alleging trespass and nuisance and sought to enjoin plaintiffs from use of the entrance road for any and all purposes. Plaintiffs prevailed in the trial court and defendants appealed. The appellate court found that circumstantial evidence could not be used to establish permissive use in cases involving joint driveways. The court determined there must be a positive showing of evidence of permissive use, not mere presumption. The Supreme Court determined that while the evidence presented at trial established that the neighbors acquiesced in the plaintiff's use (of their portion of the driveway), it failed to rebut the presumption that such use was adverse. The court further determined that where there has been open, visible, continuous and unmolested use of a road across the property of another for the prescriptive period, the use will be presumed to be adverse and under a claim of right, and places upon the owner of the servient estate the burden to rebut such presumption by showing that the use was permissive and not under a claim of right. Defendants presented no positive showing sufficient to establish permissive use.

- b. *Taylor, et al. V. McConchie, et al.*, Va. No. 012583 (Sept. 13, 2002) (Davis) **Exhibit 23**
- c. *Hatfield v. Kenneth R. Lape, Trustee, et al.* Circuit Court, Albemarle Co. Va. Record No. 020092 **Exhibit 23A**

ISSUE: whether a "line-of-sight" or "view easement" renders title unmarketable.

17. EMINENT DOMAIN

- t. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 228 F.3d 998 (9th Cir. 2002), affirmed 4/23/02 122 S.Ct. 1465 (2002)(Kletke) **Exhibit 24;**

Comment: held that an ordinance temporarily suspending land development does not constitute a taking.

Contra: see *Nolen v. Newtown Township*, 55 D&C 4th 548 (PA) (2001) (Hart) holding that the federal standard for de facto taking is higher than the Pennsylvania standard. Noting the distinction and citing *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003 (1992) the court noted that **the federal standard** requires that all economically beneficial or productive uses of property be denied by the regulation. **The Pennsylvania standard**, on the other hand, does not require that all uses be denied. The Pennsylvania standard for determining whether a de factor taking has occurred is whether the governmental action has substantially deprived the owner of the beneficial use of his property. [See www.blankrome.com/newsevents/articles/ominsky_049.ASP]. **Exhibit 4** of Supplemental Agenda

- u. *Cass County Joint Water Resource District v. 1.43 Acres of Land in*

Comment: County water district brought condemnation action to acquire land conveyed to Indian tribe. Tribe moved to dismiss the action on grounds of sovereign immunity. Supreme Court of North Dakota held condemnation of land did not violate Federal Nonintercourse Act.

NB ENDORSEMENTS; GAP ENDORSEMENT

v. *Ulysses I & Co. Inc. v First American Title Insurance Co.*, (S. Ct New York County, No. 603991/01) (&25/02) [Hart-Editors choice] **Exhibit 25A**

Comment: The Supreme Court of New York (the trial court) has held there exists no coverage under a Gap Endorsement for title interests known to the buyer and specifically excepted in the title insurance commitment notwithstanding the fact that a lis pendens asserting a claim of ownership of a prior contract purchaser was recorded prior to the deed to the insured purchaser. The insured had knowledge of and bought subject to those rights. The court rejected the insured's claims under Ins. Cl. 2 and it's contention that the LP was an encumbrance which clouded title or rendered it unmarketable. The court listed several policy provisions which negated coverage, particularly Exc. Cl 3(a) and the special exception for the unrecorded contract in Schedule B. The court also found that because the transaction was ultimately unwound and the purchase price was refunded to the insured, the insured suffered **no loss** which matter is addressed under Ex. Cl. 3(c) & C&S 7 (a)(ii).

Our thanks to Bush Nielsen for pointing out this case to us in the September issue of the *Title Insurance Law Newsletter*.

18. EQUITABLE MORTGAGE

a. *Allen v. Union Federal Mortgage, et al.*, 204 F. Supp. 2d 543 (U.S.D.C. NY, 2002) (Kletke) **Exhibit 26**

Comment: a New York Federal Court has granted a equitable mortgage to LTIC after the title insurer repurchased an insured loan from the insured lender after it was determined that the insured mortgage was unrecordable because the signature page and acknowledgment were lost. After the borrower's filed suit to set aside the mortgage claiming that the home equity loan was in violation of existing law LTIC was able to present to the Court the loan application, the note executed by the borrowers, the pay-off statements and proof of payment of two previously existing mortgages; the pay-off of three credit card accounts and the signed HUD 1 showing the disbursement to the borrowers. The case further discusses New York law this issue

19. EQUITABLE SUBROGATION

a. *Harms v. Burt*, 40 P3d 329, Kan. Ct. App. (2002) (Wood) **Exhibit 27**

Comment: this case discusses the doctrine of equitable subrogation in Kansas and does not join with the Indiana and Washington State Supreme Courts (and others) in their findings and ruling under *Wilshire Serving v. Timber Ridge Partnership*, 2001 Ind. App. Lexis 300 and *Kim v. Lee* (Wash. S.Ct.) which cases were discussed in the TLA Newsletter, Spring 2002 and Fall 2001 issues. Those cases held that Equitable subrogation will be denied where the claimant is covered by title insurance. [Ed. Note: Refer to **Exhibit 39** of Spring 2002 of the TLA Newsletter for further discussion; see also Bush Nielsen's DIRT Posting of 4/3/01 listing other equitable subrogation cases]

20. ESCROW

- a. *Fleming Cos. V. Tucker*, 2002 WL 819602, Ct. App. Ark. (Kletke) **Exhibit 28**

Comment: In a case of questionable merit an Arkansas Appellate court has determined that a lender may sue an escrow agent for not making a promised payment in holding that a title company made a contract with a lender when asking for a payoff letter, and broke that contract when one of the title company owners told the escrow agent not to pay the lender from the closing. This case is contrary to the well reason opinion of the California Court in *Summit Holdings, Ltd. V. Continental Lawyers Title Co.*, 27 Cal. 4th 705, 41 P3d 548. That case held an escrow agent owes no duty of care to third parties. NB There is a good discussion of an escrowee's duties to non-parties to be paid out of escrow in Nielsen, [Title and Escrow Claims Guide](#), at pages 414-6.

21. FRAUD

- a. *U.S. v. Hartz*, U.S. Ct. App. 7th Cir. No. 01-2801 (2002) (Maher) **Exhibit 29**

Comment: This case concerns the actions of a defalcating attorney agent in the creation of a series of phony transactions and reviews both the old federal sentencing guidelines and the new guidelines regarding application of enhancement penalties to a prison sentence. In this case the felon was given additional time for stealing from an FDIC insured bank. The case also has determined that a title company does not fit the definition of a financial institution. Thus, the revised federal criminal sentencing rules that require a longer prison term for stealing from a financial institution do not apply to money stolen by an attorney agent from a title insurer.

22. INSURANCE; GENERAL INSURANCE; DUTY TO DEFEND

- a. *Dart Industries v. Commercial Union Insurance Co.*, Sup. Ct. CA No. S086518 (Cavallaro) **Exhibit 30**

Comment: On appeal the Supreme Court of California was asked what an insured must prove in order to establish its rights under a lost or destroyed insurance policy. In stating there is no evidentiary requirement to prove the contents of lost documents, be they insurance policies or otherwise, the Supreme Court determined that the court below had established a special evidentiary rule with respect to insurance policies, i.e., an actual language rule. Thus, anything short of the actual reproduction of the policy language does not constitute evidence of content. In so doing the Court of Appeals reasoned that the meaning of an insurance policy, like that of any contract, is derived from the examining its language. Absent such language, the contents of the policy cannot be determined. The S. Ct., on the other hand, determined that the proponent of the lost document need only prove the relevant substance of the document. In which case the contents of lost policy may be proven by secondary evidence through oral testimony.

23. JUDGMENTS; MONEY JUDGMENTS ISSUED BY A FOREIGN JURISDICTION; UNIFORM FOREIGN COUNTRY MONEY JUDGMENT RECOGNITION ACT; LAW OF COMITY; MAREVA ORDER; KNOWLEDGE THEREOF

- a. *CIBC Mellon Trust v. Mora Hotel Corp.*, 743 N.Y.S.2d 408 (N.Y. App. Ct. 2002) (Rush) **Exhibit 31**

Comment: This is an interesting case involving multi-national fraud which required the court to consider what circumstances are sufficient to grant recognition and enforcement of a money judgment issued by an English Court in relation to the financial collapse of Castor Holdings Ltd., a Canadian real estate and financial investment company that declared bankruptcy in 1992, where the defendants are Netherlands corporations doing business in New York that maintained no presence in England and appeared only for the purpose of contesting personal jurisdiction.

The basis of the assertion of jurisdiction by the English High Court over Mora Hotel Corp was that they were “necessary or proper parties” pursuant to the Rules of the Supreme Court of England Order 11 Rule 1[1][c]. This rule permits the court to grant a plaintiff leave to serve process on out-of-jurisdiction defendants in multi-defendant cases so long as one “anchor” defendant is a domiciliary of England, and the out-of-jurisdiction defendants are necessary or proper parties [which term is further defined at page 3 of 13]. The court then goes on to examine New York’s enactment of the Uniform Foreign Country Money Judgements Recognition Act under CPRL 5309.

NB A Mareva Order restrains parties from transferring assets and directs certain disclosures.

NB it may be that the defendants appearance was their undoing.

24. LIS PENDENS

- a. *Chaney v. Minneapolis Community Development Agency*, 641 N.W. 2d 328 (Minn. 2002) (Zachow) **Exhibit 32**

25. MARITAL PROPERTY; TITLE HELD AS TENANT-BY-THE ENTIRETY; DIVORCE; JUDGMENT IN DISSOLUTION; TENANCY-IN-COMMON; ATTACHMENT OF JUDGEMENT LIENS AGST. EITHER PARTY

- a. *Pegram v. Pegram*, 821 So.2d 1264 (Jones) **Exhibit 33**

Comment: This case is significant because it illustrates the importance of the use of express language to be included within a property settlement agreement if judgment creditors are to be prevented from asserting an interest upon dissolution of the marriage and to avoid the contention that thereafter the parties own the property as tenants-in-common. In Florida, a judgment of dissolution may convey real property from one spouse to another and, if it does, liens that pertain only to the spouse who conveys the property will not attach (case and statutory citations omitted). In the instant case however, the judgment dissolving the Pegram's marriage not distribute assets and thus did not operate as a conveyance. Instead, the property settlement agreement required the husband to execute a quit claim deed to the wife. The judgment of dissolution ordered that he comply with the terms of the settlement agreement. The property settlement agreement did not specifically state that the wife would obtain sole title to the real estate and the judgment "directing" the husband to convey the real property to the wife did not distribute assets as contemplated under FSA 61.075. The husband signed the deed pursuant to the property settlement agreement in June of 1996. The court entered the final judgment of dissolution in July of 1996. The former wife did not execute the deed from her husband and herself to herself until August 14th of 1996. [We do not know if the deed made lengthy recital of the facts.] Because the husbands conveyance of his interest was not effective until 8/14/96 the property was held as a tenancy-in-common for a period between the date of dissolution and that date. Thus, the lien of judgment creditors could attach to his interest during the interim.

26. MORTGAGES

- a. *Superior Housing, Inc. v. Deutsche Financial Services Corp.*, 40 P3d 336 (Kan. Ct. App. 2002) (Wood) **Exhibit 34**

Comment: the court is asked to determine whether a prior UCC security interest on modular housing is superior to a mortgage granted on property to which the modular home is thereafter affixed.

- b. *Wells Fargo Home Mortgage v. Newton*, 646 N.W.2d 888, Ct. App. Minn. (2002) (Zachow) **Exhibit 35**

Comment: Here we have another case illustrating the danger of having only one spouse execute the mortgage. In 1998 Michelle R. Newton [W], then a single person executed a contract for deed. Thereafter she married Theodore Witkowski [H]. Following the marriage H & W lived in the subject premises and same was the marital home. In 1999 the couple separated and H moved out. Thereafter H petitioned for divorce. In October 1999, during dissolution proceedings, W borrowed money from mortgage corporation and mortgaged the premises. The mortgage did not name H as a mortgagor and H did to sign the mortgage. W used part of the mortgage proceeds to pay-off the contract for deed and the balance for her personal use. The mortgage was assigned to Norwest Mortgage Inc., n/k/a Wells Fargo. Thereafter W defaulted on the loan. Wells Fargo filed suit seeking, inter alia, declaration that mortgage was a purchase money mortgage superior to the claim or right of any defendant. Both Bank and H filed motion for summary judgment. Thereafter, the trial court dismissed claims against H. Bank appealed and the Court of Appeals was presented with the following issues: (1) was the mortgage W executed exempt from the spousal-signature requirement of the Minn. Statute because it was a purchase money mortgage? (2) is the mortgage W executed valid under Minn. Statute without H's signature because W owned the mortgaged property when he married H? The court ultimately determined that (a) mortgagee could enforce mortgage only to a limited extent, i.e., to recover only that portion of the funds secured by the mortgage that were used to pay off the contract for deed. The mortgage cannot be for a amount greater than the unpaid balance of the contract for deed because the mortgage was not signed by H & W; and (b) wife's rights under the Married Women's Act did not include the right to mortgage her property once it became homestead.

- 26A. MORTGAGES; DUE ON SALE CLAUSE; SUBSEQUENT SALE SUBJECT TO; NO ASSUMPTION OF UNDERLYING DEBT, MORTGAGE OBLIGATION OR LIABILITY; PRIVACY OF CONTRACT; BANKRUPTCY; Chapter 13;

In re Trapp, 260 B.R. 267 (Bankr. D. S.C. 2001)

Comment: Bank of New York made loan to property purchaser. Mortgage contained "due-on-sale clause" that prohibited any sale or transfer without the lenders consent and allowed for accelerated payment. Original borrower sold property to debtor subject to the mortgage under general warranty deed. Lender was unaware of sale. Grantee did not assume note or mortgage. Thereafter grantee/debtor stopped making mortgage payments. Lender notified grantee/debtor they had 30 days to cure and debtor filed Chapter 13 Bankruptcy proceeding. The plan proposed to cure arrearages and reinstate monthly mortgage payments. Lender argued: (i) the stay should be lifted to permit foreclosure claiming no debtor-creditor relationship existed between

debtor and lender; (ii) the mortgage debt was not a "claim" as defined under sec. 1322(b)(2), (5), (6) or 101(5) of the Bankruptcy Code; and (iii) it should not be forced to accept decelerated payments proposed under debtor's plan. Debtor's counsel argued real property was part of debtor's estate and therefore lender was adequately protected. The court determined the debtor's plan allowed debtor to decelerate the loan payments and cure default.

NB This case is illustrative of how bankruptcy law may impact upon and change the rights and priorities that normally exist under real property law.

Our thanks to Professor Randolph for calling this case to our attention in DIRT DD of 8/15/02.

27. POLE ATTACHMENTS ACT; CODIFIED AS 47 USCS 224(F); COMMUNICATIONS LAW; EASEMENTS

- a. *UCA, L.L.C., d/b/a Adelphia Cable Communications v. Lansdowne Community Development, L.L.C., et al.*, 215 F. Supp. 2d 742 (E.D. Va. 2002) (Davis) **Exhibit 36**

Comment: Congressional purpose in passing Pole Attachments Act was to prevent utilities from exploiting monopoly control of easements.

28. POLICY COVERAGE

[Duty to Defend; Duty to Search; In. Cl. 2, Defect, Lien or Encumbrance; Ex. Cl. 3(a); 87 ALR 3d 764, *What Constitutes a Charge, Encumbrance or Lien within Contemplation of a Title Insurance Policy*; 18 ALR 4th 764, *Defects Affecting Marketability of Title Within Meaning of a Title Insurance Policy*; Taub/Rydeburg, *Defects Created, Assumed or Agreed to by the Insured*, 306 PLI/Real 489 (1988); Pedowitz, *Understanding Title Insurance Coverage*, 397 PLI/Real (1993); Sher/Miller, *Interpreting the Term "Created" in Policy Exclusion 3(a)*, 434 PLI/Real 349 (1993)]

- a. *Private Lending & Purchasing v. First American*, 54 Mass. App. 532; 766 N.E.2d 532 (2002) (Jones, Davis) **Exhibit 37**

Comment: Mortgage exception need not warn against Dragnet Clause. Appellant lender filed action against appellee title insurer for, inter alia, breach of contract, and negligent misrepresentation. Trial court granted summary judgment in favor of title company and lender appealed. Lender foreclosed on two senior mortgages. When the foreclosure resulted in a deficiency the lender contended that the "dragnet clauses" in the mortgages were defects in, or liens or encumbrances on, title that should have been, but were not, disclosed in the lenders title insurance policies (presumably in violation of Ins. Cl. 2). The court noted that the mortgages excepted in Schedule B of the insured's policy where the same mortgages in which the dragnet clause appeared and thus did not

create a separate lien or encumbrance beyond the mortgage itself, but rather expanded the scope of the obligation that the mortgage secured. The alleged failure to disclose the “dragnet clauses” did not transform them into a defect in title.

TILN, June

Quaere: What is the scope of disclosure for any title exception? To what extent is the insurer obligated to disclose the terms of an excepted item?

NB While it does not appear that counsel entered Exc. Cl. 3(a) as a defense it would seem to apply since both loans were created by the lender and we presume it would have knowledge of those terms.

NB The “created, suffered, assumed or agreed to” exclusion is invoked by title insurers more than any other exclusion from coverage under the standard ALTA policy to exclude title “defects, liens or encumbrances”.

[Exclusions from Coverage; Ex. Cl. 3(b); C&S 1(c); Policy Integration Clause (C&S 14)]

b. *Archambo v. Lawyers Title Insurance Corp.*, [[Archambo I](#)] 466 Mich. 402 646 N.W.2d 170 (2002), (Kletke, Zachow, Rush) **Exhibit 38(A)**

Comment: In another decision in which a Michigan Court has used the Title Policy Integration Clause to cancel the language set forth in the Michigan Commitment Form [see also C&S 2 of the ALTA Commitment to Insure], the Michigan Supreme Court has determined that the commitment language merged into the policy in holding that the proposed insured’s failure to disclose a recorded tax lien against him to the insurer does not cancel the policy. Further, Policy Exclusion 3(b) does not apply because it pertains only to unrecorded matters [thus distinguishing from *Kirwin v. CTIC*, 2000 WL 781109 (Neb. S.Ct.)]. In the instant case the plaintiff was a shareholder in a solar heating company against which the IRS had filed a tax lien, including all of the shareholders individually. The title agent failed to disclose the lien.

Archambo testified that he had not been in charge of the corporate books at the solar company and did not know the company had failed to pay federal taxes or that a lien had been filed. The court determined since the lien was on record the insuring provision of the policy applied. That left open the opportunity for denial of liability under Ex Cl. 3(a). Those hopes were dashed in [Archambo II](#) (below).

[See also *Archambo v. Lawyers Title Insurance Corp.* ([Archambo II](#)) 2002 WL 31013194 (Mich. App.) [Ex. Cl. 3(a) Created or Suffered Exclusion; Gosdin, [Title Insurance, A Comprehensive Overview](#), pp. 69-76;] **38(B)**

Comment: In [Archambo II](#), a Michigan Appellate Court has determined the policy exclusion phrase “created and suffered” must be applied with regard to the intentional acts of an insured, (as opposed to negligent, unintentional or mistaken conduct on the part of the insured) and do not apply where the insured claims he has no knowledge, i.e., in order for a

title insurer to prevail under the exclusion the title insurer must prove the insured intended to create a lien, or, alternatively, that it had the power to prevent it. The court seized upon the fact that the title policy itself does not provide a definition of those words. The court therefore reviewed a summary of cases appearing in 87 ALR 3d 515 and cases cited and thereafter drew its own conclusions to the effect that an adverse matter may be deemed to have been "created, suffered, assumed or agreed to" when it results from the insured's intentional misconduct, action or permission, but not when it is brought about by mere negligence on the part of the insured.

NB The courts opinion also would appear to defeat the purpose of exclusion 3(a) with regard to its application to **all liens** filed against an insured. It was never the intention of title insurers to provide an insured coverage against his own obligations.

NB We believe the recent trend of the courts to construe the exclusion narrowly is misguided judicial license and strongly suggest that the exclusion should be interpreted to encompass all acts of the insured, including both intentional and unintentional acts.

NB The Editor has some questions with regard to these decisions and to the defenses argued. For example:

- the plaintiff borrowed money to pay off the tax lien and then sued LTIC. C&S Cl. 3 requires that notice of an adverse claim must be given to the insurer promptly. C&S Cl. 8(c) relates to voluntary settlement by the insured. Since the title insurance company retains the right to participate fully in the in the disposition of any title claim, if the insured settles or compromises a claim without permission we believe the insured has waived coverage under the policy. Why weren't the requirements of C&S Cl. 3 and Cl. 8 (c) argued together as a whole, particularly in light of the earlier defense posed by LTIC in *Straight Creek Processing Co. v. LTIC*, No. 94-0009-B, 1995 WL 170368 (W.D. Va. March 30, 1995, *aff'd*, 76 F3d 375 (4th Cir. 1996) ? When the insured first paid the claim *and thereafter notified the insurer*, did that not compromise defense(s) and have an adverse affect or adverse impact upon the insurer with regard to it's ability to exercise its options and obligations under C&S 4 [Duty to Defend] or C&S 9(a) [Limitation of Liability]? We think that the failure of an insured to comply with the policy's conditions and stipulations gives the title insurance company defenses to coverage which should be seized upon.
- In Archambo I, the court appears to have fashioned it's own definition of "Known" rather than rely upon that provided under C&S 1(c).
- Assuming that the courts were correct in their findings, shouldn't the title company have prevailed under its right of subrogation under C&S 13?

We agree with Bush Nielsen that it should be against public policy to allow an insured to obtain coverage against his own tax obligations! We also agree with John Thomas, Counsel with Connecticut Attorneys Title Insurance Company in his Dirt Post of 11/04/02 when he stated: “. . . the shareholder should see to it that his ever-present potential personal liability for unpaid taxes never materializes. If he fails to do this, he “suffers” the consequences, in both senses of that word: (1) he has to pay the taxes, and (2) he allows or permits the existence of the tax lien that arises because of non payment.” Clearly the plaintiff had the power to prevent the lien from arising.

We further suggest our readers obtain copies of Bush Nielsen's August and October issues of the *Title Insurance Law Newsletter* for his analysis and comment. See also DIRT DD of 11/04/02.

[Access; Ambiguity Between Policy Schedules; Rule]

- c. *Aubuchon Realty Co. v. Fidelity National*, 743 N.Y.S.2d 626 Sup. Ct. N.Y. (2002) (Kletke) **Exhibit 39**

Comment: The Appellate Division of the Supreme Court of New York has determined that a policy does not automatically insure an access easement, when Schedule A of the policy does not recite the easement but does reference a deed containing the easement, and Schedule B of the policy excepts any claim concerning title beyond the boundary lines of the property described in Schedule A. Thus, the ambiguity in the terms of the title insurance policy could not be resolved without resort to extrinsic evidence, and thus precluded summary judgment for the policy holder. See Nielsen, *supra*. July 2002 issue.

NB The fact that the court did not construe the latent ambiguity in the policy against the insured immediately is favorable to Fidelity. We should like to suggest that any policy use of "incorporation by reference" represents an increased risk to the title insurer and subjects them to a claim by reason of policy ambiguity for which they do not intend to assume liability. It is a bad practice. The general rule in policy draftsmanship is for there to be no ambiguity or conflicting statements in the policy.

[Access; Ins. Cl. 4; Policy Coverage; Public Street]

- d. *Dishman v. Stewart Title*, 2002 WL 491493, Ct. App. Wash. (Kletke) **Exhibit 40**

Comment: Policy does not assure access to streets on attached map. A Washington State Appeals Court has held that a policy of title insurance does not insure that the streets shown on a filed plan as recited in both Schedules A and B are public and improved. The court distinguished an earlier Washington case that had accepted the "incorporation by reference theory". Contra: see *Kuper v Stewart Title Guaranty Co.*, 2002 WL 992566. NB Our thanks to Bush Nielsen for pointing our attention to *Kuper*, in the June Issue of the *Title Insurance Law Newsletter*.

- e. *Rivera v. Old Republic*, Award of Arbitrator (Oct. 2, 2002), AAA Commercial Arbitration Tribunal (Zachow, Uecker) **Exhibit 41**

- f. *Kaufer v. Chicago Title*, 2002 WL 1651341 (Cal. App. W Dist.) (Kletke) **Exhibit 42**

Comment: This case involves the question of access over Indian land and is illustrative of what is the trial courts discretion in accepting independent testimony in determining where lack of access diminishes but does not destroy lands value.

29. PRENUPTIAL AGREEMENTS; PREMARITAL AGREEMENTS; MARITAL RIGHTS; TITLE UNDERWRITING

- a. *Hoag v. Dick*, __ A.2d __ (Me. Sup. Ct. 2002) (Rush) **Exhibit 43**

Comment: Declining to apply the Uniform Premarital Agreement Act, the Maine Supreme has held a premarital agreement unenforceable where it was presented on a wedding day so that the spouses did not have an opportunity to consult with legal counsel of their choice before signing. The case points out the hazards to a title insurer when asked to rely upon the terms of a premarital agreement and subsequent non-joinder of spouse. It may be declared as invalid and unenforceable for any number of reasons. Matters to be considered in the underwriting process should include. For example, the underwriter should try to determine what is the current relationship between the parties? (happy/hostile); were both parties aware of their rights under state law? Did either or both parties make complete financial disclosure to the other in the agreement? Did either or both parties make valuable provision in terms of consideration or life insurance for the other party in exchange for the one spouse surrendering his/her rights? Were the documents signed voluntarily and were they delivered for review in a timely manner free of duress or coercion? Do the agreements meet the standards of law required in the jurisdiction where the property is located?

30. PRIORITY; TORRENS TITLE

- a. *In the Matter of Ocwen Financial Services*, 649 N.W.2d 854, Ct. App. Minn. (Kletke) **Exhibit 44**

Comment: Torrens property registration numbers provide conclusive evidence of the order in which mortgages were filed.

31. PUBLIC TRUST TIDELANDS; RIPARIAN LANDS; LANDS UNDER WATER

- a. *Stewart v. Hoover and State of Mississippi*, 815 So.2d 1157 (Miss. 2002) (Matrick) **Exhibit 45**

Comment: This case involves and addresses an oversight in the states riparian mapping process. The Supreme stated the state did not lose title to public trust tidelands by an oversight in the mapping process. The S. Ct. cited, in support of its decision *City of Newark v. Natural Resources Council*, 133 NJ Super 245, 336 A2d 46 (Law. Div. 1974), aff'd 148 NJ Super 297, 372 A2d 644 (App.Div. 1977), noting that the New Jersey Statute was comparable to The Mississippi Public Trust Tidelands Act.

31(A) RECORDING ACTS; BANKRUPTCY; CONSTRUCTIVE NOTICE; NOTARIZATION [See Case cited under BANRUPTCY, item 8, **Exhibit 8**]

32. RECISSION; INSURANCE FRAUD; VOIDING OF MALPRATICE POLICY

- a. *First American v. Lawson, et al.*, 351 N.J. Super. 407; 798 A2d 661 Super. Ct. N.J. 2002 (Kletke) **Exhibit 46**

Comment: Malpractice Policy void because Approved Attorney(s) lied about stolen funds. Professional liability insurer brought action against insured law firm and its individual partners seeking declaratory judgment that policy be rescinded or, alternatively, provided no coverage for claims of professional malpractice brought and asserted by two title insurers by reason of misrepresentations in malpractice insurance applications. Title insurers denied recoupment from Lloyds for defalcation losses.

33. RELIGIOUS SOCIETIES

- a. *Falwell v. Miller*, 203 F. Supp. 2d 642 (W.D. Va. 2002) (Davis) **Exhibit 47**

Comment: In this case the United States District Court for the Western District of Virginia struck down the Art. IV, sec 14(20) of the Virginia Constitution which heretofore prohibited the General Assembly from incorporating any church or religious denomination. The Court held that provision of the Va. Constitution violates Plaintiffs' First Amendment rights to the free exercise of their religion.

34. RESPA

- ii. *Haug v. Bank of America*, U.S. Ct. of App. 8th Cir. No. 02-2458: Discussion of amicus briefs (Maher) **Exhibit 48**

Comment: settlement mark-up charge not a kickback. In so deciding the 8th Circuit has joined the 7th Circuit (*Echevarria v. CTIC*, 256 F3d 623 (2001)) and the 4th Circuit (*Boulware v. Crossland Mortgage Corp.*, 291 F3d 261) in holding Section 8(b) of RESPA is not a broad price control, and the markup of a credit report charge on a HUD-1 is not a prohibited kickback.

- jj. *More v. Radian Group*, 2002 U.S. Dist. LEXIS 17791 (Maher, others) **Exhibit 49**

Comment: Putative class representative sued defendants claiming a RESPA violation and challenged the relationship between lenders and primary mortgage insurers: (i) alleging primary mortgage insurers have provided below market pool insurance to lenders in exchange for the referral of the lenders PMI business, (ii) claiming the referral arrangement increases the

PMI component of their settlement costs; (iii) that PMI settlement charges are a kickback to the referring lender; and (iv), even if they do not the arrangement violates RESPA, which creates statutory rights to be free of unlawful referral arrangements. The question presented to the court was whether congress intended to allow a private plaintiff to sue for alleged violation of RESPA anti-kickback provisions if the referral arrangement does not increase settlement costs.

- kk. "Title Company Raided" Article on HUD enforcement action. (Rush) **Exhibit 50** See story line at www.newsday.com/business/ny-bztitl142823019aug14.story?cool=ny%2Dtop%2D

35. SERVITUDES; LAW OF PRESCRIPTION; PRESUMPTIVE GRANT v. IRREVOCABLE LICENSE;

- a. *The Morning Call, Inc. v. Bell Atlantic*, 761 A.2d 139 (PA. Super. 2000) (Rush. Hart) **Exhibit 51**,

Comment: Property owner wanted demolish building to create a parking garage and sought injunction to require phone company to remove equipment it had installed on its property in 1917. The Superior Court of Pennsylvania determined that a Irrevocable license inferred by permissive use over a period of 82 years in holding a license will become irrevocable under rules of estoppel and in those circumstances it is similar to an easement. Cases cited.

36. SLANDER OF TITLE

- a. *Mason v. Southern Mortgage Co.*, 2002 WL 1767552 (Miss. Sup. Ct.) (Matrick) **Exhibit 52**

37. SUBDIVISION

- a. *Kimball v. Raike*, 2002 Haw. LEXIS 499 (Klarin) **Exhibit 53**

Comment: case addresses the issue of whether a lease constituted an illegal subdivision in violation of county's subdivision code was therefore void.

38. SUBORDINATION; SUBORDINATION AGREEMENTS; MORTGAGES; PRIORITY OF LIENS; MECHANICS LIENS; CIRCULAR PRIORITY

- a. *In re: Price Waterhouse Limited*, 46 P.3d 408 (Ariz. Sup. Ct. 2002) (Rush) **Exhibit 54**

Comment: in a case involving a circuitry of lien problem between two deeds of

trust and a mechanics lien a California bankruptcy court asked the Arizona Supreme Court to determine what effect, if any, does the subordination agreement have on the relative priorities of liens of the three parties. The Arizona Supreme Court, in a case of first impression in that state, has adopted the approach known as "partial subordination" in holding that a subordination agreement between two mortgage lenders will neither prejudice nor benefit the interest of an intervening mechanics' lien claimant. See also *ITT Diversified Credit Corp v. First City Capital Corp.*, 737 SW2d 803 (1987) and *Bratcher v. Buckner*, 90 CalApp.4th 1177. This is a useful case when considering this issue. And it resolves the dilemma posed by Kratovil in Modern Mortgage Law and Practice, 8th Printing, 1972. We suggest you add this to your copy of the Claims Litigation Index Case Law Digest link on the TLA web site. See also DIRT DD of 9/05/01

39. UNAUTHORIZED PRACTICE OF LAW

- a. *Doe v. Condon*, 2002 WL 178627 (Sup. Ct. S.C.) (Kletke) **Exhibit 55**
- b. West Virginia Draft Unlawful Practice of Law Advisory Opinion 2002-01 and ALTA Comment Letter (Maher) **Exhibit 56**
- c. FTC letter of 3/29/02 re: Proposed Bill H.7462 Restricting Competition from Non-attorneys in Real Estate Closings. See Howard Lax DIRT post of 4/08/02. [Http://www.ftc.gov/be/v020013](http://www.ftc.gov/be/v020013) . (Hart)
- d. See also DIRT DD 6/30/02 re NC Proposal of The Special Committee on Real Estate Closings of the North Carolina State Bar regarding Authorized Practice Advisory Opinion on Real Estate Transactions (Hart)
- e. See also Joyce Palomar's Article, *The Was Between Attorneys and Lay Conveyancers-Empirical Evidence says "Cease Fire!"*, Connecticut Law Review, Volume 31 Number 2, Winter 1999 (Hart)

40. UNDUE INFLUENCE

- a. *Estate of Reid v. Pluskat*, 2002 WL 1067965 (Miss. Sup. Ct.) (Matrick) **Exhibit 57**

LEGISLATION AND REGULATION

41. *Attorney General Opinion No. 02-112: Electronic Recording* (Cavallaro) **Exhibit 58**
42. *HUD Proposed Rule on RESPA Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs to Consumers*, Docket No. FR-4727-P-01; 67 Fed. Reg. 49134 (July 29, 2002) and ALTA Comments (Maher) **Exhibit 59**
43. *Virginia Settlement Agent Release Act* (Davis) **Exhibit 60**

43A. Parity Act Regulations Revised by OTS.; 12 CFR Parts 560, 590 & 591,
See DIRT DD's of 9/26/02

43B. FTC holds lender responsible for Broker actions; perceives a mortgage broker to
be the agent of the lender. (*United States of American and State of Illinois v.
Mercantile Mortgage Company, Inc. et al.*,
(<http://www.ftc.gov/opa/2002/07/mercantilediamond.htm>)

44. OLD BUSINESS

45. NEW BUSINESS

46. ADJOURN